

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) CAUSE NO. 1:13-cr-00190-SEB-TAB-01
) Indianapolis, Indiana
 JEFFREY WILSON,) Wednesday, July 13, 2016
) 9:40 o'clock a.m.
 Defendant.) VOLUME 3 of 8

Before the
HONORABLE SARAH EVANS BARKER

TRANSCRIPT OF JURY TRIAL, DAY 3

APPEARANCES:

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ALSO PRESENT: The Defendant in person.

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PROCEEDINGS TAKEN BY MACHINE SHORTHAND
COMPUTER-AIDED TRANSCRIPTION

1 I N D E X

2 ALEXANDER CHEPURKO

3 Cross-examination by Mr. Tierney389
 Redirect examination by Mr. Schmidt418

4 DAVID COLAPINTO

5 Direct Examination by Mr. DeBrota431
 6 Cross-examination by Mr. Tierney445
 Redirect examination by Mr. DeBrota456
 7 Recross-examination by Mr. Tierney460

8 TROY McKEE

9 Direct Examination by Mr. Ballantine463
 Cross-examination by Ms. Lorbieski Anderson ...554
 10 Redirect examination by Mr. Ballantine600

11 MARTHA ASHLEY PLAYER

12 Direct Examination by Mr. DeBrota612
 Cross-examination by Mr. Tierney663
 13 Redirect examination by Mr. DeBrota675
 Recross-examination by Mr. Tierney679

14 Certificate of Court Reporter681

15 I N D E X O F E X H I B I T S

16 DESCRIPTION RECEIVED

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 10479
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1 (In open court.)

2 (Jury in, 9:40 a.m.)

3 THE CLERK: Court is in session.

4 THE COURT: Good morning, all. Nice to see you.

5 Better to be in here where the air conditioning is going to

6 save us today. It is a little muggy outside. I am glad to

7 see everyone. You may be seated, and we will get underway.

8 Sir, I remind you, Mr. Chepurko -- say it for me again.

9 Chepurko?

10 THE WITNESS: Chepurko.

11 THE COURT: Chepurko. I remind you, sir, you are

12 still under oath. Mr. Tierney, you may resume your

13 examination of this witness.

14 MR. TIERNEY: Thank you, Your Honor.

15 **CROSS-EXAMINATION CONTINUED**

16 BY MR. TIERNEY:

17 Q Mr. Chepurko, yesterday you were testifying about a
18 meeting that took place in New Jersey in June of 2011; do you
19 recall that?

20 A Yes.

21 Q And was that -- that was the first time that you had met
22 Jeff Wilson, wasn't it?

23 A Yes.

24 Q Before that meeting you had never spoken to Jeff Wilson,
25 correct?

1 A Correct.

2 Q And you had never -- not over the phone?

3 A Correct.

4 Q And not in person?

5 A Correct.

6 Q And you testified that Mr. Wilson came to the New Jersey
7 offices of Caravan with Gary Williky, right?

8 A Yes.

9 Q And you testified extensively about a meeting that took
10 place there, right?

11 A Yes.

12 Q But you couldn't tell us what time Mr. Wilson got to the
13 Caravan offices?

14 A I did.

15 Q What time did you say?

16 A In the morning between 9:00 and 11:00.

17 Q So a two-hour window between when Mr. Wilson got there,
18 right?

19 A Yes.

20 Q And did you go to lunch with Mr. Wilson?

21 A I believe so, yes.

22 Q What time did you go to lunch?

23 A Between 11:00 and 1:00.

24 Q If he got there at 11:00, it was shortly after he got
25 there that you-all went to lunch?

1 A He wouldn't have gotten there at 11:00 if we went to
2 lunch at 11:00.

3 Q Well, you just said you can't tell us if he got there at
4 9:00 o'clock or 11:00 o'clock, right?

5 A If he got there at 11:00 we would have went to lunch
6 after 11:00, so 12:00 or 1:00.

7 Q So your time ranges are 9:00 to 11:00 for when he got
8 there and lunch 11:00 to 11:00?

9 A Yes.

10 Q You don't recall specifically, do you, sir?

11 A Four years ago actually, no.

12 Q It is actually five years ago, right?

13 A Or five, yes.

14 Q Well, it is not four or five. June of 2011, we are in
15 July of 2016. That is five years ago, right?

16 A Yes.

17 Q Okay. The fact of the matter is, Mr. Wilson was not in
18 the meeting that you were testifying about yesterday that
19 happened in New Jersey, right?

20 A He was.

21 Q The fact of the matter is, Mr. Wilson went downstairs in
22 the offices of Caravan and had a meeting with other people
23 when what you are talking about happened between Williky and
24 Furando.

25 A No, that is not correct.

1 Q The second time that you met Mr. Wilson was in -- at
2 e-biofuels facility in Indiana about a month after that,
3 correct?

4 A Yes.

5 Q And that was only the second time you had spoken to Mr.
6 Wilson.

7 A We may have had e-mail conversations.

8 Q But you never heard his voice between the first meeting
9 in New Jersey and the second meeting in Indiana?

10 A No.

11 Q So the second time that you met with Mr. Wilson and the
12 second time that you heard his voice was in the meeting in
13 Indiana?

14 A Yes.

15 Q You never met with him or spoke with him after that
16 again?

17 A No.

18 Q That was in July of 2011?

19 A Yes.

20 Q So the entire -- in your life experience, you have had
21 two meetings where you spoke with Mr. Wilson?

22 A We did also have interactions after the meetings.

23 THE COURT: Say that again?

24 THE WITNESS: We did have interactions after the
25 meetings.

1 BY MR. TIERNEY:

2 Q I am talking about where you heard his voice, sir.

3 A Yes. I heard his voice during meetings and during
4 interactions after the meetings.

5 Q So you are saying now that you had conversations with Mr.
6 Wilson after the Indiana meeting?

7 A On the same trip to Indiana we did -- we also had a golf
8 trip. I believe we had dinner. We had meals together, so it
9 wouldn't have just been at the plant in Indiana. It would
10 have been at other places as well.

11 Q Okay. Because your meetings at Indiana was on July 27
12 and July 28 of 2011, right?

13 A It was in July.

14 Q Was it a two-day meeting?

15 A I can't recall right now. It was more than one day.

16 Q Okay. We have got recordings of your conversations
17 there, right?

18 A Yeah. It was more than one day.

19 Q Okay. And you're saying -- your testimony here is that
20 you met with Mr. Wilson the first day at e-biofuels, the first
21 day you came to Indiana?

22 A Yes.

23 Q And that you went out to dinner with him?

24 A Yes.

25 Q You went to St. Elmo's; is that right?

1 A Yes.

2 Q That is a steak place?

3 A I believe so.

4 Q You are saying that Mr. Wilson went to dinner with you?

5 A Yes.

6 Q You are 100 percent sure?

7 A Eighty or 90 percent.

8 Q And you also are trying to tell the jury that you played
9 golf with Jeff Wilson?

10 A I didn't play myself.

11 Q Okay. But you were at a golf course?

12 A Yes.

13 Q And Mr. Wilson was there?

14 A Yes.

15 Q Jeff Wilson?

16 A Yes.

17 Q You know who Jeff Wilson is? I mean, do you recognize
18 him?

19 A Yes.

20 Q This is Jeff Wilson, right?

21 A Yes.

22 Q You are saying that you went to dinner with Mr. Wilson
23 when you came out to Indiana?

24 A Yes.

25 Q At St. Elmo?

1 A Yes.

2 Q Okay. And you're saying that you went to a golf course
3 and you didn't play, but Mr. Wilson was there?

4 A Yes.

5 Q Did you have any conversations with Mr. Wilson after you
6 left Indiana in that July 2011 visit?

7 A I can't recall any conversations.

8 Q Okay. So there were no conversations between you and Mr.
9 Wilson after July 2011?

10 A I can't recall any conversations.

11 Q Okay. Yesterday the Government asked you to look at a
12 transcript of a recording that you had made when you visited
13 e-biofuels in Indiana in July of 2011, right?

14 A Right.

15 Q And you testified that you listened to the recording as
16 you looked at the transcript, correct?

17 A Yes.

18 Q And you testified that you recognized Jeff Wilson's voice
19 on that recording.

20 A Yes.

21 Q That is a voice that you had only heard two times in your
22 life, right?

23 A I --

24 MR. SCHMIDT: Object, Your Honor. I believe that
25 mischaracterizes the testimony. I don't think he said he only

1 heard him twice.

2 THE COURT: In his life. I sustain that objection.

3 BY MR. TIERNEY:

4 Q There were two times when you met with Jeff Wilson,
5 right?

6 A Two times.

7 Q June of -- June New Jersey meeting and July Indiana
8 meeting?

9 THE COURT: You mean two dates, two events? When
10 you ask it vaguely the witness doesn't know how to answer
11 because he hasn't said there were only two times.

12 MR. TIERNEY: I will try to clarify, Your Honor.

13 THE COURT: Thank you.

14 BY MR. TIERNEY:

15 Q The meeting in New Jersey in June of 2011, that
16 was one day, correct?

17 A Yes.

18 Q When you came out to Indiana about a month later in July,
19 that was two days of meetings, right?

20 A Something -- it was two or more days, yes. I believe
21 two.

22 Q Okay. I am saying -- I am calling the New Jersey one
23 incident and the Indiana another incident.

24 A Yes.

25 Q All right. Outside of that, you never spoke to Jeff

1 Wilson?

2 A No.

3 Q And that -- so your last contact with him was five years
4 ago, right?

5 A Yes.

6 Q And when did the Government ask you to listen to the
7 recording that you identified in court yesterday?

8 THE COURT: First time?

9 MR. TIERNEY: Yes, Your Honor. Let me back up. I
10 will withdraw the question.

11 THE COURT: All right.

12 BY MR. TIERNEY:

13 Q The recordings that you made of the Indiana visit in July
14 of 2011, you made recordings, right?

15 A Yes.

16 Q And you recorded those conversations using what device?

17 A A phone.

18 Q Okay. And you kept those recordings, didn't you?

19 A Yes.

20 Q You turned those over to the Government, didn't you?

21 A Yes.

22 Q You know that the Government received those recordings
23 because you have had conversations with the Government about
24 some of the recorded communications that you provided to them?

25 A Yes.

1 Q And that goes back all the way to -- well, do you recall
2 when you turned over the recordings to the Government?

3 A It would have been after -- it would have been in the
4 winter of 2011, beginning of 2012.

5 Q Okay. So by late 2011 or early 2012, you had turned over
6 the recordings that you made of the July meetings in Indiana?

7 A To the Government.

8 Q Yes.

9 A Yes.

10 Q Thanks for clarifying that. So the Government has had
11 those recordings for -- ever since then, right?

12 A Correct.

13 Q You never pointed out to the Government Jeff Wilson's
14 voice on -- that you identified on Government Exhibit 148
15 yesterday, the transcript of that portion of the recording
16 before when? I mean, when did you first identify that to the
17 Government?

18 THE COURT: Wait a minute, I don't understand that
19 question. Rephrase.

20 BY MR. TIERNEY:

21 Q Yesterday you testified that you identified Jeff Wilson's
22 voice on a transcript of a recording?

23 A Yes.

24 Q Government's Exhibit 148?

25 A Yes.

1 Q When did the Government ask you to identify Jeff Wilson's
2 voice on that for the first time?

3 A It probably would have been in the first, one of the
4 first Government meetings, either over a telephone call or a
5 meeting, a physical meeting. So it would have been one of the
6 first times we had a meeting.

7 Q So you are saying that you identified that exhibit to the
8 Government back in when?

9 MR. SCHMIDT: Objection.

10 THE COURT: Sustained. Asked and answered.

11 MR. TIERNEY: I am sorry, Judge?

12 THE COURT: Asked and answered.

13 BY MR. TIERNEY:

14 Q Well, when was the first meeting with the Government?

15 A We had a telephone meeting, I believe in 2011, and trying
16 to recall the first meeting probably was -- physical meeting
17 was in 2012.

18 Q Isn't it true, sir, that you just recently got contacted
19 by the Government and they asked you to identify Government's
20 Exhibit 148 and Jeff Wilson's voice on that?

21 A 148? Yes.

22 Q You were just recently contacted by them?

23 A Yes.

24 MR. SCHMIDT: Object.

25 THE COURT: Wait just a minute. I don't understand

1 "by them" and I don't understand "recently." So you have got
2 to ask it more specifically, but what is your objection, sir?

3 MR. SCHMIDT: My objection is that Exhibit 148
4 didn't exist until we just recently created it. So I don't
5 know how the witness could have -- I mean.

6 MR. TIERNEY: (Audible aside.)

7 THE COURT: None of that, none of that. Go back to
8 your questions and ask them in an admissible way, please.

9 BY MR. TIERNEY:

10 Q Mr. Chepurko, were you recently asked to identify Jeff
11 Wilson's voice on a recording that you made?

12 A Yes.

13 Q When?

14 A Sunday.

15 Q Okay. Today is July 13th, right?

16 A I think so.

17 Q All right. What is the date here? Okay. You are
18 talking about this past Sunday?

19 A Yes.

20 Q Was that the first time that you were asked to identify
21 that voice on that portion of the recording?

22 MR. SCHMIDT: Objection. Asked and answered. He
23 already testified that back in --

24 THE COURT: Overruled, overruled.

25 MR. SCHMIDT: Okay.

1 THE WITNESS: No.

2 BY MR. TIERNEY:

3 Q When was the first time?

4 A I can't recall the first time the Government asked me a
5 question about Jeff Wilson's voice on a recording.

6 Q Okay. I am not asking you the first time that the
7 Government asked you to identify Jeff Wilson's voice on the
8 recording at all. I am talking about that specific portion of
9 the recording.

10 A Okay. Yeah, can you restate the question, then?

11 Q Sure. When is the first time that you were asked to
12 identify Jeff Wilson's voice on the portion of the recording
13 that is depicted in Government's Exhibit 148?

14 A I can't recall the first time I was asked to identify his
15 voice.

16 THE COURT: That microphone will pick up your voice
17 without your leaning over it. It has a range.

18 THE WITNESS: Oh, sorry. Okay, thanks.

19 BY MR. TIERNEY:

20 Q So this is Government's Exhibit 148, right?

21 A Yes.

22 Q And you testified that you used Government's Exhibit 148
23 and compared it to a recorded conversation, right?

24 A Yes.

25 Q And that you identified Jeff Wilson's voice?

1 A Yes.

2 Q Based on that comparison?

3 A Based on my knowledge of Jeff Wilson's voice.

4 Q Okay. Were you provided -- you got contacted by the
5 Government on Sunday?

6 A No.

7 Q Okay. You said you had a conversation --

8 A Contacted -- I wasn't contacted by them on Sunday. I was
9 contacted by them before Sunday to arrive here.

10 Q But you were asked on Sunday specifically about the
11 recording that is transcribed in Government's Exhibit 148?

12 A Yes.

13 Q Okay. Who asked you about that?

14 A Who? The Government?

15 Q Yes.

16 A Multiple people on the -- on the Government's side asked
17 me about this recording.

18 Q Who?

19 A I believe the prosecutors, Mr. Schmidt, Mr. DeBrotta.

20 Q Who else?

21 A Besides them? I am not sure anybody else.

22 Q Was this an in-person meeting?

23 A On Sunday?

24 Q Yes.

25 A Yes.

1 Q Okay. Where did it take place?

2 A In their offices.

3 Q Who was there?

4 A The Government team prosecuting the case, the entire team
5 was there as well as my attorney.

6 Q Who is the entire team?

7 A Well, everybody at that table at least plus, plus others.

8 Q Okay. Do you know Agent Madtson?

9 A Yes.

10 Q Was she there?

11 A She was not in the room with us. She was in the office
12 with us.

13 Q I am sorry, I didn't understand you. You said she was
14 not in the room with you?

15 A Not in the office with us.

16 Q Did you see her at all on Sunday?

17 A She may have been in another conference room that I
18 walked by, but I can't remember.

19 Q Okay.

20 THE COURT: Where do you live now? Where is your
21 residence, state?

22 THE WITNESS: I live overseas in Europe.

23 THE COURT: So when you came in on the weekend were
24 you coming in for the trial?

25 THE WITNESS: Yes.

1 THE COURT: You flew in?

2 THE WITNESS: Yes.

3 MR. TIERNEY: Thank you, Judge.

4 BY MR. TIERNEY:

5 Q So you testified that you went to dinner with Jeff
6 Wilson, right?

7 THE COURT: In --

8 MR. TIERNEY: Sorry, sorry.

9 THE COURT: Is this Sunday, or when did you meet?

10 BY MR. TIERNEY:

11 Q You testified that you went to dinner with Jeff Wilson
12 when you came out to meet him in Indiana at e-biofuels,
13 correct, in July of 2011?

14 A Yes, yes.

15 Q And you recorded that dinner, didn't you?

16 A I may have recorded it. I think so yes.

17 Q You turned that recording over to the Government, right?

18 A Yes.

19 Q And so if Mr. Jeff Wilson's voice is on that recording at
20 St. Elmo's, then we could listen to it, right?

21 A I believe that recording is extremely -- there was a lot
22 of background noise, so it is one -- it is one of the less
23 audible recordings.

24 Q Okay. If you recorded Jeff Wilson at dinner at St.
25 Elmo's, we could hear it, couldn't we?

1 A I don't know. I don't think so.

2 Q So if his voice isn't on there it is not because he
3 wasn't there, it is because your recording is bad; is that
4 what you are saying?

5 A No. I believe there was a lot of background noise in
6 that restaurant.

7 Q Okay. What about golf? Did you record the golf,
8 golfing?

9 A I can't recall if I recorded the golf.

10 Q You don't remember if you -- sorry. You don't remember
11 if you recorded a golfing?

12 A Maybe there was parts of it, but I can't remember that.

13 Q All right. So we are probably not going to hear any of
14 Jeff Wilson's voice at that golf course, right?

15 A I would have to hear the recording, if there is one.

16 Q Yes. All right, sir. So when you first met Jeff Wilson
17 in June of 2011 in New Jersey you were working for Ausburg at
18 that point, correct?

19 A Yes.

20 Q And you testified yesterday that you first started
21 working at Caravan in the fall of 2010, correct?

22 A Yes.

23 Q And that you started working at Ausburg in January of
24 2011?

25 A Yes.

1 Q And your duties at Ausburg included trading RINs, right?

2 A Yes.

3 Q That you only did once?

4 A Yes.

5 Q And it wasn't very financially successful?

6 A It was financially successful.

7 Q I am sorry?

8 A It was financially successful.

9 Q You made \$500 to \$700?

10 A Around that, yes.

11 Q Your duties also included biodiesel trading at Ausburg.

12 A No biodiesel trading.

13 Q Well, did you buy and sell biodiesel?

14 MR. SCHMIDT: Your Honor, I am just going to object.
15 This all was covered I think both in the direct and in the
16 cross yesterday. These are the same questions we have already
17 heard.

18 THE COURT: Well, there was an interruption, so he
19 can go back and retrace that.

20 MR. SCHMIDT: Okay.

21 BY MR. TIERNEY:

22 Q Did you buy and sell biodiesel?

23 A At Ausburg, no.

24 Q So you did not buy and sell biodiesel at Ausburg?

25 A We act as a broker for CIMA Green, so we did offer it.

1 We did make the offers on Platts.

2 Q So you offered to sell biodiesel?

3 A Yes.

4 Q In fact, you had purchased before?

5 A I -- no, we did not. I did not purchase it, no.

6 Q It came from CIMA?

7 A It didn't come from anywhere, we never traded it.

8 Q What were your other duties at Ausburg? Did they include
9 hedging?

10 A Yes.

11 Q What is hedging?

12 A It is offsetting the risk of owning biodiesel
13 essentially. So, if you own trucks with biodiesel you can
14 offset the price risk of that by selling futures contracts.

15 Q By doing what?

16 A Selling futures contracts.

17 Q How do you do that?

18 A On an exchange basically on a broker's -- on a future
19 broker's software platform on the computer.

20 Q Sorry.

21 A On the computer.

22 Q Do you need money to be able to do hedging?

23 A Yes.

24 Q And did you do hedging at Ausburg?

25 A Yes.

1 Q What risk were you hedging at Ausburg?

2 A The actual physical exposure -- the, the floating
3 position of biodiesel owned by Caravan Trading.

4 Q Okay. So the biodiesel that was owned by Caravan Trading
5 --

6 A Yes.

7 Q -- is what you were hedging?

8 A Yes.

9 Q And you know that the biodiesel that Caravan Trading was
10 selling, that that was part of the RINs fraud scheme, right?

11 A Yes.

12 Q Okay. So any money that Caravan or most of the money,
13 almost all of the money that Caravan was making was from the
14 fraudulent RINs -- was from the RINs fraud?

15 A Caravan Trading?

16 Q Yes, correct?

17 A Caravan Trading, yes.

18 Q All right. And the money that you used to hedge at
19 Ausburg you just said came from Caravan?

20 A I don't know where it came from.

21 Q Well, you just said that it came from Caravan?

22 A It may have come from Joseph Furando.

23 Q Okay. At any rate, if it came from Caravan or from
24 Joseph Furando it was the result of a massive fraud scheme?

25 A I don't know what it was the result of.

1 Q Well, you said that Caravan made almost all of its money
2 from a massive RINs fraud scheme?

3 A Yes.

4 Q And you knew that by February of 2011?

5 A Yes.

6 Q And you were hedging at Ausburg using money from Caravan?

7 A I don't know where the money came from.

8 Q Well, you told us it came from Caravan?

9 A I didn't say it came from Caravan.

10 Q You did, sir.

11 A I said I did not know.

12 Q You said you didn't know after you said you did know?

13 THE COURT: Don't argue with the witness. Ask the
14 questions, and then you will have your time to argue at the
15 end of the trial.

16 BY MR. TIERNEY:

17 Q All right, sir, didn't you say that it either came from
18 Caravan or Joseph Furando?

19 A I believe I said it was from -- yes. I think that is,
20 that is what I said.

21 Q Okay. And most of the money that Joseph Furando was
22 making was the result of a massive fraud scheme?

23 A I don't know -- I am not aware of his personal finances.
24 I couldn't tell you what he was making, and I don't know.

25 Q Because if you knew that money that you were using to

1 conduct financial transactions with hedging was illegally
2 obtained and you were using that money to try to make more
3 money, that is illegal, right?

4 A I wasn't aware whether it was legal or not.

5 Q That is called money laundering, isn't it?

6 A I don't know.

7 Q You haven't been charged with money laundering, have you?

8 A No.

9 Q Yeah. Sir, are you familiar with the professional
10 networking Website called LinkedIn?

11 A Yes.

12 Q And do you have a LinkedIn profile?

13 A Yes.

14 Q Do you manage the content on your LinkedIn profile?

15 A Yes.

16 Q And is it current?

17 A I don't know if it is current. I haven't updated it. I
18 am not sure.

19 MR. TIERNEY: Okay. Your Honor, may I approach the
20 witness?

21 THE COURT: Yes.

22 BY MR. TIERNEY:

23 Q Mr. Chepurko, I am handing you what has been marked for
24 identification purposes as Defendant's Exhibit 682.

25 MR. TIERNEY: Your Honor? Yes, Your Honor, may I

1 approach?

2 THE COURT: Yes.

3 BY MR. TIERNEY:

4 Q I will ask you to look at that document and review it and
5 page through it. Let me know when you are finished.

6 A I am ready.

7 Q All right, sir, is that your LinkedIn profile?

8 A Yes.

9 Q And did you write the content that is in there?

10 A Most of it.

11 Q Turn to page 5 of --

12 MR. TIERNEY: Your Honor, I would move to admit.

13 THE COURT: Is it in evidence yet?

14 MR. TIERNEY: No, Your Honor. I move to admit
15 Defendant's Exhibit 682.

16 THE COURT: Any objection?

17 MR. SCHMIDT: Your Honor, we object. We don't
18 understand what the purpose of the exhibit is.

19 THE COURT: You object on the grounds of relevance?

20 MR. SCHMIDT: Yes.

21 THE COURT: What is the relevance?

22 MR. TIERNEY: May we approach?

23 THE COURT: Yes.

24 *(A bench conference was held on the record.)*

25 THE COURT: Relevance of the document?

1 MR. TIERNEY: Judge, he has testified that that
2 is -- he was employed at Caravan starting in the fall of 2010
3 and that he didn't start working at Ausburg until January of
4 2011, and he has testified that the money that -- he has
5 testified that he only made 500 to \$700 trading RINs, which he
6 did one time and that --

7 THE COURT: For Ausburg?

8 MR. TIERNEY: Yes, and that he never sold any
9 biodiesel.

10 MR. DeBROTA: To e-biofuels.

11 THE COURT: Hold on, hold on. Do not talk until you
12 are ready.

13 MR. TIERNEY: I believe the testimony was that he
14 never sold any biodiesel, and he also testified that he was
15 hedging using money from Caravan.

16 MR. SCHMIDT: He did not testify to that.

17 THE COURT: Did I call on you, sir?

18 MR. SCHMIDT: No.

19 THE COURT: I --

20 MR. TIERNEY: He testified that he was hedging the
21 money that he got from Caravan or Joseph Furando.

22 THE COURT: That -- he said he couldn't remember.

23 MR. TIERNEY: At first he said he did, and then he
24 said he didn't remember.

25 THE COURT: Well, I am not looking at the record,

1 but my recollection is he said several times he didn't know
2 where it came from. And you said, was it Caravan or Furando,
3 and he said yes, probably.

4 MR. TIERNEY: Okay. At any rate, Judge, this
5 evidence that Mr. Chepurko is currently presenting himself in
6 a fraudulent manner to people in the professional community,
7 which is exactly what people were doing to Mr. Wilson at this
8 time, the fraudsters who started this fraud.

9 THE COURT: Wait, wait, wait, this is what is on
10 page 5?

11 MR. TIERNEY: Yes.

12 Sorry, Judge, I wasn't clear there. It is on page 5.

13 THE COURT: Ausburg Energy section?

14 MR. TIERNEY: Yes. First of all the dates are
15 different than what he has testified to. Secondly, in the
16 second sentence at the top section, it says, quote forged new
17 client relationships, was major obligated parties and blenders
18 allowing us to open --

19 THE COURT: Is it only this part of his LinkedIn
20 site that you intend to direct his attention?

21 MR. TIERNEY: Yes. Yes, Your Honor.

22 THE COURT: So what else is in here?

23 MR. TIERNEY: That is all I am going to use it for,
24 but that is the entire printout of his LinkedIn profile,
25 Defendant's Exhibit 682.

1 THE COURT: Do you intend to go through this and ask
2 him if he did these things?

3 MR. TIERNEY: I have already asked him if he did
4 these things.

5 THE COURT: So you are not going to ask him?

6 MR. TIERNEY: I am going to ask him what it says on
7 here.

8 THE COURT: Well, the document speaks for itself, so
9 what is the question you are going to put to the witness?

10 MR. TIERNEY: I will ask him if it is true or not.

11 THE COURT: Do you have any objection to use of that
12 section on page 5?

13 MR. DeBROTA: Just this.

14 MR. SCHMIDT: I still don't understand the
15 relevance. What he put on his resume in 2015 is relevant to
16 this case?

17 THE COURT: It may not have a lot of relevance, but
18 it has some. So I will overrule your objection. You may ask
19 about that section.

20 MR. TIERNEY: Thank you, Your Honor.

21 *(End of bench conference.)*

22 THE COURT: The objection is overruled. Defendant's
23 Exhibit 682 is admitted.

24 *(Defendant's Exhibit 682 was*
25 *received in evidence.)*

1 BY MR. TIERNEY:

2 Q Mr. Chepurko?

3 THE COURT: Got your mic back on?

4 BY MR. TIERNEY:

5 Q Mr. Chepurko, I will direct your attention to page 5 of
6 Defendant's Exhibit 682. That is a section from your LinkedIn
7 profile, isn't it?

8 A Yes.

9 Q And right underneath where it says managing director,
10 portfolio manager, Ausburg Energy, it has some dates, doesn't
11 it?

12 A Yes.

13 Q And those dates are listed as September 10, 2011, to
14 September 2000 -- sorry, strike that.

15 Those dates are September 2010 to September 2011, right?

16 A Yes.

17 Q But that is not correct, is it?

18 A Correct as to?

19 Q The dates that you worked at Ausburg Energy?

20 A To Ausburg Energy, no.

21 Q Because you started at Caravan in the fall of 2010,
22 right?

23 A Right.

24 Q And it wasn't until January of 2011 when you started
25 working at Ausburg Energy?

1 A Yes.

2 Q Is the reason that you didn't put Caravan on your resumé
3 because people now know that Caravan was a massive fraud
4 scheme?

5 A Main reason was to shorten the length of my resumé.

6 Q You are not trying to hide from people that you were part
7 of a massive fraud scheme?

8 A No. There is other companies on here which were actually
9 from where I worked in several subsidiary companies.

10 Q Yes, sir.

11 A Which I just grouped into one.

12 Q Okay. I will ask you to look at the bullet point that I
13 have just highlighted there, and can you read that bullet
14 point?

15 THE COURT: The fourth one down, for the record.

16 THE WITNESS: "Trading through the Platts MOC
17 window, opened up the firm to new deal opportunities from
18 major companies such as Morgan Stanley, BP, and Valero."

19 BY MR. TIERNEY:

20 Q The fifth bullet point down, what does that say?

21 A "Managed fiscal trading of biodiesel and RINs as well as
22 futures hedging, realized 33 percent profit on entire position
23 value, resulting in net gains in fiscal trading book."

24 Q The fiscal trading of biodiesel and RINs. You never sold
25 biodiesel, correct? Never sold any biodiesel while you were

1 at Ausburg?

2 A At Ausburg, no.

3 Q All right. And you traded RINs one time and made 500 to
4 \$700, right?

5 A Yes.

6 Q And hedging that you did, you did with money from Caravan
7 or Joseph Furando?

8 A Yes.

9 Q And he is a fraudster?

10 A Yes.

11 THE COURT: What did you say?

12 MR. TIERNEY: I said, he is a fraudster.

13 THE COURT: Whatever that means.

14 MR. TIERNEY: Okay.

15 BY MR. TIERNEY:

16 Q And you are representing people that -- this is how you
17 made money, realized a 33 percent profit on the entire
18 position value?

19 A I am -- I don't understand the question.

20 Q Can you repeat what you just said?

21 A I don't understand the question.

22 Q Doesn't it say here that "realized a 33 percent profit on
23 entire position value, resulting in net gains in fiscal
24 trading book"?

25 A Yes.

1 Q Okay.

2 MR. TIERNEY: Your Honor, may I have a minute to
3 consult with co-counsel?

4 THE COURT: Yes, you may.

5 MR. TIERNEY: Nothing further, Your Honor.

6 THE COURT: All right, redirect?

7 MR. SCHMIDT: Your Honor, may I have just 30
8 seconds?

9 THE COURT: Yes, you may.

10 MR. SCHMIDT: Thank you.

11 THE COURT: You may proceed.

12 MR. SCHMIDT: Thank you, Your Honor.

13 **REDIRECT EXAMINATION**

14 BY MR. SCHMIDT:

15 Q Mr. Chepurko, you worked for Joe Furando's companies for
16 about a year or less, right?

17 A Yes.

18 Q Can you tell us what your salary was at those companies?

19 A I started at Caravan Trading in October 2010, fall 2010
20 at 35,000 annually, and then once I obtained employment with
21 Ausburg I was raised to 45,000 annually.

22 Q Okay. And did you receive bonuses or any kind of
23 commissions?

24 A Bonuses, yes.

25 Q How much?

1 A I believe it was two, \$5,000 bonuses and one time I think
2 during Christmas for 3,000.

3 Q Okay. So in that a little less than a year time frame,
4 you were paid between 35- and \$45,000, and you got
5 approximately \$13,000 in bonuses; is that correct?

6 A Yes.

7 Q Is that the sum total of the money you got from being
8 employed with Mr. Furando's companies?

9 A Yes.

10 Q Okay.

11 You were asked questions about a meeting that you met
12 with -- sorry, let me back up. You made certain recordings
13 that you handed over to the Government; is that correct?

14 A Yes.

15 Q And then you also testified about an initial phone call
16 you had with the Government in late '11 and then sometime in
17 '12 you met with the Government for the first time; is that
18 correct?

19 A Yes.

20 Q Do you remember if the recordings that you had were
21 handed over to the Government before or after that first
22 meeting?

23 A I do remember that the FBI did come to my house to
24 establish chain of custody to get the recordings from,
25 physically from, from me. And I, I want to say that was

1 before the first physical meeting.

2 Q Okay.

3 A I can't remember it specifically, though.

4 Q Okay. So you are not sure one way or the other?

5 A No.

6 Q Okay. Yesterday Mr. Tierney asked you questions and you
7 testified that after Joe Furando told you about the alchemy
8 scheme you were allowed into certain meetings that discussed
9 the alchemy scheme that you previously weren't allowed into?

10 A Yes.

11 Q Like the meetings you have already testified about that
12 included Jeff Wilson, correct?

13 A Yes.

14 MR. SCHMIDT: Thank you. No more questions.

15 THE COURT: Recross?

16 MR. TIERNEY: No thank you, Your Honor.

17 THE COURT: Thank you, Mr. Chepurko. You may step
18 down, sir.

19 MR. SCHMIDT: Your Honor, can the witness be
20 excused?

21 THE COURT: Can the witness be excused?

22 MR. TIERNEY: Yes, Your Honor.

23 THE COURT: You are excused, sir. Thank you again.

24 (Witness excused.)

25 MR. DeBROTA: Your Honor, may I approach?

1 THE COURT: Yes.

2 (*A bench conference was held on the record.*)

3 MR. DeBROTA: The defense --

4 THE COURT: Just a second.

5 MR. DeBROTA: The defense has given the impression
6 that the first time this man heard the recording was last
7 Sunday. That is not true. His attorney who was representing
8 him was listening to all that testimony, knows the information
9 this man doesn't know, which is that those recordings were
10 listened to by this witness. They made their own transcripts.
11 They did all that stuff in 2012.

12 THE COURT: Who is "they"?

13 MR. DeBROTA: Mr. Colapinto. He represents Mr.
14 Chepurko. He has been in the courtroom, so it is absolutely a
15 fact that those were turned over in early -- in late '11,
16 early '12. The Government has had them the whole time. This
17 witness actually made their own transcriptions of them and has
18 consistently identified Mr. Wilson. The testimony -- that is
19 what happened.

20 THE COURT: Wait, wait. This witness or this
21 lawyer?

22 MR. DeBROTA: This lawyer witness. We would like to
23 call Mr. Colapinto for the mere purpose of saying this is not
24 the first time my client or I ever talked about the content of
25 these things. We talked about them years ago. They give the

1 impression by focusing on Exhibit 148, which is a slice of
2 that recording. This is the first time anybody heard that the
3 Government had some sort of secret plot to frame him last
4 Sunday.

5 He has had the witness prepare summaries of these things
6 for their own internal preparation years ago, years ago. So
7 this was totally misleading. We want to call Mr. Colapinto
8 for the narrow purpose of pointing that out. Of course, he
9 was representing Mr. Chepurko, so he was in the courtroom. We
10 didn't know they were going to do this, but this is not the
11 first time he has heard the recording. This is the first time
12 he heard the slice that the parties wanted to use in the case
13 because we selected that slice in the course of trial
14 preparation over the weekend after they listed this exhibit,
15 this recording on their list.

16 THE COURT: So the relevance of this is -- just a
17 minute. When did he first identify --

18 MR. DeBROTA: Mr. Wilson --

19 THE COURT: Wait. Let me finish.

20 MR. DeBROTA: I'm sorry.

21 THE COURT: I can't ask you a question if you answer
22 it before I get it out.

23 MR. DeBROTA: Sorry.

24 THE COURT: So the question is, when did this
25 witness first identify Mr. Wilson's voice on those -- on the

1 recordings? Not necessarily on the transcript but on the
2 recordings.

3 MR. DeBROTA: That's right, that's right.

4 THE COURT: When did he first?

5 MR. DeBROTA: Yes. It is when, after he got hired,
6 which he was retained in --

7 THE COURT: Wait, wait, after the lawyer gets hired?

8 MR. DeBROTA: Yes. This is the lawyer representing
9 Mr. Chepurko throughout, and the testimony is he hires the
10 lawyer, then they get together and do the report to the
11 Government. He becomes a whistleblower.

12 THE COURT: As part of that work product, that
13 lawyer had the witness identify the voices on the --

14 MR. DeBROTA: I believe so. If you want we can have
15 Mr. Colapinto state that outside the presence of the jury
16 briefly. They turned them over to the Government after they
17 presented them.

18 THE COURT: Approximately.

19 MR. DeBROTA: They meet in 2011. The Government's
20 first interview --

21 THE COURT: They?

22 MR. DeBROTA: The lawyer, Mr. Colapinto. His lawyer
23 and Mr. Chepurko meet him in the summer of '11, they are
24 retained. The notification then to the Government of all this
25 is in the fall of '11. Our first meeting in Indianapolis was

1 on January 9, 2012, at which -- and in that meeting summary,
2 which the defense has, it references the turning over of
3 recordings. And they were turned over to the Government after
4 the attorney and the person making them reviewed them. It
5 says that in summary. So Mr. Colapinto --

6 THE COURT: So my question pertains, when was the
7 first time that this witness identified Mr. Wilson's voice or
8 his participation in those meetings?

9 MR. DeBROTA: What I can tell you is it is
10 identified at least by January 9, 2012, but because this all
11 happened very fast in court today, it was probably earlier in
12 2011. But in no event was it last Sunday.

13 THE COURT: Okay. Mr. Tierney?

14 MR. TIERNEY: Judge, our position is that witnesses
15 who testify as to the recording that is transcribed in
16 Government's Exhibit 148, the witnesses who identified Mr.
17 Wilson in that recording have recently fabricated that, and
18 the Government could have elicited testimony from Mr. Chepurko
19 about if he ever talked to the Government about that specific
20 portion of the recording and identified that as being Mr.
21 Wilson. But the first time that he ever identified that as
22 being Mr. Wilson to the Government was on Sunday, and --

23 THE COURT: Do you believe that to be true?

24 MR. TIERNEY: Yes.

25 MR. FARLOW: Yes.

1 MR. TIERNEY: Judge, we learned on Friday, late
2 Friday afternoon that the Government was planning on using
3 that portion of the recording and attributing it to Mr.
4 Wilson. Before this, we had had the recordings, Mr.
5 Chepurko -- we had the recordings of Mr. Chepurko for a long
6 time.

7 The Government had never identified that section of the
8 recording as being Mr. Wilson. A big gap in the Government's
9 proof leading up to trial was being able to establish that Mr.
10 Wilson knew about the fraud scheme, when he knew about the
11 fraud scheme. On the eve of trial, on late Friday afternoon,
12 they identified to us for the first time that they had a
13 recording that they -- that they want to present as being Mr.
14 Wilson and Joseph Furando talking about the fraud scheme.

15 We have never heard that before, and our position is that
16 questions to witnesses about when they first identified Jeff
17 Wilson's voice on that recording are entirely relevant for the
18 purposes of establishing that this is a recent fabrication.

19 THE COURT: Okay. Mr. DeBrotta?

20 MR. DeBROTA: That is exactly what we are going to
21 ask his lawyer. So the entire recording, just so the Court is
22 aware of this.

23 THE COURT: Wait just a minute. We have side
24 conversations. I know you like to do that. Do you want to
25 step aside and have a conversation?

1 MR. FARLOW: No.

2 THE COURT: I don't mind if you do that. I just
3 don't want you to talk when I talk.

4 MR. FARLOW: I will let you finish.

5 THE COURT: All right.

6 MR. DeBROTA: Okay, so Exhibit 147 is the audio
7 file.

8 THE COURT: Right.

9 MR. DeBROTA: The audio file is the last end of
10 over an hourlong conversation where, just so it is clear, the
11 word "Jeff" and "Wilson" is discussed about 30 times.

12 THE COURT: Okay.

13 MR. DeBROTA: They listed that exhibit as a defense
14 exhibit which is why we focused on it. They put it on their
15 list of things they wanted to use, which we got the morning of
16 the pretrial last week.

17 THE COURT: Okay.

18 MR. DeBROTA: So we went back and listened to it.
19 That is why we did that. We had previously listened to it,
20 but we hadn't focused on it, so we did. We noticed at the
21 tail end of that the discussion of alchemy. We went back and
22 we looked and we saw that that was Mr. Wilson talking. We
23 listened to it before, but we weren't focusing on it as a very
24 important exhibit. They listed it, though. We couldn't
25 understand why they wanted to admit this hour-long exhibit.

1 We decided we liked it, so we created Exhibit No. 148, which
2 is our summary of the part which we think is good to us. We
3 disclosed that to them over the weekend. That is the story
4 here.

5 Now, there is no question in the early part of that
6 exhibit. It says Jeff about 30-some times I am told. There
7 is no question about that as an addressee. There is no
8 question, live witnesses have said he is in a meeting. You
9 heard that from Kat. He said, "I heard him say these things."
10 What they try to do now is suggest, as he just said, that we
11 fabricated a piece of evidence on Sunday.

12 In fact, that piece of evidence was given to us in 2012.
13 It was discussed between Mr. Chepurko and his lawyer in 2011
14 and 2012, and he identified Mr. Wilson as having been involved
15 back then. That is the point, that he has only just
16 discovered this factor over the weekend because we did
17 something magical. That is not the case.

18 The lawyer and Mr. Chepurko made their own transcripts of
19 things which, of course, are work product. But they did these
20 steps. All of this is the answer to this didn't just happen
21 over the weekend. If they are going to do that we should
22 allow Mr. Colapinto to explain he has independent reason to
23 believe his client had those recordings back then, that they
24 discussed it, and it wasn't some over-the-weekend fabrication.
25 That is why we want to call Mr. Colapinto.

1 THE COURT: And will you recall Mr. Chepurko to ask
2 him those questions?

3 MR. DeBROTA: He said he didn't know the name, but
4 they did hear. He doesn't know the date he met with us. Some
5 of his answers were I don't know when I met with them. That
6 is because he doesn't know if it is late '11, which he said a
7 couple of times or early '12. In fact, the meeting was at the
8 U.S. Attorney's office. This is the write-up.

9 THE COURT: Has that been disclosed?

10 MR. DeBROTA: Yes, they have had this the whole
11 time.

12 THE COURT: The tape recording itself, the recorded
13 conversation, was that something you gave them in discovery?

14 MR. DeBROTA: Absolutely, absolutely, with all the
15 other ones. They listed some other ones as well. So they had
16 it years ago. That is how they had it listed on their exhibit
17 list. Now we have other recordings, but we don't want this
18 trial to go on for seven weeks.

19 THE COURT: That part is true.

20 MR. DeBROTA: Exactly. The fact that Mr. Wilson is
21 identified 30 times before that segment refutes this point as,
22 well, or however many times it is.

23 THE COURT: Okay. Mr. Tierney?

24 MR. TIERNEY: Our position, Judge, is that the
25 Government has had this evidence for years, that it has

1 recordings that it does have portions of the July 27, 2011,
2 recording do contain Jeffrey Wilson on it. But, the
3 Government has to have known for years that there was, that
4 this was an important piece of evidence that they had
5 collected, and they had years to go through and have Mr.
6 Chepurko identify this section of the recording.

7 They could have done this. They could have done this
8 through redirect with Mr. Chepurko. They could have refreshed
9 his recollection with the FBI 302s of his conversations with
10 the Government to see if, to see when he first started talking
11 about recordings with the Government. But they chose not to
12 do that. So now --

13 THE COURT: The point is -- or is it the point, you
14 tell me, that you have the conversations and the tape recorded
15 communications that this -- that this witness, Mr. Chepurko,
16 had created and you put them on your list; is that true?

17 MR. TIERNEY: Yes.

18 THE COURT: So you have known what was in those
19 conversations wasn't like it was fabricated, right? On the
20 eve of trial?

21 MR. TIERNEY: What we are saying is fabricated is
22 identifying Jeff Wilson as the speaker in Government's
23 Exhibit 148. That is what we are saying is fabricated. Of
24 course, we had these recordings for a long time, but we were
25 never notified that the Government's view was that that was

1 Jeff Wilson in Government Exhibit 148. So we have no reason
2 to do any other work on that particular section of the
3 recording.

4 Now, that would have been a significant piece of evidence
5 for us, and it is a significant piece of evidence in terms of
6 preparing for this trial because if you believe the Government
7 witnesses and that is Jeff Wilson, then they have evidence
8 that Jeff Wilson was discussing the fraud scheme with one of
9 the key leaders of the fraud scheme, Mr. Furando. Our
10 position is that that is not Mr. Wilson. They could have done
11 all this on redirect with Mr. Chepurko --

12 THE COURT: They have other options too, and that is
13 really what the Government has been asking if they can call
14 the lawyer for Mr. Chepurko because he would know, be able to
15 testify as to this fact about when the correlation was made
16 between the tape and the voices identified here. So either
17 you can recall Mr. Chepurko or you can call the lawyer.

18 MR. DeBROTA: I think the easier thing to do is this
19 is a prior consistent statement of Mr. Chepurko. You
20 said -- he said he testified to what he said. I think we
21 should call his lawyer who, after all, prepared the
22 whistleblower notification, participated in --

23 THE COURT: I said you could do that.

24 MR. DeBROTA: We will call Mr. Colapinto next.

25 MR. TIERNEY: Your Honor, we object to them being

1 able to call Mr. Colapinto. He was present in the courtroom,
2 and there was a separation of witnesses.

3 THE COURT: He is a lawyer. I expect him to
4 understand that he has to defend upon proof of testimony
5 without regard to what he overheard. So a lawyer is an
6 exception, generally, to a separation order; and besides,
7 these questions specifically were not asked of Mr. Chepurko,
8 so they wouldn't be tainted by that. Might perceive the
9 relevance, but these questions weren't specifically asked of
10 Mr. Chepurko because -- or at least the answers that Mr.
11 Chepurko gave wouldn't be influential or persuasive with the
12 lawyer because Mr. Chepurko couldn't remember exactly. So the
13 lawyer is being called for that purpose as I understand it.
14 Objection is overruled.

15 *(End of bench conference.)*

16 MR. DeBROTA: The Government calls Mr. Colapinto.

17 THE COURT: Good morning. Come to the witness
18 stand, please. Remain standing, be sworn by the clerk.

19 **DAVID COLAPINTO, GOVERNMENT'S WITNESS, SWORN**

20 **DIRECT EXAMINATION**

21 BY MR. DeBROTA:

22 Q Good morning, sir. Could you spell your first and last
23 name, please?

24 A My first name is David. My last name is Colapinto,
25 C-O-L-A-P-I-N-T-O.

1 Q And what do you do for a living, sir?

2 A I am an attorney.

3 Q And where do you work?

4 A In Washington, D.C at the law firm of Kohn, Kohn &
5 Colapinto.

6 Q And how long have you worked there?

7 A More than 25 years.

8 Q Generally, how long have you been a lawyer?

9 A A little more than 25 years. I was admitted to the bar
10 in 1988.

11 Q And do you have a particular area of practice that at
12 times involves what we commonly call a whistleblower?

13 A Yes.

14 Q Can you briefly describe what that area of practice is
15 for the jury, what you do and your firm does?

16 A Yes. What we do is, most of my practice over 25 years
17 has been representing people who are known as whistleblowers
18 who have, to make it brief, generally are people who have
19 worked somewhere and have witnessed misconduct and desire to
20 either report it to the Government or have reported it to the
21 Government and have either suffered some adverse consequence
22 as a result of that or are seeking legal representation
23 concerning that.

24 Q And is this a normal lawful area of practice lawyers
25 engage in?

1 A Yes, and it has been a growing area over the last 25
2 years.

3 Q And with regard to the Securities and Exchange
4 Commission, for example, are there whistleblower procedures
5 and programs to have, that occur in those kind of cases?

6 A Yes. Those are fairly new. There was a law passed in
7 2010 that created a new whistleblower remedy and whistleblower
8 program through the Securities and Exchange Commission.

9 Q Do these programs provide, for example, a safe pathway
10 for the whistleblower to provide information to the
11 Government?

12 A Yes. They allow a whistleblower to report information
13 anonymously through an attorney to the Government.

14 Q With regard to the Internal Revenue Service, does it have
15 whistleblower protections and programs as well?

16 A Yes, very similar.

17 Q And are you someone with expertise in how those programs
18 work?

19 A Yes.

20 Q Now, when someone comes to you and provides you with some
21 information that might be the subject of some whistleblower
22 representation, do you sit down with them and get their story?

23 A Yes. That is the first thing we do.

24 Q And before you give them any advice, do you do your own
25 kind of analysis of what the right thing to do might be?

1 A Yes. In fact, generally what we do is we analyze
2 information that they have that they give to us to determine
3 which or if any of these programs or claims they may have.

4 Q Okay. And if they have recordings do you listen to them?

5 A Yes.

6 Q And in the course of doing that do you talk to the people
7 about who is on those recordings?

8 A If not me, someone on my staff would.

9 Q Okay. How big is your law firm?

10 A We are a small law firm. We have three partners and
11 currently two associate attorneys and other staff.

12 Q Okay. But the process of analyzing what to do includes
13 looking at what they can provide you?

14 A That's correct.

15 Q And after you have analyzed that, does it take some time
16 to do that?

17 A Yes, depending on the amount of -- and the volume of the
18 documentation or information.

19 Q So after that process is completed, do you give them
20 advice on how to make a whistleblower notification to the
21 right authorities?

22 A That's right.

23 Q Do you assist them in that process?

24 A Yes.

25 Q How would you go about doing that with your assistance?

1 A Well, what we would do is we would obtain all of the
2 information from the client, and then we would write it up,
3 make a report to the Government.

4 Q Is that on your side a formal looking process?

5 A Yes. It is formal.

6 Q With documentation?

7 A Yes.

8 Q After you make the report, is it common for a Government
9 agency then to respond at some period after that?

10 A Yes. Not always, but often we will receive contact from
11 one or more Government agencies in response to that type of
12 submission.

13 Q And when they do that do you give them the information
14 that you already have that they might request at that point?

15 A Yes or additional copies of what we have previously
16 provided.

17 Q So if you had recordings and they were requested at that
18 time, you provide them?

19 A Yes.

20 Q Now, that wouldn't be the first time, though, that you
21 would know what is in those recordings?

22 A No, it would not.

23 Q And why is that?

24 A Because we would want to review what is in that type of
25 information before we actually notify the Government of

1 anything because we want to make sure that what is provided to
2 the Government is truthful and accurate.

3 Q Okay. Do you know how you first met Alex Chepurko?

4 A Yes. He was referred to us through a referral service,
5 and he contacted -- we contacted him -- or he contacted us via
6 that process. And then we started communicating with him I
7 think sometime in July of 2011.

8 Q And did he eventually become a client of your firm?

9 A Yes. I believe in early August of 2011 he formally
10 became a client.

11 Q So if earlier he was testifying about a recording from
12 July 27, 2011, that is a recording that he made before having
13 a formal attorney-client relationship with your firm?

14 A That's correct.

15 Q Okay. In the course of your preparation of his
16 whistleblower notification and otherwise, have you gone over
17 with Mr. Chepurko the contents of all the recordings that he
18 did?

19 A Yes.

20 Q And in the course of those communications, did he
21 identify Jeff Wilson's voice and prepare transcripts of that
22 that you two discussed together?

23 MR. TIERNEY: Objection.

24 THE COURT: Grounds?

25 MR. TIERNEY: It is hearsay, Your Honor.

1 THE COURT: Overruled.

2 BY MR. DeBROTA:

3 Q In the course of that, did you go over with him those
4 recordings and discuss the preparation of working transcripts
5 that you used with him that identified Mr. Jeff Wilson as
6 being in those conversations?

7 A Yes. Several people in my office over a period of time
8 did do that, and I personally have done that with him as well
9 as I became more involved in the case.

10 Q So if the suggestion was made that Mr. Chepurko first
11 heard a recording on July 27 -- first made on July 27, 2011,
12 that he first heard it last Sunday, that is not true, is it?

13 MR. TIERNEY: Objection, Your Honor.

14 THE COURT: Sustained.

15 BY MR. DeBROTA:

16 Q Okay. Do you know whether the particular recording from
17 July 27, 2011, which there has been testimony about, is part
18 of a larger recording you have discussed with Mr. Chepurko?

19 A Yes.

20 Q Did he before last Sunday, in the course of your
21 representation, identify Jeff Wilson as being a participant in
22 that phone call -- that recording?

23 A Yes, years ago.

24 Q Years ago. Before he even made his whistleblower
25 notification?

1 A I can't say specifically before that -- that would have
2 been in October of 2011, but there were representations made
3 that he had conversations with Mr. Wilson when we made that
4 first notification to the SEC.

5 Q Which would be in October of 2011?

6 A Correct.

7 Q So you, on behalf of Mr. Chepurko, filed a formal
8 notification to the Government stating that Mr. Wilson was a
9 participant in October of 2011?

10 A That is correct. My law partner --

11 MR. TIERNEY: Object.

12 THE COURT: Sir, what is the objection?

13 MR. TIERNEY: It is hearsay. He is testifying about
14 out-of-court statements. We don't have them.

15 THE COURT: He is testifying to what he did in
16 reporting to the Government, so he can testify to that. He is
17 not testifying to the statements, he is testifying to the acts
18 that occurred.

19 THE WITNESS: The submission was made by my law
20 partner, Stephen Kohn, which I reviewed before it was
21 submitted.

22 BY MR. DeBROTA:

23 Q So it is not a fact that the first time Mr. Chepurko has
24 made that identification is last Sunday, is it?

25 A No.

1 Q It was years ago?

2 A Correct.

3 Q And it was before the Government even knew about any of
4 this because you made the initial notification of the RINs
5 fraud scheme?

6 A Correct.

7 Q Now, there was also some testimony Mr. Chepurko said. He
8 didn't know how much money he might gain as a result of being
9 a whistleblower. How much has he received to date?

10 A He has personally received \$9,000 out of a settlement
11 between Pinnacle Biofuels and Mr. Chepurko and the United
12 States Government.

13 Q And --

14 A False Claims Act action.

15 Q Okay. On his behalf, did you help him file a civil suit
16 that is a false claims action suit?

17 A Yes.

18 Q Can you explain to this jury what that is?

19 A That is a civil lawsuit where there is a U.S. law called
20 Lincoln's Law. It dates back to Abraham Lincoln. Any citizen
21 can submit a lawsuit to, in the name of the United States and
22 themselves against any individual who it is alleged has
23 defrauded the United States in some way.

24 Q And is there a period of time where the Government then
25 has a decision they can take over that lawsuit and proceed

1 with it in the name of the U.S. or not?

2 A Yes. Yes, that is correct.

3 Q If the Government chooses, they call that intervene; is
4 that right?

5 A That's right.

6 Q If the Government intervenes then the case continues
7 forward at that time with Government lawyers; is that right?

8 A That's correct.

9 Q If the Government chooses not to intervene, then you
10 would have to proceed forward and prove all of that; is that
11 true?

12 A That is correct.

13 Q Now, what happened in the case of the Pinnacle lawsuit
14 that resulted in him getting \$9,000?

15 A The Pinnacle lawsuit settled after the Government
16 declined to intervene, so under the statute we had authority
17 to enter into a proposed settlement, which was then
18 subsequently approved by the United States Attorney's office
19 and Department of Justice. And then the final settlement was
20 approved, and the monies were paid to Mr. Chepurko, the United
21 States, and it was a certain amount of money for attorney's
22 fees specified in the settlement.

23 Q Now, in the case of e-biofuels or Imperial Oil, did Mr.
24 Chepurko also file a False Claims Act action in the name of
25 the United States as well?

1 A Yes, he did.

2 Q Did you assist him in preparing that?

3 A Yes, I did.

4 Q About when in the timeline did you file that case?

5 A I -- I am thinking it was in or about March or April of
6 2012.

7 Q Okay.

8 A It might have been a little later than that.

9 Q And did --

10 A My recollection, it was in the spring of 2012.

11 Q Did the Government intervene in that case as well?

12 A No.

13 Q So that is still an active -- it is still a case that is
14 in a court in the United States?

15 A That case was stayed pending the outcome of several other
16 proceedings.

17 Q So it is lying dormant?

18 A Correct.

19 Q Is one of the reasons it was stayed, there were a series
20 of criminal prosecutions that relate to that?

21 A Yes.

22 Q That includes, for example, the cases involving
23 e-biofuels itself, Caravan, CIMA, Mr. Furando, Craig Ducey,
24 Chad Ducey, Chris Ducey, Brian Carmichael, all of that?

25 A Correct.

1 Q Did that case also involve a lawsuit against Imperial
2 Petroleum?

3 A Yes.

4 Q Did it involve a lawsuit against Mr. Wilson, Jeff Wilson?

5 A I believe it did.

6 Q Okay.

7 A Yes.

8 Q How would Mr. Chepurko get any money out of that if those
9 cases are stayed?

10 A After the stay is lifted, Mr. Chepurko, through his
11 attorneys, would have to prosecute that action civilly as a
12 civil case, would have to go to court and win and get a
13 judgment, and then if there was anything to collect from those
14 Defendants, then a certain amount of money could be collected
15 on behalf of the United States. And Mr. Chepurko could
16 theoretically obtain, if that was successful, a percentage
17 based on what the recovery is to the United States.

18 Q Lots of things have to happen between today and that for
19 Mr. Chepurko to get any money from that at all; is that true?

20 A That's correct.

21 Q So if he testified earlier he didn't know whether he
22 would get any money, that is true, no one could know that?

23 A That's correct.

24 Q And his source of information would have to be you, and
25 you don't know whether he is going to get any money either

1 with regard to that first False Claims action case.

2 A Nobody knows.

3 Q To the extent he gets a private judgment against Imperial
4 Oil, for example, he would have to be able to collect from
5 that Defendant too, right?

6 A That's correct.

7 Q And they have to have money to collect?

8 A That's correct.

9 Q There also are victims in these various cases like victim
10 oil companies; is that right?

11 A That is my understanding.

12 Q And sometimes in criminal cases they get paid first; is
13 that right?

14 MR. TIERNEY: Objection.

15 THE COURT: Overruled.

16 BY MR. DeBROTA:

17 Q Sometimes in criminal cases if there is restitution paid,
18 that gets paid first?

19 A That is my understanding.

20 MR. TIERNEY: Objection.

21 THE COURT: I just ruled on that objection.
22 Overruled.

23 THE WITNESS: That is my understanding, is that in
24 the restitution -- that has to do with the criminal case, and
25 there is -- there are statutes and rules with respect to

1 paying people in restitution that, that are involved. That is
2 my understanding.

3 BY MR. DeBROTA:

4 Q So to be clear as of today, Mr. Chepurko has received
5 \$9,000. The rest is a possibility, but that is all?

6 A That is correct.

7 Q Now, with regard to the process of notifying the IRS or
8 the Securities and Exchange Commission, do you consider that a
9 good thing?

10 A Yes.

11 Q Those agencies try to provide an incentive for people to
12 come forward and talk about crimes by adding programs where
13 they might provide some compensation there as well; is that
14 right?

15 A That is an express purpose why the laws were passed to
16 encourage people to come forward to report.

17 Q To date, it is possible one or two of those agencies
18 might also provide some sort of payment for that purpose, but
19 that hasn't happened to date; is that true?

20 A That has not happened, correct.

21 Q We are not talking about tens of millions of dollars or
22 anything like that, are we?

23 A It is unknown. It is unknown.

24 Q Which is what your client said a few minutes ago on the
25 stand.

1 A It is completely unknown, yes.

2 MR. DeBROTA: One moment, Your Honor.

3 THE COURT: Yes.

4 MR. DeBROTA: No further questions, Your Honor.

5 THE COURT: Cross. Mr. Tierney?

6 **CROSS-EXAMINATION**

7 BY MR. TIERNEY:

8 Q Good morning, Mr. Colapinto. My name is Kevin Tierney.
9 I represent Jeff Wilson. I have got a few questions, sir. We
10 just met earlier this morning, correct?

11 A Yes. We met in the hall.

12 Q All right. So when did you first start representing Alex
13 Chepurko?

14 A Early August of 2011 is when my firm entered into a
15 representation agreement with him.

16 Q When? I am sorry.

17 A That was the commencement of the representation.

18 Q Okay. And by August of 2011 Mr. Chepurko had already
19 obtained recordings at issue in this case, right?

20 A Yes.

21 Q Did -- when did he turn those over to you?

22 A Very early in the representation. It would have been
23 within the first 60 days.

24 Q All right. And when did he -- when did you review those
25 with Mr. Chepurko?

1 A Other people in my office reviewed them with him. It was
2 very time-consuming to go through them. I personally did not
3 initially go through them with Mr. Chepurko until later on,
4 but others in my office did initially.

5 Q But you did personally review them with Mr. Chepurko?

6 A Yes.

7 Q Okay.

8 A I, I had personally listened to all of them.

9 Q With Mr. Chepurko?

10 A Not every one of them with Mr. Chepurko.

11 Q Are you familiar with what has been marked for
12 identification purposes as Government's Exhibit 148?

13 A Yes.

14 Q And that is a transcript of a portion of a recording that
15 your client made on July 27, 2011, correct?

16 A Yes.

17 Q Is your testimony that you know that you reviewed that
18 portion of the recording with Mr. Chepurko?

19 A Yes.

20 Q When?

21 A Certainly the earliest time I would have reviewed this
22 with Mr. Chepurko would have been in 2012.

23 Q Okay. Well, do you recall?

24 A Yes.

25 Q And did Mr. Chepurko identify Jeff Wilson as the person

1 who is identified on this transcript as being the speaker
2 there?

3 A I know he did. I don't have a specific recollection of
4 him doing that in a conversation with me. I can't tell you
5 that on X date he said this was Mr. Wilson's voice. I do know
6 that that was done over the identification process of who was
7 on these recordings, was done over a period of time with
8 people in my office, and we also then had discussions with the
9 Government where recordings were discussed.

10 Q All right. But you understand that July 27, 2011, Mr.
11 Chepurko made -- how long is that recording?

12 A I don't remember.

13 Q All right. But it is not -- it is not just --

14 A This is a portion of recording.

15 Q Right.

16 A Or a recording or recordings he would have made that day.

17 Q And so my question is, you don't recall going over this
18 portion of the recording with Mr. Chepurko and having Mr.
19 Chepurko identify Jeff Wilson's voice to you on this portion
20 of the recording?

21 A Well, I, I remember it did happen. I, I can't remember
22 specifically on what date.

23 Q Was it on this portion of the recording, or was it on
24 other parts of July 27?

25 A No. This was a key portion of that recording, so I

1 remember this portion of that recording and going over it with
2 him. I just can't remember the specific date in which we did
3 that.

4 Q Okay. Was it before or after you made the report to the
5 Government regarding your client's claims?

6 A For me personally? It was after the report to the
7 Government.

8 Q Okay. So your report to the Government did not include
9 Mr. Chepurko identifying this Jeff Wilson as the speaker on
10 this recording?

11 A Not on this recording, but the initial report to the
12 Government did identify Mr. Chepurko having had one or more
13 conversations with Mr. Wilson.

14 Q Okay, but not specifically --

15 A Not specifically identifying this conversation.

16 Q Okay. And was the first time that Mr. Chepurko did that
17 on Sunday right before trial started?

18 A No.

19 MR. DeBROTA: Objection.

20 THE COURT: Overruled.

21 THE WITNESS: No.

22 BY MR. TIERNEY:

23 Q When was it?

24 A As I said, it would have been sometime as early as 2012.
25 I can't remember the specific date we went over this specific

1 portion of a, of a recording with Mr. Chepurko. But we, we
2 have gone over this material several times with him both alone
3 and in the presence of the Government on certain occasions.

4 Q That is what I am trying to get down to is when -- when
5 do you know that Mr. Chepurko first told the Government that
6 Jeff Wilson is the person who is identified as Jeff Wilson in
7 Government's Exhibit 148?

8 A I don't remember that, sir.

9 Q Okay.

10 THE COURT: Can you estimate? Can you --

11 THE WITNESS: We had several -- there were several
12 phone conversations and follow-ups to the initial meeting that
13 we had with the Government. So it is impossible, as I am
14 sitting here today to say, hey, it was between 2012 and there
15 was other follow-ups in 2014. There might have been
16 follow-ups in 2013 as well and in 2015.

17 BY MR. TIERNEY:

18 Q Okay. So first meeting with the Government between you
19 and your -- sorry, strike that. Let me rephrase.

20 First meeting between your client and the Government with
21 you representing your client took place in early 2012?

22 A That's correct.

23 Q Then you had other follow-up meetings with the Government
24 in 2014?

25 A Correct.

1 Q And when?

2 A Then there were several phone conversations.

3 Q Okay.

4 A Sometimes the agents would call with questions, sometimes
5 the attorneys wanted to talk to Mr. Chepurko.

6 Q All right. So does it sound about right that the first
7 meeting between your client and the Government took place in
8 January 2012?

9 A That's correct.

10 Q And then do you recall an April 4th conference call
11 between your client and --

12 THE COURT: April 4th? What year?

13 MR. TIERNEY: 2012.

14 BY MR. TIERNEY:

15 Q Phone call between your client and some agents?

16 A I remember there were several follow-up calls. I don't
17 remember the dates specifically.

18 Q Okay. Do you recall a May 9th -- strike that.

19 And then do you recall an April 3, 2014, meeting with Mr.
20 Chepurko that you were present for?

21 A I do.

22 Q With, with the prosecutors?

23 A I do remember there was an in-person meeting that was
24 held in Washington DC.

25 Q Okay. And during that interview, before you started that

1 interview, you had the opportunity to review a report of the
2 conversation that your client had with the Government in
3 January of 2012, right?

4 A Mr. Chepurko was provided the opportunity to review a
5 report of a prior interview, and I was present. I cannot
6 recall, as I sit here, whether I actually reviewed that or
7 what I did there, but I know that he was given an opportunity
8 to review it and make any comments.

9 Q Okay. And then when -- you did that in private -- or Mr.
10 Chepurko did that in private with you, correct, reviewed the
11 memo of his prior interview?

12 A My recollection, there may have been an agent there when
13 he was doing the review.

14 Q Okay. At any rate, when the actual interview started
15 then, isn't it correct that Mr. Chepurko had the opportunity
16 to make some clarifications to the report that was provided to
17 them?

18 A In that portion of the meeting, yes.

19 Q Okay. But you didn't discuss at that April 2014
20 meeting -- you didn't discuss with the Government the portion
21 of the recording that has been marked for identification as
22 Government's Exhibit 148?

23 A I don't remember.

24 Q Okay. And you didn't -- going back to the meeting of
25 July 11, 2012, there was a report of that meeting that was

1 made, right?

2 A Of what was the date? I am sorry.

3 Q In April 14 -- April 2014 meeting your client had an
4 opportunity to review an FBI 302 from his first meeting with
5 the Government in January of 2012?

6 A Yes.

7 Q And he had the opportunity to correct anything that was
8 incorrect about the January 2012 FBI 302?

9 MR. DeBROTA: I would object to foundation relevance
10 of this. If this isn't about the July 27, 2011, recording,
11 which is why he testified on direct, and this is about
12 something else, it doesn't matter whether there were
13 corrections or not on other topics. There was a whole
14 previous criminal case that was prepared for trial. Mr.
15 Chepurko was being interviewed about that. The sole relevance
16 of this witness as --

17 MR. TIERNEY: May we approach?

18 MR. DeBROTA: -- as the Court knows is this
19 recording which --

20 THE COURT: Hold on, hold on, hold on. Does this
21 have to do with exhibit -- I can't see the number, but -- push
22 it up on the thing there.

23 MR. TIERNEY: 148.

24 THE COURT: 148?

25 MR. TIERNEY: Yes.

1 THE COURT: Or about the disclosures in the tape
2 recording to this witness?

3 MR. TIERNEY: Yes.

4 THE COURT: It does?

5 MR. TIERNEY: Yes.

6 THE COURT: All right, then it is relevant. You may
7 proceed. The objection is overruled.

8 BY MR. TIERNEY:

9 Q All right. So Mr. Colapinto, your client reviewed the
10 FBI 302 -- let me rephrase.

11 April 3, 2014, your client met with a number of
12 prosecutors and agents, right?

13 A I don't recall the specific date, but he, he did -- we
14 did have an in-person meeting in April of 2014, I believe.

15 Q Okay. And that meeting was with Mr. DeBrotta, correct?

16 A Yes.

17 Q And with Mr. Ballantine?

18 A Yes.

19 Q And Agent Lisa Matovic?

20 A Yes.

21 Q And a Special Agent Wil Stanley from the IRS, CI?

22 A If it says that, yes. I know who Mr. Stanley is. I
23 don't remember if he was in that meeting.

24 Q And at the start of that interview in April 2014, your
25 client had the opportunity to review his -- a memo of his

1 first meeting with the Government prosecution team that took
2 place in January of 2012?

3 A That's correct.

4 Q And he had the opportunity to make any corrections to the
5 January 2012 report of interview?

6 A Corrections as to what the report stated.

7 Q Okay. Isn't it true, Mr. Colapinto, that your client did
8 not identify -- did not talk to the Government about this
9 portion of the recording with the Government agents in either
10 January of 2012 or April of 2014?

11 A It didn't happen in the January 2012 meeting. It may
12 have happened in the April. I just can't remember the
13 April 2014 meeting because I know that only one portion of
14 that meeting in April of 2014 had to do with going over the
15 report from the January 2012 meeting. There were many other
16 topics discussed, and there were things that were discussed
17 that I can't remember. I know that there were many other
18 topics beyond what was in the original meeting report.

19 Q Okay.

20 A But I don't have a specific recollection that it was
21 discussed at that meeting.

22 Q Okay. But you are certain that it didn't take place in
23 January of 2012?

24 A Correct.

25 Q And in the April 2014 meeting do you know that your

1 client talked with the Government about the specific part of
2 the recording of July 27, 2011, that is transcribed in
3 Government's Exhibit 148?

4 A He may have. I don't remember.

5 Q You don't remember?

6 A No.

7 THE COURT: Do you remember that the indictment was
8 returned in September of 2013?

9 THE WITNESS: No, I don't know that.

10 BY MR. TIERNEY:

11 Q Do you remember your client talking to the Government
12 generally in the April 2014 meeting about the recording that
13 he made on July 27, 2011?

14 A No, I don't remember that. I, I -- it may have been
15 discussed, but I don't have the recollection that it was.

16 Q Okay. So you can't tell us when your client specifically
17 told the Government for the first time that -- or identified
18 for the first time Jeffrey Wilson as being the speaker as
19 depicted in Government's Exhibit 148?

20 A I cannot pinpoint a date for that, no.

21 Q All right. You would agree with me, sir, that if your
22 client is correct that Jeffrey Wilson is the speaker in
23 Government's Exhibit 148, that is a big deal.

24 THE COURT: Wait a minute. I don't know what "big
25 deal" means.

1 BY MR. TIERNEY:

2 Q Okay. Is that a significant -- is that significant?

3 THE COURT: In what context, Counsel?

4 BY MR. TIERNEY:

5 Q All right, sir. Government's Exhibit 148

6 is -- Government's transcription identifies Jeff Wilson

7 talking, right?

8 A Yes.

9 Q And it identifies him talking with Joseph Furando?

10 A Yes.

11 Q Okay. About alchemy, right?

12 A Yes.

13 MR. TIERNEY: Okay. Your Honor, may I consult with
14 counsel?

15 THE COURT: You may.

16 MR. TIERNEY: Nothing further, Your Honor.

17 THE COURT: All right. Redirect, Mr. DeBrotta?

18 MR. DeBROTA: Yes, Your Honor.

19 **REDIRECT EXAMINATION**

20 BY MR. DeBROTA:

21 Q Mr. Colapinto, let me show you the document we have been
22 talking about, Exhibit 148. Do you see that?

23 A Yes.

24 Q It says at the top of this, "Transcript of portion of a
25 sound file that is called REC_2011-07-27-(13-05-13) bracket

1 16"; do you see that?

2 A Yes.

3 Q That is the last part of a long recording that you have
4 listened to multiple times?

5 A Yes.

6 Q It is over an hour?

7 A Yes, it is.

8 Q This is the final five, seven minutes of that; is that
9 correct?

10 A It is a portion of the -- whether it is the final, I
11 can't remember.

12 Q Fair enough. But I think you said that you consider this
13 portion, in your words, "a key portion of that recording."
14 You thought -- you thought it was key in your analysis of
15 representing your client?

16 A Yeah, anything that would corroborate his story we
17 thought was important.

18 Q Okay. Then you were asked some questions a minute ago on
19 whether this was discussed specifically with the meeting, with
20 the Government in April of 2014; you recall that?

21 A Yes.

22 Q And you remembered the location of that meeting?

23 A Yes.

24 Q And you remembered some people who were present?

25 A That's correct.

1 Q And you indicated me and Mr. Ballantine?

2 A That's correct.

3 Q And Lisa Matovic, and you said you weren't sure if Wil
4 Stanley was present?

5 A That's correct.

6 Q Would it refresh your recollection to the persons in that
7 meeting and its date if I showed you a document relating to
8 that meeting that you have seen previously?

9 A Yes.

10 Q Does that refresh your recollection who was present?

11 A Yes.

12 Q Did it include Mr. Stanley as well?

13 A Yes.

14 Q I was there, Mr. Ballantine was there, Miss Matovic was
15 there, Mr. Stanley was there?

16 A Yes.

17 Q Now, earlier your client referred to meetings with the
18 prosecution team. That is a large part of the prosecution
19 team, right?

20 A That is a large part of it, yes.

21 Q You were asked a lot of questions over whether or not a
22 specific recording was played or not just now on
23 cross-examination?

24 A Right.

25 Q And you were asked about what portion you might have

1 listened to. Would it refresh your recollection to look at
2 the summary to see precisely what portion you listened to?

3 A Yes.

4 MR. DeBROTA: Referring to page 7 of 7, Your Honor,
5 at the top.

6 THE WITNESS: Okay.

7 BY MR. DeBROTA:

8 Q Does that refresh your recollection?

9 A Yes, it does.

10 Q In fact, that day you listened to the entire recording
11 specifically that day with Mr. Chepurko April 3, 2014?

12 A Yes.

13 Q And that is because that specific recording was a
14 specific topic of that interview and recorded in the summary
15 of it?

16 A That's correct.

17 Q Now, in that summary, or do you recall also that day your
18 client saying the following persons were present in the
19 recording, Jeff Wilson, Aaron Wilson, Tim Jones, Furando,
20 Tracy, and Craig, meaning Craig Ducey?

21 A Yes, and I remember that we actually went through and had
22 a discussion with you and other members of -- whoever was
23 present, about the identity of the voices on that recording.

24 Q And the particular write-up summary doesn't just
25 reference the date, it references the exact name of that

1 recording, which is identical to the name here on Exhibit 148;
2 isn't that true?

3 A That's correct. It identifies the precise audio file.

4 Q So there is no question on April 3, 2014, the entire file
5 was played years ago, way before last Sunday for Mr. Chepurko,
6 and he identified Jeff Wilson's voice in the entire recording,
7 not just this piece?

8 A After reading that, there is no question in my mind.

9 MR. DeBROTA: I have no further questions, Your
10 Honor.

11 THE COURT: Recross?

12 MR. TIERNEY: Yes. Thank you.

13 **RECROSS-EXAMINATION**

14 BY MR. TIERNEY:

15 Q So the recording that is titled the
16 2011-07-27-(13-05-13)16 is a long recording, right?

17 A Yes.

18 Q And Government's Exhibit 148 only transcribed a portion
19 of that longer recording, correct?

20 A That's correct.

21 Q And your client identified Jeff Wilson as being present
22 in parts of the recording from July 27, 2011?

23 A Correct.

24 Q Because Jeff Wilson is not in all of the recordings from
25 July 27, 2011?

1 A Correct. There were, I believe, portions of where there
2 is no voices at all on the recordings.

3 Q Okay. And there is a portion of the recording from
4 July 27, 2011, where some people go to dinner at St. Elmo's,
5 right?

6 A Yes.

7 Q But Jeff Wilson is not on that?

8 MR. DeBROTA: This is beyond the scope.

9 THE COURT: Of redirect. It is beyond -- the St.
10 Elmo's conversation are beyond the scope of redirect, and you
11 are on recross.

12 MR. TIERNEY: Okay. Right.

13 BY MR. TIERNEY:

14 Q So your client identified Jeff Wilson as being on that
15 recording, right?

16 A He -- he identified Mr. Wilson being on that recording in
17 specific portions; in particular, the portion that we are
18 talking about on Exhibit 148. I recall that now after reading
19 the, the other summary report of what was discussed at the
20 April 2014.

21 Q But Mr. Wilson wasn't there for the whole -- his voice
22 isn't on the entire recording of July 27, 2011?

23 A Well, there are many different conversations in different
24 places on that recording, I believe.

25 MR. TIERNEY: Your Honor, may I have a minute?

1 THE COURT: Yes, you may.

2 Re-redirect?

3 MR. DeBROTA: No further questions, Your Honor. May
4 Mr. Colapinto be excused?

5 THE COURT: Yes, and thank you, Mr. Colapinto. You
6 may step down.

7 THE WITNESS: Thank you very much.

8 THE COURT: May we excuse him?

9 MR. FARLOW: No. We would like him to stay.

10 THE COURT: Stay in standby status, please.

11 THE WITNESS: For today or for --

12 THE COURT: I don't know. Just answer your phone,
13 please, when we call.

14 THE WITNESS: I do have a flight this afternoon.

15 THE COURT: You should talk to the lawyers.

16 THE WITNESS: Okay.

17 THE COURT: Okay.

18 (Witness excused.)

19 THE COURT: Okay, ladies and gentlemen, it is a good
20 time for a morning recess, so let's take one. During this
21 period of recess, as at all times, you must remember and
22 follow my instructions. Don't talk about this case among
23 yourselves. That includes nonverbal as well as verbal
24 communications. Don't let anyone talk to you about it. Don't
25 form any opinions or conclusions with respect to any of these

1 matters until the case is finally submitted to you at the end
2 of the trial for your deliberations. You may rise and depart.
3 We will call you back in about 20 minutes or so.

4 THE CLERK: All rise.

5 (Jury out, 11:13 a. m.)

6 THE CLERK: Court is in recess.

7 AFTER RECESS

8 THE CLERK: All rise.

9 (Jury in, 11:41 a.m.)

10 THE CLERK: Court is in session.

11 THE COURT: Would you call your witness, please?

12 MR. BALLANTINE: Yes, Your Honor. The Government's
13 next witness is Troy McKee.

14 THE COURT: McKee?

15 MR. BALLANTINE: Yes, ma'am.

16 THE COURT: Hi, Mr. McKee.

17 THE WITNESS: Hi there.

18 THE COURT: Would you remain standing? Raise your
19 right hand and be sworn by the clerk.

20 **TROY MCKEE, GOVERNMENT'S WITNESS, SWORN**

21 **DIRECT EXAMINATION**

22 THE COURT: Mr. Ballantine, you may take up your
23 questioning.

24 MR. BALLANTINE: Thank you, Your Honor.
25

1 BY MR. BALLANTINE:

2 Q Good morning. Would you please tell the Court your full
3 name and spell your last name for the record.

4 A My name is Troy McKee, M-C-K-E-E.

5 Q Mr. McKee, how old are you?

6 A Thirty-eight.

7 Q And where do you live?

8 A I live in Middletown, Indiana.

9 Q How far did you go in school?

10 A How far what?

11 Q How far did you go in school?

12 A Associate's degree at Ivy Tech.

13 Q And where did you start working? Where did you work
14 between 1996 and 2007?

15 A I worked at Chrysler Corporation in Kokomo.

16 Q What kind of work did you do there?

17 A I was a pipe fitter.

18 Q And what did you do next after you left Chrysler?

19 A I worked at e-biofuels.

20 Q How long did you work at e-biofuels?

21 A From 2007 to 2012.

22 Q And now what do you do?

23 A I am a plumber and, for a company in New Castle.

24 Q Okay. I would like to ask you some questions about what
25 things were like at e-biofuels when you started there in 2007.

1 A Okay.

2 Q So if you would start out by just sort of describing what
3 it looked like when you got to work in the morning.

4 A When I started out, this was in 2007?

5 Q Yes, sir.

6 THE COURT: Would you tell us what your job was
7 there, so we know?

8 THE WITNESS: I had several jobs there, so, I mean.

9 THE COURT: So at the beginning.

10 THE WITNESS: At the beginning I was just a
11 production worker and moved to a supervisor over a shift, and
12 then I went to maintenance. And then I went to manager, then
13 towards the end I was sort of over the floor and
14 troubleshooting issues for quality and if something broke,
15 just fixed it.

16 THE COURT: Did you work a daytime shift mostly?

17 THE WITNESS: Mostly daytime. I did work some
18 nighttime shifts throughout those years.

19 THE COURT: Now you can answer Mr. Ballantine's
20 questions.

21 THE WITNESS: Okay.

22 BY MR. BALLANTINE:

23 Q Which was, if you would describe what it was like when
24 you arrived there in the morning or when you arrived at
25 e-biofuels on a regular day in 2007?

1 A We would get feedstock trucks in.

2 Q I am sorry, physically. What did the building look like?

3 Help the jury understand what this place was.

4 A There was tanks and machines there. Trucks would come
5 in, get unloaded into a tank. From a tank they get processed
6 through a centrifuge system to another holding tank. From
7 there the machine itself would pull out of that tank, go
8 through the process, then go to a finish tank and be ready for
9 load out.

10 Q Okay. But it was a pole barn-type building?

11 A Yes. It is roughly 120 feet long, 60, 70 feet wide.

12 Q And were there -- how many production units were in place
13 when you first started working there?

14 A There was two.

15 Q And what was -- what did you know about the two
16 production units, their capacities?

17 A Well, the one which we ran mostly at the beginning was a
18 5-million-gallon-a-year system, and the second system we
19 called P2. It was not running when we first started, but it
20 was going to be capable of a 10-million-gallon-a-year system.

21 Q So when you first started there the facility was working
22 just with P1?

23 A Yes, a 5-million-gallon-a-year system, yes.

24 Q And then you anticipated some of my questions about kind
25 of the process, but I would like to walk through the process.

1 Just what was involved and do it step by step in producing
2 e-biofuels, let's say, with P1?

3 A Like I said, feedstock would come in which would be --

4 Q If you don't mind I would like to do it step by step.

5 You said feedstock would come in. What is feedstock?

6 A Would be like choice white grease. It would be a
7 substance that they make biodiesel out of.

8 Q You know what choice white grease was made of?

9 A We got a lot of stuff like from Indiana Packers which was
10 the byproduct of their process. It was -- their waste,
11 basically.

12 Q All right. So feedstock would come in and then what
13 would happen next?

14 A Then we would run it through a centrifuge system to sort
15 of clean out the heavy materials out of it. It would go into
16 a storage tank, and from that tank is where we would pull out,
17 the system would pull out and start going through the system.
18 It had four different skids on that system. Skid one was the
19 reactor. That is where you added the methanol and the sodium
20 methyllate to the product to get your reaction.

21 Skid two would be a separation stage that the byproduct
22 of this process is glycerin, so that is where a lot of the
23 separation stage was.

24 The third skid would be a flash station. That is where
25 the methanol that you put in, you have to get that out of the

1 product. So we would super heat that product to roughly 240
2 degrees to get the methanol out. It would also go through a
3 wash and dry system before it goes to the finish tanks.

4 Q And you mentioned one kind of feedstock was choice white
5 grease. Was there another kind that was typically used?

6 A When we first started off it was just choice white
7 grease, but there is another feedstock, soy, that we ended up
8 using.

9 Q Soybean oil is another example of a feedstock?

10 A Right, yes.

11 Q You mentioned a centrifuge. What was the centrifuge for?

12 A We had one on the feedstock before we processed it in
13 which, what that does is, it gets out the heavy waste. It is
14 a machine that spins around real fast. It shoots the heavy
15 waste away and uses the cleaner. It cleans it up. It cleans
16 it up a lot.

17 Q Was there a difference between using, between using
18 choice white grease and soybean oil with respect to cleaning
19 it up before you put --

20 A You did not have to use a centrifuge.

21 Q Was there a time when you were filtering choice white
22 grease using something called a filter pod?

23 A Yes.

24 Q Tell us about using that and then the transition if there
25 was one to the centrifuge?

1 A The filter system is what we tried out first, it did not
2 work so well. We had a series of eight pods of filters, and
3 that was one person's job that that is all they did was change
4 filters all day long because they would clog up so easily that
5 they was always changing filters. So that didn't last that
6 long, and we ended up getting the centrifuge system which took
7 the place of filtering the product.

8 Q Was the centrifuge system something that e-biofuels owned
9 or something they rented?

10 A They rented it.

11 Q How did it get to the plant?

12 A The people we rented it to dropped it off.

13 Q Was it on wheels? I think you talked about skids before?

14 A It was a fork truck, moved it around.

15 Q I am sorry, I may have spoken over you. What was your
16 answer?

17 A The fork truck is how we moved the centrifuge to where it
18 needed to be.

19 Q You mentioned P1 and P2. Was there a third line ever at
20 e-biofuels?

21 A It was supposed to be. There was an area for it, but the
22 equipment was never there for it.

23 Q And I think you mentioned that the two capacities at
24 e-biofuels for those P1 and P2, do you know of any
25 modification that were ever made to those that would increase

1 that capacity?

2 A No.

3 Q What was the environment like when these -- processing
4 was going on when biodiesel was being made at the facility?
5 Was it noisy, hot?

6 A Noisy, hot, both. Pumps would be running. Like I said,
7 a boiler system would be running at all times. An air,
8 compressed air system, pumps, the heat. Like I said, the
9 product got up to 200-some degrees, so it was warm in there.
10 Pumps.

11 Q How many operators when you were running both P1 and P2?

12 A Operators -- there were probably two operators per shift.

13 Q What other kinds of people worked there?

14 A There was people loading, receiving trucks, couple
15 quality people per shift. We did swing shift, so there was
16 12-hour days. So there was I think probably a group of four
17 on each group of shifts.

18 Q What would the quality people do?

19 A They would test product, whatever, whatever we needed to
20 be tested at that time. The people on the floor would bring
21 in product.

22 Q Got it.

23 We talked about the production system. Tell the jury
24 about what, what would have to go into that as the feedstock
25 came in? Would you have to test it in any way?

1 A Yeah. The feedstock truck came in with feedstock. Every
2 truck, before it gets unloaded, would have to do an FFA test.
3 That is a free fatty acid test to determine if that product
4 was good enough for us to run or not. An FFA would say
5 5 percent, it was too rough on our machine to, to produce that
6 product. So that FFA had to be five or under before we say we
7 will take this truck and load it in that way.

8 Q On the other end, the product end, were there quality
9 specifications for the product that went on?

10 A On the final biodiesel, after the feedstock goes in and
11 runs through the process, we always take samples hourly on the
12 end of the machine for our soap, moisture, and acid test.
13 Then if there is -- we can do GC test, a gas chromatograph,
14 and that tells you the total reaction of your product.

15 Q Okay.

16 A Those all have to be during set limits.

17 Q When you first started there, was e-biofuels just
18 producing product as you described?

19 A Yes.

20 Q And then did the P2 line come on at some point?

21 A Not during the first set, during the first year or so.

22 Q Okay. When did it come online?

23 A Probably roughly 2008ish, '8, '9, somewhere in there.

24 Q Once it was online how much biodiesel were you making,
25 approximately?

1 A The most -- it would make around 24-, 25,000 gallons per
2 12-, for 24-hour shift. That was about the limit that we
3 could get that to run.

4 Q Okay. And were you able to run flat out that long, 24/7?

5 A Yeah, if we had product. Minding any technical setbacks,
6 either machine breaking down or something like that. As long
7 as we had everything to run, yes.

8 Q Going forward in time, how were the economic conditions
9 for e-biofuels?

10 A Not very good.

11 Q What was your experience of that?

12 A There was, as in --

13 Q Did you experience that, the economic, economic downturn
14 for e-biofuels? What did you see? Were people ever laid off?

15 A Yes. There were people laid off. We actually quit
16 buying the feedstock for a while due to price increases. We
17 just totally, just due to the price of the feedstock going up.
18 The price over -- almost doubled of what it was within a year,
19 year and a half or so. So we couldn't get the profit we was
20 making on just running, so.

21 THE COURT: When would that have been,
22 approximately, when you stopped buying it because it was too
23 expensive?

24 THE WITNESS: I would say 2009 sometime.

25

1 BY MR. BALLANTINE:

2 Q Were there layoffs -- did that correspond with the
3 layoffs?

4 A When the layoffs started we stopped running the
5 choice -- I mean, the feedstock in the machine. That is when
6 the layoffs and -- pretty sure it was 2009.

7 Q First half, second half of 2009?

8 A I would say second half.

9 Q Second half of 2009, who was laid off? What kinds of
10 workers would be laid off?

11 A Some production people. We went down to one shift
12 or -- because we had, like I said, three, three or four
13 different classes of shifts. Went down to one shift a day.
14 There wasn't any night shift.

15 Q Were you laid off?

16 A No.

17 Q What kinds of things did you do? What happened?

18 A I mowed quite a bit. If something needed to be cleaned
19 up or whatever in, in the factory, if we wanted to change some
20 things around, that is what I do.

21 Q What was going on? Was there still biodiesel being sold
22 out of e-biofuels during that period?

23 A There was. We did have trucks coming in and trucks going
24 out of biodiesel.

25 Q So you had -- did you have trucks of biodiesel coming

1 into the plant?

2 A Yes.

3 Q And did you ever talk to anybody -- what was your
4 understanding of what was going --

5 A We were told it was off-spec feedstock.

6 Q And off-spec feedstock, you would have the experience of
7 dealing with choice white grease. You have testified to that?

8 A Right.

9 Q And the experience of dealing, I guess, with soybean oil?

10 A Right.

11 Q Was it that kind of feedstock?

12 A No.

13 Q What was it?

14 A It was biodiesel.

15 Q How could you tell?

16 A Just because the test we run on it was not like -- you
17 didn't -- on an FFA test for feedstock, that is what you have
18 got to do. On the biodiesel you don't really do the FFA test,
19 you do the other test which is the soap, the moisture test on
20 that product, and we had to do that for every truck that came
21 in with that stuff.

22 Q Was it off-spec?

23 A It was in our specs. It was in the specs of the ASTM.

24 Q So ASTM, is that the specification for biodiesel? Is
25 that what you are referring to?

1 A Yes.

2 Q Did it meet those specifications?

3 A Yes.

4 Q Did you ever have a truck that came in that was frozen?

5 A Yes. We had some trucks come in from California that it
6 was during the wintertime, and during the haul over they were
7 supposed to have heated tanks. Some of those broke down, and
8 we had to thaw some of those out using our steam process.

9 Q Did that cause any specification problems, any
10 moisture --

11 A High moisture content.

12 Q How would you get the moisture out?

13 A We would separate that in a tank, and then we had the
14 machine set up, the P2 at that time and this was P2. To where
15 we could run it just on half the system on the drying part and
16 the washing part to get some of moisture out. So we would run
17 half of the process.

18 Q So sometime in the end of the second half of summer,
19 second half of 2009, sounds like the production equipment was
20 basically turned off?

21 A Turned off, and, yeah.

22 Q When did it turn back on again?

23 A Probably start of 2011.

24 Q Okay. We will get into that, but during that period of
25 time, did you -- did it become routine to get biodiesel into

1 the plant?

2 A Oh, yes.

3 Q How much testing was necessary on the biodiesel that was
4 coming into the plant as routine matter over time?

5 A Every truck that came in we pulled a sample from, they
6 did the same test on.

7 Q You pulled a sample from and then took it over to the
8 lab?

9 A Took it to the lab, checked for soap and moisture, make
10 sure that was good because that is what you do with finished
11 product and we unload it to the tank. They go to our holding
12 tank, then we would load it out whenever trucks would come in.

13 Q All right. So let's break that down. A truck would come
14 in with biodiesel in it?

15 A Correct.

16 Q You would take a sample from that truck?

17 A Yes.

18 Q Send it to the laboratory?

19 A Yes.

20 Q Put it in your tank?

21 A Yes.

22 Q And then another truck would come up and pull biodiesel
23 out of that tank?

24 A Out of, out of the load-out tank, out of the load-out
25 station where trucks for our customers --

1 Q What step did I miss? You say "the load-out tank." Did
2 I miss a step? It comes in, put into a tank, and then we
3 pumped out a load-out tank. Would anything --

4 A It could be the same tank. It got -- wherever there is
5 room to put it when it was coming in, it would go there. They
6 would go to either a Tank 7, 8, or 9. That is the load-out
7 tanks. That is what the pump would hook up to to take it out
8 to the load-out station. There were several tanks, and it
9 could come in to wherever. This had to be one of them tanks
10 to get pumped out.

11 Q When a particular load came in to e-biofuels and was
12 sampled, it was then put into a tank with any other load that
13 was coming in?

14 A Yeah.

15 Q They are all mixed together?

16 A Yes.

17 Q So if it was something that was off-spec about a
18 particular load that was coming in, there would be no way to
19 do anything to that?

20 A We could. I mean, there was several -- several tanks, so
21 you could throw that into an empty tank if needed to, to fill
22 it up and then.

23 Q How often would that happen?

24 A Not very often.

25 Q Approximately.

1 A Handful, five to ten out of a lot.

2 Q All right. At this point I would like to draw your
3 attention to Government's Exhibit 10, which should be up there
4 on the stand with you.

5 MR. BALLANTINE: This has already been admitted into
6 evidence, Your Honor.

7 THE COURT: Okay.

8 THE WITNESS: I don't know. All of these are turned
9 over.

10 THE COURT: You want to put it on the monitor, and
11 then he can follow it?

12 BY MR. BALLANTINE:

13 Q I will put it on the monitor. Do you see it there,
14 though?

15 A Yes.

16 Q Can you read that all right, sort of? It is --

17 A That is better.

18 MR. BALLANTINE: Your Honor, for the record, I would
19 like to offer for admission these exhibits that have been
20 stipulated to, Government's Exhibit 10, 6, 35, 37, 39, 40, 44,
21 53, 79, 80. I believe 87 has already been admitted, and then
22 there has been no stipulation to Government Exhibit 149, which
23 I will intend to introduce over the course of this witness's
24 testimony.

25 THE COURT: Okay. Pursuant to the stipulation, the

1 exhibits listed by counsel are admitted, not the one that he
2 excepted from the list, which is Exhibit 149.

3 MR. BALLANTINE: Thank you, Your Honor.

4 *(Government's Exhibits 10, 6, 35, 37, 39, 40,*
5 *44, 53, 79, 80 were received in evidence.)*

6 BY MR. BALLANTINE:

7 Q Do you recognize these kind of documents?

8 A Yes.

9 Q What is it?

10 A This is a bill of lading a truck would have when it would
11 come to our plant to be unloaded.

12 Q And please tell the jury what, what was the bill of
13 lading?

14 A A bill of lading is a document that would tell the load
15 what the product is, where it came from, and where it is
16 going.

17 Q So would it travel with a truckload?

18 A Yeah, it would travel with the load from wherever,
19 from Point A to Point B.

20 Q At the top does it indicate where this one came from?

21 A Kinder Morgan, Argo, Illinois.

22 Q And does it indicate further down on the document what
23 the product is that came into the plant?

24 A Yes, it says -- soy, biodiesel, B99 9.

25 Q What is your understanding what B99.9 is?

1 A That is biodiesel that is mixed with diesel fuel.

2 Q Do you know why it is mixed with diesel fuel?

3 A I believe it has something to do with a tax credit.

4 Q And over the course of your workday, would you see these
5 kinds of bills of lading from time to time?

6 A Yes.

7 Q Was it part of the records that e-biofuels works with?

8 A Yes.

9 Q And in general were bills of lading the kinds of records
10 that you-all would deal with?

11 A Yeah.

12 Q Did e-biofuels produce, in the course of your work, would
13 you produce bills of lading for product going out?

14 A Yes.

15 Q And was there another kind of bill of lading? And at
16 this point I will ask you about Government Exhibit 149, which
17 I won't publish since it has not been admitted, but if you
18 would take a look at that, if you can pull it up on paper. It
19 should be that stack of documents in front of you.

20 A I have a bunch of stacks. There is a lot of them there.

21 Q The first page of that, do you recognize that as a
22 Caravan -- I am sorry, let's go to the last page or -- is that
23 a bill of lading similar to the one that has been admitted as
24 Government Exhibit 10?

25 A Yes.

1 Q And is the next one a bill of lading from e-biofuels?

2 THE COURT: Is this all this Exhibit 149?

3 MR. BALLANTINE: Yes, ma'am.

4 THE COURT: Have the witness describe what he knows
5 it to be. You are trying to get it into evidence, aren't you?

6 MR. BALLANTINE: Yes, Your Honor.

7 THE COURT: Ask him, please.

8 BY MR. BALLANTINE:

9 Q Take a look at the second-to-the-last page. Would you
10 take a look at that?

11 THE COURT: Do you recognize this document?

12 THE WITNESS: Yes.

13 THE COURT: Or is this a compilation of documents?

14 MR. BALLANTINE: A compilation of documents.

15 THE COURT: Do you recognize this compilation?

16 THE WITNESS: It -- the first page is a bill of
17 lading.

18 THE COURT: We don't want you to read from it. It
19 is a question of do you know what those things are?

20 THE WITNESS: Yes.

21 THE COURT: How do you know them?

22 THE WITNESS: We see them every day just working.

23 THE COURT: It is a routine business document?

24 THE WITNESS: Yes.

25 THE COURT: Go on, lawyer.

1 BY MR. BALLANTINE:

2 Q Would you describe as a routine business document that is
3 the second-to-last page?

4 A That is a bill of lading form that we would make out to,
5 for our customers, or for after we load the product we give it
6 to that truck driver, then they would take it to wherever the
7 customer was at.

8 Q And were you familiar with occasions when those kinds of
9 documents would be faxed to truck drivers?

10 A Um, I -- there has been times that has happened.

11 Q And is the second-to-last page -- the second page of this
12 document a fax cover sheet?

13 A It might be. I never sent a fax, so, I don't know that.

14 Q But you are familiar that sometimes these would be faxed
15 to truck drivers?

16 A Yeah, yeah.

17 Q Now looking at the top document.

18 A Yes.

19 Q Top page of that document, do you recognize that kind of
20 document?

21 A Yes.

22 Q What was that?

23 A This was another bill of lading form that we would fill
24 out and just keep.

25 Q And what is the nature of this bill of lading? Is it

1 indicating product going to or coming from e-biofuels?

2 A It is implying shipping from Caravan Trading and --

3 Q Don't read it. If you just answer. Is it --

4 A Could you repeat the question?

5 Q Is it going into -- is this a bill of lading reflecting
6 product coming to or leaving e-biofuels?

7 A Well, coming to.

8 MR. BALLANTINE: Okay. Your Honor, I move to admit
9 Government Exhibit 149.

10 THE COURT: How many pages are in the exhibit?

11 MR. BALLANTINE: Five pages, Your Honor.

12 MS. LORBIESKI ANDERSON: Objection.

13 THE COURT: What is the objection?

14 MS. LORBIESKI ANDERSON: I don't believe that the
15 Government's Counsel has established that this hearsay
16 document is admissible under the business records exception.
17 The witness testified that he had no idea what page 2 and 3
18 are. He has never seen this document before. He also
19 testified that he could read the document on page 3, but he
20 did not establish that he had knowledge that the information
21 was made at the time it was created, that it was in the normal
22 course of business, that it was the regular practice of the
23 business to create the document.

24 He also didn't provide those representations with regard
25 to the last page, and on the first page of the document he

1 indicated that this was a document that is created in the
2 normal course. But he didn't say whose normal course, and it
3 appears that this is a document that was not created by the
4 company he worked for. So he doesn't have personal knowledge
5 to establish who created page 1 when it was made if they had
6 knowledge and if it was in the regular course of this
7 company's business activities. So for all those reasons this
8 hearsay document is inadmissible.

9 THE COURT: Mr. Ballantine, you want to respond?

10 MR. BALLANTINE: Your Honor, the witness has
11 testified that he would make -- these are routine business
12 documents. He testified to a stack of them, that the top one
13 is one that he would -- that he would, in the normal course of
14 business, that folks at e-biofuels would make. He testified
15 about there was an extra one that they would make and keep. I
16 am sorry -- yes, that they would make and keep.

17 He testified that he knew from time to time they would
18 fax documents like these to truck drivers along the way. And
19 on its face, the second page of the document is an E-fax
20 message to --

21 THE COURT: Are you going to ask him about the
22 contents of the document?

23 MR. BALLANTINE: Yes, I am, Your Honor.

24 THE COURT: You have to establish more foundation
25 for that. The fact that he is familiar with them in the

1 ordinary course of his business doesn't mean he knows how they
2 got prepared or how the information that is related there was
3 input, so forth.

4 MR. BALLANTINE: Your Honor, maybe it would be
5 simpler if I separate these -- the compilation for a reason.
6 Maybe if I separate them into multiple exhibits, if I may.

7 THE COURT: For ease of reference, if you are going
8 to pull it apart make it 149A, 149B, and lay your foundation
9 as to each page.

10 BY MR. BALLANTINE:

11 Q Mr. McKee, I ask you to look at Government's
12 Exhibit 149A.

13 A Yes.

14 Q Does that appear to be a document that is in nearly
15 always similar --

16 THE COURT: Excuse me. Just for the record, is that
17 page 1 of 149 or --

18 MR. BALLANTINE: That is page 5.

19 THE COURT: Page 5, okay.

20 MS. LORBIESKI ANDERSON: Your Honor --

21 MR. BALLANTINE: It is the last page, Counsel, of
22 149.

23 THE COURT: Wait, wait, wait, wait. Are you talking
24 for the record, because I can't hear you.

25 MS. LORBIESKI ANDERSON: My mic.

1 THE COURT: If you just want to talk to Mr.
2 Ballantine, go over there and talk to him, please.

3 MS. LORBIESKI ANDERSON: Your Honor, I wasn't sure
4 how the document has been split up.

5 THE COURT: He is going to show you.

6 MS. LORBIESKI ANDERSON: Thank you.

7 (Off-the-record discussion.)

8 MS. LORBIESKI ANDERSON: Mr. Ballantine?

9 MR. BALLANTINE: I took them out.

10 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

11 THE COURT: Okay. 149A is before the witness.

12 BY MR. BALLANTINE:

13 Q Mr. McKee, does that appear to be very similar to
14 Government Exhibit 10?

15 THE COURT: Do you have 10 there, sir?

16 THE WITNESS: Yes. I am looking at it right now.
17 Yes, it does.

18 BY MR. BALLANTINE:

19 Q You testified that Government's Exhibit 10 is a Kinder
20 Morgan bill of lading for product that would come into the
21 plant, that you would keep those as a regular routine course
22 of business?

23 A Yes.

24 Q Is that the case for 149A?

25 A Yes.

1 Q And this is a regular record of product coming into
2 e-biofuels?

3 A Correct.

4 Q And you, you know that that -- that those records would
5 be kept and filed away somewhere?

6 A Yes.

7 Q On that basis, Your Honor, I move for admission of
8 Government's 149A.

9 MS. LORBIESKI ANDERSON: Objection.

10 THE COURT: What is the objection?

11 MS. LORBIESKI ANDERSON: Hearsay, Your Honor. The
12 witness has testified that this Kinder Morgan document was
13 kept in his company's regular course of business after it was
14 made, but he has not established the other requisites of the
15 business records exception, which is that the record was made
16 at or near the time by someone with knowledge. This witness
17 has no information of personal knowledge about who made this
18 Kinder Morgan document.

19 He has no information if it was kept in the regular
20 course of Kinder Morgan's business, and he has no personal
21 knowledge whether making this record was in Kinder Morgan's
22 regular practice of activity. So the hearsay exception has
23 not been satisfied.

24 THE COURT: What is the purpose of the offer?

25 MR. BALLANTINE: The purpose of the offer is to show

1 that these documents were then used by e-biofuels' employees
2 to make another document.

3 THE COURT: So no matter what is in them and how
4 they, how it got put there and so forth, you are going to ask
5 him about the use at e-biofuels?

6 MR. BALLANTINE: I am going to ask him about that.
7 There is also the, like Exhibit 10 that has already been
8 admitted into evidence, the product, the -- there is a product
9 description on this document.

10 THE COURT: But the question is, are you going to
11 ask him about his use of this document without regard to how
12 the information was inputted?

13 MR. BALLANTINE: Yes.

14 THE COURT: Then I will overrule the objection.
15 Exhibit 149A can come in for the limited purposes for which it
16 is intended to be used.

17 *(Government's Exhibit 149A was*
18 *received in evidence.)*

19 BY MR. BALLANTINE:

20 Q Showing you Government Exhibit 149A, Mr. McKee, on
21 the --

22 THE COURT: Which is to say it is not offered for
23 the truth of the matters contained in it, so it is not
24 hearsay.

25 MR. BALLANTINE: Yes, Your Honor. That is right.

1 BY MR. BALLANTINE:

2 Q So what would you do with a document like this? What
3 would happen at e-biofuels with a document like this when it
4 came into the plant?

5 A When it came into the plant, we would take this from the
6 truck driver, see what it is, which we could always tell. It
7 would say soy supreme, biodiesel are the same thing, which is
8 a different type of biodiesel, put it in the correct tank so
9 we wouldn't mix them up, take our sample. We would take this
10 paperwork, and we could make it, a different copy to save,
11 then unload the truck.

12 THE COURT: What was the last thing you said?

13 THE WITNESS: Unload the truck.

14 BY MR. BALLANTINE:

15 Q Ask you to look at what has now been marked as
16 Government's 149B. Do you have that in front of you?

17 A Yes.

18 Q From time to time --

19 THE COURT: Wait just a minute, which page from 149?

20 MR. BALLANTINE: It is the fourth page, Your Honor.
21 Thank you.

22 THE COURT: Go ahead, sir.

23 BY MR. BALLANTINE:

24 Q Were there occasions when employees at e-biofuels would
25 take information from Government's -- information from bills

1 of lading like Government's Exhibit 149A and enter them into a
2 template to make exhibit -- make documents like
3 Government's 149B?

4 MS. LORBIESKI ANDERSON: Objection, hearsay.

5 THE COURT: No. Leading. Sustained as to leading.
6 He was talking about the use of the document. That is not a
7 hearsay, Counsel, Ms. Anderson, Counsel.

8 MS. LORBIESKI ANDERSON: Yes, Your Honor.

9 THE COURT: But it is leading.

10 MR. BALLANTINE: Yes, Your Honor.

11 BY MR. BALLANTINE:

12 Q Mr. McKee, how would a document like this be made?

13 THE COURT: Wait a minute. Have you seen a document
14 like 149B before?

15 THE WITNESS: Yes.

16 THE COURT: Was it used in the ordinary course of
17 your business?

18 THE WITNESS: Yes.

19 THE COURT: So in performing your responsibilities,
20 this kind of document was one with which you were familiar,
21 right?

22 THE WITNESS: Daily.

23 THE COURT: Daily? Okay. Now go, Counsel.

24 BY MR. BALLANTINE:

25 Q Would you enter data into this kind of document?

1 THE COURT: How did you use it, right? Direct
2 examination, Counsel.

3 MR. BALLANTINE: Thank you, Your Honor.

4 BY MR. BALLANTINE:

5 Q How would you use this kind of document?

6 A This would be a document that we would use when a
7 customer or if we -- we had to actually have drivers ourselves
8 if they loaded up their truck to deliver. So any outbound
9 product from our plant we would type up this bill of lading
10 for.

11 THE COURT: This was a document prepared by
12 e-biofuels?

13 THE WITNESS: Correct.

14 MR. BALLANTINE: Your Honor, I move to admit on that
15 basis Government's Exhibit 149B.

16 MS. ANDERSON: Objection, Your Honor. May we
17 approach?

18 THE COURT: Well, is it the same objection, hearsay?

19 MS. LORBIESKI ANDERSON: It is, but I would like to
20 provide detail to Your Honor.

21 THE COURT: I can't hear you.

22 MS. LORBIESKI ANDERSON: It is the same objection,
23 but I would like to provide some detail as to why I think this
24 is being used for the truth and why it is not. The business
25 records exception is not established. I can do that standing

1 here, but I would rather do it at the bench if you prefer,
2 Your Honor.

3 THE COURT: Go ahead. I think it is all right. I
4 understand it is not prejudicial.

5 MS. LORBIESKI ANDERSON: Okay. So this document --

6 THE COURT: Mr. Ballantine is right between us, so
7 get someplace where I can see you and hear you.

8 MS. LORBIESKI ANDERSON: Yes, Your Honor. I don't
9 believe he has established the business records exception for
10 this document because this witness did not create this
11 document. He doesn't know who created it. He testified that
12 it was used in the regular course. He did not testify it was
13 kept in the regular course, and the reason why I think both --
14 all pages of this document are being used for the truth,
15 including Exhibit A, which has already been admitted, is
16 because there is a thread that the Government's attorney is
17 trying to establish through them. And it is not just because
18 they used it, it is for the truth of the document, what is in
19 the document.

20 And so, I think they do have to establish a hearsay
21 objection to get these into evidence because the purpose for
22 using these documents is for the truth of the documents.

23 THE COURT: What is the purpose of the offer?

24 MR. BALLANTINE: Your Honor, the purpose of the
25 offer is to show how this string of documents are inner

1 related. The Government is going to be able to show, through
2 other documents, that this particular -- what the, the content
3 of 149A, that the specific product there can be established
4 through other documents and other, I believe, admitted
5 documents or documents that have been stipulated to. So we
6 will connect that up later through Rule 104, but at this point
7 --

8 THE COURT: What is the purpose of asking this
9 witness about this document? He didn't input the data, right?

10 MR. BALLANTINE: He did not, Your Honor. These are
11 a set of document --

12 THE COURT: Well, what is the purpose of asking him
13 about it?

14 MR. BALLANTINE: He is able to introduce these three
15 documents and --

16 THE COURT: He is not if I don't let him.

17 MR. BALLANTINE: That's right, Your Honor.

18 THE COURT: What is the purpose you want him to
19 serve with these documents, Counsel?

20 MR. BALLANTINE: I would like him to explain them in
21 the normal course of business --

22 THE COURT: He can't explain the content if he
23 didn't put it in there.

24 MR. BALLANTINE: Not the content, the nature of the
25 production of these documents. These documents form part of

1 the recordkeeping to effectuate the alchemy fraud that is
2 being --

3 THE COURT: It is being offered as an example of the
4 kind of documents he creates when e-biofuels sends out product
5 in one of its shipments?

6 MR. BALLANTINE: It is, Your Honor.

7 THE COURT: That is what your answer is, then.

8 MR. BALLANTINE: Yes, Your Honor. Thank you.

9 THE COURT: So this witness has experience in
10 creating these documents generally?

11 MR. BALLANTINE: Yes, Your Honor.

12 THE COURT: Without regard specifically to the
13 content of this one?

14 MR. BALLANTINE: Yes, Your Honor. Yes, Your Honor.

15 THE COURT: So it is a limited offer at least
16 subject to connecting it up; is that right?

17 MR. BALLANTINE: It is, Your Honor. Thank you.

18 THE COURT: You want to respond to that?

19 MS. LORBIESKI ANDERSON: Yes, Your Honor. I think
20 the way that this is being presented is a little bit different
21 than the way it is going to be used ultimately, and I can show
22 you the parts I have circled on the documents to show how the
23 truth of these documents is being offered as a string
24 throughout. But I would have to approach to show you.

25 THE COURT: Wait, wait, wait. You are jumping the

1 gun a little bit because that is not what this witness is
2 being asked about with respect to these documents. So with
3 respect to the limited scope of this witness's familiarity
4 with this document; namely, that it is reflective of
5 documents. It is not the truth of the matter asserted, but it
6 is reflective of documents that were created by e-biofuels to
7 accompany shipments that go out from e-biofuels.

8 He didn't create it. He didn't put it in in this
9 specific case. If they connect it up it might be offered for
10 the truth of the matter, but that is not what the offer is
11 here, so the objection is overruled. It is premature, for one
12 thing.

13 MS. LORBIESKI ANDERSON: Okay.

14 THE COURT: Exhibit 149B is admitted.

15 *(Government's Exhibit 149B was*
16 *received in evidence.)*

17 THE COURT: How about if we use this as a lunch
18 break?

19 MR. BALLANTINE: Thank you, Your Honor.

20 THE COURT: Okay. Ladies and gentlemen, it is about
21 25 after 12:00, so let's reconvene at 15 minutes until 2:00,
22 which will be about an hour and 20 minutes. During this
23 recess as at all times, be careful, be alert. Remember,
24 follow all my admonitions. Have a nice lunch break. We will
25 see you after lunch. You may rise and depart.

1 THE CLERK: All rise.

2 (Jury out, 12:21 p.m.)

3 THE COURT: You may be seated. The jury has
4 departed. I was alerted during the morning recess that the
5 defense has a motion to make. Mr. Farlow?

6 MR. FARLOW: Thank you, Your Honor. If I may, this
7 morning there was an issue raised. It was important to the
8 defense, and that was about when Mr. Chepurko first notified
9 the Government that a particular statement was made in the
10 presence of Mr. Wilson and Mr. Wilson had a response. That
11 was key -- that is key to our defense, because it is our
12 contention that Mr. Wilson -- that is not Mr. Wilson. It is
13 not his voice, and he was not present. The Government --

14 THE COURT: This is 148, right? Exhibit 148?

15 MR. FARLOW: I think so. I think so. My --

16 THE COURT: The transcript, right?

17 MR. DeBROTA: The transcript is 148. The recording
18 is 147.

19 THE COURT: Right.

20 MR. FARLOW: That is key to our defense. We
21 developed our defense, and we moved for discovery pursuant to
22 Rule 16 and the Government responded by giving us their 302
23 reports --

24 THE COURT REPORTER: I'm sorry, "The Government responded
25 by" --

1 MR. FARLOW: Their 302 reports and all of the tapes,
2 two terabytes of material -- I will try to slow down. I
3 understand. I don't know how many tapes --

4 THE COURT: You can step down. You don't need to
5 hear this. Sorry.

6 (Witness excused.)

7 MR. FARLOW: I forgot about him.

8 THE COURT: You are not going to be on the hot spot
9 for this one.

10 MR. DeBROTA: He can go. You can go to lunch.

11 THE COURT: Yes, go to lunch.

12 MR. DeBROTA: What time should he be back, Your
13 Honor?

14 THE COURT: Well, you tell him. I told him when the
15 Court starts again, it is 15 minutes until 2:00.

16 MR. DeBROTA: 1:30. Sorry.

17 MR. FARLOW: Thank you.

18 The Government also gave us some, 50 tapes -- again, I am
19 paraphrasing. I don't know the exact numbers, some 50 tapes
20 without transcripts. In the report of interview that was
21 referenced by counsel, there is only one reference made to
22 that tape. That report of interview prepared by the FBI
23 agent -- I have to pull my glass out here, makes this
24 reference: Chepurko does not --

25 THE COURT: Wait, wait, wait. I need more

1 documentation as to the date of the interview and so forth.

2 MR. FARLOW: Yes. I will try to make my record now.
3 I am sorry. With respect to recording 2011-07-27, reference
4 the recording made 7/27 of '11 (1305-13)16. Pursuant to --
5 according to that report, I will quote: Recording makes
6 reference to that number. Chepurko does not recall Chad
7 Ducey, Chad being present when he made this recording.
8 Chepurko recalls the following being present: Wilson, Aaron
9 Wilson, Tim Jones, Furando, Tracy, and Craig. It does not
10 specifically identify, nor does it ever make mention in this
11 report that Chepurko, Chepurko said that it was Jeff Wilson,
12 who was present when Furando outlined the alchemy scheme and
13 that Wilson responded. They simply say he was present. They
14 make no reference to that in this report.

15 Chepurko comes in, and he testifies that the first time
16 he made, made reference to the fact that Wilson was present
17 and heard about the alchemy scheme described by Furando. This
18 is important because this is the only tape, the only place
19 where they claim Wilson is on tape hearing about the alchemy
20 scheme. We deny that.

21 He says he told -- Mr. Tierney said, "When did you first
22 tell the Government?" He says, "Oh, back in this report, back
23 in April 3, 2014." We notified the Government of our
24 exhibits. We sent them to them, including this tape recording
25 because we were going to use the tape recording, because in

1 our minds the tape recording exonerates or tends to show that
2 Mr. Wilson is not guilty. They take a different position.

3 Over the weekend we receive an e-mail from Mr. DeBrotta,
4 and included in that is Dear Counsel.

5 THE COURT: This is the weekend prior to trial?

6 MR. FARLOW: I'm sorry, yes. This would be -- allow
7 me to give a date, that would be more -- for the record.

8 July 28, 2016, 4:31 p.m.

9 Paragraph 7, recordings. "In discovery we provided you
10 with all the secret recordings made by Alex Chepurko,
11 including the recordings made of the meetings in Middletown,
12 Indiana on 7/27/11. The participants in one of these meetings
13 were your client, Jeffrey Wilson, Joseph Furando, Chepurko,
14 Kat Tracy, and Craig Ducey. There is also an unknown male who
15 may have been Aaron Wilson.

16 "After you have listed similar recordings as potential
17 exhibits, we asked Victoria Madtson to review the recordings.
18 She has now prepared the attached official report of her
19 review of one of those recordings. See Attachment A. As you
20 will note, it contains what we believe to be admissions by
21 your client of illegal activity as well as further
22 co-conspirator statements between the various parties who were
23 present. We do not know what portion of the recordings you
24 will intend to introduce or whether you have made your own
25 transcript of this recording.

1 "Your current list does not include the answer to these
2 questions; however, please be aware we plan to use the listed
3 portion of the recording in the transcript. The audio excerpt
4 we might use is Exhibit 147, and the portion of the transcript
5 excerpt 148, see Attachment A."

6 So for the first time over the weekend they told us that
7 this is Jeffrey Wilson, which we deny, present at that meeting
8 and they knew about it since April of 2014. And we know that
9 because counsel just told us he told them that.

10 They failed to put it, FBI agent failed to put it in her
11 report. She failed to identify Wilson as having been present
12 at a meeting where Mr. Furando describes the alchemy scheme.
13 That is the key to our defense. That is the one seminal event
14 in this trial that can convict Mr. Wilson, and they hid it.

15 She failed to include it in her report that the counsel
16 told her that, and then they act like they just received it
17 for the very first time this weekend and they deliver it to
18 us. And so, we scramble around and tried to do our own
19 transcripts, tried to find an expert, voice identification
20 expert and find witnesses who will refute that contention and
21 we found them.

22 I don't know how you cure that kind of thing where they
23 have failed that they have hidden the ball from us. They
24 failed to give us pivotal information. They have led us down
25 this track, and we have based our defense on it. I don't know

1 how you cure that.

2 Reluctantly, I move for a mistrial based on the egregious
3 conduct of the Government in having sprung that on us when
4 they knew about it all the time and they acted like, they
5 acted like they just found it and Madtson just found it. I
6 haven't checked, but she may well have been present at that
7 2000 meeting.

8 THE COURT: Miss Madtson is the case agent, right?

9 MR. FARLOW: Yes.

10 THE COURT: From the FBI?

11 MR. FARLOW: Yes. It appears that she was not.

12 Lisa Matovic is the individual who made this report wherein
13 counsel and Mr. Chepurko identified this seminal event, and
14 they failed to put it in their report and they failed to tell
15 us about it. And then they told us they just found it on
16 Friday. Once again, we move for a mistrial because I don't
17 see how you can cure this. Thank you, Your Honor.

18 THE COURT: All right. Mr. DeBrotta, you wish to
19 respond?

20 MR. DeBROTA: Your Honor, first I would like to --

21 THE COURT REPORTER: I'm sorry, is your mic on?

22 MR. DeBROTA: First I would like to tender to the
23 Court what we have marked for purposes of just this argument
24 only, Exhibit 172. It is not a report of the FBI because this
25 wasn't an FBI report. It is the actual report that matters,

1 which is a report of Lisa Matovic, who is the EPA Special
2 Agent for April 3, 2014. It is the one that is relevant to
3 this testimony. They have this report.

4 If I can direct your attention to page 7.

5 THE COURT: This is 172?

6 MR. DeBROTA: Yes.

7 THE COURT: Page 7?

8 MR. DeBROTA: Yes. This is the language that is
9 going to matter in part, and I put it on the ELMO for Your
10 Honor. So the recording that we are talking about is over an
11 hour, and the exact -- the name of that file is correctly
12 listed in this report back in April of 2014. It couldn't be
13 clearer. It is spelled out there very specifically, and it is
14 in bold, and it is underlined and it is the heading of that
15 part of the discussion of the write-up of the interview.

16 And immediately following it, and I have -- in the copy I
17 have on the screen here I have marked this for my own personal
18 benefit. The language used there could not have been clearer
19 in referencing that, what is being discussed is the stuff
20 under that heading, and it says there, it is as clear as day.
21 Chepurko does not recall Chad Ducey being present when
22 this -- when he made this recording because, of course, the
23 paragraph is talking about the recording that is the heading.

24 Chepurko recalls the following being present. When this
25 recording was made is the way you can read that in the English

1 language. Jeff Wilson, Aaron Wilson, Tim Jones, Furando,
2 Tracy, and Craig. The only content in that paragraph is the
3 reference to the recording, which is what the heading is
4 about. This particular document was an official report of
5 Miss Matovic, which was provided in discovery a hugely long
6 time ago.

7 This was the type of discovery we gave way before we had
8 to, months, I think maybe years ago, in discovery and they
9 have had this the whole time. So this document right here put
10 them on notice that Mr. Chepurko had explained the specific
11 recording that we are talking about, including the point that
12 it included his statement that the recording doesn't include
13 Chad Ducey but does include, relevant to here, Jeffrey Wilson.

14 So the first thing we would say is, they were on notice
15 and they fell onto this. Then what they did when
16 Mr. Colapinto was testifying is they fell into it worse. They
17 caused all that to happen. What Mr. Colapinto did was, he
18 said not surprisingly, when you have a whistleblower and you
19 give legal advice to the whistleblower, they are going to go
20 back and look through the evidence, okay?

21 They elicited all that on cross. They made this more
22 important on cross-examination by asking Mr. Colapinto about
23 it again and again. The whole thing they were trying to do is
24 suggest that the Government team, they pointed to our whole
25 table, basically conspired to produce evidence on the Sunday

1 night before trial, brave call. If you are going to do that,
2 you will run the terrible risk that it might not be true
3 because here it wasn't true.

4 So they stepped into it. The damage they caused they
5 caused by going for something that is not a fact. This
6 recording was provided in discovery. Its content was
7 discussed years ago in this document. That is a fact.

8 Now, from there, they make the problem worse because they
9 decide to list this very recording among the defense
10 witnesses -- defense exhibits last week. We got their list
11 the morning of the pretrial. The previous days we kept
12 asking, are you going to give us this? Are you going to give
13 us this? Are you going to give us this, and they delayed
14 until the last minute.

15 The Government went through fits to try to get
16 stipulations in this case. We spent days and days and days to
17 try to reach agreement on things. They took it all to the
18 last minute. What they told us about this recording was they
19 intended to use it, and we asked what part because it is over
20 an hour.

21 I said, can we agree on the language? I don't know what
22 they are going to do with it, but we start listening to this
23 and other recordings. There were a bunch of them they listed.
24 We assumed they were going to cross and try to put it in, but
25 frankly, we didn't think they could do that because they can't

1 put on co-conspirator statements. They can't put their
2 client's own story on. We start focusing on them. This
3 particular one wasn't the centerpiece of our case. It was to
4 put on witnesses who said they heard Mr. Wilson say things,
5 but in the course of our trial prep we liked the last six
6 minutes of that recording.

7 By the way, in the first hour, Mr. Wilson is identifying
8 himself, and people are calling him Jeff. I wouldn't say he
9 is identifying himself. They are talking about Jeff, Jeff,
10 Jeff, Jeff. That is in the first hour. Okay, so the idea of
11 that there was any question in our mind we can show that is
12 Jeff, that is not what we were thinking was going to be an
13 issue they are actually going to get in the trial and try to
14 contest. And frankly, it is mind boggling to me that they are
15 going to try to do that, okay?

16 We were careful to not state the other guy is Aaron
17 Wilson. We think it is, but we decided not to go there and
18 try to prove that up.

19 THE COURT: As the unidentified voice?

20 MR. DeBROTA: Yes, and we think it is Aaron Wilson.
21 Miss Pattison thought it was too, but in this particular
22 segment we were going to use he is not talking, so it doesn't
23 matter whether it is him or not. But that is the question of
24 distinguishing between him and his father, whatever.

25 Okay, now, so what we did in the preparation for trial is

1 once we decided we liked that recording, we had the excerpt
2 put together, which under the rules we are allowed to not
3 decide to play the whole thing, and it wastes an hour of jury
4 time. And we prepared a transcript of what we wanted, and we
5 promptly, when we had both those things in hand done, produced
6 by the FBI agent, I sent that with the exhibit numbers we
7 planned to use to the defense over the weekend.

8 In no event is that improper. In no event did I have to
9 do that. They listed this as a defense exhibit. We decided
10 we liked it too, so when we made that tactical decision we
11 listed it then, not surprisingly. Then over the weekend, Mr.
12 Chepurko flew in from Cypress, the country. We met with him,
13 and one of the things we asked him to do instead of doing it
14 live on the stand was listen to that segment, read the
15 transcript, and see if he agreed with the language.

16 Because now we found the part we wanted. He made hours
17 of recordings, many of them which we didn't think we were
18 going to use, so we didn't have him listen to them, but this
19 we were, so we did that. We did it with Pattison, too. There
20 is other recordings of her, okay?

21 So what we did was make sure we could provide a solid
22 evidentiary foundation for that segment, and then what we have
23 done is ask the defense many times, when are you going to play
24 these recordings, because we don't think you can just play it
25 and put everybody else's statements in.

1 We had a bench conference about that on the exhibit they
2 wanted to use previously, which they ran into trouble using.
3 And I said to them, I don't know how many times, if you want
4 us to agree what is in the recording, tell us what segment you
5 want. That hasn't produced any successful release of
6 information to me.

7 So to this day, I have no idea what question they are
8 going to ask next off a recording. I don't know if I agree
9 with the language in the segment, but I know for the stuff
10 that the Government has put in evidence, we provided notice
11 before the trial started specifically what we were going to
12 play and introduce to witnesses.

13 Now the idea that this witness didn't identify people in
14 his recordings years ago is silly. He basically did a
15 whistleblower notification and lawsuits based on his talking
16 back and forth with his counsel. They made the notification.

17 We interviewed him for the first time January 9, 2014,
18 and there is a summary write-up of that. He was asked about
19 that, too. It doesn't have a reference to this particular
20 recording. It is talking about generally what he knew up to
21 that time, and then we got more recordings. So when we meet
22 with him in April a few months later, this specific recording
23 was discussed.

24 Now, Mr. Colapinto pointed out, I am at meeting in DC.
25 That is in DC. He identified correctly who was there to the

1 degree he remembered it. Then we asked, you know.

2 "Do you remember pointing this out to the Government?

3 "Yes.

4 "Do you remember discussing this with your client before
5 the Government knew about the case specifically?"

6 He says, "Yes."

7 So on the narrow question that they are trying to pursue
8 here, did we frame Mr. Wilson on Sunday night, they just
9 stepped in it because we couldn't have done that because this
10 information previously existed. The identification previously
11 existed.

12 Now, the discovery violation, we don't understand what it
13 is. We gave them the recording. There is no question about
14 that. They listed it as their exhibits in what they were
15 going to do, so there is no notice question they had this. We
16 are not talking about a statement of the Defendant to law
17 enforcement. We are talking about a recording. They had the
18 whole thing, okay?

19 Our exhibit we finalized. We finalized our version of it
20 and gave it to the defense promptly. We didn't have that
21 document finalized sitting around two years ago. We didn't,
22 but we don't even have to give him that. We don't have to do
23 that. We have to give him in discovery the recording, and we
24 did.

25 Over the weekend we asked, "What further things do you

1 want?" They asked for some other stuff. So we come to this
2 trial, and that is when the first time they try to suggest we
3 have somehow framed somebody with what is going on with Mr.
4 Chepurko.

5 Now I don't know if they remembered, frankly, until I did
6 it in this courtroom, that this is the exact recording listed
7 in this document. But I think that puts to bed the question
8 of whether or not they were on notice that this was dangerous.
9 That is what I think, and then, when they asked Mr. Colapinto
10 why he remembers this particular one? Because Mr. Colapinto
11 thinks it is devastating and key.

12 That is not what we said. It is what he said, which
13 shows he discussed it with his client. So now they have the
14 lawyer sitting out in the hall for whatever purpose, and the
15 more we focus on this, the less we are talking about what
16 really matters in the case because this doesn't change the
17 point that they don't have a witness to say that is not Jeff
18 Wilson. And we have put two people on the stand that says it
19 was.

20 It doesn't matter when they first heard it unless they
21 are going to put on witnesses to say that is not Mr. Wilson,
22 why are we doing this and how could it be significant and why
23 would that be a mistrial? To my counting of the numbers we
24 will end up calling Craig Ducey. We have called Pattison and
25 Chepurko. Who is going to say that is not Jeff Wilson? Jeff

1 Wilson? He can get up and do that, okay?

2 THE COURT: He has a right not to.

3 MR. DeBROTA: Right, but they are not prejudiced in
4 their decision to do that in any way. It is their call. They
5 had that call five years ago to think about, okay? And this
6 piece of discovery they have had the whole time, so in
7 counseling to him what do you want to do or not, that is not a
8 surprise that he is on tape. He knows that. They have had
9 the document the whole time.

10 Finally, they made reference to their expert witness.
11 Running along with this now apparently they want to say --

12 THE COURT: Okay. You don't have to bring up the
13 expert witness.

14 MR. DeBROTA: He did. That is the only reason I
15 mentioned it.

16 THE COURT: I haven't resolved that. I just have
17 that notice.

18 MR. DeBROTA: Got it.

19 THE COURT: I will inquire about that later.

20 MR. DeBROTA: So this isn't the only document of our
21 communications with Mr. Chepurko, but as the Court knows,
22 there was a whole other trial we were preparing for. Not
23 everything was about this Defendant or this particular
24 recording, but to us this is the clearest statement that the
25 defense got notice of this fact, including the identification,

1 and I think it answers the question over what they had notice
2 of, which would be the only violation even to discuss, it
3 seems to me. Because we have told them what we are planning
4 on doing.

5 Now, even as we stand here, they have other recordings.
6 I have no idea what they are going to do with it. I don't
7 know how they are going to present it, and it could cause the
8 same problem. So it is the way this is occurring that is
9 causing this issue to arise in the first place, and I don't
10 think we should have to be in this position to do more than
11 the Government did here. And we did it timely and before the
12 trial started, and this information has been out there for
13 years. That is our position, Your Honor.

14 Thank you, Mr. DeBrotta.

15 THE COURT: Mr. Farlow, you want to respond?

16 MR. FARLOW: Your Honor, what the Government is
17 doing, is, is confusing the point we are trying to make. This
18 tape is a very long tape.

19 THE COURT: An hour.

20 MR. FARLOW: An hour.

21 THE COURT: That is not really, really long. It is
22 certainly not long in this judge's experience where we have
23 wiretap communications that go on for days. So, it is an hour
24 long.

25 MR. FARLOW: That's right. And we are focused on

1 one particular point, whether or not Mr. Wilson was that
2 person present and that person who responds to Mr. Furando.
3 We deny that.

4 THE COURT: Let me ask you, did you get 172, the
5 report that reflects the interview of Mr. Chepurko?

6 MR. FARLOW: Yes.

7 THE COURT: And do you agree you got that as part of
8 discovery?

9 MR. FARLOW: We do.

10 THE COURT: And you got it in a timely fashion?

11 MR. FARLOW: Yes, we did.

12 THE COURT: And you got the recording itself in a
13 timely fashion?

14 MR. FARLOW: Yes, we did.

15 THE COURT: There has been no discovery slippage
16 with respect to you being on notice that Chepurko says one of
17 the people was Wilson, and his saying that is reference to the
18 recording, which is the heading on this report.

19 MR. FARLOW: That's correct.

20 THE COURT: So you have known for some period of
21 time --

22 MR. FARLOW: Yes.

23 THE COURT: -- that there was a recording?

24 MR. FARLOW: Yes.

25 THE COURT: That Mr. Chepurko recounts that in that

1 meeting, one of the people is Mr. Wilson?

2 MR. FARLOW: Yes.

3 THE COURT: And that because of the reference to Mr.
4 Wilson and the recording in the same paragraph, it is likely
5 that that is reflected in the recording?

6 MR. FARLOW: I am sorry. I missed that, Your Honor.

7 THE COURT: The heading is recording.

8 MR. FARLOW: Yes.

9 THE COURT: Chepurko says the following people were
10 present.

11 MR. FARLOW: Yes.

12 THE COURT: In the recorded conversation.

13 MR. FARLOW: Yes.

14 THE COURT: One of which was the Defendant.

15 MR. FARLOW: Yes.

16 THE COURT: You have known that, and you have known
17 it for some time.

18 MR. FARLOW: Yes.

19 THE COURT: So what is your problem?

20 MR. FARLOW: On Friday they sent us a memo and that
21 e-mail I told you, where they misidentify this individual as
22 Wilson, who is not Wilson, as being present when Furando is
23 talking. Much of that, in much of that tape we don't dispute
24 Wilson's statements and other people's statements. People
25 come and go from that meeting.

1 THE COURT: Well, wait. That, that was the
2 testimony that Mr. Chepurko provided, that he took the tape.

3 MR. FARLOW: Yes.

4 THE COURT: He made the tape.

5 MR. FARLOW: Yes.

6 THE COURT: He was there.

7 MR. FARLOW: Yes.

8 THE COURT: He identified Mr. Wilson's voice.

9 MR. FARLOW: Yes.

10 THE COURT: And the Government pulled out the
11 section that they wanted to present out of that recording.

12 MR. FARLOW: Yes.

13 THE COURT: And had Mr. Chepurko do the appropriate
14 correlations.

15 MR. FARLOW: Yes.

16 THE COURT: So I don't quite understand your point
17 here.

18 MR. FARLOW: They learned today.

19 THE COURT: "They."

20 MR. FARLOW: The Government. The Government learned
21 two years ago from Chepurko and counsel that that particular
22 portion of the tape, not the whole tape, but that particular
23 portion was Furando and Wilson, which we dispute. They knew
24 that, and then they tell us that.

25 THE COURT: They told you that. It is in the

1 report. They have given you that as discovery.

2 MR. FARLOW: Not that particular portion.

3 THE COURT: Well, they gave you the whole, the whole
4 tape recording. They pulled out the part they wanted to use.

5 MR. FARLOW: Yes.

6 THE COURT: And prepared a transcript, which is not
7 different from their theory that one of the people in that
8 part of the conversation was Mr. Wilson.

9 MR. FARLOW: Yes.

10 THE COURT: Right. So I don't get your point.

11 MR. FARLOW: My point is that they notified us for
12 the first time. Here is the point we wanted to make to the
13 jury. They notified us for the first time this weekend that
14 they were going to contend it was Wilson who was present with
15 Mr. Furando when Mr. Furando made those statements.

16 Mr. Tierney attempted to release from Mr. Chepurko that
17 the first time ever that he was asked, shown he met with the
18 Government and covered that particular portion of the tape was
19 this weekend, and he said no.

20 THE COURT: I didn't hear him to say that, Counsel.

21 MR. FARLOW: Okay.

22 THE COURT: I heard him to say that early on he made
23 that tape recording available. Early on he said, and that is
24 what his lawyer said, they disclosed to the Government that
25 Mr. Wilson was one of the people there.

1 MR. FARLOW: Yes.

2 THE COURT: That he was on that tape, and that was
3 his voice.

4 MR. FARLOW: Yes.

5 THE COURT: So it is not a late-breaking
6 development. I mean, it is true that they met on Sunday
7 because he came in for pretrial preparation, but you have been
8 on notice of who the Government believed through its witness
9 were the names on this recording. That is not a late-breaking
10 development.

11 MR. FARLOW: What is late breaking is they
12 misidentify this individual and contend that this is Mr.
13 Wilson, and it is not.

14 THE COURT: But that is their theory, and that is
15 what their witnesses says, and so they have a basis in fact
16 for that, and it is not a late-breaking development because
17 all of the discovery was presented to you. You have this,
18 this early indication in Exhibit 172.

19 MR. FARLOW: Yes.

20 THE COURT: That that is the evidence that they
21 think exists and they are going to present to the jury that
22 ties Mr. Wilson to that recording; and therefore, to that
23 meeting. So this is not new. You may not have focused on the
24 fact that they were going to use part of that tape recording
25 too, but it is in their evidence and they are entitled to and

1 they disclosed it to you as discovery.

2 MR. FARLOW: Yes.

3 THE COURT: And they -- in the course of trying to
4 get stipulations, that didn't work, but that doesn't mean that
5 it wasn't in the evidence that was available to both sides.
6 That is the point.

7 MR. FARLOW: Yes. Okay.

8 THE COURT: And so, the Government has made the
9 requisite disclosures. I don't see any discovery violation.
10 I don't see any misconduct by the Government.

11 MR. FARLOW: Okay.

12 THE COURT: I do see some slippage between counsel
13 in understanding what each was going to do, but that is not
14 unusual. That is what a trial is for.

15 MR. FARLOW: Yes.

16 THE COURT: I deny your request.

17 MR. FARLOW: Thank you, Your Honor.

18 THE COURT: Now while we are here, even though I cut
19 into your lunch hour, we might as well bring up the expert
20 disclosure. That doesn't have a brief with it, so we had to
21 do some research. It is just a notice.

22 MR. FARLOW: Yes.

23 THE COURT: It implicates some troublesome issues
24 because this is not a highly regarded field of scientific
25 expertise, and it is not clear to me in reading the resumé of

1 your proffered expert, Mr. Papcun, spelled P-A-P-C-U-N, that
2 he actually has the kinds of knowledge that would be relevant
3 to this case. The cases that I could find, none directly from
4 the Seventh Circuit but some within our Circuit, casts a doubt
5 on its general acceptance within the scientific community.
6 There is nothing about peer review. There is nothing about
7 any publications.

8 In fact, when you read his resumé to the extent that I
9 can discern, what he does for a living to make him an expert,
10 there is nothing about voice identification or personal voice
11 identification. All of his expertise appears to focus on
12 improving the accuracy of computerized speech recognition. So
13 this is an issue left to the sound discretion of the Court.
14 The Government hasn't had an opportunity to respond, but that
15 is the, the concern that I have, having reviewed it
16 preliminarily.

17 Before I could allow this witness to appear I would have
18 to at least have a Daubert hearing and some law, please.

19 MR. FARLOW: I understand. We are doing the best we
20 can.

21 MR. DeBROTA: We can't tell --

22 THE COURT REPORTER: Your mic.

23 MR. DeBROTA: We can't tell what exactly he is going
24 to say he analyzed --

25 THE COURT: That is the other thing. I can't tell

1 what the scope of the questions are that you intend to put to
2 this witness or the testimony you intend to elicit. So this
3 is barely bare bones.

4 MR. FARLOW: I am sorry?

5 THE COURT: There is barely bare bones.

6 MR. FARLOW: Yes. It is.

7 THE COURT: I don't know what it means to give me a
8 notice. You are not very far around the track yet.

9 MR. FARLOW: We understand that.

10 MR. DeBROTA: The last thing is, if he is going to
11 say -- I assume he is going to say I have listened to this,
12 done some comparison, and that is not Mr. Wilson on the
13 recording we are all talking about. I am guessing. I, I
14 don't know if that requires him to, for example, get voice
15 stuff from the actual Defendant. He has had some medical
16 issues. I don't know how that is going to work, but the
17 orderly presentation of this evidence needs to be done in a
18 way that doesn't implicate his right to remain silent. But
19 then, this is about speaking, so I just don't know how this is
20 going to work.

21 THE COURT: Yes. I don't either, and it is
22 apparently because we don't have it fully developed by defense
23 counsel. So what has been filed so far is just a heads up.
24 It doesn't carry the day. Do I have somebody else's
25 Exhibit 172, or do you want me to keep it?

1 MR. DeBROTA: You can keep that one, Your Honor, for
2 the record.

3 THE COURT: Okay. That is enough for the lunch
4 hour. Go eat. We will see you after lunch.

5 THE CLERK: All rise. Court is in recess.

6 (Lunch recess taken, 12:52 p.m.)

7 **AFTERNOON SESSION**

8 AFTER RECESS

9 (Jury in, 1:58 p.m.)

10 THE CLERK: Court is in session.

11 THE COURT: It is warming up in here, isn't it?
12 Okay. Mr. Ballantine, you may resume your questioning.
13 Sir, I remind you you are still under oath.

14 THE WITNESS: Yes, ma'am.

15 MR. BALLANTINE: Thank you, Your Honor.

16 **TROY McKEE, GOVERNMENT'S WITNESS, RESUMES**

17 **DIRECT EXAMINATION CONTINUED**

18 BY MR. BALLANTINE:

19 Q Mr. McKee, let me back up and ask you just some questions
20 about the steps that were necessary, the paperwork steps that
21 occurred during the period of time when biodiesel came into
22 the plant and went back out again.

23 A Okay.

24 Q So when the biodiesel came in, what kind of documentation
25 would come in with that biodiesel?

1 A A bill of lading would come in as we have here, whatever,
2 and we test the product. We get a sample from the tank, from
3 the trailer that come in, run that into our lab, have it
4 tested. If it passed the specs, then we would unload it at
5 the holding tank.

6 Q And did it always pass the specs basically? How often
7 did it not pass the specification?

8 A I would say 99 percent of the time it passed. We might
9 get one every once in a while, but that is it.

10 Q And what would you do with that bill of lading?

11 THE COURT: When you say "you tested it and it
12 passed," does that mean that your results from the test match
13 the bill of lading?

14 THE WITNESS: There is no results on the bill of
15 lading. It is just a standard --

16 THE COURT: It matched up with whatever your
17 standard was --

18 THE WITNESS: Yes.

19 THE COURT: -- for the product?

20 THE WITNESS: For finished product, yes.

21 THE COURT: Thank you.

22 BY MR. BALLANTINE:

23 Q So what would you do with that document, then?

24 A We would sign the received by. We would sign that and
25 put it onto a, an incoming folder that was on the outside of

1 the offices.

2 Q Was there another step that you would take with respect
3 to a different kind of bill of lading? What other paperwork
4 steps would you take?

5 A What is that?

6 Q What other paperwork steps would you take?

7 A We would also, we would, on some instances on some of the
8 loads there would be this -- it is here in front of me? I
9 don't know if I can say it or not or whatever. The one, the
10 bill of lading we would make up and keep for our records.

11 Q And now you are referring to -- what kind of bill of
12 lading was that?

13 A That was just like this one -- whatever it is, 149C.

14 Q If you can just describe from your recollection, what
15 kind of record that was.

16 A It was a bill of lading that we would make.

17 MS. LORBIESKI ANDERSON: I object --

18 THE COURT: I can't hear you.

19 THE COURT REPORTER: Is your mic on?

20 THE COURT: When you speak, step this way, will you?
21 Because you are right behind the lawyer, and you are speaking
22 softly anyway.

23 MS. LORBIESKI ANDERSON: My objection is I believe
24 the witness is testifying about a document that is not in
25 evidence.

1 THE COURT: No, that wasn't the question to the
2 witness. He said it is like this one, but that wasn't the
3 question the lawyer put to him.

4 BY MR. BALLANTINE:

5 Q From your recollection, what other kinds of documents
6 would you produce?

7 A This 149C.

8 Q Just from your memory, though, what kind -- describe that
9 document.

10 A It was a --

11 Q Just in reference to the --

12 A It was a bill of lading --

13 THE COURT REPORTER: I am sorry, one at a time,
14 please.

15 THE WITNESS: Sorry.

16 THE COURT: Mr. Ballantine, lead him through it.

17 BY MR. BALLANTINE:

18 Q Would you produce another kind of bill of lading?

19 A Yes, the one for our records that we would keep.

20 Q Okay. And what, what -- what was different about that
21 kind of bill, that bill of lading compared to the one that
22 came in with the truck?

23 A We would just fill out our name, the gallons, the weight,
24 and --

25 THE COURT: The name of what?

1 THE WITNESS: Where -- our name, just -- without
2 showing it on here.

3 THE COURT: We are not wanting you to read from that
4 document.

5 THE WITNESS: I know.

6 THE COURT: We want you to tell us, from your memory
7 when you filled out your bill of lading for your own records,
8 you put a name on it. Whose name?

9 THE WITNESS: Our name, e-biofuels.

10 THE COURT: E-biofuels.

11 THE WITNESS: Yes.

12 THE COURT: Now go ahead, Counselor.

13 THE WITNESS: Company's name, the gallons, and the
14 weight of product.

15 THE COURT: Okay. Perfect.

16 BY MR. BALLANTINE:

17 Q And then, what would happen with that bill of lading?

18 A It would stay there at the office.

19 Q Okay. Was there a template that you used?

20 A Yes, a computer template that we would punch in all of
21 this information and just hit.

22 Q Where was the computer terminal?

23 A It was in the lab area.

24 Q So you would fill out a document, and -- you would keep
25 that record for your own records; is that right?

1 A Yes.

2 Q Was that a document that was going out with the product
3 or a document that was associated with the product that would
4 just come in?

5 A That was the one that came in.

6 Q And you would record on there the gallons and --

7 A Weight.

8 Q -- weight?

9 A Yes.

10 Q Why would you record weight?

11 A That was the spot for it. That is what we were just told
12 to -- that is the three things we would fill out.

13 Q What was the product associated with that?

14 A Biodiesel.

15 Q That was the product that was, in fact?

16 A Yes.

17 Q What did the document indicate?

18 A That it was feedstock.

19 Q All right. And specifically, the kinds of feedstock you
20 talked about earlier in your testimony?

21 A That -- it just said feedstock.

22 Q Okay. Is Document 149C an example of that kind of bill
23 of lading?

24 A Yes.

25 Q Did you prepare Document 149C?

1 A Personally?

2 Q Yes, personally.

3 A I don't know. I don't know if I did this one.

4 Q But it is an example of the kinds of --

5 A It is the template that we had on our computers was this,
6 yes.

7 Q And was that document, was that document designed to
8 accurately reflect what had just come in? Was it feedstock
9 that was coming in?

10 A It was -- they called it feedstock, but I mean, it was
11 finished biofuel that passed all our standards.

12 Q Was it designed to hide what had just come in?

13 A That, I don't know. I am not sure -- this is the form
14 that they had us fill out.

15 Q This is an example of that form?

16 A Correct.

17 MR. BALLANTINE: Your Honor, on that basis I move to
18 admit Government's 149C.

19 MS. LORBIESKI ANDERSON: Objection.

20 THE COURT: What is the objection?

21 MS. LORBIESKI ANDERSON: Hearsay, Your Honor. The
22 witness has already testified that as to --

23 THE COURT: Would you speak to me, please?

24 MS. LORBIESKI ANDERSON: I am sorry. Yes. The
25 objection is hearsay. The witness has testified that he does

1 not know if he prepared Document 149C. In order to satisfy
2 the business records exception, the witness has to testify as
3 a custodian of records or person with knowledge, that the
4 record was made at or near the time or from information
5 transmitted by someone with knowledge.

6 This witness has not testified as to any personal
7 knowledge about when this document was made, who made it. He
8 has testified that documents like this are kept in the regular
9 course of business. He has not testified that this document
10 was kept in the regular course of business because this
11 witness has established that he doesn't know anything about
12 this document except that it looks like a template.

13 As to the content of this document, this witness has no
14 personal knowledge, and therefore, this witness cannot
15 establish the business records exception.

16 THE COURT: Okay. Well, that wasn't the purpose of
17 the offer, to vouch for the contents of this particular
18 document. The offer, as I understood it and the questions
19 that this witness answered were, that this document is -- that
20 it is an example of the kind of document that he filled out,
21 that it asked for this sort of information, that this is how
22 they prepared it and when they prepared it, and he did that in
23 the ordinary course of his responsibilities.

24 So your objection is shooting wide of the mark
25 because -- hang on. Your objection is shooting wide of the

1 mark because you are not taking into account the limited use
2 and purpose of the proffer. So I overrule it on that basis.

3 MS. LORBIESKI ANDERSON: May I, Your Honor
4 or -- I --

5 THE COURT: If you are going to repeat something you
6 already said --

7 MS. LORBIESKI ANDERSON: I am not, Your Honor.

8 THE COURT: Tell me something new.

9 MS. LORBIESKI ANDERSON: I believe that the
10 Government's attorney is trying to lay the foundation for this
11 document to use it for the truth of what is in the document,
12 and the next question will be about the content of the
13 document. And because the purpose of this document is to use
14 it for the truth of what is in the document, I do believe that
15 the Government's attorney has to establish the business
16 records exception.

17 THE COURT: The last document like this and the last
18 time we addressed this set of objections, the Government
19 indicated that it was going to connect up the contents
20 specifically in the truthfulness and the accuracy of the
21 contents of this particular document. Now, you remember under
22 the business records exception, this person doesn't have to
23 have filled out the document as long as the procedures for its
24 being filled out are regular and in the ordinary course of
25 responsibilities.

1 So that part of your objection is inapplicable, but in
2 any event, it is not being offered for that, and if he goes
3 into the substance of it, I will either rule sua sponte or
4 I'll hear your objection on that.

5 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

6 THE COURT: But for now, based on the limited
7 proffer, the Court overrules your objection, so I won't allow
8 it to come in.

9 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

10 BY MR. BALLANTINE:

11 Q Showing you what has been admitted as an example as
12 Government Exhibit 149C. Will you take a look at that on the
13 monitor, please?

14 THE COURT: Can you enlarge it just a little?

15 MR. BALLANTINE: Oh, yes. Of course, Your Honor
16 (indicating).

17 BY MR. BALLANTINE:

18 Q Is it the kind of document we were just talking about?

19 A Yes.

20 Q And is this the way -- how did the template appear when
21 you have it up on the computer screen?

22 A The blank area would be --

23 Q Mr. McKee, if you touch that screen it will put an arrow
24 on it.

25 A That is great. You sure?

1 THE COURT: Kelly, go show him how to do that, would
2 you please?

3 THE WITNESS: Can you put an arrow on it?

4 THE COURT: She can walk over there and show him
5 how to do that.

6 (Complied.)

7 THE COURT: Is it working?

8 THE CLERK: This screen is not working, Your Honor.

9 THE COURT: What you are going to do is use your pen
10 and point to something on the monitor, and then they will all
11 see what that is. So draw his attention to whatever part you
12 want him to talk about.

13 BY MR. BALLANTINE:

14 Q Mr. McKee, what were the areas you were able to enter on
15 the template?

16 A The bill of lading number.

17 Q Right above that? I am not going to do this either.
18 Right here?

19 A Yes, 6990 --

20 MS. LORBIESKI ANDERSON: Objection, Your Honor. Now
21 we are talking about the content of the document.

22 THE COURT: Overruled, Counsel.

23 BY MR. BALLANTINE:

24 Q What else would appear on the template?

25 A This is what we would fill in?

1 Q Yes.

2 A Yeah, the bill of lading number, and then down where it
3 says -- yes. Under customer order information, there is a
4 weight.

5 Q Yes.

6 A Of say 50,083. We would fill in that number. Then also
7 down the handling unit package there would be a quantity
8 number and then the weight again also.

9 Q How did you get the weight?

10 A It was roughly the quantity of gallons times 7.3.

11 Q Were you weighing anything, or were you just multiplying
12 the quantity?

13 A Multiply it out.

14 Q And in the commodity description, was that something that
15 you could change, or was that something --

16 A No, that was already -- that was.

17 Q That was the case for all of these?

18 A Yes, all of these forms right here, yes.

19 Q Earlier, you said that it was a feedstock, but
20 here -- does this refresh your recollection about what that
21 was?

22 A It is describing it as feedstock, but it, it was actually
23 biodiesel that came in.

24 Q But when you say "feedstock" in that instance, the actual
25 quote here under commodity description --

1 A This, this, this would be described as like fatty acids,
2 inedible waste to perform the procedure for the actual
3 production of biodiesel.

4 Q But this is -- this is the kind of thing that you would
5 use in feedstock --

6 A Yes.

7 Q -- as feedstock if you were actually producing biodiesel?

8 A Correct.

9 Q Again, you're talking about what you would do when a load
10 of biodiesel came in with a regular biodiesel bill of lading?

11 A Correct.

12 Q And where would you get the information for that bill of
13 lading, I mean, for this?

14 A Off the bill of lading that came in.

15 Q Okay. Thank you.

16 From time to time would you prepare bills of lading for
17 product going out?

18 A Yes.

19 Q And what would go on those?

20 A Roughly the same thing. It would be our -- our name, the
21 gallons, the weight, the specific gravity if needed, gallons.

22 Q So that -- your product going out, would it
23 indicate -- what kind of products would it indicate were going
24 out?

25 A Oh, whatever the customer would want. It would be B100

1 or B99 or whatever.

2 Q B100, meaning?

3 A 100 percent biodiesel, no diesel fuel added to it.

4 Q Thank you. Is Government's Exhibit 149B an example of an
5 e-biofuels' bill of lading?

6 A Correct.

7 MR. BALLANTINE: Your Honor, I am not sure whether I
8 moved 149B into evidence, but on that basis, I move that into
9 evidence as well.

10 MS. LORBIESKI ANDERSON: Objection, hearsay.

11 THE COURT: I will overrule the objection for the
12 same reasons I had explicated before. Exhibit 149B is
13 admitted as an example of the process that was followed as
14 this witness has testified to it.

15 *(Government's Exhibit 194B was*
16 *received in evidence.)*

17 THE COURT: Not for the truth of the matters
18 asserted.

19 MR. BALLANTINE: Thank you, Your Honor.

20 BY MR. BALLANTINE:

21 Q You have testified that there was a period of time during
22 which you were, where there was basically no biodiesel
23 production at the facility?

24 A Correct.

25 Q And you estimated that period earlier in your testimony

1 today, starting sometime in the second half of 2009 going
2 through to I think you said, sometime in early 2011?

3 A Right.

4 Q Is that right?

5 A That is correct.

6 Q Did you eventually -- why did the plant start up again?
7 What was your --

8 A We, we had P2 that was capable of running. Feedstock
9 prices came down a little bit, and we just, I don't know, we
10 were told -- on the floor we were told --

11 MS. LORBIESKI ANDERSON: Objection.

12 THE COURT: Sustained.

13 BY MR. BALLANTINE:

14 Q Well, did you make the decision to start it up?

15 A Me personally?

16 Q Yes.

17 A Not me personally, no.

18 Q Did you start it up --

19 MR. BALLANTINE: I guess I am asking you, I am
20 asking this question, Your Honor, for the effect on Mr. McKee
21 --

22 THE COURT: Based on what you were told, is that why
23 you started it up?

24 THE WITNESS: Yes, yeah.

25

1 BY MR. BALLANTINE:

2 Q Who told you?

3 A Chris Ducey was usually the person who would come from
4 the offices and be the informant or whatever on the floor to
5 tell us what is all going on.

6 Q All right.

7 MR. BALLANTINE: Government's Exhibit 40 has been
8 previously admitted, Your Honor.

9 BY MR. BALLANTINE:

10 Q And can you take a look at that? I will put it up on --

11 A What?

12 Q Forty, four-zero?

13 MR. BALLANTINE: I can put it on the screen as well.

14 BY MR. BALLANTINE:

15 Q Do you have it there?

16 A Yeah, I have it.

17 Q Can you flip through that?

18 THE COURT: When did you say that the plant started
19 up again?

20 THE WITNESS: Roughly -- it was either late 2010 or
21 early 2011.

22 THE COURT: Okay. Thank you.

23 BY MR. BALLANTINE:

24 Q Mr. McKee, did e-biofuels keep logs of the material that
25 was coming into the plant?

1 A Yes.

2 Q Is that what Government Exhibit 40 appears to be?

3 A Yes, that's correct.

4 Q And would you take a look at it up on the monitor? I
5 have the first page there, the AG Oil Incoming Log?

6 A Yeah.

7 Q What was ag oil?

8 A That is our ag oil. That would be the feedstock used to
9 make, to make biodiesel.

10 Q Feedstock used to make biodiesel?

11 A Like choice white grease or soy raw oil.

12 Q And then it says up at the top is the, the --

13 THE COURT: Don't you think you should enlarge that
14 so we can see it?

15 MR. BALLANTINE: Yes, Your Honor. Not the volume
16 but the zoom.

17 BY MR. BALLANTINE:

18 Q On this particular page of the log, on the date received,
19 does it indicate a date?

20 A This page is blank, no.

21 Q Okay. And then if you -- turning to the next page, the
22 Methanol Receiving Log?

23 A Yes.

24 Q What is methanol used for in the facility?

25 A It is used for the alcohol that makes the reaction into

1 the process of making biodiesel.

2 Q And is there a date for two entries there?

3 A Yes.

4 Q What are those dates?

5 A 5/17 of 2011 and 5/18 of 2011.

6 Q And the next page?

7 A Caustic Receiving Log.

8 Q And are there any entries on that page?

9 A No entries here.

10 Q The next page?

11 A Acid Receiving Log, no entries.

12 Q And the -- I guess two pages in. The next one reading

13 Sodium Methylate Receiving Log?

14 A There are zero entries for sodium methylate.

15 Q And then the Biodiesel Receiving Log?

16 A No, nothing on that page.

17 Q And then the next page says Feedstock Receiving Log?

18 A Yes.

19 Q What does this page of the log refer to?

20 A It refers to the incoming trucks that we received.

21 Q So the incoming trucks of biodiesel?

22 A According to this, yes.

23 Q Okay. And so this shows that the last date of this is

24 May 31, 2011, up at the top; is that right?

25 A Yes. That is what it says up at the top.

1 Q Can you find the earliest entry on this part?

2 A The earliest?

3 Q Yes, please.

4 THE COURT: Can you see it on the monitor?

5 THE WITNESS: Yes, I see it. Oh, yes, 5/2 of 2011.

6 BY MR. BALLANTINE:

7 Q So does this represent a period when the facility was
8 making biodiesel or --

9 A Yes. This is the month of May's incoming, everything we
10 got in the month of May of that month.

11 Q Does it represent a period when the facility was making
12 biodiesel?

13 A Oh, no, not making biodiesel.

14 Q Okay. I am going to show you Government's Exhibit 39.

15 MR. BALLANTINE: And for the Court, I will mention
16 they are out of chronological order. May is 40, and June is
17 39. I think that may be precisely my error in putting this
18 together, so I apologize to everybody about that.

19 BY MR. BALLANTINE:

20 Q Would you look at the AG Incoming Log on Government's
21 Exhibit 39, please?

22 A Yes.

23 Q What does this indicate?

24 A This is the actual Ag Oil Incoming Log, feedstock to make
25 to produce biodiesel.

1 Q This is real feedstock?

2 A Yes, correct.

3 Q Okay. And does this -- what can you -- going across the
4 first row there --

5 A Yes.

6 Q -- when is the last date shown where real feedstock was
7 received in June?

8 A Was it June 30, 2011, at 4:05 p.m.

9 Q Can you tell what company provided it?

10 A Green Grease was the company. The feedstock we got in
11 was soy.

12 Q And does it indicate how much?

13 A 6,346 gallons.

14 Q Okay.

15 A Of feedstock in.

16 Q Okay. And let's see. Does it indicate a carrier?

17 A ADM.

18 Q And who is ADM, do you know?

19 A I don't know what it stands for. That is their -- the
20 company we got it from.

21 Q All right. And then is there an indication of what the
22 FFA is?

23 A Yes, .07.

24 Q And you testified earlier that was one of the things you
25 needed to measure for real feedstock; is that correct?

1 A That is correct. You do an FFA test on feedstock and not
2 finished biodiesel.

3 Q All right. So now, I am just going to run through the
4 next few pages.

5 THE COURT: Of Exhibit 39?

6 MR. BALLANTINE: Of Exhibit 39, yes, Your Honor.

7 BY MR. BALLANTINE:

8 Q There is the Ag Oil Incoming Log, the continuation of the
9 first page?

10 A Uh-huh.

11 Q And then a Methanol Receiving Log; is that right?

12 A That is correct.

13 Q You were receiving methanol?

14 A Yes.

15 Q That is necessary. You received a little bit of methanol
16 in May; is that correct?

17 A Yes, according to the sheet.

18 Q Caustic Receiving Log, is that part of the production
19 chemicals?

20 A Yeah -- yes, sorry.

21 Q What is acid used for?

22 A That -- this receiving would just be getting totes of it,
23 like 250-gallon totes just to -- we had acid pumps on the
24 machine.

25 THE COURT: Turn so they can hear you, too, please.

1 THE WITNESS: We have acid pumps on the machine to
2 fight the soaps. Acid would be used for it.

3 BY MR. BALLANTINE:

4 Q The next is sodium methylate received?

5 A Yes.

6 Q And is that the catalyst used to make biodiesel?

7 A That is the catalyst used to make biodiesel.

8 Q And then there is something called a Biodiesel Receiving
9 Log, finished fuel that is blank?

10 A Right.

11 Q Back to a Feedstock Receiving Log?

12 A Yes.

13 Q And does that represent production of biodiesel from raw
14 feedstock, or is that the biodiesel --

15 A No, this is the biodiesel we received to the plant in
16 trucks.

17 Q And then shipped back out again?

18 A Yes.

19 Q All right. So based on these two logs, when did
20 e-biofuels start making biodiesel again in 2011?

21 A Based on this one it would be --

22 Q Based on the two, compare one to the other.

23 A Yeah. I was going to see the tape. It looks like early
24 June of 2011.

25 Q Thank you.

1 And who was -- were there any special efforts that had to
2 be taken to, to get the P1 online; do you remember? Actually
3 I won't do it that way. It is easier, I think we have
4 Government's Exhibit 35 that has previously been admitted,
5 pursuant to stipulation. If you take a look at 35, Mr. McKee?

6 Do you see yourself here on this e-mail?

7 A Yes.

8 Q And I think you said before Chris Ducey would bring
9 information down onto the plant floor?

10 A Correct.

11 Q And does this indicate that P1 was broken in some way?

12 A Yes.

13 Q You remember that independently from this e-mail or not?

14 A I mean, there was things that always would go down or
15 break or whatever, so, I mean.

16 Q And it indicates you have some loads and ordering
17 catalyst; is that right, or Mr. Chris Ducey is going to order
18 some loads and order catalyst?

19 A Correct. He says he is going to order 15 loads of soy to
20 run this week and gives the delivery date of when it will be
21 delivered.

22 Q Earlier you testified about what was necessary to produce
23 biodiesel from choice white grease?

24 A Uh-huh.

25 Q And that there was a centrifuge process?

1 A Correct.

2 Q Okay. And that they were rented; is that right?

3 A That is correct, too.

4 Q So looking at Government's Exhibit 37, I would like to
5 start.

6 MR. BALLANTINE: It is an e-mail chain, Your Honor,
7 so I will ask the witness about the beginning of the chain
8 down here dated May 31, 2011, on the first page of the exhibit
9 going over to the next page. Does this indicate -- realize
10 you are not in the specific e-mail chain, but it has been
11 admitted pursuant to stipulation.

12 BY MR. BALLANTINE:

13 Q Does it indicate, "We are getting a centrifuge and will
14 not get choice white grease until a centrifuge is available"?

15 A Correct.

16 Q There was an earlier piece to the chain where it looks as
17 though Chad Ducey sent, I am reading from the e-mail, Troy's
18 response on the centrifuge for feedstock. He handed it to
19 Chris and it says that you said: "Last I knew, they were
20 saying that we didn't need one because we were running soy
21 instead of choice white grease"?

22 A Correct.

23 Q Finally up at the top of this e-mail, I will read it in
24 the record, the very beginning of the last part of the chain.
25 Chad Ducey to Craig Ducey and copying Chris: "It would be

1 worthwhile to run at least two weeks of soy so that we can be
2 sure to properly train the operators. I know this may not be
3 the most profitable but will help minimize the errors going
4 forward"?

5 A Correct.

6 Q So at this point the operators were starting to --

7 A Be trained on the system.

8 Q Why was that?

9 A Because the system hadn't been ran in a while so there
10 were new operators just getting training.

11 Q Okay. I won't go through all of Government's Exhibit 44
12 in detail. Will you take a look at that, and I want to ask
13 you after you have had a chance to look at it, does this
14 describe difficulty getting one of the production lines up and
15 running.

16 THE COURT: Well, wait a minute. What is it?

17 MR. BALLANTINE: I am sorry, Your Honor. It is an
18 e-mail between Craig Ducey and Mike Richardson. It is in
19 evidence, Your Honor.

20 THE COURT: Put it up on the ELMO so we can see it.

21 MR. BALLANTINE: Yes, Your Honor.

22 THE COURT: E-mail from?

23 MR. BALLANTINE: From Craig Ducey to Michael
24 Richardson.

25

1 BY MR. BALLANTINE:

2 Q Do you see in that e-mail chain references to yourself,
3 Mr. McKee, and e-mails from yourself?

4 A Yes.

5 Q Does this e-mail indicate there were problems getting one
6 of the production lines up and running, at least by the time
7 of June 17, 2011?

8 A Correct, yes.

9 Q Do you remember what those problems were?

10 A If it was on skid one, I am sure it was a reaction
11 problem. Reaction to the biodiesel would be good, a good mix
12 for product with methanol and all three components.

13 Q In this time frame, did any -- were you aware of any
14 investors coming to look at the facility?

15 A I wasn't thoroughly aware, so.

16 Q You were not aware of that?

17 A No.

18 Q Okay. So in the summer of 2011, did you see -- you don't
19 recall seeing any investors; is that right?

20 A I, I, I honestly don't know if they were investors or
21 not, being on the floor, you know, there is people coming and
22 going. We weren't always told who was what or whatever.

23 Q Showing you what has been admitted previously as
24 Government's Exhibit 53. It is an e-mail from the Defendant
25 to Gary Williky.

1 THE COURT: Dated?

2 BY MR. BALLANTINE:

3 Q Dated July 14, 2011. Is that around the time frame that
4 we have been talking about?

5 A Yeah, yes.

6 Q And down there at the bottom, earlier in the e-mail chain
7 on the part dated Wednesday, July 13th of 2011, from Jeff
8 Wilson, the Defendant, to Gary Williky -- actually, I will go
9 back earlier one more notch in the e-mail chain.

10 THE COURT: Point to where you want us to look,
11 Counsel, so we can find where you are.

12 BY MR. BALLANTINE:

13 Q Do you see where it reads "Jeff, going to do a plant
14 visit with the city manager of Sanger, Texas, July 28th or 29.
15 Will that be okay with you?" You see the reply above that?

16 A Yes.

17 Q And does it say, "He'll no," H-E apostrophe L-L, no, "why
18 do they need to see our facility in Indianapolis? Send him
19 the video"?

20 A That is what it reads, yes.

21 Q And then going forward to the next e-mail from Gary
22 Williky --

23 THE COURT: Wait a minute. What is the purpose of
24 your just reading these e-mails? Do you have a question for
25 the witness? I mean, we can all read them, but what is your

1 question for the witness?

2 MR. BALLANTINE: Your Honor, this was during the
3 period of time when -- I was introducing them as being
4 relevant to the period of time when they are having trouble
5 getting --

6 THE COURT: Then ask your question instead of just
7 reading e-mails, please. Ask your question of the witness so
8 we can get some relevant --

9 BY MR. BALLANTINE:

10 Q Was the choice white grease feedstock that was working on
11 July 14th of 2011?

12 A I am not sure.

13 Q All right.

14 A I would have to look at the, the paperwork here.

15 Q Let me do it this way then, Your Honor. I will come back
16 to this one.

17 Would you take a look at Government's Exhibit 79? Is
18 that dated August 30, 2011?

19 A Correct.

20 Q The subject line P1, "Re: P1"?

21 A Yes.

22 Q And then going later or earlier in that e-mail chain, is
23 that an e-mail message from Chris Ducey to Michael Richardson
24 and yourself, subject, "P1"?

25 A Yes, correct.

1 Q The text reads, "We need to come up with a date to start
2 running CWG on P1"?

3 A Yes. P1 was going to run choice white grease, and P2 was
4 running the soy product.

5 Q Okay. And going forward through this e-mail, take a look
6 at it, was there a plan to get choice white grease up on P1?

7 A There was a plan, yes.

8 Q And did you indicate there in the middle, I will point to
9 it, that you needed like a week or so of training people?

10 A Yes, because the process, the P1 ran, just ran different
11 than P2. It was just some different components, it was
12 smaller, didn't run as fast. There were these different
13 things to watch, and the choice white grease runs different
14 than the soy does.

15 Q Taking a look at Government's Exhibit 80 previously
16 admitted. Does that indicate looking at the second notch of
17 the e-mail chain, that as of the 1st of October there still
18 wasn't a plan -- or there was a plan to get choice white
19 grease up on the 1st of October?

20 A That is correct.

21 Q So going back, I will just stick to this one question
22 about Government's Exhibit 53. Did the Defendant indicate
23 that he was not going to allow a plant visit "until we have
24 feedstock that works"?

25 A On the date of this, the P1 was not running.

1 Q Thank you.

2 A That is correct.

3 Q I would now like to turn your attention back to
4 January 1st of 2010.

5 At that point in time, I think you have already testified
6 that the facility was not making biodiesel from genuine
7 feedstock.

8 A Correct.

9 Q Not from soy oil, not from choice white grease?

10 A No.

11 Q And then from that period going forward, did you ever see
12 the Defendant in the facility?

13 A Maybe a handful of times is all I have seen him in the
14 facility, five to ten times is what I personally.

15 Q Five to ten times?

16 A Yeah.

17 Q Were you ever given any direction to disguise what was
18 going on at the facility from the Defendant?

19 A From the Defendant?

20 Q No, to disguise -- did anybody ever tell you not to show
21 the Defendant what was going on at the facility?

22 A No.

23 Q Did you learn at some point that the Defendant's company.
24 Imperial Petroleum, had bought e-biofuels?

25 A Down the road whenever we was told.

1 Q After it happened?

2 A Yes, yes.

3 Q At that point did you know that the Defendant was an
4 officer in Imperial Petroleum?

5 A As an officer?

6 Q Yes, like -- high up in Imperial Petroleum?

7 A Yeah, yeah. We was aware, I think, that he owned it or
8 whatever, on, on the board or CEO or something of it.

9 Q If the CEO of Imperial Petroleum had come in and asked
10 you what was going on, what would you have told him?

11 MS. LORBIESKI ANDERSON: Objection. Calls for
12 speculation.

13 THE COURT: Sustained.

14 BY MR. BALLANTINE:

15 Q At any rate, was there ever any direction to hide what
16 was going on?

17 MS. LORBIESKI ANDERSON: Objection. Asked and
18 answered.

19 THE COURT: Overruled.

20 THE WITNESS: Not that I know of.

21 BY MR. BALLANTINE:

22 Q Okay. Did anything change between -- what, if anything,
23 changed in terms of the day-to-day operations of this facility
24 between the period, say, from January 1st of 2010 from the
25 period that began January 1st of 2010 to the period that ended

1 May 24th of 2010, comparing that to the period after May 24th
2 of 2010. Specifically, after the purchase. Did anything
3 change on your day-to-day operations that you noticed?

4 A No.

5 Q On the plant floor, was there a term that was used
6 referring to "phantom loads"?

7 A Yes.

8 Q What was a phantom load?

9 A Phantom load would be loads that would never come to our
10 plant but be delivered.

11 Q How did that work?

12 A A truck would be loaded off-site, and instead of being
13 delivered to our facility and unloaded, it would go straight
14 to say a customer or a railcar or somewhere. It wouldn't even
15 come to the plant.

16 Q Was there paperwork that had to be completed?

17 A Yes.

18 Q Same kinds of paperwork as referred to in Government's
19 149A, B, and C?

20 A Yeah, the bills of lading.

21 Q The bills of lading, okay.

22 What would get logged about a phantom load? How would
23 you know about a phantom load?

24 A Because our -- they would have our load-out guys or
25 whatever just print out one of those documents.

1 Q Make an entry for a truck that --

2 A Make an entry for a truck, and that is it.

3 Q And then, do you know what would happen to those
4 documents?

5 A They would go right into the outgoing file and on the
6 outside of the office, and the office would take care of all
7 the paper, the rest of the paperwork.

8 MR. BALLANTINE: If I may have one moment, Your
9 Honor?

10 THE COURT: Yes.

11 BY MR. BALLANTINE:

12 Q Mr. McKee, did the regular production of biodiesel
13 produce any by-products?

14 A Yes, glycerin.

15 Q What byproducts?

16 A Glycerin and wastewater.

17 Q And during the period we have been talking about between
18 the same half of 2009, forward, until I guess the production
19 started again in June of 2011 --

20 A Uh-huh.

21 Q -- was the facility making any glycerin?

22 A No.

23 Q Were you aware of any -- at this point, one last thing I
24 want to do, which is to show you part of an exhibit previously
25 admitted as Government's Exhibit 87, I have one quick question

1 about that. That is a video that I would like to play a clip
2 from. Before I do and to bring that testimony into focus, I
3 think you testified earlier about the P1 process, the P2
4 process, and that there was space for a P3 process; is that
5 right?

6 A Yes.

7 Q And you testified about the capacity of P1 and P2?

8 A Correct.

9 Q Once again, I realize it has been since the break since
10 lunch since I asked you about this. What were those
11 capacities?

12 A P1 is a 5-million-gallon-a-year system. P2 was
13 10-million-gallon-a-year.

14 Q Had anything been done that would increase those
15 capacities, those nameplate capacities?

16 A No.

17 MR. BALLANTINE: If you could play that clip, and we
18 could switch the monitor.

19 (A video is played for the Court and jury.)

20 THE COURT: What is the exhibit number?

21 MR. BALLANTINE: This is Exhibit No. 87, Your Honor.

22 THE COURT: Thank you.

23 BY MR. BALLANTINE:

24 Q At any time while you were working at e-biofuels, was it
25 able to exceed its nameplate capacity of 25 million gallons

1 per year?

2 A Twenty-five?

3 Q Exceed its nameplate capacity of 15 million gallons per
4 year?

5 A No.

6 Q Could it ever produce 25 million gallons per year?

7 A Not as it was, no.

8 MR. BALLANTINE: Thank you.

9 THE COURT: You pass the witness?

10 MR. BALLANTINE: Yes, Your Honor.

11 **CROSS-EXAMINATION**

12 THE COURT: You may cross-examine.

13 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

14 BY MS. LORBIESKI ANDERSON:

15 Q Good afternoon, Mr. McKee. My name is Michele Lorbieski
16 Anderson. I represent the Defendant, Jeffrey Wilson, in this
17 case. I talk a little fast, so I will try to talk slowly, but
18 if you can't understand the question, just let me know, all
19 right?

20 A All right.

21 Q Okay. Earlier you were testifying about the capacity of
22 production just now, about the P1 process and the P2 process,
23 right?

24 A Correct.

25 Q Now, there was a point in time when you were working at

1 e-biofuels when e-biofuels was filtering product, right?

2 A Yes.

3 Q Okay. And during that time, when e-biofuels was
4 filtering product, the product would come with the truck,
5 correct?

6 A The -- yes. All product comes from the truck.

7 Q I am just trying to break it down in the simplest of
8 terms. So the product would come in a truck to the plant,
9 correct?

10 A Uh-huh.

11 Q That truck would be hooked up to a tube, correct?

12 A Hose.

13 Q A hose?

14 A Correct.

15 Q And it is pumped out of the truck into a tank, right?

16 A Yes.

17 Q Okay. And then after it is in the tank there is a
18 filtering process; is that right, or is it before it gets in
19 the tank?

20 A There is a filter -- filter off the tank or off the truck
21 before it gets into the tank it just goes through a filter to
22 protect the --

23 THE COURT: Speak so the jury can hear you too,
24 please.

25 THE WITNESS: What is that?

1 THE COURT: Speak so the jury can hear you too,
2 please.

3 THE WITNESS: Oh, sorry. Sorry, ma'am.

4 BY MS. LORBIESKI ANDERSON:

5 Q Thanks for clarifying that. So the product comes from
6 the truck?

7 A From the truck, yes.

8 Q There is a hose connected. It goes through a filter, and
9 then it ends up in a tank, right?

10 A Correct.

11 Q And then it is taken out of the tank through a tube,
12 right, and the pump does that; is that right?

13 A To where is it going?

14 Q Well, you tell me. I am talking about the reprocessing.
15 I am trying to walk through the reprocessing system.

16 A Then it goes from the tank, and then it goes through
17 another set of filters to the load-out tank to load the
18 trucks.

19 Q All right. So now we are -- from that tank it goes
20 through another set of filters to a load-out tank?

21 A To a load out -- no, to, to the truck.

22 Q To the truck?

23 A Yes.

24 Q And then a pump pumps that product from the load-out tank
25 to the truck, right?

1 A From the load-out tank to the truck there is a set of
2 filters that it goes through, and that is it. There -- that
3 is the last tank.

4 Q And that process that we have just discussed, that was
5 not done in P1 or P2, correct?

6 A No.

7 Q That was a different set of tanks, right?

8 A That was where the finished fuel for P1 and P2 could go
9 to, is where the incoming, the biodiesel incoming could go to
10 any one of those tanks. Tanks 7, 8, 9 was the only tanks that
11 was piped up to pump to load a truck on the outside.

12 Q Okay. So the process that we just discussed, the
13 capacity of that process, you weren't discussing that when you
14 were saying that the full capacity of P1 and P2 was, right?

15 A I was discussing the, what, how much we could run is what
16 they are designed to run in a year.

17 Q Maybe let me ask it a little bit differently. So P1 has
18 a maximum capacity of 5 million gallons per year, right?

19 A Correct.

20 Q P2 has a maximum capacity of 10 million gallons per year,
21 right?

22 A Correct.

23 Q And in addition to those 15 million gallons per year, the
24 process we just discussed could process additional product,
25 right?

1 A That is -- you could do unlimited with that. I mean,
2 that is biodiesel just coming in and going out. I mean, that
3 is not processed. We, we didn't process it.

4 Q And you worked in the plant, you said, for five years,
5 right?

6 A Correct.

7 Q You worked in the daytime?

8 A Daytime and some nighttime shifts and throughout my time
9 there.

10 Q What time did you come to work?

11 A 7:00, 7:00 in the morning.

12 Q 7:00 in the morning. What time would you go home?

13 A 4:00.

14 Q You worked Monday through Friday, 7:00 to 4:00?

15 A Usually.

16 Q So for the five years that you worked Monday through
17 Friday, 7:00 to 4:00, there was a portion of time when you
18 were doing that reprocessing that we just discussed, correct?

19 A If you call it the reprocessing, yes.

20 Q When you were doing that reprocessing, that is what I
21 will call it just for short. Did you call it something else?

22 A We just called it unloading the trucks. I mean, there
23 was no -- I, I --

24 THE COURT: Was that just the load and unload
25 process?

1 THE WITNESS: Yes. Everything we unload, I mean, it
2 came through filters. Even the choice white grease came
3 through a different type of filter, but that was -- it just
4 went to a filtering product.

5 BY MS. LORBIESKI ANDERSON:

6 Q So that, that process of the, of the product coming from
7 the tanks through filters to another tank back to a truck?

8 A Uh-huh.

9 Q You were doing that during the five years you were there
10 Monday through Friday, 7:00 to 4:00, right?

11 A No. We did not start off there when we first started the
12 plant.

13 Q At some point in time. I guess I should be more
14 specific, not the whole five years. But at some point in time
15 during the five years you worked there, that was happening,
16 right?

17 A Yes.

18 Q And at no point in time when that process was being
19 conducted at the plant, did you think that that was illegal;
20 isn't that right?

21 A Did I think it was illegal?

22 Q Yes.

23 A I wouldn't think so.

24 Q Okay. You could do unlimited production using that
25 process, right, that is what your testimony was?

1 A That is not production, though.

2 Q Well, that process. You could make unlimited amounts of
3 product could go in and out of that, correct?

4 A Unlimited, yes.

5 Q Okay. Now, you got a call from a Government agent a few
6 months ago; is that right?

7 A Okay, yeah.

8 Q And that agent asked you a similar question that you were
9 asked here today, didn't she?

10 A Which question is that?

11 THE COURT: He has been asked a lot of questions.

12 MS. LORBIESKI ANDERSON: Sure. I will repeat the
13 question.

14 BY MS. LORBIESKI ANDERSON:

15 Q Did that agent ask you if you were ever told to turn on
16 the plant to fool Jeff Wilson into thinking the plant was
17 running?

18 A Yes.

19 Q You thought that was a strange question, didn't you?

20 A I said -- yeah. I answered no.

21 Q Well, didn't you think that that was a strange question
22 because the plant was running when you saw Jeff Wilson at the
23 plant?

24 A No. I just thought it was a strange question. I mean,
25 at the time we was doing -- I mean we were doing both things

1 at every -- the whole time, not the whole time but different
2 sets of the times I was there, there was different things
3 going on.

4 Q Okay. You previously -- or you previously agreed that
5 you understood that Imperial bought e-biofuels in May of 2010?

6 A Okay.

7 Q And you worked there until sometime in early 2012, right?

8 A Correct.

9 Q So it was about a two-year period that you worked at
10 e-biofuels after Imperial purchased e-biofuels, right?

11 A Okay, yes.

12 Q Is that right? Okay. And your best guess is that you
13 saw Jeff Wilson five to ten times during that two-year period,
14 right?

15 A That is my guess, yes.

16 Q When you saw Jeff Wilson at the plant you didn't see him
17 on the plant floor checking out the pumps and the tanks, did
18 you?

19 A No.

20 Q Is it true that when you saw Jeff Wilson at the plant you
21 saw him walking through the plant floor on the way to a
22 meeting?

23 A In the offices, yes.

24 Q And he was in the offices because he was there for
25 meetings as far as you knew, right?

1 A I, I don't know.

2 Q You never saw him meeting anyone on the plant floor, did
3 you?

4 A Correct.

5 Q The reason you didn't see him meeting on the plant floor
6 because the plant floor was really loud, right?

7 A When running, yes.

8 Q And when the product was piped out of a truck and in
9 through the filters and then back in to a truck, that was
10 noisy, right?

11 A Correct.

12 Q Very noisy?

13 A Pretty noisy.

14 Q Just as noisy as when the process was being run in P1 and
15 P2, right?

16 A There was additional noise when the systems are running,
17 not just isolated to one pump.

18 Q Do you think that you can distinguish the difference of
19 the noise because you worked there for five years every day
20 from 7:00 to 4:00?

21 A I am not for sure. I mean, it is loud. I mean. The
22 whole thing is loud.

23 Q Whole thing is loud.

24 When you worked at e-biofuels, did you have an
25 opportunity to meet a woman named Katirina Tracy or Pattison?

1 A Yes.

2 Q And you thought she was shady, right?

3 A Yes.

4 Q You also met the Duceys while you were working there
5 because they ran the plant, right?

6 A Correct.

7 Q And you also thought, and I will be specific, you met
8 Chris Ducey, yes?

9 A Yes.

10 Q Chad Ducey?

11 A Yes.

12 Q And Craig Ducey?

13 A Yes.

14 Q And you thought they were all shady, too?

15 A A little bit.

16 Q When you worked at e-biofuels, was Chris Ducey the Ducey
17 that actually directed the plant staff about how the plant was
18 going to operate?

19 A Yes.

20 Q Jeff Wilson never directed the plant staff about their
21 operations, did he?

22 A Not that I know of.

23 Q Now, earlier on direct, you talked about skids; do you
24 remember that?

25 A About what?

1 Q About skids?

2 A Skids?

3 Q Yes.

4 A Okay, yes.

5 Q Are skids used to make biodiesel from feedstock?

6 A Skids -- that is just what -- the skids of the process?

7 Q Yes.

8 A That is just what you call them so you can narrow them
9 down so you can decipher what thing is what. Like Skid 1 is
10 the reactor. That is just the first phase, and then Skid 2
11 would be the second phase, and that was the separator. That
12 is just, that is just what we called them.

13 Q Let me make sure I understand you correctly. So the
14 skids, those were part of the process that was in the
15 10-million-gallon-per-year process or the
16 5-million-gallon-per-year process?

17 A Correct.

18 Q So the skids were used in the process where feedstock is
19 used to create biodiesel, right?

20 A Yes.

21 Q Now, when you were answering questions earlier you talked
22 about biodiesel, so I just want to make sure I am on the same
23 page with you. You mentioned B100. What is that again?

24 A One hundred percent biodiesel.

25 Q Okay. And then do you know what B99 is?

1 A 99.9 percent biodiesel, .1 percent diesel fuel.

2 Q Now, B100 is biodiesel without fuel, right?

3 A Correct.

4 Q B99 is biodiesel with a little bit of petroleum; is that
5 right?

6 A Correct.

7 Q Okay. Now, at e-biofuels, when someone used the word
8 "biodiesel," were they referring to B100 or B99 or both?

9 A We --

10 MR. BALLANTINE: Objection, foundation, Your Honor.

11 THE COURT: Sustained.

12 BY MS. LORBIESKI ANDERSON:

13 Q Did you use the term "biodiesel" when you worked at
14 e-biofuels?

15 A Yes.

16 Q When you used the term "biodiesel," were you referring to
17 B100, B99, or both?

18 A The final process that we make is B100.

19 Q All right.

20 A Yes.

21 Q I guess what I am trying to understand is, you worked
22 there for five years, right?

23 A Yes.

24 Q You understood that process?

25 A Right.

1 Q I didn't work there for five years, and the ladies and
2 gentlemen of the jury didn't, so I am trying to help everyone
3 understand what these terms mean when they are being used at
4 e-biofuels, okay?

5 A Uh-huh.

6 Q So when you use the term "biodiesel," are you referring
7 to B100, B99, or both?

8 A B100.

9 Q Okay.

10 A Because anything that added diesel fuel, we just called
11 it B99.

12 Q Okay. And did you ever have an understanding that
13 biodiesel was used to refer to B99 sometimes?

14 A I am not sure I understand.

15 Q Well, this is all pretty confusing, isn't it, biodiesel
16 and RINs for you?

17 A RINs?

18 Q Yeah.

19 A Yeah. I mean, it is -- it is not too bad.

20 Q You don't understand how RINs work, do you?

21 A Yeah, I do.

22 Q You do?

23 A Yeah, I know how RINs work.

24 Q Can you please explain to us how RINs work?

25 A RINs are a renewable -- I guess renewable identification

1 number that the Government comes up with so they can keep
2 track of who is producing biodiesel. Those RINs get attached
3 to a set amount of gallons, like say, we produce or whatever.

4 When they get shipped off they go to, say a gas station,
5 get unloaded, then that customer has the RIN number that they
6 can turn in. That is how everybody keeps track of the
7 renewable energy produced, basically something like that.

8 Q Something like that?

9 A Basically.

10 Q Did you have the responsibility of doing anything with
11 RINs at e-biofuels?

12 A No.

13 Q So you didn't know how to do the paperwork, right?

14 A For RINs? No. I didn't do that.

15 Q You didn't know exactly what you could attach a RINs to
16 with the paperwork, right?

17 A Correct.

18 Q During the time that you were working the five to ten
19 times that you saw Jeff Wilson at the plant, did you see him
20 at the plant when the process of P1 and P2 were operating
21 during that time period?

22 A P1 would probably only run maybe a month out of that,
23 after that, but P2 would have been running in Juneish of that
24 year production wise, June of 2011.

25 Q Do you remember the period -- do you remember when you

1 saw Jeff Wilson at the plant?

2 A I don't know exactly, no.

3 Q You couldn't tell us what month or what year you saw Jeff
4 Wilson at the plant, could you?

5 A Probably not.

6 Q Probably not or definitely not?

7 A I -- probably, probably not, definitely not. I can't
8 tell you exact dates I seen him there, no.

9 Q Okay.

10 A I know it was five to ten times I seen him, seen the man.

11 Q And do you know who Jeff Wilson was meeting with when you
12 saw him at the plant?

13 A No. I would assume Craig Ducey.

14 Q Craig Ducey, what was his job at the plant or e-biofuels
15 in general, I should say?

16 A What was that?

17 Q What was Craig Ducey's job at the e-biofuels?

18 A He was like a CFO of the e-biofuels.

19 Q Did he kind of run the show?

20 A Financially.

21 Q Okay. And then what was Chad Ducey's job at the plant as
22 far as you knew?

23 A He was like R&D research and development and went
24 in -- they was brothers, so they talked.

25 Q The way that the Duceys operated e-biofuels were -- did

1 you get a lot of information, or were you just told what to do
2 and you just carried it out?

3 A Just basically told what to do and carried it out.

4 Q One of the things that you talked about doing while you
5 were working there was testing the product on the trucks when
6 it came in; do you remember that?

7 A Uh-huh.

8 Q Is that a yes?

9 A Yes.

10 Q Sorry, just for the transcript, you have to say "yes" or
11 "no."

12 Now, you mentioned FFA testing; do you remember that?

13 A Correct.

14 Q When the product came in and you did the test, the liquid
15 that you were testing, what happened to it after you tested
16 it? Did you throw it out?

17 A Of the FFA or which type?

18 Q Or are there different types?

19 A The biodiesel it came in, then there is the feedstock or
20 the choice white grease that came in.

21 Q So let's start with the feedstock. When you would test
22 the feedstock --

23 A Uh-huh.

24 Q -- when you were done testing the feedstock, what would
25 you do with the feedstock?

1 A Just dump the jar back into the tank.

2 Q And if the biodiesel came in and you tested it, then what
3 would you do with it?

4 A Basically the same thing but to a different tank.

5 Q Just dumped it out?

6 A Uh-huh.

7 Q Now, at the plant, wasn't there an area of the plant
8 where there was a collection of jars --

9 A Yes.

10 Q -- with liquid in them? Okay, and what was the purpose
11 of having those jars of liquid in the plant?

12 A Those was on trucks that got sent out. They took a
13 sample from every truck, and they had to keep it for three
14 months, I think, in case to cover, cover them if someone said
15 they had bad fuel, then they can pull the sample and test.

16 Q It was to make sure that the product that went out of the
17 plant, you had proof of the quality of it; is that right?

18 A Yes.

19 Q Then a truck would come in to the plant. Could you tell
20 by looking at the truck if it was a truck of feedstock or a
21 truck of something else?

22 A Usually we would have a list of what was coming in for
23 that day.

24 Q So you would have to look at paperwork to determine what
25 is in that truck; is that right?

1 A Yeah.

2 Q Just by looking at the truck you couldn't tell, right?

3 A You probably wouldn't be able to if you was there. I
4 mean, if he seen -- on a daily basis, same trucks coming in,
5 bringing stuff or whatever.

6 Q So is it fair that you, working at the plant, for five
7 years, from 7:00 to 4:00 could tell maybe what a truck was by
8 looking at it?

9 A Yes.

10 Q Someone who did not work there for five years Monday
11 through Friday --

12 MR. BALLANTINE: Objection. Calls for speculation,
13 Your Honor.

14 THE COURT: That part, if you are asking for
15 somebody else's ability to understand what was in the truck, I
16 will sustain that part.

17 BY MS. LORBIESKI ANDERSON:

18 Q How long did it take you to come to that understanding?
19 Did you --

20 THE COURT: What understanding?

21 BY MS. LORBIESKI ANDERSON:

22 Q The first day you started working at e-biofuels in 2007,
23 were you able to distinguish what was on the truck that first
24 day?

25 A No.

1 Q How long did you have to work there before you could make
2 that distinction?

3 A A few weeks.

4 Q That was by working with the trucks every day, Monday
5 through Friday, 7:00 to 4:00? Is that a yes?

6 A Yes. Sorry.

7 Q No, that is all right.

8 Earlier you looked at a document that discussed a repair
9 on P1; do you remember that?

10 A Yes.

11 Q All right. And so according to that document, it was
12 your understanding that P1 was broken on that day, right?

13 A Correct.

14 Q Just to make sure we are on the same page, P1 is the
15 process that could make 10 million gallons?

16 A Five.

17 Q Five, excuse me.

18 A It was a small one, yes.

19 Q P1 was the 5-million-gallons-per-year system. And you
20 also mentioned that things were broken all the time, right?

21 A Yes.

22 Q So when P1 was broken, wouldn't you fix it?

23 A Try to, yes.

24 Q And after you fixed it, you would just start running the
25 process again?

1 A Yes.

2 Q You mentioned that you had met Katirina Pattison. Did
3 you see Katirina Pattison at the plant in February of 2012?

4 MR. BALLANTINE: Your Honor, I object as to the
5 scope of cross-examination.

6 THE COURT: The objection is overruled. She may
7 ask.

8 THE WITNESS: In what month?

9 MS. LORBIESKI ANDERSON: I will go ahead and restate
10 my question.

11 BY MS. LORBIESKI ANDERSON:

12 Q Did you -- how many times did you meet Katirina Pattison?

13 A Under five.

14 Q And was one of those times in February of 2012 when she
15 was meeting with Tim Jones?

16 A Yes.

17 MR. BALLANTINE: Objection as to relevance, Your
18 Honor, and scope.

19 THE COURT: What is the relevance?

20 MS. LORBIESKI ANDERSON: I am going to ask him about
21 his personal knowledge about what Miss Pattison said on that
22 day.

23 THE COURT: If she overheard it?

24 MS. LORBIESKI ANDERSON: Yes.

25 THE COURT: Well, you better approach for a minute,

1 please.

2 MS. LORBIESKI ANDERSON: Okay.

3 *(A bench conference was held on the record.)*

4 THE COURT: Co-conspirator statement you try to get
5 in through this witness? We went through that yesterday.

6 MS. LORBIESKI ANDERSON: It is actually impeachment,
7 so, Mr. --

8 THE COURT: Impeachment of whom?

9 MS. LORBIESKI ANDERSON: Miss Pattison, so Mr. McKee
10 was at the plant on the day that she was making the threats
11 that she testified to the other day. He filed a police report
12 indicating that she made threats, and she testified yesterday
13 that it wasn't her.

14 THE COURT: Wait, wait, wait, I am losing you.

15 MS. LORBIESKI ANDERSON: Sure.

16 I will go slower, sorry. I believe it was
17 Miss Pattison's testimony that in February 20 --

18 THE COURT: Wait, wait, wait. Members of the jury,
19 take a break but not a verbal break, because I can't keep
20 track of that. So just be quiet.

21 MS. LORBIESKI ANDERSON: Miss Pattison's testimony
22 in February 2012, when she went to Mr. Jones' office, but it
23 wasn't her that was making threats, it was Mr. Furando on the
24 phone. Mr. McKee filed a police report saying that he heard
25 Miss Pattison making threats, so I am impeaching Miss Pattison

1 with Mr. McKee's testimony. I am not going to put this
2 evidence in. I am asking him to refresh his recollection. I
3 am just going to ask him what his memory is of what he heard
4 Miss Pattison say on that day.

5 THE COURT: Is your evidentiary for that a statement
6 of a co-conspirator?

7 MS. LORBIESKI ANDERSON: No, it is just impeachment.
8 She said she --

9 THE COURT: You are getting the statement of
10 Miss Pattison in, right?

11 MS. LORBIESKI ANDERSON: I am getting the
12 statement -- oh, I see. The statement of Miss Pattison, yes,
13 and her statement impeaches her prior testimony that she did
14 not make threats.

15 THE COURT: Okay. The statement of Miss Pattison is
16 a co-conspirator statement, right?

17 MS. LORBIESKI ANDERSON: Yes, Your Honor.

18 THE COURT: And so, it is not admissible under the
19 Rule 801(d)(2).

20 MS. LORBIESKI ANDERSON: I believe under 806 I can
21 impeach her.

22 THE COURT: No. 801(d) -- just a minute.

23 That says if the declarant has testified as a witness,
24 then you can do that. So is that -- you are saying Miss
25 Pattison is the declarant?

1 MS. LORBIESKI ANDERSON: Yes, Your Honor.

2 THE COURT: Let me see.

3 MS. LORBIESKI ANDERSON: May I grab my rule book,
4 too? I am sorry. I will just stay here. I will see if I can
5 do it without a rule book.

6 THE COURT: 806 declares the declarant gets the
7 opportunity to explain or deny the inconsistent statement.

8 MS. LORBIESKI ANDERSON: I believe she was given the
9 opportunity.

10 THE COURT: Give her the opportunity to
11 cross-examine the statement.

12 MS. LORBIESKI ANDERSON: I believe she was given an
13 opportunity yesterday.

14 THE COURT: So --

15 MS. LORBIESKI ANDERSON: Yesterday.

16 THE COURT: So you want to respond?

17 MR. BALLANTINE: Your Honor, I don't believe she
18 will be able to testify and explain or deny the contradictory
19 statements because she is not on the stand anymore and she has
20 been excused. Mr. McKee's statement about what she said, we
21 can't ask her anything about it. It is too late for that.

22 In addition, it is impeachment on collateral matter of
23 using extrinsic evidence, testimony of Mr. McKee, and for
24 those reasons -- I think Mr. DeBrotta will add, in my ear, we
25 would object.

1 THE COURT: You want to talk to him?

2 MR. DeBROTA: That is not impeachment because she
3 said I did what Mr. Furando told me to. That is not a denial.
4 The question wasn't did you say that to Mr. McKee. She never
5 got that question. That is what you need to do if you want to
6 make Mr. McKee the witness. She didn't get asked that
7 question. Did you ever say X, Y, Z is what they asked, not
8 close enough. You needed to say was Troy McKee there? They
9 didn't do that. This is how this rule works.

10 MS. LORBIESKI ANDERSON: I disagree, Your Honor.
11 She was examined yesterday. She had an opportunity to say
12 everything she wanted to say about that statement. Her
13 statement was --

14 THE COURT: Just a minute. She was answering the
15 lawyer's questions, so it wasn't like she was going to openly
16 speak.

17 MS. LORBIESKI ANDERSON: So the Government had the
18 opportunity to examine her, and they did, in fact, examine her
19 about her statements. I believe what Mr. DeBrotta is referring
20 to where she said she made a statement because Mr. Furando
21 told her to was actually the false rape charge that was the
22 text message. That was not the threats that she made in Tim
23 Jones' office, and I don't need to establish, I don't believe,
24 that Miss Pattison testified she made statements to Mr. McKee,
25 because Mr. McKee is not going to testify that she made

1 statements to him. He is going to testify that he heard her
2 screaming in that office while he was just walking around.

3 THE COURT: We will let the jury go. We will do an
4 afternoon break, and you can do a proffer with this witness,
5 an offer of proof.

6 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

7 MR. BALLANTINE: One more question, your Honor, just
8 in terms of, is it counsel's contention that Miss Pattison was
9 asked about this statement that she supposedly made? Isn't it
10 true that you said, and then whatever statement will be
11 elicited, because that will be the impeachment. She should be
12 asked, isn't it true that you said whatever it is she is about
13 to ask the witness to say.

14 THE COURT: I don't know. That is why we are going
15 to wait and see what she says.

16 MR. BALLANTINE: I guess I am asking it, it seems as
17 though it is out of order in terms of the impeachment. The
18 appropriate impeachment would be to ask her, isn't it true
19 that you said in the context of that testimony about the
20 assault. And then if she denied it, then potentially
21 introduce this evidence or if they want other objections --

22 THE COURT: Well, this is what we are doing outside
23 the presence of the jury. We will ask the court reporter to
24 get her testimony on the point so we know exactly what it was
25 she said and whether it is subject to impeachment in this way.

1 MR. BALLANTINE: Very well. Thank you, Your Honor.

2 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

3 *(End of bench conference.)*

4 THE COURT: Ladies and gentlemen, thank you.

5 We are going to use this as a time for the afternoon
6 recess so I can resolve this legal issue that has arisen
7 without making you just sit there and watch us whisper up
8 here. So we will take an afternoon recess. We will probably
9 not be able to call you back in exactly 20 minutes, but we are
10 going to aim for something close to that while we get this
11 other issue resolved.

12 So if you will just be patient, don't leave your jury
13 environs up there, because when we are ready to go we will
14 want to go right away. So during this recess, and as always,
15 remember to follow my admonitions. You may rise and depart.

16 THE CLERK: All rise.

17 *(Jury out, 3:07 p.m.)*

18 THE COURT: The jury has departed. You may be
19 seated. Do you think that if we took a brief recess that you
20 could find Ms. Pattison's testimony and lead the lawyers to
21 the point where she made statements about the false rape
22 report? Can you search for "rape"? I hate to put it in that
23 way, but I think that is your word hook, and as soon as you
24 get that, would you read it to the lawyers and then I will
25 have you read to it me, but I will take a recess while you

1 look for it. We will be in recess.

2 MS. LORBIESKI ANDERSON: Your Honor, I am actually
3 going to cross about statements she made in the office beyond
4 just the rape charge, too.

5 THE COURT: You can elicit that from the court
6 reporter.

7 MS. LORBIESKI ANDERSON: Okay.

8 THE CLERK: All rise. Court is in recess.

9 (Judge leaves the bench at 3:09 p.m.)

10 (Brief recess.)

11 (Jury out, 3:29 p.m.)

12 THE COURT: Would you read to me the portion you
13 identified in the record?

14 THE COURT REPORTER: Question by Ms. Anderson:

15 "Q. Didn't you threaten" --

16 THE COURT: Excuse me, this is a question to Miss
17 Pattison?

18 THE COURT REPORTER: Yes, it is from July 12th in
19 the afternoon.

20 THE COURT: Okay.

21 THE COURT REPORTER: By Ms. Anderson:

22 "Q. Didn't you threaten to file a false rape charge
23 against Tim Jones in February of 2012?

24 "A. That was at the direction of Mr. Furando. He was
25 the one on speakerphone.

1 "Q. My question was, didn't you make the threat?

2 "A. I made the threat in a text message to Craig Ducey
3 after I had returned back from Indiana at the direction of Mr.
4 Furando.

5 "Q. And in that text message to Craig Ducey you said, 'I
6 will be filing' --

7 "MR. DeBROTA: Objection.

8 "THE COURT: Sustained.

9 "BY MS. ANDERSON:

10 "Q. The reason that you were making threats against Tim
11 Jones is because you were trying to collect money, right?

12 "MR. DeBROTA: Objection.

13 "THE COURT: Sustained.

14 "BY MS. ANDERSON:

15 "Q. Why did you make the false rape -- why did you
16 threaten to make a false rape charge against Mr. Tim Jones?

17 "A. I was directed by Mr. Furando to make that claim to
18 Tim Jones in order to get some funds that were owed to the
19 company.

20 "Q. And how much funds were owed to Caravan by
21 e-biofuels?

22 "A. I don't know the specific number.

23 "Q. Why did Caravan loan that money to e-biofuels?

24 "A. I don't know specifically why they loaned a certain
25 amount of money. I am not sure where you are referring to.

1 There were multiple loans made back and forth between
2 e-biofuels and Caravan over the course of the two years, three
3 years that we had done business together."

4 MR. BALLANTINE: I think that is about as far as we
5 worked through together, isn't it?

6 THE COURT REPORTER: Do you want me to go to --

7 MR. DeBROTA: My redirect.

8 THE COURT: The redirect.

9 THE COURT REPORTER: Okay. Redirect by Mr. DeBrotta:

10 "Q. You had talked about Mr. Furando was on a
11 speakerphone?

12 "A. Yes.

13 "Q. He is in another city?

14 "A. Yes.

15 "Q. Where are you when this is happening?

16 "THE COURT: Wait just a minute. Are we talking about
17 the threats to Tim Jones?

18 "MR. DeBROTA: Correct. I am sorry.

19 "BY MR. DeBROTA:

20 "Q. Where are you when this happens?

21 "A. I was in the e-biofuels facility, I believe, in Tim
22 Jones' office.

23 "Q. With other people, correct?

24 "A. Yes, a colleague of mine had attended the trip.

25 "Q. Who is that?

1 "A. Jeff Linzenbold was his name.

2 "Q. Who is Mr. Jones with?

3 "A. I don't know if he was with anybody in his office,
4 but there were other employees in the facility.

5 "Q. Okay. So you went to the facility with Mr.
6 Linzenbold?

7 "A. Yes.

8 "Q. And talked to Mr. Jones?

9 "A. Yes. That is where the phone call took place.

10 "Q. And while you are there physically, Mr. Furando is
11 on the phone saying things?

12 "A. Yes.

13 "Q. He is the one that makes the rape threat, not you,
14 it is him.

15 "MS. ANDERSON: Objection. Misstates prior testimony --

16 "THE COURT: I didn't hear what you said.

17 "MS. ANDERSON: Objection. Misstates prior testimony and
18 leading.

19 "THE COURT: Overruled. This is redirect examination,
20 re-redirect.

21 "BY MR. DeBROTA:

22 "Q. Mr. Furando is the one that said that, not you. You
23 are just there in the room when it is happening?

24 "A. Yes. Initially Mr. Furando was the one who made the
25 verbal threat to Tim Jones over the telephone. When I

1 returned home, I believe it was the following day or it may
2 have been two days later, I am not positive on the dates. Mr.
3 Furando directed me to send a text message not to Tim Jones
4 but to Craig Ducey stating that I was going to file a claim
5 against Tim Jones, and that was at Mr. Furando's direction.

6 "Q. In all events you never filed any such claim, true?

7 "A. That is the truth.

8 "Q. So it didn't involve you lying to any court or
9 investigator or anyone else?

10 "A. No."

11 THE COURT: So what are you going to do, a proffer with
12 this witness that you expect to present to him about this
13 matter? You can do it by just proffering it.

14 So I am speaking to Ms. Anderson. Ms Anderson, do you
15 want to proffer what this witness, what you would ask this
16 witness and what you expect him to say if you know? He is not
17 exactly your witness, but what were you going to ask him?

18 MS. LORBIESKI ANDERSON: Your Honor, I would ask
19 this witness if he was in the plant in February 2012 when
20 Miss Pattison arrived there with a gentleman. I believe he
21 would say yes. I would ask him if while Miss Pattison and the
22 gentleman were at the plant, if he -- if he understood that
23 she went into Tim Jones' office? He would say yes.

24 I will ask him if he heard her making verbal threats to
25 Mr. Jones in the office. I believe he will say yes. I will

1 ask him, did you hear Miss Pattison cussing at Mr. Jones? He
2 will say yes. I will ask the witness if he heard
3 Miss Pattison demanding money from Mr. Jones. He will say
4 yes, and all that testimony is admissible, one, as an excited
5 utterance by Miss Pattison; and two, to impeach Miss Pattison,
6 who testified that she did not make any verbal threats to Mr.
7 Jones in that office.

8 It was her testimony that Mr. Furando was making the
9 verbal threats over the phone in that office, but that she was
10 directed by Mr. Furando to make a threat by text message the
11 next day. She specifically denied making a verbal threat when
12 Mr. DeBrotta was questioning her, and I am going to impeach
13 that with Mr. McKee's testimony about what he heard
14 Miss Pattison say, and it is an excited utterance.

15 THE COURT: So read to me again the last part of the
16 redirect, please. Can you?

17 THE COURT REPORTER: Yes.

18 THE COURT: Yes. Sorry.

19 MR. BALLANTINE: Your Honor, if I may while the
20 court reporter is pulling that up. Is the --

21 THE COURT: Wait, wait, wait, we are not on the
22 record.

23 MR. BALLANTINE: Oh.

24 THE COURT REPORTER: The re-redirect?

25 THE COURT: The re-redirect. There was an

1 objection, and I overruled it. I said it is re-redirect.

2 THE COURT REPORTER: Question by Mr. DeBrotta:

3 "Q. You had talked about Mr. Furando was on a
4 speakerphone?

5 "A. Yes.

6 "Q. He is in another city?

7 "A. Yes.

8 "Q. Where are you when this is happening?

9 "THE COURT: Wait just a minute. Are we talking about
10 the threats to Tim Jones?

11 "MR. DeBROTA: Correct. I am sorry.

12 "BY MR. DeBROTA:

13 "Q. Where are you when this happens?

14 "A. I was in the e-biofuels facility, I believe, in Tim
15 Jones' office.

16 "Q. With other people, correct?

17 "A. Yes, a colleague of mine had attended the trip.

18 "Q. Who is that?

19 "A. Jeff Linzenbold was his name.

20 "Q. Who is Mr. Jones with?

21 "A. I don't know if he was with anybody in his office,
22 but there were other employees in the facility.

23 "Q. Okay. So you went to the facility with Mr.
24 Linzenbold?

25 "A. Yes.

1 "Q. And talked to Mr. Jones?

2 "A. Yes. That is where the phone call took place.

3 "Q. And while you are there physically, Mr. Furando is
4 on the phone saying things?

5 "A. Yes.

6 "Q. He is the one that makes the rape threat, not you,
7 it is him?

8 "MS. ANDERSON: Objection. Misstates prior testimony --

9 "THE COURT: I didn't hear what you said.

10 "MS. ANDERSON: Objection. Misstates prior testimony and
11 leading.

12 "THE COURT: Overruled. This is redirect examination,
13 re-redirect."

14 THE COURT: There is a little bit after that.

15 "BY MR. DeBROTA:

16 "Q. Mr. Furando is the one that said that, not you. You
17 are just there in the room when it is happening?

18 "A. Yes. Initially Mr. Furando was the one who made the
19 verbal threat to Tim Jones over the telephone. When I
20 returned home, I believe it was the following day or it may
21 have been two days later, I am not positive on the dates. Mr.
22 Furando directed me to send a text message not to Tim Jones
23 but to Craig Ducey stating that I was going to file a claim
24 against Tim Jones, and that was at Mr. Furando's direction.

25 "Q. In all events you never filed any such claim, true?

1 "A. That is the truth.

2 "Q. So it didn't involve you lying to any court or
3 investigator or anyone else?

4 "A. No."

5 THE COURT: Okay. Now, Mr. Ballantine, what did you
6 want to say?

7 MR. BALLANTINE: Your Honor, first of all, I don't
8 think that counsel intends to -- she didn't proffer that she
9 intends to ask whether Ms. Tracy made a verbal rape threat,
10 which I think is what the issue is that she is trying to
11 impeach Miss Tracy about. I didn't hear that when she
12 proffered what she was going to ask Mr. McKee. I think, my
13 first -- that is my first, I guess, question for the Court is
14 whether that is your understanding as well.

15 My second is that I think the issue here is really
16 governed by Rule 608, which addresses the witness's character
17 for truthfulness or untruthfulness. The situation was
18 Miss Pattison was on the stand --

19 THE COURT: Wait a minute, before you say that, let
20 me just say this. First, repeat to me, please, Ms. Anderson,
21 what you expect this witness to say, what you are going to ask
22 him if the Court permits it.

23 MS. LORBIESKI ANDERSON: Did you see Miss Pattison
24 in February of 2012 at e-biofuels' plant? Yes. Was she there
25 with a man? Yes. Was it your understanding that

1 Miss Pattison and that man went into Mr. Jones' office? Yes.

2 When Miss Pattison was in Mr. Jones' office, did you hear her
3 making verbal threats? Yes.

4 Did you hear her cussing at Mr. Jones? Yes. Did you
5 hear her demand money from Mr. Jones? Yes. And then, I
6 probably -- I would also ask questions about the gentleman.

7 So can you describe --

8 THE COURT: About the gentleman?

9 MS. LORBIESKI ANDERSON: The gentleman. Was he a
10 large gentleman?

11 THE COURT: You mean -- well, tell me. You want the
12 witness to describe the man who was with Pattison?

13 MS. LORBIESKI ANDERSON: Yes. I was just going to
14 add that because I didn't want the Court to think that I
15 didn't have further questions about this incident, so I would
16 ask to describe the gentleman as well. And then depending on
17 --

18 THE COURT: What is the relevance of that?

19 MS. LORBIESKI ANDERSON: Because I believe she
20 brought a large gentleman to intimidate Mr. Jones, which --

21 THE COURT: You didn't ask her anything about that
22 on the stand.

23 MS. LORBIESKI ANDERSON: No, but I am not impeaching
24 her on that, I am just asking about his personal knowledge of
25 this man that he saw.

1 THE COURT: Now, Mr. Ballantine.

2 MR. BALLANTINE: Your Honor, I think what I just
3 heard was that counsel intends to say, ask the witness whether
4 Ms. Tracy was threatening but not meaning verbal rape threat.

5 THE COURT: That is what I heard, too.

6 MR. BALLANTINE: I mean, the issue going to her
7 truthfulness, her character for truthfulness, which my second
8 argument is going to be that this -- an inquiry into a
9 collateral matter about that, but sticking with this, the
10 questions are character for truthfulness. So if she made a
11 false rape threat, that would go to her character for
12 truthfulness.

13 THE COURT: Well, there is no evidence going to be
14 elicited about that, about the rape report. I didn't hear
15 that in the proffer.

16 MR. BALLANTINE: I agree, Your Honor, so in that
17 case I don't understand how it is impeaching her with respect
18 to her character for truthfulness because my understanding
19 is --

20 THE COURT: I think it arises under 613, witness's
21 prior statement, and it comes under extrinsic evidence of a
22 prior inconsistent statement, so it is 613(b). I don't think
23 the statements are inconsistent. I don't think there is
24 anything in the proffer that is inconsistent with what
25 Miss Pattison testified to.

1 MR. BALLANTINE: I certainly agree with that as
2 well, Your Honor.

3 THE COURT: So you can't bring in extrinsic evidence
4 in order to show a prior inconsistent statement because the
5 proffer is not inconsistent with what Miss Pattison testified
6 to.

7 MS. LORBIESKI ANDERSON: Your Honor, I respectfully
8 disagree. I believe that Miss Pattison was inconsistent
9 because her testimony was that she didn't make a threat in
10 that room with Mr. Jones. Her testimony was that Mr. Furando
11 made the threats over the phone, and she did not make the
12 false rape threat until the next day she believed by text
13 message.

14 THE COURT: Well, that really is collateral because
15 what she said was, yes, she made threats; yes, she sent a text
16 message. Yes, she got drawn into this false rape report in
17 order to extort some money or to pressure for some money. She
18 admitted all of that. That is when we first heard that, but
19 she was doing that at Mr. Furando's direction. So your
20 witness will not be able to say that what he overheard by
21 Miss Pattison was not instigated by Mr. Furando.

22 So whatever happened in that room and whatever happened
23 afterwards, although, this witness can't testify to afterwards
24 when the text message was sent. You can only testify, I
25 assume, to what he overheard in the room is not inconsistent

1 with what Miss Pattison said. She said she was in that
2 office, she was creating a scene, and she was doing it because
3 Mr. Furando made her do it. Isn't that how you heard that
4 testimony?

5 MS. LORBIESKI ANDERSON: Your Honor, I respectfully
6 heard it differently.

7 THE COURT: Tell me how you think Ms. Pattison said
8 something else.

9 MS. LORBIESKI ANDERSON: I believe Miss Pattison's
10 testimony was that I was just sitting in that room being
11 quiet.

12 I never heard "sitting there being quiet." We just had
13 it read to us. I never heard any of those words.

14 MS. LORBIESKI ANDERSON: That is fair. She didn't
15 say those words. That is the impression she --

16 THE COURT: I go on the basis of the record, so you
17 have to use the testimony that was given.

18 MS. LORBIESKI ANDERSON: Sure.

19 THE COURT: Don't characterize it. It is what it
20 is.

21 MS. LORBIESKI ANDERSON: I understand.

22 THE COURT: It is what it is, as our kids say.

23 MS. LORBIESKI ANDERSON: I believe her testimony was
24 that she was in the room, and that she made a threat the next
25 day over text message. And that is the only way she made a

1 threat, and that is inconsistent with Mr. McKee's testimony
2 that he heard her making threats in that room to Mr. Jones.

3 THE COURT: Okay. So your proffer, there is nothing
4 about a rape.

5 MS. LORBIESKI ANDERSON: My question was, did she
6 make threats? Was she cussing at him? Was she demanding
7 money?

8 THE COURT: Okay. I am sorry, can you go back to
9 just that part of her testimony where she said that she was in
10 that office and that Furando had called in or something like
11 that?

12 MR. BALLANTINE: Your Honor, is that the portion on
13 cross?

14 THE COURT: Redirect or cross?

15 MR. BALLANTINE: That is what I guess I am asking.
16 Are we trying to get to the portion where Mr. DeBrotta was
17 redirecting her or the portion that was on the original cross?

18 THE COURT: Start with the cross, please.

19 THE COURT REPORTER: Recross by Ms. Anderson:

20 "Q. Didn't you threaten to file a false rape charge
21 against Tim Jones in February of 2012?

22 "A. That was at the direction of Mr. Furando. He was
23 the one on speakerphone.

24 "Q. My question was, didn't you make the threat?

25 "A. I made the threat in a text message to Craig Ducey

1 after I had returned back from Indiana at the direction of Mr.
2 Furando.

3 "Q. And in that text message to Craig Ducey you said, 'I
4 will be filing' --

5 "MR. DeBROTA: Objection.

6 "THE COURT: Sustained.

7 "BY MS. ANDERSON:

8 "Q. The reason that you were making threats against Tim
9 Jones is because you were trying to collect money, right?"

10 THE COURT: Okay, that is fine. Mr. Ballantine, you
11 want to respond?

12 MR. BALLANTINE: Your Honor, I think -- during that
13 part of the testimony, she was asked whether she made any rape
14 threats, and she said that those threats were made while
15 Mr. Furando was on the telephone. Then counsel asked, "Did
16 you make any threats?" And then she said, "Yes." She started
17 answering about a different time frame, but I don't think she
18 denied making any threats.

19 THE COURT: Okay. I don't hear it as an
20 inconsistent statement.

21 MR. BALLANTINE: Yes.

22 THE COURT: So I will allow you -- although, in
23 asking this question, you probably corroborate Miss Pattison
24 because you are going to ask this witness did you hear threats
25 and he will say yes and that is as far as you can go.

1 MS. LORBIESKI ANDERSON: I can't ask did you hear
2 her cuss at Mr. Jones?

3 THE COURT: No.

4 MS. LORBIESKI ANDERSON: I can also not ask if you
5 heard her demanding money from Mr. Jones?

6 THE COURT: She didn't deny that she -- that she was
7 demanding money from Mr. Jones. She wasn't asked that
8 question on cross-examination. So whatever you would elicit
9 from this witness is not going to be inconsistent with
10 something she said. So you shouldn't ask that question
11 either.

12 MS. LORBIESKI ANDERSON: Okay. I can ask did you
13 hear Miss Pattison make threats?

14 THE COURT: Yes. You will need to establish
15 foundationally that he was present and able to overhear.

16 MS. LORBIESKI ANDERSON: I understand.

17 THE COURT: And threats is sort of nebulous, but ask
18 him what he heard, I guess.

19 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

20 THE COURT: Mr. Ballantine.

21 MR. BALLANTINE: Your Honor, if I may, I believe it
22 is Rule 608(b) also covers this. That Rule reads: "Except
23 for a criminal conviction under Rule 609, extrinsic evidence
24 is not admissible to prove specific instances of a witness's
25 conduct in order to attack or support the witness's character

1 for truthfulness," period. There is another sentence after
2 that, but I don't think the second sentence means -- takes
3 away from the first sentence, which is what I believe that
4 counsel is intending to introduce which is --

5 THE COURT: Right. I don't think it is even
6 impeachment.

7 MR. BALLANTINE: I agree, Your Honor.

8 THE COURT: Because it is not inconsistent.

9 MR. BALLANTINE: In which case I don't think that
10 she should be allowed to inquire of it at all. She is not
11 impeaching a witness who is on the stand, and Miss Pattison is
12 no longer here. And she -- and, in fact, the second sentence
13 under Rule 608(b) says, "But the Court may, on
14 cross-examination, allow them," meaning specific instances of
15 conduct, "to be inquired into, if they are probative of the
16 character for truthfulness or untruthfulness of the witness or
17 another witness, whose character the witness being
18 cross-examined has testified about."

19 She did that. She inquired of Miss Tracy about the false
20 rape threats. So that, I think, closes the book on this
21 testimony about or any testimony about this specific instance
22 of conduct being offered to prove whether or not Miss Tracy
23 has a character for untruthfulness. So I would also add the
24 Government's objection to this line of inquiry under Rule
25 608(b).

1 THE COURT: Is that your intention in offering this
2 evidence. You intend to impeach Miss Pattison with it?

3 MS. LORBIESKI ANDERSON: I think I intend to offer
4 the testimony; one, to impeach Miss Pattison; and two, it is
5 also an excited utterance.

6 THE COURT: Well, no. Those aren't parallel. I
7 mean, those are -- you have got two different rules that are
8 the avenues, but I am asking you what your purpose is. There
9 is no purpose in an excited utterance if it doesn't serve some
10 substantive purpose. Is your purpose to impeach?

11 MS. LORBIESKI ANDERSON: Yes, Your Honor.

12 THE COURT: Well, then, I am going to exclude it
13 because it doesn't impeach. It is not appropriate under 608.
14 It is not appropriate under 613, and it is certainly not under
15 806. So no, you may not do that. Exclude all questions on
16 that matter.

17 MS. LORBIESKI ANDERSON: Are we bringing back the
18 jury now, Your Honor?

19 THE COURT: Who is your witness?

20 MR. DeBROTA: One scheduling thing so the Court is
21 aware. My next witness is Ashley Player who will testify, she
22 is one of our experts; and after that is Craig Ducey. Your
23 colleague --

24 THE COURT REPORTER: I'm sorry --

25 MR. DeBROTA: This can be off record, really, it is

1 just a timing issue.

2 THE COURT: Well, wait. The other side needs to
3 hear what you are telling me.

4 MR. DeBROTA: This has to do with Mr. Minch's
5 schedule. Mr. Minch is the attorney for Craig Ducey. He is
6 in the building. He has been waiting to testify. We thought
7 he might get on earlier, and he -- it might not matter, but
8 Mr. Minch is in a sentencing hearing with Judge Young.

9 THE COURT: This is all hypothetical scheduling?

10 MR. DeBROTA: Agreed.

11 THE COURT: Let's just roll it out and see how we
12 are doing. I can't tie up every loose end, neither can you.
13 So we will do the best we can. Call the witness, call the
14 jury.

15 Mr. McKee, come back to the stand, would you, please,
16 sir? Your testimony has gotten sort of disrupted today. You
17 are a flexible guy.

18 THE WITNESS: Not too flexible.

19 THE COURT: It sounds like something your wife would
20 say.

21 AFTER RECESS

22 (Jury in, 3:56 p.m.)

23 THE COURT: Thank you for your patience, ladies and
24 gentlemen. We did the work we needed to do, and we are ready
25 to resume the questioning of Mr. McKee. So cross-examination

1 may continue.

2 MS. LORBIESKI ANDERSON: Thank you, Your Honor.

3 BY MS. LORBIESKI ANDERSON:

4 Q Mr. McKee, during the time that you worked at e-biofuels,
5 did you ever use the term "off-spec"?

6 A Yeah, that is what they said the product was coming in
7 that we was unloading.

8 Q Who said that?

9 A Chad Ducey said that.

10 Q And what is your understanding of what off-spec means?

11 A My understanding, off-spec would be biodiesel that fails
12 one of several ASTM or whatever the -- the
13 guidelines -- moisture or something is wrong with it.

14 Q So it is your understanding that off-spec biodiesel was
15 biodiesel that failed a regulatory guideline, for example, by
16 having too much water in it; is that correct?

17 A Yes, yes.

18 Q Okay. And is it your understanding -- that that off-spec
19 biodiesel could then be fixed so that it would be within the
20 guidelines?

21 A It could.

22 Q And then once the biodiesel that was off-spec was fixed,
23 you could attach a RIN to it?

24 MR. BALLANTINE: Objection, Your Honor, calls for a
25 legal conclusion.

1 THE COURT: Sustained.

2 BY MS. LORBIESKI ANDERSON:

3 Q You never thought there was anything illegal
4 about -- e-biofuels' use of off-spec product, correct?

5 A No.

6 MS. LORBIESKI ANDERSON: Pass the witness.

7 THE COURT: Redirect?

8 MR. BALLANTINE: Thank you, Your Honor.

9 **REDIRECT EXAMINATION**

10 BY MR. BALLANTINE:

11 Q Mr. McKee, you were asked some questions about when you
12 started at e-biofuels and how long it took you to be able to
13 tell the difference between a truck that was coming in
14 with -- I guess leaving with biodiesel on it and a truck that
15 was coming in with feedstock on it?

16 A Right.

17 Q Had you ever worked at a biodiesel company before?

18 A No.

19 Q Had you owned a biodiesel business?

20 A Am I what?

21 Q Have you owned a biodiesel business?

22 A No, no.

23 Q Are you an engineer?

24 A No.

25 Q You were asked some questions about the steps taken

1 during the period when biodiesel was coming into the plant and
2 going back out as biodiesel?

3 A Correct.

4 Q And would you repeat those steps for me, please?

5 A When the biodiesel comes in?

6 Q And then goes back out again as biodiesel, yes.

7 A The biodiesel would come in on a truck, hook up or get a
8 sample taken from it, get it tested in the lab, hook up a
9 hose, turn on the pumps. The pumps would pump it through the
10 filter into a tank, into a storage tank. Then when that gets
11 so full, that tank would be transferred over into the load-out
12 tanks. Then from there on the load-out tanks, a pump would
13 turn on. It would go through another set of filters and go
14 into the finished truck ready to be delivered.

15 Q And what was that process known as at e-biofuels, if
16 anything?

17 A Just loading and unloading.

18 Q Counsel used the term "reprocessing." Did anybody at
19 e-biofuels call that "reprocessing"?

20 A No.

21 Q Was there anything -- was -- is filtering when a tanker
22 truck is loaded or unloaded a regular part of operating a
23 facility like this?

24 A We filtered stuff coming in and out as, as it is run
25 through a fine micron filter.

1 Q Is that the case for raw feedstock as well?

2 A No. Raw feedstock went through a centrifuge, but when
3 stuff is coming off a truck it is filtered. It is filtered.
4 The raw feedstock was on one side of the building, and it had
5 its pump set up for that and a filter system for it which is a
6 harder screened filtering product.

7 Q What is your understanding of the purpose of filtering?

8 A On the choice white grease --

9 Q Oh, I am sorry. I am asking specifically the purpose of
10 filtering when the biodiesel is coming off of a truck.

11 A I just imagine we just filter it just to filter it. I
12 mean, just to catch anything that might be hanging around
13 inside the truck or debris or buildup or soap or whatever.

14 Q And the purpose of filtering stuff when it goes
15 into -- an outgoing truck?

16 A Same, same purpose, just so if there is something in a
17 tank, or it is just to catch bigger product.

18 Q Did the filtering have anything at all to do with lab
19 results?

20 A No.

21 Q Would you change the filters based on the lab results?

22 A No.

23 Q You testified about phantom loads earlier?

24 A Uh-huh, yes.

25 Q Did the e-biofuels facility have any, any control over

1 what happened during a phantom load, a ghost load?

2 MS. LORBIESKI ANDERSON: Objection. Outside the
3 scope of the cross.

4 THE COURT: Sustained. I don't remember anything
5 about phantom loads on cross-examination.

6 MR. BALLANTINE: Proffer for the Court, counsel
7 suggesting that there was processing or reprocessing going on
8 at the e-biofuels' facility through the loading and unloading
9 of these trucks. That was the purpose of my question.

10 THE COURT: So if you tie it to that, then I will
11 permit it. The phantom loads need to be tied to that.

12 BY MR. BALLANTINE:

13 Q Did phantom loads ever come to the facility?

14 MS. LORBIESKI ANDERSON: Objection. Outside the
15 scope of the cross.

16 THE COURT: Overruled, overruled.

17 THE WITNESS: No.

18 BY MR. BALLANTINE:

19 Q So whatever filtering took place at the facility would
20 not take place for a phantom load; is that correct?

21 A As far as I know, correct.

22 Q Well, it couldn't; isn't that true?

23 A Well, it couldn't at our facility, correct.

24 Q Thank you. During the period that the facility was not
25 producing biodiesel and the biodiesel was coming out and going

1 back out as biodiesel and when phantom loads were going
2 on -- well, actually specifically focusing on the period when
3 there was biodiesel coming in the facility and going back out
4 again, were the process tanks, the tanks that were normally
5 used for processing with P1 and P2 used to store biodiesel?

6 A Yes.

7 MS. LORBIESKI ANDERSON: Objection. Outside the
8 scope.

9 THE COURT: Wait a minute, wait a minute. Were used
10 what?

11 MR. BALLANTINE: To store biodiesel.

12 THE COURT: No, he can answer that question.

13 THE WITNESS: Yes.

14 BY MR. BALLANTINE:

15 Q Did that make it impossible during that period of time to
16 run P1 and P2 as they were designed?

17 A The way they were designed, yes, because we, we had two
18 designated AG tanks, Tank 5 and Tank 6. Those were to run the
19 system. We cleaned out one tank, and Tank 6 for the fuel that
20 was coming in for more storage.

21 Q Did you ultimately clean out the other tank as well?

22 A No. Tank 5 was left alone.

23 Q Would that impact -- having that one tank unavailable to
24 the process, would that impact the throughput that was
25 available with that process?

1 A Yeah, yes.

2 Q I take it it wouldn't --

3 A It -- the Tank 5, that was a 30,000-gallon tank. We took
4 Tank 6 and cleaned it out, so that was 30,000 gallons of
5 storage or whatever.

6 Q So that reduced the ability to operate the plant as
7 designed?

8 A In half.

9 Q Is it your testimony that the biodiesel that came into
10 the plant and went back out of the plant was not processed at
11 all?

12 A Filtered only.

13 Q But was it processed other than that?

14 A No.

15 Q You testified at the beginning of your testimony about
16 various jobs that you held at the facility?

17 A Yes.

18 Q Based on that -- and then you were asked some questions
19 about when you were at the facility and what you knew about
20 what different shifts could accomplish?

21 A Uh-huh.

22 Q Based on your jobs as a shift supervisor or a manager,
23 did you have experience in what different shifts could
24 accomplish?

25 MS. LORBIESKI ANDERSON: Objection. I don't believe

1 I asked any questions about this on cross. I think this is
2 also outside of the scope of the cross.

3 THE COURT: I don't recall this either, so I will
4 sustain the objection.

5 MR. BALLANTINE: Counsel asked some questions about
6 when he was -- at the facility, you asked if he was, you know,
7 working the night shift. I took those to be questions going
8 to the question, going to the issue of whether this witness
9 would know what the capacity of the plant was.

10 THE COURT: Okay. So if you tie it to that, if you
11 say, given your work schedule or whatever.

12 MR. BALLANTINE: Yes.

13 THE COURT: You may ask that question.

14 MR. BALLANTINE: Thank you, Your Honor.

15 BY MR. BALLANTINE:

16 Q Given your work schedule, given -- I know that you don't
17 know directly what is going on at the plant when you are not
18 working there.

19 A Correct.

20 Q That is why I was asking during periods of time when you
21 were shift supervisor or a manager.

22 MR. BALLANTINE: That was the nature of my question,
23 Your Honor. If I may --

24 THE COURT: You may proceed.

25

1 BY MR. BALLANTINE:

2 Q Were you aware of what other shifts were doing?

3 A Yes.

4 Q And is that part of what forms the basis for your
5 testimony earlier today that the facility going -- could
6 produce about 24,000 gallons a day?

7 A Yes, because that is at the end of each shift you wrote
8 down how much that shift did, so it was easy to tell.

9 Q What is a skid?

10 A A skid?

11 Q Yes.

12 A That is just the section of the process that we determine
13 it to be.

14 Q So it is a name that -- is there anything physical
15 associated with a skid, or is it a geographic location? I
16 guess I --

17 A It is just location, like on P2 it was Skid 1, Skid 2,
18 Skid 3, Skid 4, Skid 5.

19 Q I guess -- does that mean it is sort of a unit of the
20 process?

21 A Yes.

22 Q So would it ever be possible to describe all of P1 as a
23 single skid?

24 A No.

25 Q It is made up of smaller pieces that are the skids?

1 A That was -- that was labeled on the machine what skid
2 that was. That was the sections of that machine.

3 Q Were they -- were they physically tied together with
4 metal or something, or that was just the label?

5 A Just the labeling. It was -- it was a continuous flow
6 system. I mean, everything was piped into one thing to
7 another. They was just separated into sections, just called
8 them skids.

9 Q Separated by function?

10 A Yes, function.

11 Q So was there a centrifuge function, was that one of the
12 skids?

13 A That was not a skid. We added that on later, but there
14 was a centrifuge onto the -- after the wash station before it
15 went to the dry.

16 Q Remember what each of the skids did off the top of your
17 head?

18 A Yes.

19 Q Could you go through them for P2, please?

20 A P2 on Skid 1, that is the reactor skid. That is where
21 the ag oil would come in and get --

22 THE COURT: Turn towards the jury, to tell them.

23 THE WITNESS: Skid 1 was the reactor skid. It is
24 where the raw ag oil and methanol and sodium methylate would
25 come in, get mixed together, make its reaction, and from there

1 it was piped, connected to a Skid 2, which was a long tank
2 that was about a 6,000-gallon tank. And that is where it
3 settled at for your byproduct of glycerin and biodiesel. It
4 would give it time in that station to separate. So you have
5 glycerin at the bottom, biodiesel at the top.

6 Skid 3 took the product from Skid 2. One side of it the
7 biodiesel would go in from the top, then the other side the
8 glycerin would go in, and that would be the flash station.
9 That is where we would super heat the product, both the
10 glycerin and the biodiesel to flash out the methanol that we
11 put into it and reclaim the methanol.

12 From there it would go to Skid 7, which is the wash
13 station. It was a big tank. The product would go in, get
14 washed with water to get all of the, the glycerin out of the
15 system that is left over.

16 From the wash station, we would go to Skid 4 -- no, it
17 would go to the centrifuge to spin out any debris, any soap,
18 moisture that it could before it goes to the dryer, which is
19 Skid 4, and that is the final process. It would get heated up
20 to 240 degrees, get all the moisture out, there would be a
21 vacuum pump sucking out moisture. Product would be pumped out
22 of that tank, through a set of filters, and then to a finished
23 tank. So when that tank would be filled up, we would switch
24 tanks, and that tank could be tested for a finished product to
25 move over to a load-out tank.

1 BY MR. BALLANTINE:

2 Q So during the period the biodiesel was coming in the
3 facility and going back out as biodiesel, every single one of
4 those functions was skipped other than filtering at the
5 beginning and filtering at the end as it came off of a truck
6 and went back onto a truck; is that right?

7 A Yes. It was on the opposite side of the plant.

8 MR. BALLANTINE: If I may, Your Honor, I will just
9 inquire with my co-counsel.

10 THE COURT: Yes, you may.

11 MR. BALLANTINE: Thank you, Your Honor.

12 BY MR. BALLANTINE:

13 Q My last question for you, Mr. McKee is, counsel asked you
14 some questions about, about off-spec, the material that was,
15 people called off-spec at the facility?

16 A Correct.

17 Q You had an understanding there was such a thing as
18 off-spec biodiesel, I think you testified to that it was
19 biodiesel that failed, I think you said, ASTM guidelines or
20 something along those lines?

21 A Yes.

22 Q You understand the ASTM to be kind of an industry
23 standard?

24 A Correct.

25 Q Is there a specific one for B100 biodiesel?

1 A Yes.

2 Q Okay. So your understanding was that off-spec biodiesel
3 was something that failed that standard?

4 A Correct.

5 Q And you testified that -- I believe you testified on
6 direct that 99 percent of the biodiesel that came into the
7 facility was, met that standard?

8 A Correct.

9 Q Is that right?

10 So can you estimate how many occasions you pulled aside
11 biodiesel that came into the facility -- again, during the
12 period, during this period we have been talking about from,
13 say after 2009 through the end, beginning of June of 2011, how
14 many times did you pull aside a tank load of biodiesel because
15 it didn't meet those specifications?

16 A Under five.

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

18 THE COURT: Recross?

19 MS. LORBIESKI ANDERSON: No questions, Your Honor.

20 THE COURT: Thank you very much, sir. You may step
21 down, Mr. McKee. Is the witness excused?

22 MR. BALLANTINE: Yes, Your Honor.

23 MS. ANDERSON: Yes, Your Honor.

24 THE COURT: You are excused, sir, from your
25 subpoena. Thank you again very much.

1 (Witness excused.)

2 MR. DeBROTA: The Government calls Ashley Player,
3 Your Honor. Ashley Player.

4 **MARTHA ASHLEY PLAYER, GOVERNMENT'S WITNESS, SWORN**

5 **DIRECT EXAMINATION**

6 BY MR. DeBROTA:

7 Q Can you spell your name for us, please?

8 A Martha Ashley Player, M-A-R-T-H-A, A-S-H-L-E-Y,
9 P-L-A-Y-E-R.

10 Q Can you tell the jury what you do for a living?

11 A I am a professional engineer, and I manage the quality
12 assurance plan or QAP or QAP program at Weaver where we audit
13 renewable fuel producers and verify the RINs that they are
14 generating.

15 Q And can you tell us what your educational background that
16 led to you being a professional engineer?

17 A I graduated from Clemson University with a bachelor's in
18 chemical and biomolecular engineering, and then I worked
19 full-time at Frazier Barnes & Associates for about five years.
20 And then I moved to Weaver & Tidwell where I have been for the
21 past two and a half years.

22 While at Frazier Barnes & Associates I worked under
23 professional engineers and attained the necessary experience
24 that is required to apply for and take the test to get your
25 professional engineer certification.

1 Q Is that a difficult test?

2 A Yes.

3 Q How long did it take you to study to get your
4 professional engineer license?

5 A It requires four years of work under a professional
6 engineer. It also requires passing the fundamentals of
7 engineering exam first. I passed that in my senior year of
8 college, and then at the end of the four years you can apply
9 to take the PE exam and I studied for weeks for that.

10 Q Does that lead to, if you pass the exam, being licensed
11 in certain states to do engineering work?

12 A Correct. I am licensed in certain states, and I can
13 apply to be licensed in other states and have my license
14 transferred by comity just by having references sent in.

15 Q Comity meaning the states get along with each other, not
16 that anything is funny. That is spelled differently, right?

17 A Correct.

18 Q With regard to that, when you got your job at Frazier
19 Barnes, why don't you describe what Frazier Barnes was as a
20 business?

21 A Frazier Barnes was a biofuels consulting firm. They
22 provided technical consulting services and also business
23 management consulting services to the renewable fuel and
24 oilseed processing industries.

25 Q And did you work with some other people there on various

1 projects?

2 A Yes, I did.

3 Q Who did you work with with regard to the project that's
4 going to matter here with regard to e-biofuels?

5 A Gerald Sherfy and Billy Griffin.

6 Q Tell us who each of those is and what kind of background
7 and certification they might have.

8 A Gerald Sherfy had an MBA, and he worked on the financial
9 side of analyzing projects. And he prepared business plans
10 and conducted due diligence on financial records for
11 companies. Billy Griffin was a professional engineer. I
12 worked underneath him at the time, and he provided technical
13 consulting services.

14 Q With regard to the kind of work that you do today, have
15 you then been working in the regulatory field involving
16 engineering, and in particular, in the biodiesel industry?

17 A Yes.

18 Q And in the course of that, have you educated yourself on
19 the RIN program, renewable identification numbers?

20 A Yes.

21 Q How long have you worked on issues relating to the RIN
22 program?

23 A A little over six years.

24 Q And have you worked with a variety of different clients
25 in that capacity?

1 A Yes.

2 Q About how many different clients or projects have you
3 worked on dealing with RINs?

4 A About 100.

5 Q And does your work include working with potential clients
6 on their compliance with the RIN program?

7 A Yes.

8 Q What kind of topics do you discuss with those clients
9 relating to compliance with the RIN program?

10 A We discuss the feedstock types that they intend to use,
11 the production process used that they are using, and the
12 finished products that they are producing and how that fits
13 into the renewable fuels standards pathways, the combination
14 of those elements combined to form what EPA calls a "pathway."

15 Q In the course of that do you interact with the EPA as
16 well at various times?

17 A Yes.

18 Q That is one of the reasons people would hire you is to be
19 the mechanism to find out what the EPA might want them to do
20 or not do as far as what their pathway might be?

21 A Yes. That is a benefit.

22 Q Can people lawfully make RINs from choice white grease?

23 A Yes.

24 Q Can they also make that from soybean oil?

25 A Let me clarify that. I said they can make RINs on

1 biodiesel that is produced from choice white grease. You
2 can't make RINs on choice white grease.

3 Q Fair enough. If all you do is pick up choice white
4 grease from a slaughterhouse, you can't deliver that to a gas
5 station and claim a RIN, can you?

6 A Right.

7 Q You have to make it into something else?

8 A Yes.

9 Q To that point, if you had a big tank of choice white
10 grease, you can't put that in a truck and drive down a road
11 too effectively, can you?

12 A No.

13 Q That wouldn't be good for an engine?

14 A Generally, no.

15 Q What people do is they get choice white grease, and they
16 make it into biodiesel that people sell at gas stations, for
17 example?

18 A Yes.

19 Q If they do that in the right way they can be the producer
20 of that under the rules, and then they get a RIN or 1.5 RINs.
21 They can generate each gallon of that that they make; is that
22 right?

23 A For each gallon of qualifying biodiesel that is in spec
24 they can generate 1.15 RINs.

25 Q That is with regard to choice white grease. Is the same

1 thing true with regard to soybean oil? You get virgin soybean
2 oil and you process it into biodiesel, you do all that, you
3 can potentially create a RIN?

4 A Correct.

5 Q Now, and you assist lots of different companies in
6 understanding the process, for example, with regard to those
7 two different pathways; is that right?

8 A That's right.

9 Q In the case of e-biofuels, where there is two of the
10 pathways that you ended up discussing with people at
11 e-biofuels?

12 A Yes.

13 Q There was also a pathway you discussed with people at
14 e-biofuels that they said they were using that was different
15 than those two pathways; is that right?

16 A That's right.

17 Q And was that a pathway where they said they were
18 processing off-spec biodiesel into biodiesel?

19 A Yes.

20 Q And that pathway is different than the other two we
21 talked about; is that correct?

22 A That's correct.

23 Q Tell how that is different.

24 A That is different because, as I said, there is a
25 combination of feedstock production process and finished

1 product that combines to make what EPA calls a "pathway" for a
2 given producer of renewable fuel. That producer of renewable
3 fuel has to have a facility, and the EPA defines a facility as
4 taking in feedstock and being in control of the feedstock that
5 is qualifying through the production process and all the way
6 until they make the finished product.

7 And so, with those definitions in mind, bringing in an
8 off-spec material instead of, say, soybean oil or choice white
9 grease would cause that to be considered to be your feedstock.
10 And that is not listed in the pathways table as a feedstock.

11 Q So you could look up in the pathway table soybean oil as
12 a feedstock?

13 A Yes.

14 Q You can look up choice white grease as a feedstock?

15 A It is called biogenic waste, oils, fats, or grease.

16 Q For people like you who know how to look that up, you can
17 look it up; is that right?

18 A Yes.

19 Q It is a well-known fact in the biodiesel industry you can
20 make RINs out of choice white grease, isn't it?

21 A Yes.

22 Q You can't look up off-spec biodiesel, can you, as a
23 pathway, because there isn't one?

24 A Correct.

25 Q It is unlawful to make a RIN out of off-spec biodiesel?

1 A Correct.

2 Q There is no exceptions to that rule, is there?

3 A No.

4 Q And that is because it has -- you have to do everything
5 at one place and have a facility with a facility ID number,
6 and if you did it at two different places, that wouldn't be
7 true, right?

8 A Right.

9 Q So there is no such thing as RIN eligible off-spec
10 biodiesel, and there never has been?

11 A Right.

12 Q There is no more to that, am I correct?

13 A Correct.

14 Q Now, when you went -- at some point you got involved in a
15 project with Frazier Barnes at the e-bio facility; is that
16 right?

17 A That's right.

18 Q Now, who is the client that caused you to go do work
19 there?

20 A Platinum Partners.

21 Q Not e-biofuels?

22 A No.

23 Q Okay. Who is Platinum Partners?

24 A Platinum Partners is an investment firm. They were
25 looking at investing in e-biofuels and Imperial, and they

1 hired us to conduct due diligence on the facility.

2 Q What is due diligence?

3 A Making sure that everything they are doing is correctly
4 reflected in the understanding that Platinum has of what they
5 are doing.

6 Q Okay. So the scope of work, was it set by Platinum then?

7 A Yes.

8 Q And they gave you a series of things they wanted you to
9 check --

10 A Correct.

11 Q -- and your colleagues to check? And in particular, part
12 of your job was to look at the RIN aspect of it; is that
13 right?

14 A Not from the beginning.

15 Q Okay. What was your job at the beginning in that
16 project?

17 A To look at the facility from an engineering standpoint
18 and figure out what their technical capabilities were to
19 process feedstock and make finished product at the rates that
20 they were claiming.

21 Q Okay. If you had gone to the facility and you determined
22 that they could make biodiesel at the rates they were
23 claiming, that would be a good thing?

24 A Yes.

25 Q And if you went and you determined that they couldn't

1 make that much, they couldn't meet that claimed production
2 level, that would be bad?

3 A Yes.

4 Q And the person that is asking you that question is
5 Platinum Partners, who is a potential investor; is that right?

6 A That's right.

7 Q And your job is to report your conclusion one way or the
8 other to the investor, Platinum Partners, who might buy into
9 this investment with Imperial; is that correct?

10 MR. TIERNEY: Objection, leading.

11 THE COURT: Overruled.

12 BY MR. DeBROTA:

13 Q Is that correct?

14 A Yes.

15 Q Okay. Now, who selected you personally to be involved in
16 this process?

17 A My boss at that time, Pete Moss.

18 Q Okay. And did it lead to a trip you made out to the
19 e-biofuels facility in Middletown, Indiana?

20 A Yes, it did.

21 Q And that was on one particular day; is that right?

22 A That's right.

23 Q Why don't you explain before you made the trip, did you
24 do some analysis and some paperwork to try to figure out what
25 you might want to look at that day?

1 A There was some analysis of some paperwork prior to that
2 point, but it was a rushed project, and so, there wasn't much
3 time to look at much supporting documentation before we
4 arrived on site.

5 Q Okay. With regard to this project, how large was it your
6 understanding the loan to be or the investment that Platinum
7 Partners was going to potentially make in Imperial Petroleum?

8 A It was around \$25 million.

9 Q Okay. So a large investment?

10 A A very large investment.

11 Q And when you went to the plant that day, who from Frazier
12 Barnes went with you?

13 A Gerald Sherfy and Billy Griffin.

14 Q Can you spell those for the court reporter?

15 A G-E-R-A-L-D, S-H-E-R-F-Y, and Billy Griffin, Billy,
16 B-I-L-L-Y, G-R-I-F-F-I-N.

17 Q So on the ride there that day, did you have any problems
18 that you would identify or worrying about in particular on the
19 way to the plant?

20 A On the way to the plant we didn't have large concerns.
21 We were, we were going to look into the expansion that they
22 had put in place to be able to increase their nameplate
23 capacity and run more biodiesel.

24 Q What is a nameplate capacity?

25 A A nameplate capacity is the rated volume throughput of a

1 plant, so a large plant has a very large nameplate capacity,
2 and it is usually for biodiesel in gallons per year. And for
3 this facility, the technology provider that had provided the
4 technology to the plant had rated it originally at 15 million
5 gallons per year. But they had been -- they told us that they
6 had been able to increase that capacity by about ten to
7 15 million gallons per year more than that.

8 Q So on your way to the plant, one of the questions in your
9 mind is how did they make that extra 10 to 15 million gallons
10 from a facility with a nameplate capacity of only
11 15 million gallons?

12 A Right.

13 Q Okay. So that was one question. Were there any other
14 specific questions that, as you went there that day, you were
15 trying to address?

16 A We had the scope of work in mind but no other major
17 concerns.

18 THE COURT: When was this trip, would you establish
19 that?

20 MR. DeBROTA: I will.

21 BY MR. DeBROTA:

22 Q Do you remember the date of this trip?

23 A August 4th of 2011.

24 Q Okay. And this is the e-biofuels' facility in
25 Middletown, Indiana; is that right?

1 A That's right.

2 Q Okay. So when you got to the plant there that day, and
3 let's just get this out of the way. You have not met the
4 Defendant, Mr. Wilson here, have you?

5 A No, I have not.

6 Q He is not anybody you met that day?

7 A No.

8 Q Did you meet someone named Chad Ducey?

9 A Yes.

10 Q And you had a number of conversations with him about the
11 technical aspects and so forth, production of e-biofuels?

12 A Correct.

13 Q Who else do you recall meeting that day in person?

14 A I met Gary Williky in person, and I also met Daniel Small
15 and David Steinberg with Platinum.

16 Q Okay. Did you meet Aaron Wilson?

17 A Yes, I did also meet Aaron Wilson.

18 Q And do you have an understanding whether he is related to
19 the Defendant or not, or do you know that?

20 A I believe he is his son.

21 Q Okay. You remember if you met Craig Ducey?

22 A I don't recall specifically meeting Craig.

23 Q When you got to the plant, did you tour the inside of the
24 production facility and see what kind of equipment they had?

25 A Yes.

1 Q Were your colleagues doing that kind of thing and looking
2 at other things around the same time?

3 A Yes, we split up.

4 Q If the course of your work, did you discover a fact that
5 caused you some concern relating to off-spec biodiesel?

6 A Yes. I discovered that they ran off-spec biodiesel.

7 Q Okay.

8 THE COURT: I am sorry, what? Would you say that
9 again? You discovered what?

10 MR. DeBROTA: That they might be running off-spec
11 biodiesel?

12 THE WITNESS: That they might by running off-spec
13 biodiesel.

14 BY MR. DeBROTA:

15 Q How did you get that suspicion?

16 A The operator who was giving me a tour of the facility
17 walked me over to an area that had tanks in it, and he said
18 that this is where they process the off-spec biodiesel that
19 they bring in.

20 Q Was that a concern for you?

21 A Yes.

22 Q That was a red flag?

23 A Yes.

24 Q Because there is no such thing as off-spec biodiesel that
25 can make RINs?

1 A Yes.

2 Q So that is a problem, regardless of what the equipment is
3 doing; is that correct?

4 MR. TIERNEY: Objection.

5 THE COURT: Sustained. Leading.

6 BY MR. DeBROTA:

7 Q In your analysis of this facility, did you identify that
8 as a significant problem?

9 A Yes.

10 Q Okay. And why is it a significant problem?

11 A It is a significant problem because of the pathway
12 requirements that I talked about earlier. Off-spec biodiesel
13 is not a feedstock that is in the pathways table, and you must
14 have a complete pathway at your facility in order to generate
15 RINs on your finished product.

16 Q Okay. So after you communicated that day with the people
17 you have talked about, did you then on the drive leaving the
18 facility talk to your coworkers about the problem you had
19 identified?

20 A Yes.

21 Q And what was your level of concern on the drive away from
22 the facility about their creating RINs with off-spec
23 biodiesel?

24 MR. TIERNEY: Objection.

25 THE COURT: What is the objection?

1 MR. TIERNEY: Not relevant. She is sharing
2 concerns.

3 THE COURT: Overruled, overruled.

4 BY MR. DeBROTA:

5 Q What was your level of concern with that information as
6 you were driving away from the facility?

7 A On a scale of?

8 Q One to 10, 1 meaning not concern; 10 meaning oh, my God,
9 I know for sure they are committing felonies?

10 A Okay. I would say it was an eight.

11 Q Okay. So did you then prepare some communication for
12 your client, which was Frazier Barnes, about that to sort of
13 tell them what issues they need to follow up on based on this
14 concern?

15 A We prepared a report at Frazier Barnes for the client,
16 Platinum Partners, that had pros and cons.

17 MR. TIERNEY: Objection.

18 THE COURT: What is the grounds for the objection?

19 MR. TIERNEY: It is hearsay.

20 THE COURT: She is not reading -- she is saying what
21 she did, her project, so she can testify to that.

22 MR. TIERNEY: I believe she is about to identify
23 pros and cons in the report.

24 THE COURT: That is not the question that is
25 pending. The question is, what did you do? She said she

1 prepared a report with pros and cons, so the objection is
2 overruled.

3 BY MR. DeBROTA:

4 Q Why don't you explain what type of things you put in your
5 report that you were preparing, and just to orient, I am later
6 going to ask you about a follow-on phone call that you are
7 going to have. But this is in the information you are going
8 to give to the next step to the folks at Platinum about your
9 concerns.

10 You understand what I am asking you here, that time
11 period?

12 THE COURT: I am not sure I do.

13 MR. DeBROTA: I will rephrase, Your Honor.

14 THE COURT: Okay.

15 BY MR. DeBROTA:

16 Q Just to be clear, your job here is due diligence to give
17 information to an investor; is that correct?

18 A Correct.

19 Q So they can make an investment decision?

20 A Yes.

21 Q What you are doing is giving information that you get
22 from Imperial Petroleum, e-biofuels personnel, in part; is
23 that right?

24 A That's right.

25 Q So you are reporting that forward?

1 A Yes.

2 Q So if someone, hypothetically, gives you false
3 information and you don't detect that and if it gets forwarded
4 to Imperial, it is being forwarded to one of the investors of
5 Imperial -- one of the potential investors in Imperial -- time
6 out. If you prepare a summary of information that you are
7 getting that turns out to be false, even if you don't know
8 that, and you forward it for due diligence to your client, the
9 potential investor and they rely upon it, that could be a
10 problem, right?

11 A Yes.

12 Q So the goal is to package the information, make sure it
13 is true, and then move it to your client, Platinum Partners,
14 so they can make the investment decision; is that right?

15 A That's right.

16 Q And in the course of that, you prepared an e-mail that
17 you sent to David Steinberg at Platinum talking about what you
18 will do after that tour and what your concerns were and so
19 forth; is that right?

20 A That's right.

21 Q And did that include pros and cons, good things and bad
22 things about aspects of the investment?

23 MR. TIERNEY: Objection, Your Honor.

24 THE COURT: Overruled. I ruled on that previously,
25 Counsel.

1 THE WITNESS: Yes.

2 THE COURT: That is a general description, it is not
3 hearsay.

4 BY MR. DeBROTA:

5 Q Okay. And have you -- let me show you what is marked for
6 identification as Exhibit 67, which is not in evidence, Your
7 Honor. You recognize that?

8 A Yes.

9 Q What is the first page of it?

10 A The first page of it is an e-mail that I sent to
11 Imperial, David Steinberg, and Daniel Small.

12 Q And what is the date?

13 A It is August 5, 2011.

14 Q And is this the transmittal e-mail for them, the
15 information which follows in the next few pages?

16 A Yes. It -- there was an attachment, it is an agenda for
17 a conference call.

18 Q And then in addition to that, there is some detail that
19 you created that talks about what you experienced out at
20 e-biofuels; is that right?

21 A Yes.

22 Q Now, when you were at the e-biofuels facility, did you
23 receive some information from Chad Ducey about what he said
24 was happening at the plant in terms of how it produced
25 biodiesel before that time?

1 A Yes.

2 Q And as he was saying that to you, did you take notes and
3 draw diagrams as he was talking to you?

4 A Yes.

5 Q And is it the case that the nicely typed-up and drawn
6 version of that is the basis of what you then had forwarded
7 shortly thereafter to David Steinberg so he could see what you
8 heard that day and what you were understanding about the
9 various production lines there?

10 MR. TIERNEY: Objection, Your Honor.

11 THE COURT: Sustained, leading.

12 MR. DeBROTA: Well, I'll just ask her.

13 BY MR. DeBROTA:

14 Q How did you create this document then that you sent to
15 Mr. Steinberg?

16 A I created this document from my notes that I took on the
17 date of the site visit.

18 Q Were they contemporaneous notes? You were taking while
19 you were hearing what they were telling you?

20 A Yes.

21 Q Including Chad Ducey?

22 A Yes. I was in a meeting with Chad Ducey and Billy
23 Griffin while taking the notes.

24 Q Okay. And this is something that you then provided to a
25 summary of that and the typed-up version of that to

1 Mr. Steinberg so that he could understand what your questions
2 were relative to the investment that he was considering on
3 behalf of Platinum Partners?

4 Yes.

5 MR. DeBROTA: I move to admit Exhibit 67, Your
6 Honor.

7 THE COURT: Any objection?

8 MR. TIERNEY: Yes, Your Honor.

9 THE COURT: What is your objection?

10 MR. TIERNEY: My objection is hearsay. This is a
11 document that went from Ashley Player to David Steinberg. It
12 never got to Mr. Wilson.

13 THE COURT: She prepared it, and so, it is not
14 hearsay as to this witness. She prepared it. So that
15 objection is not well-taken. Exhibit 67 is admitted.

16 *(Government's Exhibit 67 was*
17 *received in evidence.)*

18 BY MR. DeBROTA:

19 Q Okay. So let's show you the first page of this, if we
20 could go to the document cam, please.

21 Okay. So you said this is an e-mail from you, and let's
22 just identify who the other people are here. Who is David
23 Steinberg?

24 A He is with Platinum.

25 Q That is the investor on behalf of the work you were

1 doing?

2 A That is the investor, yes.

3 Q Daniel Small works with him at Platinum?

4 A Yes.

5 Q Who is Gerald Sherfy, Warren Barnes, and Billy Griffin?

6 A Colleagues at Frazier Barnes.

7 Q You sent this on August 5, which is the day after your
8 trip to Middletown; is that right?

9 A That's right.

10 Q Now, why is this the agenda for a call, what is that
11 about?

12 A We were scheduled to have a follow-up call with Platinum
13 to discuss the results of our site visit at 11:30 Central Time
14 that day.

15 Q So the second page of this is the agenda for that call as
16 you put it together so that you could make sure you covered
17 everything for your client; is that right?

18 A That's right.

19 Q So the first part of this is, has a diagram here. Did
20 you prepare this diagram?

21 A Yes.

22 Q And was it based on the information that you were
23 provided that day by Chad Ducey?

24 A Yes.

25 Q Do you know if Aaron Wilson also provided some of the

1 information that formed the basis of this?

2 A I don't think -- no, no.

3 Q So looking -- it says in number one, overview of
4 e-biofuels' facility; is that right?

5 A That's right.

6 Q And you testified earlier that you were trying to figure
7 out if you could determine how they made 25 million gallons of
8 biodiesel from a facility with a nameplate capacity of
9 15 million gallons; you remember that?

10 A Yes.

11 Q Okay. What is shown here is a number of different
12 pathways or ways in which they explained to you how they did
13 that; is that right?

14 MR. TIERNEY: Objection.

15 THE COURT: What is the objection, Counsel?

16 MR. TIERNEY: Leading.

17 THE COURT: Sustained.

18 MR. DeBROTA: Okay.

19 BY MR. DeBROTA:

20 Q What does letter A here mean?

21 A A means that it is a lower quality feedstock.

22 Q Okay.

23 A For the production of biodiesel that could be run through
24 the 10-million-gallon-per-year unit train that they had at the
25 facility.

1 Q And is that unit train this part of the exhibit here on
2 the left?

3 A Yes.

4 Q Okay. What is B?

5 A B is an alternative to A that could also be run through
6 that train, and it is -- it is marked as RBD soy, but in the
7 industry we say soybean oil to signify that it is an easy
8 feedstock to process into biodiesel.

9 Q So when you were at the plant that day, were you told
10 that this production line, which can produce
11 10 million gallons per year can either take soybean oil, B, or
12 some other product that is A?

13 A We can call A waste grease.

14 Q So just, so we are clear, neither of those two things is
15 off-spec biodiesel, is it?

16 A No, it is not.

17 Q Now, with regard to this production at the facility, did
18 they tell you they were actually doing that?

19 MR. TIERNEY: Objection as to "they."

20 THE COURT: Sustained.

21 BY MR. DeBROTA:

22 Q You said you were talking to Chad Ducey, right?

23 A Correct.

24 Q Do you remember if in this part of the description
25 anybody else told you any of this information?

1 A No. It was with Chad Ducey.

2 Q Okay. So all my questions then are about what Chad Ducey
3 told you, okay?

4 A Okay.

5 Q Did he tell you then that Line A, the -- this line was
6 getting any off-spec biodiesel?

7 A No.

8 Q Didn't say that?

9 A No, he did not.

10 Q Did he tell you that line was actually running and had
11 been running for some time in the past?

12 A Yes.

13 Q In fact, didn't he tell you it ran and produced
14 10 million gallons of biodiesel?

15 MR. TIERNEY: Objection, leading.

16 THE COURT: Sustained.

17 BY MR. DeBROTA:

18 Q How many gallons of biodiesel did he tell you it made a
19 year?

20 A Ten million gallons per year.

21 Q Okay. That would require feedstock to be purchased and
22 so forth, right?

23 A Yes.

24 Q What kind of feedstock?

25 A For, for that line it could be Option A, which is the

1 lower cost feedstock or waste grease or B, which is higher
2 cost feedstock or soybean oil.

3 Q So if it turns out the jury has heard information that in
4 the period between January 1, 2010, to your visit in August 4,
5 2011, they didn't buy anything like that much feedstock. You
6 weren't told that that day?

7 A No, I was not.

8 Q You were told the opposite, that they had bought all that
9 feedstock?

10 MR. TIERNEY: Objection, leading.

11 THE COURT: Sustained.

12 BY MR. DeBROTA:

13 Q What were you told that day about the feedstock that was
14 purchased to produce that line that produced
15 10 million gallons?

16 A That they would have purchased that much feedstock, yes.

17 Q Okay. Now, if you ran that production line, would it
18 produce glycerin?

19 A Yes.

20 Q Would you have to buy methanol?

21 A Yes.

22 Q What else would you have to buy to run that line to do
23 that 10 million gallons?

24 A A catalyst for the reaction, which is typically sodium
25 methyrate.

1 Q Okay. And if you don't buy those things and you don't
2 run the line, you don't have any feedstock, you won't have any
3 glycerin?

4 MR. TIERNEY: Objection, leading.

5 THE COURT: Overruled.

6 BY MR. DeBROTA:

7 Q Is that true? If you don't run the line and all -- you
8 don't buy the chemicals?

9 A Uh-huh.

10 Q You don't have the feedstock, you can't get glycerin from
11 nothing; is that right?

12 A That's right.

13 Q Okay. So is -- so what does the production of glycerin
14 or lack of production tell you about whether that kind of
15 equipment is running or not as an expert in the field?

16 A If, if no glycerin is being produced, then the plant is
17 not running.

18 Q And if -- in that event it can't be producing a RIN
19 through a process, a pathway that is registered in a specific
20 way, can it?

21 A No, it cannot.

22 Q Now, with regard to the second line, it is smaller, isn't
23 it?

24 A Yes. It is a 5-million-gallon-per-year line from the
25 same technology provider.

1 Q And what is depicted as the type of feedstock or, in C?

2 A The same feedstock that would be run through Option B
3 through the larger line could also be run through Option C in
4 the smaller line.

5 Q Okay. And what is D?

6 A D, Chad explained that they -- they were running acidic
7 biodiesel -- one of the specifications for biodiesel is acid
8 member. And so, if you're off-spec on acid number, then you
9 are acidic biodiesel, and acidic biodiesel that is off-spec
10 cannot have RINs generated on it. And so, Chad said that they
11 were taking this material that other producers had made and
12 running it through that line to get the acid number down and
13 make it in-spec biodiesel.

14 Q Was that a concern for you when he said that?

15 A Yes.

16 Q But nevertheless, that is what he said explained that
17 5 million gallons; is that right?

18 A Yes.

19 Q So if you add the first two parts of this you still get
20 to 15; is that correct?

21 A That's correct.

22 Q What is depicted as E here?

23 A E, they explained, or Chad explained that they had
24 sources of off-spec biodiesel, not necessarily off-spec on
25 the acid number but off-spec on any number of other things,

1 and that they could bring it into the facility and filter it
2 or wash it with water or centrifuge it to clean it up and make
3 it in-spec biodiesel.

4 Q Okay. So if you add that amount, did Chad claim they had
5 done 15 million gallons of that?

6 A He -- he said 10 to 15.

7 Q Okay. So 10 million gallons of the first line, 5 million
8 of the next, and 10 to 15 of this?

9 A Uh-huh.

10 Q Which gives you 25 to 30 million gallons of clean
11 production that Chad said they actually had done --

12 MR. TIERNEY: Objection.

13 BY MR. DeBROTA:

14 Q -- the previous year?

15 THE COURT: Leading. Sustained.

16 BY MR. DeBROTA:

17 Q All right. Why don't you explain the mathematics just so
18 it is clear.

19 A Okay. So to get to the total production in a year, based
20 on the installed lines, which the solid lines were the
21 installed actual activities as explained to us, and the dotted
22 lines were planned expansion. So based on the solid line and
23 what was explained to us on the site visit, that would get
24 their total production for a year up to about 30 million
25 gallons her year.

1 Q And that was the claim that was made to you by Chad
2 Ducey?

3 A Yes.

4 Q Now, you have below that some information on some
5 conclusions you made about each of those ideas; is that right?

6 A That's right.

7 Q And I am going to direct your attention over here to
8 your -- the advantages that were supposed to exist for the
9 options of using this production line and using soybean oil in
10 it. Is that -- am I understanding that correctly?

11 A Yes, that's correct.

12 Q If I trace down here, what are some advantages to using
13 real soybean oil in that 5-million-gallon line?

14 A The advantages that we saw for that option were
15 sustainable feedstock because there is, there is a sustainable
16 supply of soybean oil that is already being made. That
17 feedstock has an approved pathway to generate RINs on the
18 finished biodiesel. It is a proven and reliable process
19 technically to take soybean oil and make it into biodiesel,
20 and you get high yields of biodiesel from soybean oil. It is
21 very low loss from contaminants that are in the soybean oil.

22 Q So if you buy a gallon of soybean oil, how much biodiesel
23 can you make out of that?

24 A You can make about a gallon of biodiesel. So about a
25 one-to-one ratio.

1 Q By contrast, if you buy choice white grease, is there a
2 problem in yield?

3 A There is a yield loss. As you increase the FFAs or free
4 fatty acids, you lose yield.

5 Q Okay. So that was a description of what the facility
6 could do with actual feedstock that was soybean oil; am I
7 correct?

8 A Yes.

9 Q But you said there was a problem with that soybean oil.
10 What was it?

11 A It, it is a high cost feedstock.

12 Q So what happens if the cost of soybean oil is too high if
13 you are e-biofuels using that equipment?

14 A You may not make money doing it.

15 Q Is that something that would be important for the folks
16 at Platinum Partners to know?

17 A Yes.

18 Q If you had found out information that day that the
19 e-biofuels facility, if it was turned on and run in its normal
20 way, would lose 28 cents a gallon, was that something you
21 would want to know?

22 A Yes.

23 Q Nobody said anything like that to you that day?

24 A No.

25 Q No one now, not just Chad, told you if we turn on the

1 plant we lose money?

2 A No.

3 Q Okay. With regard to using A, choice white grease, what
4 were the advantages and disadvantages of that as you have
5 expressed them here?

6 A It is a lower cost feedstock, also approved for RINs to
7 use a biogenic waste, oil, fats, or grease. But the
8 disadvantages of utilizing that pathway to make finished
9 product is that you do have higher yield loss than you do with
10 soybean oil. So it is not quite a one-to-one exchange. And
11 we were concerned that there may not have been sufficient
12 equipment installed on site for them to take that lower
13 quality feedstock and make in-spec biodiesel. We were
14 concerned specifically with the cold soak filtration test.
15 That is what the CSFT means.

16 Q Now, with regard to the other two items that they said
17 they were using to make things, that is D and E; is that
18 right?

19 MR. TIERNEY: Objection as to the pronoun "they."

20 THE COURT: Overruled.

21 BY MR. DeBROTA:

22 Q You identified them collectively as having a problem; is
23 that right? What did you see as the problem of D and E on
24 your chart here?

25 A The problem with those two processing lines was that

1 it -- we considered it to be an unsustainable feedstock,
2 meaning why was there so much off-spec biodiesel available?
3 Why weren't those producers of the off-spec material just
4 filtering it themselves? So we were concerned that if they
5 had had access to a lot of off-spec material in the past that
6 they couldn't necessarily count on that going forward because
7 if all you had to do was filter it, then someone else could
8 easily install filters themselves and make their own in-spec
9 product instead of selling its off-spec material.

10 Another disadvantage for this is that those lines are not
11 approved for RINs because of the feedstock issues we discussed
12 earlier, and we, we also questioned the quality assurance and
13 quality control that was at the facility because if all you
14 have to do is filter the off-spec biodiesel or wash it with
15 water, then again, why didn't the supplier just do that?

16 And so, we thought that it may have actually been more
17 out of spec and that they were just pretending to process it
18 further and issuing certificates of analysis that said it was
19 now in spec, but it was actually still off-spec material.

20 Q Then finally you mentioned the dotted lines. How does
21 that relate to the investment by Platinum Partners if it had
22 gone through?

23 A A portion of the investment money was going to go towards
24 an expansion.

25 Q And the installation of new equipment to do more

1 operations?

2 A Yes.

3 Q But that never happened in this time period because the
4 deal doesn't go through; is that right?

5 MR. TIERNEY: Objection.

6 THE COURT: Overruled.

7 BY MR. DeBROTA:

8 Q That never happens because the deal doesn't go through;
9 is that right?

10 A That's right.

11 Q Had it gone through then, the claimed production capacity
12 would have been 40 million gallons a year; is that right?

13 A That's right.

14 Q If they had run these then four lines that they said they
15 could have installed if they had gotten the extra money and
16 run the ones that they already had?

17 A Yes.

18 Q All right. So you conveyed that information and so forth
19 to Mr. Steinberg.

20 Then this Bullet Point 2, do you have here what was
21 supposed to be done with the investment monies if Platinum had
22 gone through with the deal?

23 A Yes.

24 Q And, in particular, do you list here the proposed use of
25 that 25 to \$30 million?

1 A Yes.

2 Q And that, as you see, includes things relating to the
3 e-biofuels facility like, for example, the completed expansion
4 of 10 million gallons; is that right?

5 A That's right.

6 Q Does it also include some things unrelated to e-biofuels
7 that talk about other things Imperial was wanting to do?

8 A Yes.

9 Q Like the tar sands project and so forth?

10 A Yes.

11 Q All right. So did the -- did this agenda then result in
12 a telephone call where a number of different persons were
13 present in talking about these concerns?

14 A Yes.

15 Q And let's talk about the participants in that call. Did
16 you recognize some of the participants because you had met
17 them in person and you heard their voices?

18 A Yes.

19 Q Does that include Chad Ducey who you met?

20 A Yes.

21 Q And Aaron Wilson?

22 A Yes.

23 Q You also had met the other people from your own company,
24 Frazier Barnes; is that right?

25 A That's right.

1 Q Who are those people?

2 A Gerald Sherfy, Warren Barnes, and Pete Moss.

3 Q Who is Pete Moss?

4 A He was the president of Frazier Barnes.

5 Q Okay. Was one of the purposes of that call to sort of
6 get the response to the findings to see if Imperial and e-bio
7 personnel would answer these concerns?

8 A Yes.

9 Q Okay. Did the Defendant, Jeffrey Wilson, appear in that
10 call based on anyone identifying himself as Jeffrey Wilson?

11 A Yes.

12 Q You hadn't met him before?

13 A No.

14 Q Somebody on that call said their name was Jeffrey Wilson?

15 A Yes.

16 Q That is on a call with Aaron Wilson, who you knew to be
17 the son of Jeffrey Wilson?

18 A Yes.

19 Q Okay, okay. In the course of that call, did you raise
20 some of the same concerns that you have testified about to try
21 to get some answers?

22 A Not as explicitly. We were trying to get explanations.

23 Q With regard to Craig Ducey, did he make a statement about
24 the question of whether the plant was bringing in any diesel
25 fuel, any biodiesel as a bring it in and then doing something

1 with it as opposed to off-spec or anything else, did he talk
2 about that?

3 MR. TIERNEY: Objection, Your Honor.

4 THE COURT: What is the basis?

5 MR. TIERNEY: The best evidence rule. There is a
6 recording of this conversation. We'd ask that the full thing
7 be played.

8 THE COURT: Overruled.

9 BY MR. DeBROTA:

10 Q Did he say that, something about that?

11 A He didn't say anything about bringing in on-spec
12 biodiesel.

13 Q What do you remember him saying?

14 A He -- I referred to the material as off-spec biodiesel,
15 and he pointed out that I kept calling it biodiesel. But it
16 is, in fact, not biodiesel. It is off-spec methyl esters, and
17 methyl esters is the chemical term for biodiesel. So that was
18 a point that he made.

19 Q Did you accept that explanation as he was giving it to
20 you?

21 A Yes.

22 Q You heard him say it, but did you believe that was true?

23 A That they were bringing in off-spec methyl esters?

24 Q Yes.

25 A Yes.

1 Q So your concern at that point is if they are bringing
2 that in, can they make RINs on that?

3 A No, they cannot.

4 Q Was your concern --

5 A That was a concern, yes.

6 Q Accepting that he is telling you that, does it then
7 produce RINs is your concern; is that right?

8 A That's right.

9 Q Did anyone on that call ever state that the plant hadn't
10 made the biodiesel it said it made through the traditional
11 lines, Line 1 and Line 2, using traditional
12 transesterification and so forth? Did anybody ever say that?

13 A They did not say that they had not used the lines for
14 transesterification.

15 Q Right. If the jury has heard testimony that those lines
16 didn't really make any of that first 15 million gallons of
17 fuel the traditional way, no one said anything like that on
18 the phone call?

19 A No, they did not.

20 Q No one said we are not making any glycerin, we are not
21 buying any real feedstock, really, we are not buying catalyst,
22 none of those things? No one said anything like that?

23 MR. TIERNEY: Objection.

24 THE COURT: Overruled.

25 THE WITNESS: No, they did not.

1 BY MR. DeBROTA:

2 Q Okay. Now, if the jury hears evidence that e-biofuels
3 was picking up B99 fuel made by someone else where the RINs
4 had already been taken, the tax credits already been taken and
5 brought that to the e-biofuels facility and turned it around
6 and said it was B100 and sold it to customers and put another
7 set of RINs on it, and put a tax credit eligibility on it and
8 then sold that as B100, no one said anything like that to you;
9 is that right?

10 MR. TIERNEY: Objection.

11 THE COURT: Overruled.

12 THE WITNESS: No, they did not.

13 BY MR. DeBROTA:

14 Q Okay. Had anyone said something like that, what would
15 have been your reaction?

16 A I would have been very concerned, and we would have
17 called our lawyers and decided how to alert authorities.

18 Q So on your concern scale earlier from 1 not being a
19 concern to 10 being --

20 A Yes. That is a 10.

21 Q That is a 10? Okay. So in the follow-on to that phone
22 call, then, did you make another report to Mr. Steinberg after
23 looking at the question further on whether it was possible to
24 make RINs off of the off-spec product?

25 A Did you say a follow-up call?

1 Q A follow-up report or some more communication with
2 Mr. Steinberg?

3 A Yes.

4 Q What did you do in between the conference call we just
5 discussed and the follow-on report to Mr. Steinberg? Did you
6 do anything in between those times?

7 A Yes. I spoke with a contact at EPA and asked for their,
8 their opinion without mentioning the name of the facility or
9 any names involved.

10 Q So why don't you just explain what type of question you
11 asked the EPA representative from the fuels program.

12 A I asked if it was allowed for someone to bring in
13 off-spec methyl ester material that someone else had produced
14 at their facility and the other facility that produced the
15 off-spec material had taken in qualifying feedstock, so
16 soybean oil or choice white grease, then could that entire
17 pathway through both facilities then generate RINs at the end?
18 And the EPA representative confirmed that no RINs could be
19 generated because of the definition of facility and how the
20 raw feedstock has to come in and the finished product has to
21 come out of the same facility.

22 Q Okay. Now, that confirmed the conclusion you had already
23 reached?

24 A Yes.

25 Q So then did you convey a report to Mr. Steinberg at

1 Platinum Partners, along with the other Frazier Barnes'
2 people, reporting your findings at the end of the due
3 diligence project about that?

4 A Yes.

5 Q And is that report, Exhibit 73, marked for
6 identification?

7 A Yes.

8 Q And is it an accurate reflection, then, of the
9 information you conveyed to Mr. Steinberg about where we are
10 at this point in the storyline in your findings?

11 A Could you repeat that question?

12 Q Is this an accurate description of what you told
13 Mr. Steinberg and the other folks at Platinum Partners about
14 your conclusions up to this particular point in time, which is
15 --

16 A Not eligible for RINs. Yes, that's correct. That is
17 consistent.

18 Q That is dated August 10, 2011; is that right?

19 A That's right.

20 Q And this particular copy of it was later forwarded in
21 2012, but that is just a transmittal of it; is that right?

22 A That's right.

23 Q Okay. And was the point of giving this to Mr. Steinberg
24 so he could have further information for the potential
25 investment in Imperial, Imperial stock and so forth, the deal

1 that was being proposed?

2 A Yes.

3 MR. DeBROTA: I move to admit Exhibit 73, Your
4 Honor.

5 THE COURT: Any objection?

6 MR. TIERNEY: Yes, Your Honor.

7 THE COURT: What is the objection?

8 MR. TIERNEY: Hearsay.

9 THE COURT: This is a report she prepared?

10 MR. TIERNEY: Yes, Your Honor.

11 THE COURT: Objection is overruled.

12 *(Government's Exhibit 73 was*
13 *received in evidence.)*

14 BY MR. DeBROTA:

15 Q Showing you Exhibit 73. In the course of the work you
16 do, the client is Platinum, and the information you provided
17 them is confidential; is that right?

18 A That's right.

19 Q And it is why it says "confidential" on the top, right?

20 A That's right.

21 THE COURT: Can you adjust the zoom so that we can
22 see what you are referring to?

23 BY MR. DeBROTA:

24 Q Okay. And does this report contain a conclusion -- I
25 will hand it to you -- relating to whether or not you can make

1 RINs from off-spec biodiesel?

2 A Do you want me to read that part?

3 Q What part would tell us that if you can orient it to us,
4 I will show that as well to the jury.

5 MR. DeBROTA: This is Exhibit 73, Your Honor.

6 THE WITNESS: Okay. If you go to the second page?
7 The last two paragraphs starting with "this shows" and "again,
8 the"? Those two paragraphs contain the conclusion.

9 BY MR. DeBROTA:

10 Q Okay. Why don't you read the "this shows" paragraph into
11 the record, please.

12 THE COURT: Slowly.

13 THE WITNESS: "This shows that e-biofuels has to be
14 in control of the process from feedstock to fuel, so they
15 either need to buy the feedstock listed in the table or get
16 the off-spec methyl ester approved by the EPA as a biogenic
17 waste oil/fat/grease."

18 BY MR. DeBROTA:

19 Q Going on from there?

20 A "In my experience, the EPA will not accept a feedstock as
21 such unless it is 50 percent plus triglyceride material, so I
22 would assume that it would not fall under this category."

23 Q And the last sentence?

24 A "E-biofuels will need to petition the EPA for a new
25 pathway in order to appropriately generate RINs for this

1 material."

2 Q So if e-biofuels wanted to do something new, if it wanted
3 to process off-spec biodiesel, it has to go through a process
4 of telling the EPA about that and getting an approved pathway.
5 You can't just do it and hope to not talk to the EPA in the
6 process?

7 THE COURT: Is that a question?

8 BY MR. DeBROTA:

9 Q Is that the -- that is what they would have to do there?
10 They would have to petition for a new pathway?

11 A Yes.

12 Q Disclose it and get approval?

13 A Yes.

14 Q Without that, they can't make RINs?

15 A Correct.

16 Q When you were on the phone call, did you ask if the
17 conference call that included the Defendant, Mr. Wilson, did
18 you ask had they gone through that process of trying to get a
19 pathway approved for the off-spec product?

20 A Yes, I did.

21 Q Did they say any such pathway had been approved?

22 A They said that, that they had received approval.

23 Q And from whom?

24 A The EPA.

25 Q Okay. Is that true?

1 A No.

2 Q Okay. With regard to the last paragraph, do you state
3 there, your then existing belief that they actually made some
4 biodiesel at that facility?

5 THE COURT: What is your question?

6 BY MR. DeBROTA:

7 Q You state in the last paragraph, your belief at the time,
8 that they actually had made some biodiesel, actually produced
9 some in the period regarding the actual approved pathways of
10 soybean oil or choice white grease.

11 THE COURT: Well, what is your question, Counsel?

12 MR. DeBROTA: Is that what that is telling us I
13 guess is my question, Your Honor. This is a different topic
14 than off-spec, Your Honor.

15 THE WITNESS: So what this is saying is that from an
16 investment standpoint they would be investing in a
17 15-million-gallon-per-year-capacity biodiesel facility that is
18 capable of processing the low FFA or soybean oil feedstock.

19 BY MR. DeBROTA:

20 Q Okay. You believed it could do the 15 million gallons,
21 but it can't do the extra amount from the invalid RINs on
22 off-spec?

23 A Yes, that is what I was saying there.

24 Q But in the course of that, if the jury has heard
25 testimony that it can't actually profitably make even that

1 15 million gallons, that would be another reason not to invest
2 in e-biofuels?

3 A That would be a reason not to invest, yes.

4 Q That is not a reason, though, that you folks had
5 detected, based on the due diligence and how far it had gone;
6 is that right?

7 A That's right.

8 Q Now, with regard to that when you identified this
9 problem, it was essentially -- becomes significant to you
10 driving home from the tour at e-biofuels pretty quick, in
11 other words?

12 A Yes.

13 Q Correct?

14 A Significant.

15 Q Did you guys dive further into the other things you would
16 have looked at to check out the 5- and 10-million-gallon lines
17 as well, or did that stop with this problem being identified?

18 A We stopped work on the other items in our scope waiting
19 to clear this up, and the project was canceled or stopped
20 after this e-mail.

21 Q And how did you hear about the decision to cancel the
22 project?

23 A I heard about it from Pete Moss.

24 Q Okay. So eventually Platinum says we don't need any more
25 due diligence, and they say that is the end of it. They are

1 not going to invest?

2 A Yes.

3 Q Okay. I am going to show you Exhibit 40. This is a
4 document that has been admitted which shows the receipt of
5 agricultural oil; in other words, if the jury has heard this
6 is feedstock in choice white grease or soybean oil, this is a
7 log of that receipt. And in the case of 40 there is nothing
8 listed here; do you see that?

9 A It is kind of small to read.

10 Q It is basically a blank spreadsheet on what is being
11 received?

12 A Yes.

13 Q With regard to methanol, there are two trucks of
14 methanol; do you see that in the month of May 2011?

15 A Okay.

16 Q With regard to caustic, there is none, same month; you
17 see that?

18 A Okay.

19 Q Acid, there is none; you see that?

20 A Yes.

21 Q Sodium methyrate, there is none. Is that important to
22 you to know they didn't get any sodium methyrate in the month
23 of May 2011?

24 A It depends on how much biodiesel production they claim
25 during that month.

1 Q If they claimed a lot, would you need sodium methyrate?

2 A Yes.

3 Q With regard to biodiesel, they say they didn't get any
4 in.

5 MR. TIERNEY: Objection.

6 THE COURT: What is the objection?

7 MR. TIERNEY: He is not asking her questions. He is
8 just sort of arguing with her using this exhibit.

9 THE COURT: Sustained. Ask questions, Counselor.

10 BY MR. DeBROTA:

11 Q Does it show they received any finished biodiesel?

12 A No, it doesn't.

13 Q It says they received feedstock on the next page and
14 quite a lot of it; do you see that?

15 MR. TIERNEY: Objection.

16 THE COURT: Overruled.

17 BY MR. DeBROTA:

18 Q Does it say that?

19 A Yes.

20 Q All right. That goes on several pages. Total feedstock
21 received. What do you see there?

22 A I see 3,140,076.

23 Q So if the jury has heard testimony that that is not
24 feedstock, that is B99 biodiesel; is that a problem?

25 A Yes.

1 Q What would -- why is that a problem?

2 A If the feedstock was B99 biodiesel and the product was
3 being shipped out as B100 biodiesel with RINs, then that is
4 double counting on the tax credit because you blend to B99 to
5 claim a tax credit, and it is potentially also a double
6 counting on RINs, if RINs are being generated for both places.
7 Plus, as I have said, you can't generate RINs at all even if
8 the first guy didn't generate RINs on the off-spec biodiesel
9 that he is sending.

10 Q If it turned out e-biofuels was taking in the B99 and
11 packaging it and doing what you just described with B100, it
12 would be difficult for any other biodiesel company to compete
13 with that on price; isn't that true?

14 A That is true.

15 Q Essentially, they could undercut anyone else in the
16 market because they wouldn't really have to spend much money
17 to do anything; is that fair?

18 MR. TIERNEY: Objection.

19 THE WITNESS: Yes.

20 THE COURT: Overruled. She may answer.

21 THE WITNESS: That is fair.

22 MR. DeBROTA: And let me just ask my colleagues if
23 they have any more questions. Just a couple more questions,
24 Your Honor.

25 THE COURT: Okay.

1 BY MR. DeBROTA:

2 Q You mentioned the phone call between the conference call
3 and your final conclusion to Mr. Steinberg where you called
4 the EPA. How long did that phone call take?

5 THE COURT: You mean how long did it last?

6 BY MR. DeBROTA:

7 Q Yes, how long did that phone call last?

8 A I don't know specifically.

9 Q Minutes or hours?

10 A Minutes.

11 Q It wasn't difficult for the EPA person to tell you that
12 that is not an approved way of creating a RIN from off-spec
13 biodiesel?

14 A It did not take long for them to say that, no.

15 Q Are you familiar with a lab standard called BQ-9000?

16 A Yes.

17 Q What is that?

18 A It is a lab certification program that is run by the
19 National Biodiesel Board, and biodiesel producers can become
20 BQ-9000 producers by showing that their -- their quality
21 control procedures are very good. And that allows them to
22 issue their own certificates of analysis instead of going to
23 independent third-party regs with their material and obtaining
24 independent certificates of analysis.

25 THE COURT: What is the acronym?

1 MR. DeBROTA: What does BQ-9000 stand for?

2 THE COURT: BQ-9000? Okay.

3 BY MR. DeBROTA:

4 Q You know what the BQ stands for?

5 A I think it is biodiesel quality, but.

6 Q If the facility is BQ-9000 certified, there is an
7 advantage in terms of how they can create lab results to give
8 to other people?

9 A Yes.

10 Q They can do them in-house?

11 A Yes.

12 Q And they don't have to send the sample to someone else to
13 check to see if the material is on spec or off spec?

14 A There are round robin tests that ensure that your lab
15 results that you are getting on some frequency, these tests
16 are done to confirm the results you are getting in your lab as
17 a BQ-9000 producer are consistent with other labs.

18 Q And to qualify for that there are a number of different
19 things a facility would have to do to get the certification to
20 do BQ-9000; is that right?

21 A That's right.

22 Q Who grants the certification?

23 A The National Biodiesel Board.

24 MR. DeBROTA: Okay. I have no further questions,
25 Your Honor.

1 THE COURT: All right. Cross-examine?

2 **CROSS-EXAMINATION**

3 BY MR. TIERNEY:

4 Q Miss Player, my name is Kevin Tierney, and I represent
5 Jeff Wilson in this matter. I have got some questions for
6 you.

7 A Okay.

8 Q If you don't understand my question, just please ask me
9 to either restate it or rephrase it if you would.

10 At the time that you did this work regarding e-biofuels
11 you were working for Frazier Barnes; is that right?

12 A That's right.

13 Q And you described Frazier Barnes as a consulting firm?

14 A Yes.

15 Q Was Frazier Barnes ever involved in biodiesel production?

16 A No.

17 Q At the time that you worked there, it wasn't?

18 A No, it was not.

19 Q Was it before you worked there; do you know?

20 A Not that I know of.

21 Q Okay. And you stated that Jeff Wilson was not at the
22 plant on the day of your visit, correct?

23 A That is correct.

24 Q And that it was Chad Ducey who was giving you all of the
25 information about the plant itself, correct?

1 A Correct.

2 Q All right. And the information that Chad Ducey was
3 providing you, it was Chad that was giving you information
4 about off-spec biodiesel, correct?

5 A Yes.

6 Q And that they were using off-spec biodiesel or off-spec
7 methyl ester as a feedstock, correct?

8 A Correct.

9 Q And they were using that to reprocess it and make it into
10 biodiesel?

11 A Yes.

12 Q And he wasn't hiding that from you, he was telling you
13 that is what they were doing?

14 A Yes.

15 Q Okay. And during the follow-up call that you had with --
16 between people from Frazier Barnes and people from e-biofuels
17 there was a follow-up conference call, correct?

18 A Correct.

19 Q After your plant visit?

20 A Yes.

21 Q And you said that Jeff Wilson participated in that phone
22 call?

23 A Yes.

24 Q But you just knew that because the person identified
25 himself as Jeff Wilson?

1 A Correct, because I had never met him.

2 Q And there was some conversation during that phone call
3 about whether or not off-spec biodiesel getting reprocessed
4 into biodiesel could qualify for RINs?

5 A Yes.

6 Q Okay. And you talked -- the Government asked you about
7 Government Exhibit 67.

8 A Okay, yes.

9 Q All right. And that is the first page talking about your
10 agenda for a call, but that is your call, not with the folks
11 from e-biofuels, right?

12 A Right. That was the agenda for the call with Platinum.

13 Q Sorry, I am just trying to get it so you can see who that
14 went to. Can you read it?

15 A It went to Daniel Small and David Steinberg.

16 Q And who are they with?

17 A They are with Platinum.

18 Q Platinum Partners?

19 A Yes.

20 Q And they are not -- I mean, they are not with e-biofuels,
21 right?

22 A Right.

23 Q And who are the CCs on there? Those are people that you
24 were coworkers with, correct?

25 A Correct.

1 Q Gerald Sherfy?

2 A Warren Barnes and Billy Griffin.

3 Q All right. And on the second page of that exhibit, it
4 has got some analysis about the information that you were
5 given by Chad Ducey on the day of your visit, correct?

6 A Yes.

7 Q And you have got some analysis at the bottom regarding
8 whether or not one of the processes was approved for RINs, or
9 in this case, not approved for RINs, right?

10 A Yes.

11 Q But this was analysis that you were sharing with people
12 from Platinum Partners, right?

13 A That's correct.

14 Q You did not communicate that analysis to Jeff Wilson on
15 the conference call that you had with him?

16 A No, I did not directly.

17 Q Okay. That conference call that you had with Jeff Wilson
18 was you trying to gather more information about the processes
19 that Chad Ducey had explained to you?

20 A Yes.

21 Q Regarding processing or reprocessing of off-spec
22 biodiesel into biodiesel?

23 A Yes.

24 Q And you didn't share your conclusions with anybody on
25 that phone call, did you?

1 A No.

2 Q Okay. And then after that phone call, it wasn't until
3 after that phone call that you contacted the EPA, right?

4 A Right.

5 Q And you never had any more contact with Jeff Wilson,
6 correct?

7 A Correct.

8 Q And the only person that you communicated with after that
9 regarding your findings or your analysis was David Steinberg
10 from Platinum Partners, correct? It is on Government
11 Exhibit 73.

12 A Yes, it was David Steinberg.

13 Q And then your colleagues there are the ones who were
14 copied, Pete Moss, Warren Barnes, Gerald Sherfy, and Billy
15 Griffin, correct?

16 A Correct.

17 Q You did not share this analysis with Jeff Wilson?

18 A No.

19 Q All right. You testified on direct that you could not
20 claim a RIN from reprocessed off-spec biodiesel into
21 biodiesel?

22 A Yes.

23 Q Okay. Is it true that it was common belief in the
24 industry, that you could at this time?

25 MR. DeBROTA: Objection. Foundation.

1 THE COURT: Sustained.

2 BY MR. TIERNEY:

3 Q Isn't it true that this was a gray area?

4 MR. DeBROTA: I am sorry. I don't --

5 THE COURT: Isn't it true it was a gray area? I
6 will sustain the objection on the same grounds. You have to
7 lay a foundation for this.

8 MR. TIERNEY: Right.

9 BY MR. TIERNEY:

10 Q You got information when you visited e-biofuels that
11 their process included taking off-spec biodiesel, right?

12 A Yes.

13 Q As a feedstock?

14 A Yes.

15 Q Reprocessing it into biodiesel?

16 A Yes.

17 Q And then claiming a RIN?

18 A They confirmed that they claimed a RIN on the follow-up
19 conference call with e-biofuels after the site visit.

20 Q Okay. And that process that they described, that was
21 whether or not that was a legal pathway was a gray area in the
22 industry at the time?

23 MR. DeBROTA: Objection.

24 THE COURT: Sustained. That is the same question
25 you have asked that I have sustained twice now. You

1 understand what I mean? You have to lay the foundation that
2 she knows how to answer that. She has within her expertise an
3 ability to answer that.

4 MR. DeBROTA: Also object as to relevance, including
5 under 403, because this isn't the question. And the legal
6 correctness of this is an objective fact that shouldn't be
7 calling into question a legal analysis.

8 THE COURT: Sustained.

9 BY MR. TIERNEY:

10 Q You were asked on direct, weren't you, whether it was
11 unlawful to make a RIN from off-spec biodiesel?

12 A Yes.

13 Q Okay. And you said that it was?

14 A Yes.

15 Q And is it your statement that it was clear to everyone in
16 the industry that that was the case?

17 MR. DeBROTA: Objection.

18 THE COURT: Sustained.

19 BY MR. TIERNEY:

20 Q You went through a little bit of your professional
21 background, and you are a professional engineer, correct?

22 A Yes.

23 Q And you currently work at what place?

24 A I currently work for Weaver & Tidwell.

25 Q All right. And part of your job, as I understood it, is

1 verifying RINs; is that right?

2 A That's right.

3 Q And that is in the biodiesel industry?

4 A Yes.

5 Q How long have you been in the biodiesel industry?

6 A Full-time, I have been in the biodiesel industry for
7 about seven years.

8 Q Okay. And as part of your background in, as a
9 professional engineer and as your experience in the biodiesel
10 industry, do you feel like you have a good understanding of
11 the biodiesel industry?

12 A Yes.

13 Q Have you -- are you familiar with a magazine called
14 *Biodiesel Magazine*?

15 A Yes.

16 Q What is that?

17 A It is a magazine that is on the topic of biodiesel and
18 topics that are relevant to biodiesel producers.

19 Q Okay. And did you -- have you written articles in
20 *Biodiesel Magazine*?

21 A Yes.

22 Q Have you written articles in *Biodiesel Magazine* regarding
23 the subject of whether or not there is a legal pathway for
24 reprocessing of off-spec biodiesel into biodiesel and claiming
25 RIN?

1 A Yes.

2 Q Okay. And when did you write that article?

3 A I don't recall exactly.

4 Q Okay. Why did you write that article?

5 A I wrote the article because after --

6 MR. DeBROTA: Your Honor, I object. Why she writes
7 it doesn't matter. If they are interested in having the
8 article in evidence, okay, but why she wrote it couldn't have
9 any relevance to Mr. Wilson's knowledge, for example.

10 THE COURT: Sustained.

11 MR. TIERNEY: All right.

12 BY MR. TIERNEY:

13 Q I hand you what is marked for identification as
14 Defendant's Exhibit 683.

15 MR. DeBROTA: We will stipulate to that if you want
16 to put it in evidence.

17 THE COURT: 683?

18 MR. TIERNEY: Yes, Your Honor.

19 THE COURT: Pursuant to the stipulation, 683 is
20 admitted.

21 MR. TIERNEY: I am not offering it to be admitted
22 right now, Judge. I just wanted to hand it to her to see if
23 it would refresh her recollection about what it says.

24 THE COURT: No. The question was, did she have a
25 failure of recollection on, was when.

1 MR. TIERNEY: Okay.

2 THE COURT: That is the only thing you can refresh
3 her recollection on is with that.

4 BY MR. TIERNEY:

5 Q I handed you Defendant's Exhibit 683. Do you recognize
6 that?

7 A Yes.

8 Q Is that the article that you wrote?

9 A Yes.

10 Q In *Biodiesel Magazine*?

11 A Yes.

12 Q And does looking at that refresh your recollection about
13 when it was written?

14 A Yes.

15 Q Okay. Do you recall the title of that article?

16 THE COURT: Wait. When was it written?

17 BY MR. TIERNEY:

18 Q When was it written?

19 A It was published August 1, 2012.

20 Q Okay, and your site visit to e-biofuels was August 4,
21 2011, correct?

22 A Correct.

23 Q And so, that was a year before this article was written?

24 A Yes.

25 MR. TIERNEY: All right. May I have minute, Your

1 Honor?

2 THE COURT: Yes. Might as well stay with me, it is
3 raining outside. Carry on, Counsel. It is getting late in
4 the daytime. Let's move through it.

5 BY MR. TIERNEY:

6 Q All right, Miss Player, you're familiar with the
7 biodiesel industry, correct?

8 A Correct.

9 Q And are you familiar with biodiesel producers' practices?

10 A Yes.

11 Q And based on your experience with e-biofuels, did you
12 come to a conclusion or based in part on your experience with
13 e-biofuels, did you come to a conclusion about whether or not
14 there was a gray area in the industry on whether or not it was
15 an acceptable practice in the industry to take off-spec
16 biodiesel, reprocess it into biodiesel, and claim a RIN?

17 MR. DeBROTA: Objection.

18 THE COURT: Sustained.

19 BY MR. TIERNEY:

20 Q All right. I handed you what has been marked for
21 identification as Defendant's Exhibit 683, correct?

22 A Yes.

23 Q Is that an article that you wrote?

24 A Yes.

25 Q All right. That is the article in *Biodiesel Magazine*,

1 correct?

2 A Correct.

3 THE COURT: Yes. Asked and answered, asked and
4 answered. What is next?

5 MR. TIERNEY: All right. I move to admit
6 Defendant's Exhibit 683.

7 THE COURT: The Government stipulated, so 683 is
8 admitted.

9 MR. TIERNEY: All right.

10 *(Defendant's Exhibit 683 was*
11 *received in evidence.)*

12 THE COURT: Are these your underlinings, Counsel?

13 MR. TIERNEY: Yes, Your Honor.

14 BY MR. TIERNEY:

15 Q All right, ma'am. Can you read on the screen on
16 Defendant's Exhibit 683 the underlined portion?

17 A "One potential" --

18 THE COURT: Read it to yourself.

19 THE WITNESS: Oh, okay. Okay.

20 BY MR. TIERNEY:

21 Q Is that what you wrote?

22 A Yes.

23 Q You wrote that August 1, 2012?

24 A That is when it was published.

25 Q Okay. When did you first write it?

1 A Sometime before then.

2 MR. DeBROTA: Objection. Irrelevant.

3 THE COURT: Sustained.

4 MR. TIERNEY: All right. May I consult with
5 Counsel, Your Honor?

6 THE COURT: Yes, briefly. Quickly.

7 MR. TIERNEY: No further questions.

8 THE COURT: All right.

9 MR. DeBROTA: Very brief.

10 THE COURT: All right, very brief. Redirect.

11 **REDIRECT EXAMINATION**

12 BY MR. DeBROTA:

13 Q With regard to Exhibit 686, just to be clear, there is a
14 print date at the bottom.

15 THE COURT: 683?

16 BY MR. DeBROTA:

17 Q 683, the Defense Exhibit 683, there is a print date at
18 the bottom of June 30, 2016. That would be nothing to do with
19 your making of this thing; is that correct, Miss Player?

20 A That is correct.

21 Q Yes.

22 MR. DeBROTA: So we will ask the jury to disregard
23 that. That is just part of the exhibit preparation. Okay.

24 BY MR. DeBROTA:

25 Q So in this article you state that you cannot make RINs

1 from off-spec methyl esters; in other words, off-spec
2 biodiesel; isn't that true?

3 A That is true.

4 Q This is very consistent with what you said in a
5 confidential memo to David Steinberg right after the visit to
6 the e-biofuels facility?

7 A It is very consistent with it.

8 Q Okay. So basically what you are doing here is you are
9 giving for free, the advice that your company provided as due
10 diligence for funds to Platinum Partners; isn't that true?

11 A Yes.

12 Q Okay. Now, with regard to the RINs created at
13 e-biofuels, at no point do those RINs state that any fuel was
14 made through an off-spec pathway; isn't that correct? Those
15 RINs will say it was made from soybean oil or what have you,
16 an approved pathway?

17 A Yes, RINs that were generated were generated using the
18 codes associated with approved pathways.

19 Q So what e-bio is doing, whatever the gray area might be,
20 you could hardly take a description that says soybean oil and
21 do something else and that is your RIN. That makes no sense,
22 does it?

23 A No, it doesn't.

24 Q If there is another gray area or category, it might be
25 called gray area RINs, but it can't be called soybean oil

1 RINs; is that right?

2 A That's right.

3 Q It is from soybean oil. It can't be RINs from what
4 amounts to choice white grease; is that correct?

5 A If labeled as soybean oil, then the assumption is that
6 the feedstock used to make it was soybean oil.

7 Q Right, not something else?

8 A Yes.

9 Q Some gray area other thing?

10 A Correct.

11 Q Now, you were asked some questions about where the
12 information went. You folks had a confidentiality agreement
13 for the work that you did; is that right?

14 A That's right.

15 Q So you can only pass on your conclusions to Platinum; is
16 that right?

17 A That's right.

18 Q Do you know whether Platinum had a confidentiality
19 agreement with Imperial?

20 A I assume so, but I don't know.

21 Q If it did, then Platinum wouldn't be passing on its
22 conclusions to anyone else without Imperial's permission;
23 isn't that true?

24 MR. TIERNEY: Objection.

25 THE COURT: Sustained.

1 BY MR. DeBROTA:

2 Q Do you know if the investors and deals that you work on
3 for due diligence frequently would get confidentiality --

4 THE COURT REPORTER: I'm sorry, could you repeat your
5 question?

6 MR. DeBROTA: Yes.

7 BY MR. DeBROTA:

8 Q Do you know if it is a regular practice in investment
9 deals where you participate for due diligence for the
10 potential lender, people like Platinum, to get a
11 confidentiality agreement with the potential borrower, people
12 like e-biofuels?

13 MR. TIERNEY: Objection.

14 THE COURT: First of all, the question is "Do you
15 know?" Do you know that?

16 THE WITNESS: Yes.

17 BY MR. DeBROTA:

18 Q Okay.

19 A It is typical --

20 THE COURT: Wait, wait, wait, just yes or no so far.

21 THE WITNESS: Yes.

22 THE COURT: Okay.

23 BY MR. DeBROTA:

24 Q Okay. Is it typically done?

25 A Yes.

1 MR. TIERNEY: Objection.

2 THE COURT: All right. I will let the answer stand.

3 Are you done?

4 BY MR. DeBROTA:

5 Q E-biofuels -- the final point, Your Honor -- was using a
6 code for the RINs it created, and the code was biogenic waste,
7 oils, and greases; is that right?

8 A I haven't seen their RIN generation reports to confirm
9 that.

10 Q Okay. But if that were the code, that would not be a
11 code for off-spec biodiesel?

12 A No.

13 Q Certainly not a code for B99 RIN-less bought from a
14 producer?

15 A No.

16 THE COURT: Done?

17 MR. DeBROTA: Okay, done. I am done, Your Honor.
18 Thank you.

19 THE COURT: Recross?

20 **RECROSS-EXAMINATION**

21 BY MR. TIERNEY:

22 Q Miss Player, regardless of confidentiality agreements
23 that you had with Platinum Partners, you didn't share your
24 conclusions regarding whether or not the RINs were valid at
25 e-biofuels with Jeff Wilson, right?

1 A Right.

2 Q Or anybody at e-biofuels?

3 A Right.

4 MR. TIERNEY: Thank you.

5 THE COURT: Re-recross or re-redirect?

6 MR. DeBROTA: No.

7 THE COURT: Thank you, Miss Player, very much. You
8 may step down.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 THE COURT: Okay, we milked a lot out of this day,
12 ladies and gentlemen, but it is still only 5:35. We will take
13 our evening recess at this time. Go right ahead. It is
14 important that you continue to remember and follow my
15 instructions to you, especially when you are not here to hear
16 me say them about every hour and a half. So they were binding
17 on you throughout this trial and certainly this evening, as at
18 all other times when you are in recess.

19 So we will reconvene at 9:30 in the morning. Have safe
20 travels. We will watch for you to come a little early, then
21 we won't worry about you. Have a nice evening. You may rise
22 and depart.

23 THE CLERK: All rise.

24 (Jury out, 5:33 p.m.)

25 THE COURT: The jury has departed. I lingered just

1 in order to say I am worried about your keeping the schedule.
2 You have gone through five witnesses in three days. That is
3 not very fast, and you have got 21 people listed on the
4 Government's witness list, quite a number on the Defendant's
5 witness list.

6 So time is our precious commodity here. We seem to be
7 spinning our wheels around the edges taking time that would
8 otherwise be spent in the proceedings because of disputes. If
9 you will confer with one another about some of these matters
10 prior to their coming up, you may be able to resolve them
11 without using court time to do so. So I will see you in the
12 morning.

13 MR. DeBROTA: Thank you, Your Honor.

14 THE CLERK: Court is in recess.

15 (Court adjourned at 5:35 p.m.)

16 - - -

17 CERTIFICATE OF COURT REPORTER

18

19 I, Jean A. Knepley, hereby certify that the
20 foregoing is a true and correct transcript from
21 reported proceedings in the above-entitled matter.

22

23 /S/ Jean A. Knepley January 31, 2017
24 JEAN A. KNEPLEY, RDR/CRR/CRC/FCRR Date
25 Official Court Reporter
Southern District of Indiana
Indianapolis Division