








## Selected docket entries for case 17-12466

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09/25/2017	 Defendant–Appellant Opening Brief	2	Appellant's brief filed by Clifford Eric Lundgren. (ECF: Randall Newman)
09/26/2017			Appendix filed [2 VOLUMES] by Appellant Clifford Eric Lundgren. (ECF: Randall Newman)
	 Appellant Appendix Filed–Volume I	35	
	 Appellant Appendix Filed–Volume II	282	
11/17/2017	 Appellee Supplemental Appendix Filed	528	Supplemental Appendix [1 VOLUMES] filed by Appellee USA. (ECF: Aileen Cannon)
11/17/2017	 Appellee Brief	651	Appellee's Brief filed by Appellee USA. (ECF: Aileen Cannon)
01/02/2018	 Corrected Reply Brief	717	Corrected Reply Brief filed by Appellant Clifford Eric Lundgren. (ECF: Randall Newman)

No. 17-12466

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,**  
*Plaintiff-Appellee,*

v.

**CLIFFORD ERIC LUNDGREN,**  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Southern District of Florida  
Criminal Case No. 9:16-cr-80090-DTKH-2

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**OPENING BRIEF OF DEFENDANT-  
APPELLANT CLIFFORD ERIC LUNDGREN**

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to 11<sup>th</sup> Cir. R. 26.1-1, Appellant, Clifford Eric Lundgren, provides the following list of interested persons:

Altchiler, Robert Y.  
Barnes, Antonio J.  
Cohen, Jacob Alain  
Dell Inc. (DVMT)  
Ferrer, Wifredo A.  
Garcia, Rolando  
Golder, Randee J.  
Greenberg, Benjamin G.  
Lundgren, Clifford Eric  
Microsoft Corporation (MSFT)  
Morris, Lothrop  
Newman, Randall S.  
Reinhart, Bruce E.  
Rifkin, Mark C.  
Rodriguez, Hugo A.  
Sanchez, Lily Ann  
Schlessinger, Stephen  
Smachetti, Emily M.  
Wolff, Robert J.  
Wolf Haldenstein Adler Freeman & Herz LLP

**STATEMENT REGARDING ORAL ARGUMENT**

Appellant respectfully requests oral argument on this appeal. Appellant believes oral argument should be heard because of the importance of the novel legal issues raised by this appeal and to ensure that his liberty is not deprived without due process of law.



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**STATEMENT OF SUBJECT MATTER  
AND APPELLATE JURISDICTION**

This is an appeal of a criminal sentence of incarceration for 15 months imposed by the United States District Court for the Southern District of Florida. Appellant pled guilty to two counts of a superseding indictment on February 28, 2017, and he was sentenced on May 23, 2017. Vol. I, DOCs 129, 62 & 85. Appellant filed a timely Notice of Appeal on May 30, 2017. Vol. I, DOC 140.

The District Court had original subject-matter jurisdiction pursuant to 18 U.S.C. § 3231. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**STATEMENT OF THE ISSUES**

This appeal presents the following issues:

1. Whether, without any evidence of the value of the item that Appellant pled guilty to infringing, the district court properly calculated the Sentencing Guidelines range?
2. Whether, having improperly calculated the Sentencing Guideline range, the district court imposed an unreasonable sentence?

**STATEMENT OF THE CASE**

**A. Background of the Offenses**

In 2011, while he was living in China and operating a spare parts supply business called Source Captain, Inc., Clifford Eric Lundgren (“Mr. Lundgren”) was introduced to co-defendant Robert Wolff (“Wolff”) by a mutual friend. Vol. I,

DOC 117, p. 3. Wolff asked for Mr. Lundgren's help in reproducing Dell reinstallation discs that Wolff planned to sell to Dell computer refurbishers.<sup>1</sup> Vol. I, DOC 117, p. 3. Wolff represented that he had acquired an authentic reinstallation disc from Dell. Vol. I, DOC 117, p. 3.

At the time, Dell computers came with Microsoft's Windows operating system ("OS") software pre-installed. Vol. I, DOC 117, p. 3. Dell pre-installed the OS software pursuant to a license from Microsoft, for which it paid a fixed fee. Purchasers of Dell computers also received a license to use the Windows OS and a reinstallation disc. Vol. I, DOC 117, p. 3. The consumer license and reinstallation disc were included in the retail price of the Dell computer. Vol. I, DOC 117, pp. 3-4. The reinstallation disc contained software that allowed it to interface with the Dell computer as well as a copy of the pre-installed Windows OS software.<sup>2</sup> Vol. I, DOC 117, p. 4. The software automatically booted up when the reinstallation disc was inserted into a Dell computer and allowed the user to reinstall Windows software. Vol. I, DOC 117, p. 4. However, a user could not activate the Windows OS from the reinstallation disc unless he or she already had a valid license and a product key from Microsoft (which was also included in the retail price of the

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<sup>1</sup> Refurbishers purchase, repair, and then re-sell used computers.

<sup>2</sup> For example, a user might need the disc to reinstall the operating system as part of routine system maintenance, because of a virus, or because the operating system crashed.

computer). Vol. I, DOC 117, p. 4.

Mr. Lundgren believed that anyone who purchased a Dell computer could obtain a replacement reinstallation disc from Dell for free. He also was aware that many websites lawfully offered downloadable reinstallation software including the Windows OS or trial copies of the Windows OS for free.<sup>3</sup> Vol. I, DOC 117, p. 4.

Mr. Lundgren understood that Wolff had connections with large computer refurbishers. Vol. I, DOC 117, p. 4. Even though the refurbishers could have downloaded reinstallation software (including the Windows OS) for free over the Internet, Mr. Lundgren believed they were willing to pay a nominal sum for discs in bulk in order to save the time, materials, and effort needed to download the software or make the reinstallation discs themselves. Vol. I, DOC 117, pp. 4-5.

Mr. Lundgren took the reinstallation disc he received from Wolff to an electronics broker in China, who duplicated the disc. Vol. I, DOC 117, p. 5. The duplicated discs included a digital copy of the Windows OS software and a label that was substantially indistinguishable from the labels affixed to genuine Dell reinstallation discs. Vol. I, DOC 117, p. 5.

Although Mr. Lundgren knew he was not authorized to reproduce and sell Dell reinstallation discs, he believed his actions caused no financial loss to Dell or

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<sup>3</sup> Mr. Lundgren provided the district court with a list of more than a dozen websites that offered free Windows OS downloads, many of which were approved partners of Microsoft.

Microsoft because the discs could be obtained individually for free from Dell or created at no cost by downloading free software over the Internet. Vol. I, DOC 117, p. 5. Mr. Lundgren also believed that providing reinstallation discs with free software on them to refurbishers would substantially reduce the number of used computers that otherwise would be discarded in landfills. Vol. I, DOC 146, p. 46.

**B. Mr. Lundgren's Personal History**

Eric Lundgren is a 33-year old single man with no children. Apart from three minor offenses he committed when he was 18 years old, he has no prior criminal record. Vol. I, DOC 117, p. 5. Mr. Lundgren has been a self-employed entrepreneur since his early 20s. Vol. I, DOC 117, p. 6. He devotes most of his time to social entrepreneurship, promoting business practices that are both profitable and socially beneficial. Vol. I, DOC 117, p. 5. Mr. Lundgren strongly believes that electronic waste management practices in the United States are inefficient and harmful to society. Vol. I, DOC 117, p. 6. His primary business pursuit is to keep hazardous electronics out of landfills by repairing or re-using all their salvageable components. Vol. I, DOC 117, p. 6.

Most recently, beginning in 2013, Mr. Lundgren started an electronics recycling company, called IT Asset Partners, Inc. ("ITAP"), that now employs over more than 110 people. Vol. I, DOC 117, p. 6. ITAP is the first hybrid recycler in



the United States,<sup>4</sup> processing over 41,000,000 pounds of electronic waste in the United States annually.<sup>5</sup> ITAP has nothing to do with manufacturing or importing computer discs or with any other actions that were part of the crimes of conviction. The company is an approved and authorized electronics recycler for Nintendo, IBM, Motorola, LENOVO, Alcatel, TCL, Sprint, F.C.A, T.W.C, Samsung, Ingram Micro, LG, Verizon and many more.<sup>6</sup>

Through ITAP, Mr. Lundgren also investigates and develops innovative uses for recycled parts. Vol. I, DOC 117, p. 6. For example, ITAP has designed and built an alternative energy electric vehicle from 88% recycled consumer waste that has traveled more than 740 highway miles on a single charge. Vol. I, DOC 117, p. 7.

Mr. Lundgren is a recognized leader in his industry. Vol. I, DOC 117, p. 7. He was recently a speaker at two significant conferences where he explained efficient hybrid recycling concepts to the CEO's of Fortune 500 Companies such

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<sup>4</sup> Hybrid recycling involves taking apart a recycled item, using the good parts for new applications, minimizing the amount that goes into landfill, and disposing of any waste in an environmentally-sound manner.

<sup>5</sup> For example, ITAP sells screens and memory chips from old cellphones to companies that incorporate them into smart-video doorbell units. ITAP and its business partners also convert used laptop batteries into new cellphone chargers, broken Electric Vehicle batteries into smart-grid solar power arrays and old cable-box batteries into eWheelchairs. These new products are sold around the world.

<sup>6</sup> Materials describing ITAP's business practices and its innovative recycling projects in detail were provided to the district court during sentencing.

as SAP, Slack, and IPsoft. Mr. Lundgren's company is presently involved in advanced battery research that will substantially improve the performance of hybrid automobiles. *See* <https://www.digitaltrends.com/cars/itap-recycled-bmw-ev-news-video-specs-range/>; *see also* 11th Cir. R. 27-1(b)(2)(iv).

In addition to operating a successful and socially responsible company, Mr. Lundgren has a long history of charitable works. Beginning when he was still in high school, Mr. Lundgren has participated in Habit For Humanity projects, donated electronic equipment to sheltered women and children, assisted the Government of Ghana with toxic waste disposal problems, was the benefactor for a shanty town in India, organized charity events to build a house for a wounded veteran with Building Homes for Heroes, and much more. Vol. I, DOC 117, p. 7.

### **C. Procedural History**

On July 7, 2016, Mr. Lundgren and his co-defendant Wolff were charged in a superseding indictment with multiple counts of criminal copyright infringement under 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. §§ 2319(a) and (b)(1) and conspiracy to traffic in counterfeit goods under 18 U.S.C. § 2320(a)(1), as well as other related offenses. Vol. I, DOC 62.

Less than a month later, on February 28, 2017, Mr. Lundgren pled guilty to one count of conspiring to traffic in counterfeit goods and one count of criminal copyright infringement. Vol. I, DOC 85. In addition to admitting his guilt without a

trial, Mr. Lundgren voluntarily agreed to surrender, and surrendered to the Government, all the property subject to forfeiture under 18 U.S.C. § 2323. *Id.*

The district court held a sentencing hearing on May 22 and 23, 2017. Vols. I and II, DOCs 145 & 146. On May 23, 2017, pursuant to 18 U.S.C. § 3553, after considering the United States Sentencing Guidelines (the “Guidelines”), and primarily based on its calculation of the infringement amount, the district court determined the appropriate Guideline range for Mr. Lundgren’s offense was a Level of 21. Vol. II, DOC 146, p. 20. After considering the mitigating factors listed in 18 U.S.C. § 3553, the district court imposed a non-guideline sentence of incarceration for a period of 15 months against Mr. Lundgren and ordered him to self-surrender on July 14, 2017. *Id.* p. 68.

On May 30, 2017, Mr. Lundgren timely filed a Notice of Appeal from the district court’s sentence. Vol. I, DOC 140.

Mr. Lundgren had been free on bond following his arraignment. After the district court denied his motion for release pending appeal, Mr. Lundgren was required to self-surrender to the Federal Detention Center in Sheridan, Oregon on July 14, 2017. Vol. I, DOC 145, pp. 67-68. On July 12, 2017, Mr. Lundgren filed an Emergency Motion for Continued Release Pending Appeal in this Court. On July 13, 2017, in light of the substantial issues raised by Mr. Lundgren’s appeal from the sentence imposed by the district court, the Court granted his emergency

motion. Thus, Mr. Lundgren remains free on bond since he was arraigned. Vol. II, Tab B.

**D. Standard of Review**

This Court’s review of a criminal sentence has two parts: *first*, a challenge to the district court’s calculation of the advisory Sentencing Guidelines range and *second*, a review of the sentence for reasonableness. *United States v. Barner*, 572 F.3d 1239, 1247 (11th Cir. 2009) (citing *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Williams*, 435 F.3d 1350, 1353 (11th Cir. 2006)).

In imposing a sentence, “the district court must calculate the Guidelines range accurately.” *Barner*, 527 F.3d at 1247 (quoting *United States v. Crawford*, 407 F.3d 1174, 1179 (11th Cir. 2005)). The Court “review[s] the district court’s interpretation of the Sentencing Guidelines *de novo* and accept its factual findings unless clearly erroneous.” *Barner*, 572 F.3d at 1247 (citing *United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir. 2005)).

“An error in the district court’s calculation of the Sentencing Guidelines range warrants vacating the sentence, unless the error is harmless.” *Barner*, 572 F.3d at 1247 (citing *United States v. Scott*, 441 F.3d 1322, 1329 (11th Cir. 2006)). A miscalculation of the Guideline range is harmless only if the district court would have imposed the same sentence without the error. *Id.*

### SUMMARY OF THE ARGUMENT

Mr. Lundgren was charged with, pled guilty to, and was sentenced for infringing Windows OS software on computer discs that were sold *without a license or product key*. The Windows software and the license and product key are separate things (the license being the means by which the product key is obtained and the key being the means by which the full features of the software can be utilized). Mr. Lundgren was not charged with, he did not plead guilty to, and he was not sentenced for trafficking in Microsoft licenses or product keys. The infringed item in this case was Windows OS software *without a license or product key*.

To calculate the Guideline range under USSG § 2B5.3, the district court was required to determine the infringement amount at the sentencing hearing. As the district court recognized at the hearing, determining the infringement amount was “important because it *effectively drives the guidelines*.” Tr. 5/22, Vol. II, DOC 145, p. 210 (emphasis added). Mr. Lundgren’s sentence of 15 months of incarceration was the direct result of the district court’s substantial miscalculation of the infringement amount.

To calculate the infringement amount, the Guidelines required the district court to use “the retail value of the *infringed item*, multiplied by the number of infringing items.” USSG § 2B5.3 Application Note 2(A)(i)(I) and (II) (emphasis

added). However, the Government utterly failed to meet its burden to prove the retail value of the infringed item. It offered *no evidence* of the value of Windows software *without a license or product key*. Rather, the Government only offered evidence of the value of computer discs sold with Windows OS software *coupled together with a license and product key*.

The district court properly recognized the difference between the Windows OS software and the discs onto which it was copied, but it ignored the crucial difference between the software and the license and (most importantly) the product key. For example, discs with Windows OS software but *without a license and product key* were available from Dell for free, and the OS software could be downloaded *without a license and product key* for free from at least a dozen websites. The district court was offered no evidence that anyone ever paid *anything* to buy Windows OS software *without a license and product key*.

Having confused two fundamentally different things, the district court mistakenly accepted the Government's evidence of the retail value of Microsoft OS software *with* a license and product key as though it were also the retail value of the software alone *without* a license or product key. Since Windows OS software could be obtained for free, the value was in the license and, in particular, the product key which unlocks the full features of the OS software. Unlike the OS software itself, the license and product key were not available for free. That

fundamental mistake led the district court to substantially miscalculate the Guideline range here.

Had the district court properly determined the infringement amount, using zero as the value of the infringed item, it would not have added 14 points to the Offense Level Computation for the Special Offense Characteristic. The district court's 14-point Special Offense Characteristic upward adjustment should only have been a 4-point adjustment. After the 2-point downward adjustment for Mr. Lundgren's acceptance of responsibility and the 1-point downward adjustment for assisting the authorities in investigating his own misconduct, the Total Offense Level should have been 9, not 21 as mistakenly calculated by the district court, and would have put Mr. Lundgren in Zone B of the Sentencing Table. The resulting sentence imposed on Mr. Lundgren would have been much shorter or no incarceration at all.

Because the Government failed to meet its burden to prove the retail value of the infringed item, which led the district court to improperly calculate the infringement amount, the district court's calculation of the Guideline range was substantially in error. Had it calculated the Guideline range correctly, the district court would not have imposed the same sentence on Mr. Lundgren. Therefore, Mr. Lundgren's sentence must be vacated. *See Scott*, 441 F.3d at 1329.

## ARGUMENT

### **I. THE GOVERNMENT OFFERED NO EVIDENCE OF THE VALUE OF THE INFRINGED PRODUCT**

Under Guideline § 2B5.3, the district court was required to determine the infringement amount at the sentencing hearing. As the district court recognized at the hearing, determining the infringement amount was “important because it *effectively drives the guidelines.*” Tr. 5/22, Vol. II, DOC 145, p. 210 (emphasis added).

Sentencing Guideline Application Note 2, applicable to determining the infringement amount for purposes of Section 2B5.3(b)(1), directs courts to use “the retail value of the *infringed item*, multiplied by the number of infringing items” when “[t]he infringing item (I) is, or appears to a reasonably informed purchaser to be, *identical or substantially equivalent* to the infringed item; or (II) is a *digital or electronic reproduction of the infringed item.*” USSG § 2B5.3 Application Note 2(A)(i)(I) and (II) (emphasis added).

More particularly, the infringed item<sup>7</sup> – *i.e.*, what Mr. Lundgren was charged with and pled guilty to infringing – is Windows OS software *without a license or a product key*. Mr. Lundgren was not charged with, he did not plead guilty to, and he

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<sup>7</sup> As defined in the Guidelines, “[i]nfringing items’ are distinguishable from ‘infringed items.’ Infringed items are the legitimate items that are infringed upon by the infringing item.” *United States v. Lozano*, 490 F.3d 1317, 1320, n.3 (11th Cir. 2007) (citing USSG § 2B5.3 Application Note 1).



was not sentenced for infringing Windows OS licenses or product keys. At the sentencing hearing, the district court noted, “Remember, now, we are *not* talking about the disc, the reinstallation disc, that is just the means of installing the software. The item that has been . . . infringed *is the Microsoft software*. Tr. 5/22, Vol. II, DOC 145, p. 217 (emphasis added). The Government agreed that Windows OS software was the infringed item: “Now, the infringed item we believe was infringed was *the Microsoft operating system software*, called the software image contained on the Dell installation disc.” Tr. 5/22, Vol. II, DOC 145, p. 195 (emphasis added).

There was and is no dispute that the unauthorized copies of the discs containing OS software that Mr. Lundgren pled guilty to and was sentenced for trafficking in were digital or electronic reproductions of the Windows OS that were identical or substantially equivalent to the version of the software included on the Dell reinstallation discs.

Therefore, under the Guidelines, the relevant inquiry for the district court was the retail value of *the infringed Windows OS software*, not of the reinstallation discs. *See* USSG § 2B5.3 Application Note 2(A)(i)(I) and (II) (emphasis added).

Substantial issues of disputed fact were raised and decided during Mr. Lundgren’s sentencing hearing regarding the calculation of the infringement

amount used to determine his sentence. Where, as here, the defendant disputes the retail value of the infringed item, the Government bears the burden of persuasion on its value. Vol. I, DOC 145, p. 6. The Government expressly acknowledged its burden of persuasion at the sentencing hearing. Vol. I, DOC 145, p. 6. However, the Government completely failed to meet its burden of persuasion to prove the retail value of the infringed item (*i.e.*, the Windows OS software itself *without* a license or product key). In fact, the Government offered *no evidence* of the retail value of the Windows software *without* a license and, in particular, *without* a product key.<sup>8</sup>

The *only* evidence the Government offered in this case was of the retail value of Windows OS software it sold *together with a software license and a product key*. That is, the Government only offered proof of the retail value of something *entirely different* than what Mr. Lundgren pled guilty to infringing. Indeed, the Government's only valuation witness, Jonathan McGloin, admitted he *did not know the retail value* of the Windows OS software alone, or even the reinstallation disc, *without* a license and product key. *See* Tr. 5/22, Vol. I, DOC 145, pp. 132-33 (Mr. McGloin did not know what, if anything, Dell charged for reinstallation disc sold without license and product key during the relevant period

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<sup>8</sup> Mr. Lundgren's expert witness, Glen Weadock, testified that the software by itself, without a license and product key, was virtually worthless. Vol. II, DOC 145 p. 165.

from 2011 to 2012).

The Court recognized the difference between a computer disc and the software on it. *See* Tr. 5/22, Vol. II, DOC 145, p. 217. However, the Court appears to have been confused by the Government's evidence as to the critical difference between Windows OS software with a license and product key versus the software without a license or product key. Most importantly, without the product key, the Windows software was an inactivated version of no value. Indeed, it was available for free from at least a dozen websites.

Again, as the Government's valuation witness admitted, an operating system installed from software without a valid product key had only limited functionality and for only a short period of time. *See* Tr. 5/22, Vol. I, DOC 145, pp. 115-16 (admitting that the operating system was *not* fully functional); pp. 115 & 130-31 (admitting that XP version of Windows OS worked for *only 30 days*). Until the product key was entered, the software was merely an inactivated, limited version of the Windows OS software.

In *Lozano*, this Court held that the "[r]etail value 'of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.'" 490 F.3d 1317, 1320 n.4 (11th Cir. 2007) (quoting USSG §2B5.3 at Note 2(C)). Here, the Government offered *no evidence* of the retail value of software that installed only a partially-functional operating system which Mr. Lundgren was

sentenced for infringing. Certainly, the Government offered no evidence at the sentencing hearing of the retail price at which a copy of Windows software was sold without a license or product key – if one was ever sold that way.

To the contrary, Mr. Lundgren offered Exhibit 1 to his Sentencing Memorandum, showing multiple websites providing free downloads of the Windows OS software without a product key (some of which required a product key, some of which simply required a computer part number, and some of which required nothing). Vol. I, DOC 117-1. Mr. Lundgren's valuation witness, Glen Weadock, also testified that copies of the exact same Windows software that Mr. Lundgren was convicted of infringing, without a license or product key, were readily available *for free* in 2011 and 2012. Tr. 5/22, Vol. II, DOC 145, p. 168. Mr. Weadock's testimony was uncontradicted; indeed, the Government's own valuation witness conceded that original equipment manufacturers were permitted to and did distribute *free* copies of the Windows OS software without a license or product key. Tr. 5/22, Vol. I, DOC 145 pp. 132, 145.<sup>9</sup> At most, the infringing product – the discs with inactivated software and certain features disabled – had only nominal convenience value, which was never proven, and certainly not anything like the retail value of the full-featured, permanent version of the software sold with a license and a product key.

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<sup>9</sup> Mr. McGloin conceded that the distribution of free Windows software had no economic impact on Microsoft. *See* Tr. 5/22, Vol. I, DOC 145, p. 132.

Here, the Government provided no proof of the price at which Windows OS trial software was sold in any market without a license or product key. Indeed, the district court had no proof that Windows software was *ever* sold in *any* market at *any* price without a license or product key. Thus, the Court had no basis to determine the retail value of the infringed item, *i.e.*, the Microsoft software without a license or product key. With no proof of the retail value of the infringed item,<sup>10</sup> the district court was left to assume that Windows trial software, without a license and product key, had the exact same retail value as the full-featured Windows OS software, sold with a license and a product key.

Therefore, because the Government offered no evidence of the retail value of Windows OS software *without* a license or product key, it utterly failed to meet its burden to prove the retail value of the infringed item. The Government provided no basis for the district court to determine the infringement amount for purposes of calculating the Special Offense Characteristic under Guideline § 2B5.3(b)(1).

## **II. THE DISTRICT COURT ERRED WHEN IT MISCALCULATED THE ADVISORY RANGE UNDER THE GUIDELINES**

### **A. The District Court Confused Windows OS Software With and Without a License and Product Key**

As discussed in Point I above, Sentencing Guideline Application Note 2 directed the district court to use “the retail value of the *infringed item*, multiplied

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<sup>10</sup> Mr. Lundgren’s expert testified that Windows OS software *without a license and product key* had no value. *See* Tr. 5/22, Vol. II, DOC 145, p. 165.

by the number of infringing items” to determine the infringement amount for purposes of calculating the Special Offense Characteristic under Guideline Section § 2B5.3(b)(1). Under Guideline § 2B5.3, the district court was required to determine the infringement amount at the sentencing hearing. That determination “*effectively drives the guidelines.*” Tr. 5/22, Vol. II, DOC 145, p. 210 (emphasis added).

In addition, as discussed in Point I above, the district court and the Government agreed that the infringed item in this case was the *Microsoft OS software*, not the reinstallation discs. *See* Tr. 5/22, Vol. II, DOC 145, p. 217 (“we are *not* talking about the disc, the reinstallation disc, that is just the means of installing the software. The item that has been . . . infringed *is the Microsoft software.*”) (emphasis added); p. 195 (“the infringed item we believe was infringed was *the Microsoft operating system software*”) (emphasis added).

Mr. Lundgren pled guilty to and was sentenced for infringing Windows OS software *without a license or a product key*. Mr. Lundgren was not charged with, he did not plead guilty to, and he was not sentenced for infringing Windows licenses or product keys. Under both sub-parts of Application Note 2, the district court should have used the retail value of the Windows software *without a license or a product key* to calculate the infringement amount under USSG § 2B5.3(b)(1). *See* USSG § 2B5.3 Application Note 2(A)(i)(I) and (II).

However, the district court did not do so. Instead, apparently confused by the Government's presentation at the sentencing hearing, which consisted entirely of testimony from a Microsoft employee regarding the retail value of Windows OS software sold *with a license and a product key*, the district court implicitly accepted the retail value of that licensed, full-featured version of the software as though it was the same as the value of the stripped-down, unlicensed, trial version of the software *without a product key*.

**B. The District Court's Confusion Caused It to Calculate the Infringement Amount in Error**

When it imposed a sentence on Mr. Lundgren, the district court was required to “calculate the Guidelines range accurately.” *Barner*, 527 F.3d at 1247 (quoting *Crawford*, 407 F.3d at 1179). The sentence must be vacated when, as here, the district court miscalculates the Guideline range. *Id.* (“error in the district court’s calculation of the Sentencing Guidelines range warrants vacating the sentence”) (citing *Scott*, 441 F.3d at 1329).

Here, the district court’s confusion led to a fundamental error in its calculation of the infringement amount. Mr. Lundgren pled guilty to crimes relating to infringed copies of Microsoft operating system software. He was *not* charged with, he did *not* plead to, and he was *not* convicted of any crime relating to Microsoft licenses or product keys.

The software is separate and distinct from the license and, most importantly,

the product key. An inactivated copy of the software *without* a license and product key – readily available for free on a reinstallation disc from Dell or for free as a download from any number of websites – is very different than a permanent, licensed, full-featured copy of the software *with* a product key. Thus, a critical factual determination for the district court to make at the sentencing hearing was the retail value of the Windows software *without a license and most importantly without a product key*.

**C. The District Court’s Substantial Miscalculation of the Infringement Amount Was Not Harmless Error**

To calculate the Guideline range, the district court began with a base Offense Level Computation of 8.<sup>11</sup> Next, to calculate the Special Offense Level Computation, the district court determined the retail value of \$25 for the infringed item, based solely on the Government’s evidence of the cost paid by refurbishers for the licensed version of Windows software *together with a product key*. The district court multiplied that value by the 28,000 disc copies that were made, computing an infringement amount of \$700,000. On the basis of that calculation, the district court added 14 points to the Offense Level Computation for the Special Offense Characteristic, which was based on an infringement amount of \$700,000.

With no proof of the retail value of the infringed item, the district court was left to infer that Windows software without a license and product key had the exact

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<sup>11</sup> The district court’s base Offense Level Computation is not disputed.



same retail value as installation discs sold to refurbishers with Windows software, with a license, and with a product key. In concluding that the infringement value of the software was \$25 – the price charged to refurbishers for a licensed copy of the Windows software together with a product key – the district court apparently did so. The district court was forced to make this unwarranted and unjustified assumption because the Government provided no evidence of the retail value of the Windows OS software without a license or a product key, and no evidence that the two different products had the same retail value.

When the district court denied Mr. Lundgren’s motion to extend his release, it noted Mr. Lundgren’s argument that the Government “offered no evidence on the retail value of [the Microsoft] software sold without a license or product key.” DE 154, at 3. The district court did not thereafter cite any evidence offered by the Government on the retail value of the software without a license or product key, nor did it cite to any other factual basis to support its calculation of the infringement amount of \$700,000 (which was determined based on the supposed value of the Windows software *plus* a license and new product key). The district court did not make any finding that the supposed value of the software *with* a license and new product key was the same as the retail value of the infringed item – *i.e.*, the software *without* the license or product key – much less that it was a suitable proxy for the retail value of the infringed item. Instead, the district court

began and ended its analysis of Mr. Lundgren's motion with the observation that he made substantially the same arguments unsuccessfully before.

Because the Government failed to prove any retail value for the infringed item, the Court should not have added 14 points to the Offense Level Computation for the Special Offense Characteristic, which was based on an infringement amount of \$700,000 (or \$25 multiplied by the 28,000 disc copies).<sup>12</sup> The 14-point Special Offense Characteristic upward adjustment should only have been a 4-point adjustment. After the 2-point downward adjustment for Mr. Lundgren's acceptance of responsibility and the 1-point downward adjustment for assistance to authorities in investigating his own misconduct,<sup>13</sup> the Total Offense Level should have been 9, not 21 as calculated by the district court.

In the Sentencing Table under Criminal History Category I,<sup>14</sup> the Guideline sentence range for a Total Offense Level of 21 is 37 to 46 months. By sharp contrast, the Guideline sentence range under Criminal History Category I for an Total Offense Level of 9 is just 4 to 10 months, much less than one-fourth of the Guideline sentence.

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<sup>12</sup> At most, because the offense involved the manufacture or importation of infringing items, the offense level would be adjusted to 12 under USSG § 2B5.3(b)(3)(A) before any adjustment for acceptance of responsibility.

<sup>13</sup> The district court properly credited Mr. Lundgren for both of the downward adjustments.

<sup>14</sup> There is no dispute that Mr. Lundgren was to have been sentenced under Criminal History Category I based on his Criminal History Points.

Moreover, even under Criminal History Category I, a Guideline sentence for a Total Offense Level of 21 falls within Zone D, making incarceration mandatory. Under Guideline § 5C1.1, “[i]f the applicable Guideline range is in Zone D of the Sentencing Table, the minimum term *shall be satisfied by a sentence of imprisonment.*” USSG § 5C1.1(f) (emphasis added). However, under Criminal History Category I, a Guideline sentence for a Total Offense Level of 9 falls within Zone B and does *not* require incarceration. Under Guideline § 5C1.1, “[i]f the applicable guideline range is in Zone B of the Sentencing Table, the minimum term may be satisfied by . . . a sentence of *probation*” in lieu of imprisonment. USSG § 5C1.1(c)(3) (emphasis added).

Given the district court’s substantial downward departure from the indicated Guideline sentence for a Total Offense Level of 21, had it calculated the Total Offense Level correctly, there is no doubt that Mr. Lundgren would have received a sentence of far less than the minimum of six months for a Total Offense Level of 9. Indeed, it is likely that the district court would have sentenced Mr. Lundgren to probation under USSG § 5C1.1(c)(3) had it calculated the Total Offense Level correctly.

Clearly, the district court would not have imposed the same sentence on Mr. Lundgren had it computed the Total Offense Level correctly. Importantly, the record does *not* indicate that the district court would have imposed the same

sentence on Mr. Lundgren had it calculated the Guideline range differently. Under these circumstances, the district court's error in calculating the Guideline sentencing range was the opposite of harmless. *Barner*, 572 F.3d at 1247 (citing *Scott*, 441 F.3d at 1329). Therefore, this Court must vacate the sentence imposed on Mr. Lundgren.

### **CONCLUSION**

For all the foregoing reasons, Mr. Lundgren respectfully requests that this Court vacate the sentence imposed by the district court and remand this case back to the district court for further proceedings.

Dated: September 25, 2017

**WOLF HALDENSTEIN ADLER  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionally spaced typeface using Microsoft Word in a 14-point font size and Times New Roman type style and contains 5,628 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

Dated: September 25, 2017

s/ Randall S. Newman  
Randall S. Newman

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of September 2017, the foregoing Opening Brief of Defendant-Appellant Clifford Eric Lundgren was served on all counsel of record by CM/ECF.

By: s/ Randall S. Newman

**No. 17-12466**

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,**  
*Plaintiff-Appellee,*

v.

**CLIFFORD ERIC LUNDGREN,**  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Southern District of Florida  
Criminal Case No. 9:16-cr-80090-DTKH-2

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**APPENDIX  
VOLUME I**

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TAB A

**U.S. District Court  
Southern District of Florida (West Palm Beach)  
CRIMINAL DOCKET FOR CASE #: 9:16-cr-80090-DTKH-2**

Case title: USA v. Wolff et al

Date Filed: 06/07/2016

Date Terminated: 05/24/2017

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Assigned to: Senior Judge Daniel T. K. Hurley

Appeals court case number: 17-12466-H

USCA

**Defendant (2)**

**Clifford Eric Lundgren**

13623-104

*ENGLISH*

*TERMINATED: 05/24/2017*

represented by **Lilly Ann Sanchez**

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**Pending Counts**

18:2320.F CONSPIRACY TO TRAFFIC  
CNTRFEIT GOODS/SERVICES  
(1s)

17:506A.F CRIMINAL INFRINGEMENT  
OF A COPYRIGHT  
(3s)

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

TRAFFICKING CNTRFEIT  
GOODS/SERVICES  
(1-2)

18:2320.F TRAFFICKING CNTRFEIT  
GOODS/SERVICES  
(2s)

CRIMINAL INFRINGEMENT OF A  
COPYRIGHT  
(3)

COUNTERFEIT LABELS FOR  
PHONOGRAPH RECORDS  
(4)

18:2318.F COUNTERFEIT LABELS FOR  
PHONOGRAPH RECORDS  
(4s)

FRAUD BY WIRE, RADIO, OR  
TELEVISION  
(5-15)

18:1343.F FRAUD BY WIRE, RADIO, OR  
TELEVISION  
(5s-15s)

**Disposition**

IMPRISONMENT: 15 Months. This term consists of 15 as to each of the counts 1s and 3s to be served concurrently. SUPERVISED RELEASE: 3 Years. This term consists of 3 years as to count 1s and 3 years as to count 3s to run concurrent with each other.

IMPRISONMENT: 15 Months. This term consists of 15 as to each of the counts 1s and 3s to be served concurrently. SUPERVISED RELEASE: 3 Years. This term consists of 3 years as to count 1s and 3 years as to count 3s to run concurrent with each other.

**Disposition**

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

18:1341.F FRAUDS AND SWINDLES  
(16s-21s)

DISMISSED.

**Highest Offense Level (Terminated)**

Felony

**Complaints**

None

**Disposition**

**Plaintiff**

USA

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<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b> <a href="#">Docket 17-12466</a> <a href="#">Date Filed: 09/26/2017</a> <a href="#">Page: 7 of 247</a>
06/07/2016	<a href="#">1</a>	INDICTMENT as to Robert J. Wolff (1) count(s) 1-2, 3, 4, 5-15, 16-19, Clifford Eric Lundgren (2) count(s) 1-2, 3, 4, 5-15, 16-21; FORFEITURE. (tmn) (Additional attachment(s) added on 6/7/2016: # <a href="#">1</a> Restricted Unredacted Indictment) (tmn). (Entered: 06/07/2016)
06/07/2016		SYSTEM ENTRY - Docket Entry 3 restricted/sealed until further notice. (tmn) (Entered: 06/07/2016)
06/21/2016	<a href="#">14</a>	NOTICE OF ATTORNEY APPEARANCE: Lilly Ann Sanchez appearing for Clifford Eric Lundgren . Attorney Lilly Ann Sanchez added to party Clifford Eric Lundgren(pty:dft). (Sanchez, Lilly Ann) (Entered: 06/21/2016)
06/22/2016	<a href="#">15</a>	<p>PAPERLESS Minute Order for proceedings held before Magistrate Judge Dave Lee Brannon: AUSA-Lothrop Morris, Defense Counsel-Lilly Ann Sanchez and Defendant all present. Defendant sworn/testified and advised of rights. Initial Appearance and <b>ARRAIGNMENT</b> as to Clifford Eric Lundgren held on 6/22/2016. Date of Arrest or Surrender: 6/22/16., Bond Hearing as to Clifford Eric Lundgren held on 6/22/2016. Bond set: Clifford Eric Lundgren (2) \$50,000 PSB. Defendant waives Speedy Trial. Defense Counsel will file written waiver in 5 business days. (Digital 10:09:46)</p> <p>PAPERLESS STANDING DISCOVERY ORDER: The defendant(s) having been arraigned this date in open Court, it is Ordered that within 14 days of the date of this order that all parties to this action shall review and comply with Southern District of Florida Local Rules 88.10 (Criminal Discovery), and 88.9(c) (Motions in Criminal Cases). Upon a sufficient showing, the Court may at any time, upon a properly filed motion, order that the discovery or inspection provided for by this Standing Order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make a good faith effort to comply with the letter and spirit of this Standing Order. It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of Local Rule 88.10. Signed by Magistrate Judge Dave Lee Brannon on 6/22/2016. (sa) (Entered: 06/22/2016)</p>
06/22/2016	<a href="#">16</a>	ORDER RE: STATUS REPORT, SPEEDY TRIAL AND PRETRIAL MATTERS as to Clifford Eric Lundgren. Signed by Magistrate Judge Dave Lee Brannon on 6/22/2016. (sa) (Entered: 06/22/2016)
06/22/2016	<a href="#">17</a>	\$50,000 PSB Entered as to Clifford Eric Lundgren. Approved by Magistrate Judge Dave Lee Brannon. <i>Please see bond image for conditions of release.</i> (sa) (Additional attachment(s) added on 6/22/2016: # <a href="#">1</a> Restricted Bond with 5th Page) (sa). (Entered: 06/22/2016)
06/24/2016	<a href="#">18</a>	Arrest Warrant returned executed on 6/22/2016 as to Clifford Eric Lundgren (ar2) (Entered: 06/24/2016)
06/27/2016	<a href="#">19</a>	WAIVER of Speedy Trial by Robert J. Wolff, Clifford Eric Lundgren (Sanchez, Lilly Ann) (Entered: 06/27/2016)
07/07/2016	<a href="#">21</a>	STATUS REPORT <i>Joint</i> by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 07/07/2016)
07/08/2016	<a href="#">23</a>	RESPONSE to Standing Discovery Order by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 07/08/2016)
07/11/2016	<a href="#">24</a>	ORDER SETTING TRIAL as to Robert J. Wolff and Clifford Eric Lundgren. Calendar Call set

Case 1:16-cv-01468-30-AMT-WPT Document 1-1 Filed 07/11/16 Page 8 of 27  
 Case 1:16-cv-01468-30-AMT-WPT Document 1-1 Filed 07/11/16 Page 8 of 27  
 Trial set for 10/11/2016 before Judge Daniel T. K. Hurley. Signed by Judge Daniel T. K. Hurley on 7/11/2016. (ar2)

**Pattern Jury Instruction Builder - To access the latest, up to date changes to the 11th Circuit Pattern Jury Instructions go to <https://pji.ca11.uscourts.gov> or click here.** (Entered: 07/11/2016)

07/13/2016	<a href="#"><u>25</u></a>	NOTICE OF UNAVAILABILITY by Clifford Eric Lundgren for dates of October 3, 2016 through November 1, 2016 (Sanchez, Lilly Ann) (Entered: 07/13/2016)
09/07/2016	<a href="#"><u>26</u></a>	Unopposed MOTION to Continue Trial by Clifford Eric Lundgren. Responses due by 9/26/2016 (Sanchez, Lilly Ann) (Entered: 09/07/2016)
09/09/2016	27	ORDER denying without prejudice to renewal at the calendar call Defendant (2) Clifford Lundgren's <a href="#"><u>26</u></a> motion to continue the trial. Defense counsel may ask counsel for the co-defendant to speak for her at the calendar call. Signed by Judge Daniel T. K. Hurley on 9/9/2016. (DTKH) (Entered: 09/09/2016)
10/11/2016	28	PAPERLESS ORDER RESETTING CALENDAR CALL as to Robert J. Wolff, Clifford Eric Lundgren, Due to the court's closure for Hurricane Matthew, the calendar call previously set for 10/7/16 has been reset. ( Calendar Call set for 10/14/2016 09:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley.) Signed by Judge Daniel T. K. Hurley on 10/11/2016. (mg) (Entered: 10/11/2016)
10/20/2016	<a href="#"><u>29</u></a>	ORDER GRANTING MOTION TO CONTINUE - Ends of Justice as to Robert J. Wolff, Clifford Eric Lundgren Time excluded from 10/14/16 until 11/7/16. Calendar Call set for 10/27/2016 08:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. Jury Trial set for 11/7/2016 in West Palm Beach Division before Judge Daniel T. K. Hurley. Signed by Judge Daniel T. K. Hurley on 10/20/2016. (mg) (Entered: 10/20/2016)
11/03/2016	<a href="#"><u>32</u></a>	NOTICE OF HEARING as to Robert J. Wolff, Clifford Eric Lundgren Miscellaneous Hearing set for 11/14/2016 09:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. (mg) (Entered: 11/03/2016)
11/04/2016	<a href="#"><u>34</u></a>	First RESPONSE to Standing Discovery Order by USA as to Clifford Eric Lundgren <i>Supplemental</i> (Morris, Lothrop) (Entered: 11/04/2016)
11/14/2016	35	PAPERLESS Minute Entry for proceedings held before Judge Daniel T. K. Hurley: Miscellaneous Hearing as to Robert J. Wolff, Clifford Eric Lundgren held on 11/14/2016. Court to put the case on the February trial calendar which begins February 6, 2017 with Calendar call being January 26, 2017. Total time in court: 2 hour(s). Attorney Appearance(s): Lothrop Morris, Randee J. Golder, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (mg) (Entered: 11/14/2016)
11/14/2016		Set/Reset Hearings as to Robert J. Wolff, Clifford Eric Lundgren: Calendar Call set for 1/26/2017 08:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. Jury Trial set for 2/6/2017 in West Palm Beach Division before Judge Daniel T. K. Hurley. (mg) (Entered: 11/14/2016)
11/14/2016	36	ORDER granting Defendants oral motion to continue the trial from its present setting on the November/December 2016 trial calendar. The case will be reset to the February 2017 trial calendar by separate order. All pretrial motions shall be filed on or before December 31, 2016. In granting this motion the court finds that the ends of justice served by taking this action

[Overweight the Best Interests of the Public and the Defendants in Strictly Expedient trial compliance. The necessity for this action is the Defendants' right to effective assistance of counsel in investigating and, if necessary, filing appropriate pretrial motions concerning newly-discovered evidentiary issues. Signed by Judge Daniel T. K. Hurley on 11/14/2016. \(DTKH\) \(Entered: 11/14/2016\)](#)

11/14/2016 37 Case No Longer Referred to Magistrate Judge James M. Hopkins as to Robert J. Wolff, Clifford Eric Lundgren Signed by Judge Daniel T. K. Hurley on 11/14/2016. (DTKH) (Entered: 11/14/2016)

11/25/2016 [38](#) NOTICE of Intent to Use *902(11)* Evidence by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 11/25/2016)

01/03/2017 [43](#) MOTION to Dismiss [1](#) Indictment, and Memorandum of Law by Clifford Eric Lundgren. Responses due by 1/17/2017 (Attachments: # [1](#) Exhibit Exhibit A, # [2](#) Exhibit Exhibit B, # [3](#) Exhibit Exhibit C, # [4](#) Exhibit Exhibit D, # [5](#) Exhibit Exhibit E, # [6](#) Exhibit Exhibit F, # [7](#) Exhibit Exhibit G)(Sanchez, Lilly Ann) Modified title text on 1/4/2017 (asl). (Entered: 01/03/2017)

01/03/2017 [44](#) MOTION to Exclude *Proposed Expert Evidence and Testimony of Microsoft Corporation* by Clifford Eric Lundgren. Responses due by 1/17/2017 (Attachments: # [1](#) Exhibit A, # [2](#) Exhibit B, # [3](#) Exhibit C)(Sanchez, Lilly Ann) (Entered: 01/03/2017)

01/03/2017 46 MOTION to Suppress Evidence by Clifford Eric Lundgren. See [43](#) for image (asl) (Entered: 01/04/2017)

01/04/2017 45 Clerks Notice to Filer re [43](#) MOTION to Dismiss [1](#) Indictment, . **Motion with Multiple Reliefs Filed as One Relief**; ERROR - The Filer selected only one relief event and failed to select the additional corresponding events for each relief requested in the motion. The docket entry was corrected by the Clerk. It is not necessary to refile this document but future filings must comply with the instructions in the CM/ECF Attorney User's Manual. (asl) (Entered: 01/04/2017)

01/10/2017 [47](#) RESPONSE to Motion by USA as to Robert J. Wolff, Clifford Eric Lundgren re [44](#) MOTION to Exclude *Proposed Expert Evidence and Testimony of Microsoft Corporation Request for Expert Summary* Replies due by 1/17/2017. (Attachments: # [1](#) Appendix CV of Katie Hasbrouck) (Morris, Lothrop) (Entered: 01/10/2017)

01/10/2017 [48](#) RESPONSE in Opposition by USA as to Clifford Eric Lundgren re [44](#) MOTION to Exclude *Proposed Expert Evidence and Testimony of Microsoft Corporation* Replies due by 1/17/2017. (Morris, Lothrop) (Entered: 01/10/2017)

01/10/2017 [49](#) RESPONSE in Opposition by USA as to Clifford Eric Lundgren re [43](#) MOTION to Dismiss [1](#) Indictment, Replies due by 1/17/2017. (Morris, Lothrop) (Entered: 01/10/2017)

01/17/2017 [50](#) REPLY in Support by Clifford Eric Lundgren as to Robert J. Wolff, Clifford Eric Lundgren re [44](#) MOTION to Exclude *Proposed Expert Evidence and Testimony of Microsoft Corporation* (Attachments: # [1](#) Exhibit A) (Sanchez, Lilly Ann) Modified title text on 1/17/2017 (asl). (Entered: 01/17/2017)

01/17/2017 [52](#) RESPONSE to Motion by USA as to Clifford Eric Lundgren re [43](#) MOTION to Dismiss [1](#) Indictment, *Second Rule 16 Response* Replies due by 1/24/2017. (Attachments: # [1](#) Appendix A) (Morris, Lothrop) (Entered: 01/17/2017)

01/17/2017 [53](#) Memorandum in Support by Clifford Eric Lundgren re [43](#) MOTION to Dismiss [1](#) Indictment, *or in the Alternative, to Suppress Evidence* (Attachments: # [1](#) Exhibit A) (Sanchez, Lilly

		Case 1:16-cr-00146 Document 466-1 Filed 09/26/17 Page 10 of 247
01/18/2017	<a href="#">54</a>	TRANSCRIPT of status conference as to Robert J. Wolff, Clifford Eric Lundgren held on 10-14-2016 before Judge Daniel T. K. Hurley, 1-7 pages, Court Reporter: Dawn Savino, 305-523-5598 / Dawn_Savino@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/8/2017. Redacted Transcript Deadline set for 2/21/2017. Release of Transcript Restriction set for 4/18/2017. (dwh) (Entered: 01/18/2017)
01/23/2017	<a href="#">55</a>	RESPONSE to Motion by USA as to Clifford Eric Lundgren re <a href="#">43</a> MOTION to Dismiss <a href="#">1</a> Indictment, Replies due by 1/30/2017. (Attachments: # <a href="#">1</a> Appendix A) (Morris, Lothrop) (Entered: 01/23/2017)
01/24/2017	<a href="#">56</a>	NOTICE OF ATTORNEY APPEARANCE: Bruce Reinhart appearing for Clifford Eric Lundgren <i>as Co-Counsel for trial purposes</i> . Attorney Bruce Reinhart added to party Clifford Eric Lundgren(pty:dft). (Reinhart, Bruce) (Entered: 01/24/2017)
01/26/2017	<a href="#">57</a>	NOTICE OF ATTORNEY APPEARANCE Rolando Garcia appearing for USA. . Attorney Rolando Garcia added to party USA(pty:pla). (Garcia, Rolando) (Entered: 01/26/2017)
01/26/2017	<a href="#">58</a>	ORDER SETTING EVIDENTIARY HEARING as to Robert J. Wolff, Clifford Eric Lundgren, as to <a href="#">43</a> MOTION to Dismiss <a href="#">1</a> Indictment, , <a href="#">44</a> MOTION to Exclude <i>Proposed Expert Evidence and Testimony of Microsoft Corporation</i> . ( Evidentiary Hearing set for 2/6/2017 09:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley.), Signed by Judge Daniel T. K. Hurley on 1/26/2017. (mg) (Entered: 01/26/2017)
01/31/2017	<a href="#">60</a>	MOTION in Limine <i>Regarding Evidence of Copyright and/or Suggestion that this Matter is a Civil Rather Than Criminal Matter</i> by USA as to Clifford Eric Lundgren. Responses due by 2/14/2017 (Morris, Lothrop) (Entered: 01/31/2017)
01/31/2017	<a href="#">61</a>	NOTICE of Intent to Use <i>FRE 806</i> Evidence by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 01/31/2017)
02/02/2017	<a href="#">62</a>	SUPERSEDING INDICTMENT as to Robert J. Wolff(1) count(s) 1s, 2s, 3s, 4s, 5s-15s, 16s-19s, Clifford Eric Lundgren (2) count(s) 1s, 2s, 3s, 4s, 5s-15s, 16s-21s and Forfeiture. (kza) (Additional attachment(s) added on 2/2/2017: # <a href="#">1</a> Restricted Unredacted Indictment) (kza). (Entered: 02/02/2017)
02/03/2017	<a href="#">64</a>	MOTION in Limine <i>Admissibility of Email Evidence</i> by USA as to Clifford Eric Lundgren. Responses due by 2/17/2017 (Attachments: # <a href="#">1</a> Appendix 1 to 5)(Morris, Lothrop) (Entered: 02/03/2017)
02/03/2017	<a href="#">66</a>	Third Response <i>Request for Summary of Expert Testimony</i> by USA as to Clifford Eric Lundgren (Attachments: # <a href="#">1</a> Supplement Mazzone expert report)(Morris, Lothrop) (Entered: 02/03/2017)
02/05/2017	<a href="#">69</a>	RESPONSE to Motion by USA as to Clifford Eric Lundgren re <a href="#">43</a> MOTION to Dismiss <a href="#">1</a> Indictment, <i>McGloin Expert Witness Summary FRCP 16</i> Replies due by 2/13/2017. (Morris, Lothrop) (Entered: 02/05/2017)
02/06/2017	71	PAPERLESS Minute Entry for proceedings held before Judge Daniel T. K. Hurley: Motion Hearing as to Clifford Eric Lundgren held on 2/6/2017 re 46 MOTION to Suppress Evidence filed by Clifford Eric Lundgren, <a href="#">43</a> MOTION to Dismiss <a href="#">1</a> Indictment, filed by Clifford Eric



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 Lundgren Total time in court: 8 hour(s) 26 minute(s) Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (mg) (Entered: 02/07/2017)

02/07/2017	<a href="#">70</a>	Minute Entry for proceedings held before Judge Daniel T. K. Hurley: <b>ARRAIGNMENT on Superseding Indictment DE 62</b> as to Clifford Eric Lundgren (2) Count 1-2,1s,2s,3,3s,4,4s,5-15,5s-15s,16-21,16s-21s held on 2/7/2017. Waived formal reading of indictment. Entered a plea of not guilty. Requests trial by jury. Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (lbc) (Entered: 02/07/2017)
02/07/2017	72	ORDER denying Defendant (2) Clifford Eric Lundgren's <a href="#">43</a> motion to dismiss the indictment. The court conducted an evidentiary hearing and made findings of fact and reached conclusions of law which are incorporated by reference into this order. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)
02/07/2017	73	ORDER denying Defendant (2) Clifford E. Lundgren's 46 motion to suppress without prejudice to object to the admissibility of evidence at trial. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)
02/07/2017	74	ORDER denying, without prejudice to renewal at trial, the Government <a href="#">60</a> <a href="#">64</a> motions win limine. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)
02/07/2017	75	ORDER denying, without prejudice to raise the issue via a motion pursuant to Rule 29, Fed.R.Crim.P., Defendant (2) Clifford E. Lundgren's <a href="#">44</a> motion to exclude a proposed government expert witness. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)
02/07/2017	76	PAPERLESS Minute Entry for proceedings held before Judge Daniel T. K. Hurley: Motion Hearing as to Clifford Eric Lundgren held on 2/7/2017 re <a href="#">43</a> MOTION to Dismiss <a href="#">1</a> Indictment, filed by Clifford Eric Lundgren Total time in court: 5 hour(s). Attorney Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (mg) (Entered: 02/08/2017)
02/10/2017	<a href="#">77</a>	RESPONSE to Motion by USA as to Clifford Eric Lundgren re <a href="#">43</a> MOTION to Dismiss <a href="#">1</a> Indictment, <i>Rule 16 Expert Summary Lozano</i> Replies due by 2/17/2017. (Attachments: # <a href="#">1</a> Appendix Curriculum Vitae) (Morris, Lothrop) (Entered: 02/10/2017)
02/16/2017	<a href="#">79</a>	NOTICE OF CHANGE OF PLEA HEARING as to Clifford Eric Lundgren. Change of Plea Hearing set for 2/28/2017 08:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. (mg) (Entered: 02/16/2017)
02/19/2017	<a href="#">80</a>	TRANSCRIPT of Motion to Dismiss as to Clifford Eric Lundgren held on 2.6.17 before Judge Daniel T. K. Hurley, Volume Number 1 of 2, 1-255 pages, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 3/13/2017. Redacted Transcript Deadline set for 3/22/2017. Release of Transcript Restriction set for 5/22/2017. (ps) (Entered: 02/19/2017)
02/19/2017	<a href="#">81</a>	TRANSCRIPT of Motion to Dismiss as to Clifford Eric Lundgren held on 2.7.17 before Judge Daniel T. K. Hurley, Volume Number 2 of 2, 1-148 pages, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline

For Release of Transcript Restriction After final date may be obtained through PACER. Redaction Request due 3/13/2017. Redacted Transcript Deadline set for 3/22/2017. Release of Transcript Restriction set for 5/22/2017. (ps) (Entered: 02/19/2017)

02/28/2017	83	PAPERLESS Minute Entry for proceedings held before Senior Judge Daniel T. K. Hurley. Change of Plea Hearing as to Clifford Eric Lundgren held on 2/28/2017. Clifford Eric Lundgren (2) Plead Guilty to Count 1s,3s. Total time in court: 1 hour(s). Attorney Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (lbc) (Entered: 02/28/2017)
02/28/2017	84	Notice of Presentence Investigation Assignment of Clifford Eric Lundgren to US Probation Officer Nathan Vreeland in the West Palm Beach U.S. Probation Office and he/she can be contacted at 561 804-6844 or Nathan_Vreeland@flsp.uscourts.gov. (mh2) (Entered: 02/28/2017)
03/01/2017	<a href="#">85</a>	PLEA AGREEMENT as to Clifford Eric Lundgren (ail) (Entered: 03/01/2017)
03/01/2017	<a href="#">86</a>	STATEMENT OF FACTS as to Clifford Eric Lundgren (ail) (Entered: 03/01/2017)
03/03/2017	<a href="#">87</a>	MOTION for Forfeiture of Property <i>preliminary order of forfeiture</i> by USA as to Clifford Eric Lundgren. Responses due by 3/17/2017 (Attachments: # <a href="#">1</a> Text of Proposed Order preliminary order of forfeiture)(Barnes, Antonia) (Entered: 03/03/2017)
03/07/2017	<a href="#">88</a>	PRELIMINARY ORDER OF FORFEITURE granting <a href="#">87</a> Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 3/6/2017. (ail) (Entered: 03/07/2017)
03/17/2017	91	PAPERLESS NOTICE OF HEARING as to Clifford Eric Lundgren. Sentencing set for 5/15/2017 01:30 PM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. (lbc) (Entered: 03/17/2017)
03/17/2017	93	PAPERLESS NOTICE OF HEARING as to Clifford Eric Lundgren Sentencing RESET for 5/22/2017 01:30 PM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. Reset from 5/15/17. (lbc) (Entered: 03/17/2017)
03/29/2017	<a href="#">96</a>	Acknowledgment of Service on 03/13/2017 by USA as to Clifford Eric Lundgren re <a href="#">88</a> PRELIMINARY ORDER OF FORFEITURE granting <a href="#">87</a> Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 3/6/2017. (ail) Miscellaneous Microsoft Windows CDs and DVDs (Barnes, Antonia) (Entered: 03/29/2017)
04/11/2017	<a href="#">98</a>	SERVICE (Proof) by Publication by USA as to Clifford Eric Lundgren Last Publication date 4/7/2017. Claims/Positions/Written Defenses/Answers/etc., due by 5/8/2017. (Attachments: # <a href="#">1</a> Advertisement and Certification Report) (Barnes, Antonia) (Entered: 04/11/2017)
04/17/2017	<a href="#">100</a>	DRAFT Disclosure of Presentence Investigation Report of Clifford Eric Lundgren. This is a limited access document. Report access provided to attorneys Lothrop Morris, Bruce Reinhart by USPO (Attachments: # <a href="#">1</a> Position of Parties)(mh2) (Entered: 04/17/2017)
04/18/2017	<a href="#">101</a>	Unopposed MOTION Partially COnsolidated Sentencing Hearing re 93 Notice of Hearing by Clifford Eric Lundgren. Responses due by 5/2/2017 (Reinhart, Bruce) (Entered: 04/18/2017)
04/25/2017	102	ORDER granting Defendeant (2) Clifford Eric Lundgren's <a href="#">101</a> motion for the Court to conduct a common hearing on loss valuation. The matter shall be heard for both defendants at 9:00 a.m.

		<a href="#">Case 1:17-cr-00125 Document 104-1 Filed 05/22/17 Page 18 of 423</a> On May 22, 2017, Signed by Senior Judge Daniel T. K. Hurley on 4/23/2017. (DTKH) (Entered: 04/25/2017)
05/01/2017	<a href="#">104</a>	STIPULATED MOTION for Substitution of Counsel. Substituting Bruce E. Reinhart, P.A. for McDonald Hopkins LLC by Clifford Eric Lundgren. Responses due by 5/15/2017 (Reinhart, Bruce) (Entered: 05/01/2017)
05/02/2017	105	ORDER granting Defendant (2) Clifford E. Lundgren's <a href="#">104</a> motion to permit Bruce E. Reinhart, Esq. to substitute for McDonald Hopkins, Esq. Mr. Hopkins shall have no further responsibility in this matter. Signed by Senior Judge Daniel T. K. Hurley on 5/2/2017. (DTKH) (Entered: 05/02/2017)
05/12/2017	<a href="#">106</a>	SENTENCING MEMORANDUM by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/12/2017)
05/12/2017	<a href="#">107</a>	Response <i>Expert Witness Summary</i> by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/12/2017)
05/14/2017	<a href="#">108</a>	OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT by Clifford Eric Lundgren (Reinhart, Bruce) (Entered: 05/14/2017)
05/15/2017	<a href="#">111</a>	FINAL Addendum 1 Disclosure of Presentence Investigation Report of Clifford Eric Lundgren. This is a limited access document. Report access provided to attorneys Lothrop Morris, Bruce Reinhart by USPO (Attachments: # <a href="#">1</a> Addendum)(mh2) (Entered: 05/15/2017)
05/16/2017	<a href="#">112</a>	RESPONSE to <a href="#">108</a> Objections to Presentence Investigation Report by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/16/2017)
05/16/2017	<a href="#">113</a>	NOTICE of Filing Character and Reference Letters by Clifford Eric Lundgren (Sanchez, Lilly Ann) (Entered: 05/16/2017)
05/16/2017	<a href="#">114</a>	Response <i>Second Ray Expert Witness Summary for Sentencing</i> by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/16/2017)
05/17/2017	<a href="#">115</a>	NOTICE of Filing Character and Reference Letters by Clifford Eric Lundgren (Sanchez, Lilly Ann) (Entered: 05/17/2017)
05/17/2017	<a href="#">116</a>	Amended Response <i>McGloin Expert Witness for Sentencing</i> by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/17/2017)
05/17/2017	<a href="#">117</a>	SENTENCING MEMORANDUM by Clifford Eric Lundgren (Attachments: # <a href="#">1</a> Exhibit List of Websites, # <a href="#">2</a> Exhibit ITAP description, # <a href="#">3</a> Exhibit Charitable works)(Reinhart, Bruce) (Entered: 05/17/2017)
05/19/2017	<a href="#">119</a>	Amended Response <i>Second McGloin Expert Witness Summary</i> by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/19/2017)
05/22/2017	121	PAPERLESS NOTICE OF HEARING as to Clifford Eric Lundgren. Sentencing reset for 5/23/2017 10:30 AM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. (lbc) (Entered: 05/22/2017)
05/22/2017	124	PAPERLESS Minute Entry for proceedings held before Senior Judge Daniel T. K. Hurley: Hearing as to Robert J. Wolff, Clifford Eric Lundgren held on 5/22/2017. Defendants present with counsel. Total time in court: 7 hour(s) : 00 minutes. Attorney Appearance(s): Lothrop

		<a href="#">Case 1:16-cr-00466-Goldberg Document 66-1 Filed 05/26/17 Page 14 of 47</a> Morris, Randee Gold, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (lbc) (Entered: 05/23/2017)
05/23/2017	125	PAPERLESS Minute Entry for proceedings held before Senior Judge Daniel T. K. Hurley: Sentencing held on 5/23/2017 as to Clifford Eric Lundgren. Defendant present with counsel.. Imprisonment for a term of 15 months. 3 years supervised release. \$200.00 assessment. \$50,000.00 fine. Total time in court: 1 hour(s) : 30 minutes. Attorney Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (lbc) (Entered: 05/23/2017)
05/23/2017	<a href="#">127</a>	NOTICE of Compliance <i>With Administrative Order 2016-70</i> by Clifford Eric Lundgren (Attachments: # <a href="#">1</a> Exhibit)(Reinhart, Bruce) (Entered: 05/23/2017)
05/24/2017	<a href="#">129</a>	JUDGMENT as to Clifford Eric Lundgren (2), Count(s) 1-2, 16-21, 16s-21s, 2s, 3, 4, 4s, 5-15, 5s-15s, DISMISSED.; Count(s) 1s, IMPRISONMENT: 15 Months. This term consists of 15 months as to each of the counts 1s and 3s to be served concurrently. SUPERVISED RELEASE: 3 Years. This term consists of 3 years as to count 1s and 3 years as to count 3s to run concurrent with each other. Assessment: \$200.00. Fine: \$50,000.00. Closing Case for Defendant. Signed by Senior Judge Daniel T. K. Hurley on 5/23/2017. (jas)  <b>NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69.</b> (Entered: 05/24/2017)
05/24/2017	<a href="#">130</a>	EXHIBIT and WITNESS LIST by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/24/2017)
05/25/2017	<a href="#">132</a>	MOTION for Forfeiture of Property <i>FINAL ORDER OF FORFEITURE</i> by USA as to Clifford Eric Lundgren. Responses due by 6/8/2017 (Attachments: # <a href="#">1</a> Text of Proposed Order (Final Order of Forfeiture))(Barnes, Antonia) (Entered: 05/25/2017)
05/26/2017	<a href="#">133</a>	EXHIBIT and WITNESS LIST by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/26/2017)
05/26/2017	<a href="#">134</a>	HEARING EXHIBITS <i>from Sentencing</i> 1-22 by USA as to Robert J. Wolff, Clifford Eric Lundgren (Attachments: # <a href="#">1</a> Exhibit Index of Exhibits, # <a href="#">2</a> Exhibit Batch of exhibits 1-22) (Morris, Lothrop) (Entered: 05/26/2017)
05/26/2017	<a href="#">135</a>	MOTION Requesting Permission to File Substitute Exhibit by USA as to Robert J. Wolff, Clifford Eric Lundgren. Responses due by 6/9/2017 (Attachments: # <a href="#">1</a> Affidavit)(Morris, Lothrop) (Entered: 05/26/2017)
05/26/2017		SYSTEM ENTRY - Docket Entry 136 restricted/sealed until further notice. (jmd) (Entered: 05/26/2017)
05/30/2017	137	ORDER granting the Government's <a href="#">135</a> motion for leave to file a substitute sentencing exhibit as to Defendants Robert J. Wolff (1), and Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (DTKH) (Entered: 05/30/2017)
05/30/2017	<a href="#">138</a>	FINAL ORDER OF FORFEITURE granting <a href="#">132</a> Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (lan) (Entered: 05/30/2017)

05/30/2017	<a href="#"><u>140</u></a>	NOTICE OF APPEAL as to Clifford Eric Lundgren re <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment,,. Filing fee \$ 505.00 receipt number 113C-9771569. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Reinhart, Bruce) (Entered: 05/30/2017)
05/30/2017		Transmission of Notice of Appeal, Judgment under appeal and Docket Sheet as to Clifford Eric Lundgren to US Court of Appeals re <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment, Notice has been electronically mailed. (apz) (Entered: 05/30/2017)
06/01/2017	<a href="#"><u>141</u></a>	Acknowledgment of Receipt of NOA from USCA as to Clifford Eric Lundgren re <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment, date received by USCA: 5/30/2017. USCA Case Number: 17-12466-H. (amb) (Entered: 06/01/2017)
06/12/2017	<a href="#"><u>143</u></a>	TRANSCRIPT INFORMATION FORM as to Clifford Eric Lundgren re <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment, filed by Clifford Eric Lundgren. Hearings, sentencing transcript(s) ordered. Order placed by Bruce Reinhart. Email sent to Court Reporter Coordinator. (Reinhart, Bruce) (Entered: 06/12/2017)
06/16/2017	<a href="#"><u>144</u></a>	COURT REPORTER ACKNOWLEDGMENT as to Clifford Eric Lundgren re <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment, <a href="#"><u>143</u></a> Transcript Information Form, Transcripts for 5.22.17 and 5.23.17 to be filed on or before 7.16.17. Transcripts for dates 2.6.17 and 2.7.17 previously filed. Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (ps) (Entered: 06/16/2017)
06/22/2017	<a href="#"><u>145</u></a>	TRANSCRIPT of Sentence as to Robert J. Wolff, Clifford Eric Lundgren held on 5.22.17 before Senior Judge Daniel T. K. Hurley, Volume Number 1 of 3, 1-261 pages, re: <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/13/2017. Redacted Transcript Deadline set for 7/24/2017. Release of Transcript Restriction set for 9/20/2017. (ps) (Entered: 06/22/2017)
06/22/2017	<a href="#"><u>146</u></a>	TRANSCRIPT of Sentence as to Robert J. Wolff, Clifford Eric Lundgren held on 5.23.17 before Senior Judge Daniel T. K. Hurley, Volume Number 2 of 3, 1-88 pages, re: <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/13/2017. Redacted Transcript Deadline set for 7/24/2017. Release of Transcript Restriction set for 9/20/2017. (ps) (Entered: 06/22/2017)
06/22/2017	<a href="#"><u>147</u></a>	TRANSCRIPT of Sentence as to Robert J. Wolff, Clifford Eric Lundgren held on 5.23.17 before Senior Judge Daniel T. K. Hurley, Volume Number 3 of 3, 1-32 pages, re: <a href="#"><u>140</u></a> Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/13/2017. Redacted Transcript Deadline set for 7/24/2017. Release of Transcript Restriction set for 9/20/2017. (ps) (Entered: 06/22/2017)



06/26/2017	<a href="#">148</a>	TRANSCRIPT INFORMATION as to Robert J. Wolff, Clifford Eric Lundgren - Transcript(s) ordered on: 6.8.17 by Bruce E. Reinhart, Esq. have been filed by Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov re <a href="#">144</a> Court Reporter Acknowledgment, <a href="#">140</a> Notice of Appeal - Final Judgment, <a href="#">143</a> Transcript Information Form,. (ps) (Entered: 06/26/2017)
06/28/2017	<a href="#">149</a>	Unopposed MOTION for Extension of Time Surrender Date by Clifford Eric Lundgren. Responses due by 7/12/2017 (Reinhart, Bruce) (Entered: 06/28/2017)
06/29/2017	150	ORDER denying Defendant (2) Clifford E. Lundgren's <a href="#">149</a> motion for an extension of time to self-surrender. Signed by Senior Judge Daniel T. K. Hurley on 6/29/2017. (DTKH) (Entered: 06/29/2017)
07/07/2017	<a href="#">151</a>	Defendant's MOTION Motion Continue of Bond Pending Appeal by Clifford Eric Lundgren. Attorney Hugo A. Rodriguez added to party Clifford Eric Lundgren(pty.dft). Responses due by 7/21/2017 (Rodriguez, Hugo) (Entered: 07/07/2017)
07/07/2017	<a href="#">152</a>	NOTICE OF ATTORNEY APPEARANCE: Hugo A. Rodriguez appearing for Clifford Eric Lundgren (Rodriguez, Hugo) (Entered: 07/07/2017)
07/10/2017	153	ORDER denying Defendant (2) Clifford E. Lundgren's <a href="#">151</a> motion for bond pending appeal. Signed by Senior Judge Daniel T. K. Hurley on 7/10/2017. (DTKH) (Entered: 07/10/2017)
07/11/2017	<a href="#">154</a>	MEMORANDUM OPINION and Order Denying Defendant Clifford Eric Lundgren's Motion for Release Pending Appeal. Signed by Senior Judge Daniel T. K. Hurley on 7/11/2017. (tda) (Entered: 07/11/2017)
07/15/2017	<a href="#">155</a>	MOTION to Withdraw as Attorney by Bruce E. Reinhart, P.A.. by Clifford Eric Lundgren. (Reinhart, Bruce) (Entered: 07/15/2017)
07/17/2017	156	ORDER granting Bruce E. Reinhart, Esq.'s <a href="#">155</a> motion for leave to withdraw a counsel for Defendant (2) Clifford Eric Lundgren. Effective today, Mr. Reinhart shall have no further responsibility in this matter. Signed by Senior Judge Daniel T. K. Hurley on 7/17/2017. (DTKH) (Entered: 07/17/2017)
07/17/2017	<a href="#">157</a>	MOTION to Withdraw as Attorney by Lilly Ann Sanchez. by Clifford Eric Lundgren as to Robert J. Wolff, Clifford Eric Lundgren. (Sanchez, Lilly Ann) (Entered: 07/17/2017)
07/18/2017	<a href="#">158</a>	TRANSCRIPT INFORMATION FORM as to Clifford Eric Lundgren re <a href="#">140</a> Notice of Appeal - Final Judgment, filed by Clifford Eric Lundgren. SENTENCING transcript(s) ordered. Order placed by RANDALL NEWMAN. Email sent to Court Reporter Coordinator. (Rodriguez, Hugo) (Entered: 07/18/2017)
07/19/2017	<a href="#">159</a>	TRANSCRIPT of Plea Hearing as to Clifford Eric Lundgren held on 2.28.17 before Senior Judge Daniel T. K. Hurley, 1-51 pages, re: <a href="#">140</a> Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/9/2017. Redacted Transcript Deadline set for 8/21/2017. Release of Transcript Restriction set for 10/17/2017. (ps) (Entered: 07/19/2017)
07/19/2017	<a href="#">160</a>	COURT REPORTER ACKNOWLEDGMENT as to Clifford Eric Lundgren re <a href="#">158</a> Transcript Information Form, <a href="#">140</a> Notice of Appeal - Final Judgment,. Court Reporter: Pauline Stipes,

		Case 5:17-cr-00061 Document 1-1 Filed 07/19/17 Page 1 of 1 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (ps) (Entered: 07/19/2017)
07/19/2017	<a href="#">161</a>	TRANSCRIPT NOTIFICATION as to Clifford Eric Lundgren - Transcript(s) ordered on: 7.17.17 by Randall S. Newman, Esq., Esq. has been filed by Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov re <a href="#">158</a> Transcript Information Form, <a href="#">140</a> Notice of Appeal - Final Judgment,, (ps) (Entered: 07/19/2017)
07/20/2017	162	ORDER granting Lilly Ann Sanchez's <a href="#">157</a> motion to withdraw as counsel for Defendant (2) Clifford Eric Lundgren. Effective today, Ms. Sanchez shall have no further responsibility in this matter. Signed by Senior Judge Daniel T. K. Hurley on 7/20/2017. (DTKH) (Entered: 07/20/2017)
08/08/2017	<a href="#">163</a>	Acknowledgment of Service on 07/07/17 by USA as to Clifford Eric Lundgren re <a href="#">138</a> FINAL ORDER OF FORFEITURE granting <a href="#">132</a> Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (lan) Miscellaneous Microsoft Windows CDs and DVDs (Barnes, Antonia) (Entered: 08/08/2017)

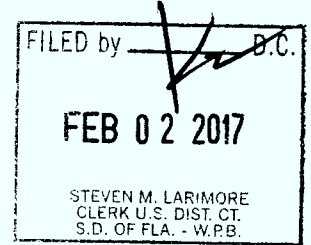
# DOCUMENT 62



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No.: 16-80090-Cr-Hurley/Hopkins(s)

18 U.S.C. § 1341  
18 U.S.C. § 1343  
18 U.S.C. § 2318  
18 U.S.C. § 2319(b)(1)  
18 U.S.C. § 2320(a)  
17 U.S.C. § 506(a)(1)(A)



UNITED STATES OF AMERICA,

vs.

ROBERT J. WOLFF, and  
CLIFFORD ERIC LUNDGREN

Defendants,

\_\_\_\_\_ /

**SUPERSEDING INDICTMENT**

**THE GRAND JURY CHARGES THAT:**

**GENERAL ALLEGATIONS**

At all times relevant to this Superseding Indictment:

**Trademark and Copyright**

1. The United States Patent and Trademark Office ("USPTO") is an agency of the United States that promotes the progress of science and the arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. In order to fulfill that mission, the USPTO examines and registers trademarks, and disseminates trademark information. Through the registration of trademarks, the USPTO assists businesses in protecting their investments, promoting goods and services, and safeguarding consumers against confusion

and deception in the marketplace. By disseminating trademark information, the USPTO promotes an understanding of intellectual property protection and facilitates the development and sharing of new technologies worldwide. Registration of a producer's trademark on the USPTO's principal register gives notice to the world of the producer's exclusive right to use and to protect that trademark.

**Microsoft Corporation**

2. Microsoft Corporation ("Microsoft") is a corporation, headquartered in Redmond, Washington, that designs and sells, among other things, computer software, such as Microsoft Office and Microsoft Windows 8 Edition, Microsoft Windows 7 Professional Edition; Microsoft Windows XP Professional Edition.

3. Microsoft, like other software developers, has critical interests in protecting the intellectual property that its products represent. One way in which Microsoft, like other software developers, protects its intellectual property is through the creation, and also the registration of copyrights of its software products through or by the United States Copyright Office. Microsoft, like other software developers, also registers trademarks for its products on the principal register of the USPTO. Microsoft has multiple registrations on the principal register of the USPTO of the mark, "MICROSOFT," for example.

4. Microsoft's software programs are recorded electronically on magnetic diskettes and/or CD-ROMs and then packaged and distributed together with associated components that include proprietary materials such as user guides and user manuals. Each of the various components- the diskettes, the CD-ROMs, the user guides, and user manuals - as well as the

packaging that contains the various components - typically bear a "MICROSOFT" mark, as registered on the USPTO principal register.

5. The purchase price for Microsoft software programs varies widely, depending upon a number of factors that include the type, power, and purpose of the software and the intended user population. For example, sophisticated and powerful network server software would be priced much higher than word processing software for a "stand alone" home computer. "Academic" versions of software for use in schools, and "reinstallation" versions of software for use by current licensees are typically sold at lower prices than is equivalent software for other users. Also the number of computers or "clients" upon which the software will be loaded and run will affect the price (the higher the number of "licensees," the higher the price).

6. Microsoft employs a variety of security techniques and tools designed to protect the integrity of its genuine products, and prevent unauthorized use. These security techniques include security features, unique labels and holograms, end user licensing agreements ("EULAs"), client access licenses ("CALs"), and Certificates of Authenticity ("COAs") that contain security features designed to thwart counterfeit duplication and assist customers in identifying genuine Microsoft software. COAs are not separately distributed from the product they are designed to authenticate.

7. The software products that Microsoft has developed, and that it markets, distributes, and licenses include but are not limited to Microsoft Windows 8 Edition, Microsoft Windows 7 Professional Edition Dell Reinstallation; Microsoft Windows XP Professional Edition Dell Reinstallation.

**The Defendants**

8. ROBERT J. WOLFF resided primarily in Boca Raton, Palm Beach County, Florida, within the Southern District of Florida, and was the sole owner and operator of RJW Technologies, Inc., where he sold computer software including, but not limited to, Microsoft software.

9. CLIFFORD ERIC LUNDRGREN resided at 8525 Penfield Avenue, Winnetka, California 91306, and elsewhere and created, owned and operated the following companies in the Central District of California, and elsewhere: Source Captain, LLC and ECA Network, LLC.

10. ROBERT J. WOLFF, CLIFFORD ERIC LUNDGREN and any of the companies owned and operated by ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN were not authorized distributors of Microsoft software, were not authorized to purchase and resell reinstallation versions of Microsoft computer software, and were not authorized to relabel and repack Microsoft software.

**COUNT 1**  
**(Conspiracy to Traffic in Counterfeit Goods)**

11. Paragraphs 1 through 10 of the General Allegations section of this superseding indictment are re-alleged and incorporated as if fully set forth herein.

12. From at least as early as in or about June 2011, through on or about October 2, 2012, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

**ROBERT J. WOLFF and**  
**CLIFFORD ERIC LUNDGREN,**

did knowingly and willfully combine, conspire, confederate, and agree with each other, and with others known and unknown to the Grand Jury, to intentionally traffic in counterfeit goods,

specifically units of Microsoft Windows XP Professional Edition Dell Reinstallation computer software, and did knowingly use counterfeit marks on and in connection with such goods, in violation of Title 18, United States Code, Section 2320(a)(1).

**PURPOSE OF THE CONSPIRACY**

13. It was the purpose and object of the conspiracy for the defendants to unjustly enrich themselves by engaging in the importation and sale of counterfeit CD-ROMs bearing counterfeit marks.

**MANNER AND MEANS OF THE CONSPIRACY**

14. The manner and means by which the defendants sought to accomplish the purpose and object of the conspiracy included, among other things, the following:

15. During the period of the conspiracy, **ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN** ordered counterfeit CD-ROMs from a seller in China.

16. **CLIFFORD ERIC LUNDGREN** shipped the counterfeit CD-ROMs by private mail carrier to **ROBERT J. WOLFF's** residence or a residence controlled by **ROBERT J. WOLFF**.

17. The counterfeit CD-ROMs sold by **ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN** included counterfeit CD-ROMs that purported to be genuine goods of Microsoft Corporation.

18. **ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN** made substantial profits in excess of \$10,000 through the sale of the counterfeit CD-ROMs.

All in violation of Title 18, United States Code, Sections 2320(a) and (b)(1)(A).

**COUNT 2**  
**(Trafficking in Counterfeit Goods)**

19. Paragraphs 1 through 10 of the General Allegations section of this superseding indictment are re-alleged and incorporated as if fully set forth herein.

20. On or about September 3, 2012, in the Southern District of Florida and elsewhere, the defendants,

**ROBERT J. WOLFF and  
CLIFFORD ERIC LUNDGREN,**

did intentionally traffic and attempt to traffic in, goods and knowingly use counterfeit marks on and in connection with such goods, that is, units of Microsoft Windows XP Professional Edition Dell Reinstallation computer software.

All in violation of Title 18, United States Code, Sections 2320(a)(1) and (b)(1)(A) and 2.

**COUNT 3**  
**(Criminal Copyright Infringement)**

21. Paragraphs 1 through 10 of the General Allegations section of this superseding indictment are re-alleged and incorporated as if fully set forth herein.

22. In or about June 2011 and continuing until in or about November 2013, in the Southern District of Florida and elsewhere, the defendants,

**ROBERT J. WOLFF and  
CLIFFORD ERIC LUNDGREN,**

did willfully infringe the copyrights of copyrighted works, that is, copyrighted computer software, for purposes of commercial advantage and private financial gain, by the reproduction and distribution, during a 180-day period, of ten (10) or more of the copies of one or more copyrighted works, which had a total retail value of \$2,500 or more.

All in violation of Title 17, United States Code, Section 506(a)(1)(A) and Title 18, United States Code, Sections 2319(a) and (b)(1) and 2.

**COUNT 4**  
**(Trafficking in Illicit Labels)**

23. Paragraphs 1 through 10 of the General Allegations section of this superseding indictment are re-alleged and incorporated as if fully set forth herein.

24. In or about June 2011 and continuing until in or about November 2013, in the Southern District of Florida and elsewhere, the defendants,

**ROBERT J. WOLFF and**  
**CLIFFORD ERIC LUNDGREN,**

using the mail and a facility of interstate and foreign commerce, knowingly trafficked in illicit labels as that term is defined in Title 18, United States Code, Section 2318, in that ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN possessed, with the intent to transport, transfer, or otherwise dispose of, labels that were affixed to, enclosed, accompanying, and designed to be affixed to, enclosed, and accompanying a copy of copyrighted computer programs including, but not limited to, Microsoft Windows 7 Professional Edition Dell Reinstallation, Microsoft Windows XP Professional Edition Dell Reinstallation, which labels are used by Microsoft, as the copyright holder, to verify identity that these computer programs and their documentation and packaging are not counterfeit and are not infringing of any copyright, and that, without the copyright owner's authorization, were distributed and intended for distribution not in connection with the copies to which such labels were intended to be affixed by the copyright owner.

All in violation of Title 18, United States Code, Sections 2318(a)(1)(A)(ii) and (c)(2) and (c)(3)(B), and 2.

**COUNTS 5-15**  
**(Wire Fraud)**

25. Paragraphs 1 through 10 of the General Allegations section of this superseding indictment are re-alleged and incorporated as though fully set forth herein.

26. From at least as early as June 2011, and continuing through on or about August 23, 2012, in the Southern District of Florida and elsewhere, the defendants,

**ROBERT J. WOLFF and**  
**CLIFFORD ERIC LUNDGREN,**

did knowingly, and with the intent to defraud, devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of a materially false and fraudulent pretenses, representations, promises, knowing that they were false and fraudulent when made, and for the purpose of executing such scheme and artifice, did transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures, and sounds, in violation of Title 18, United States Code, Section 1343.

**PURPOSE OF THE SCHEME AND ARTIFACE TO DEFRAUD**

27. It was the purpose of the scheme and artifice to defraud for the defendants to fraudulently obtain money from purchasers of computer software by making materially false and fraudulent pretenses, representations, promises that the counterfeit computer software they offered for sale was genuine Microsoft computer software.

**MANNER AND MEANS**

28. The manner and means by which the defendants sought to accomplish the object and purpose of the scheme and artifice included, among other things, the following:

- a. ROBERT J. WOLFF falsely told customers of RJW Technologies, Inc. by



means of e-mail and otherwise that the Microsoft computer software available for sale was the reinstallation retail version.

b. Between June 2011 and October of 2012, ROBERT J. WOLFF purchased from CLIFFORD ERIC LUNDGREN by wire transfer of funds for thousands of units of counterfeit Microsoft Windows 7 and XP Professional Edition Dell Reinstallation versions of software.

c. ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN altered the packaging and labeling of the Microsoft computer software in order to hide the fact that the Microsoft computer software units were counterfeit.

#### **USE OF THE WIRES**

29. On or about the dates specified as to each count below, in the Southern District of Florida, and elsewhere, the defendants, ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN, for the purpose of executing the scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises did knowing transmit and cause to be transmitted, by means of wire communication in interstate and foreign commerce, certain writings, signs, signals, pictures, and sounds as set forth in each Count below:

COUNT	APPROXIMATE DATE	DESCRIPTION OF INTERSTATE WIRE COMMUNICATION
5	June 27, 2011	Wire transfer of \$1,000 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833
6	July 18, 2011	Wire transfer of \$4,800 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833
7	August 22, 2011	Wire transfer of \$15,700 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833

8	September 26, 2011	Wire transfer of \$4,500 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833
9	February 3, 2012	Wire transfer of \$3,300 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833
10	February 28, 2012	Wire transfer of \$5,500 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833
11	April 3, 2012	Wire transfer of \$1,750 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833
12	April 10, 2012	Wire transfer of \$7,375 from Wolff's Chase bank account to Lundgren's HSBC account xxxx-xxxxxx-3833
13	July 10, 2012	Wire transfer of \$5,508 from Wolff's Chase bank account to Lundgren's US Bank account xxxx-xxxxxx-5420
14	August 13, 2012	Wire transfer of \$12,129.75 from Wolff's Chase bank account to Lundgren's US Bank account xxxx-xxxxxx-5420
15	August 23, 2012	Wire transfer of \$8,475 from Wolff's Chase bank account to Lundgren's US Bank account xxxx-xxxxxx-5420

All in violation of Title 18, United States Code, Sections 1343 and 2.

**COUNTS 16-21**  
**(Mail Fraud)**

30. Paragraphs 1 through 10 of the General Allegations section of this superseding indictment are re-alleged and incorporated as though fully set forth herein.

31. From at least as early as June 2011, and continuing until in or about November 2013, in the Southern District of Florida and elsewhere, the defendants,

**ROBERT J. WOLFF, and**  
**CLIFFORD ERIC LUNDGREN,**

did knowingly, and with the intent to defraud, devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that such pretenses, representations, and promises, were false and fraudulent when made, and knowingly caused matters and things to be delivered by the United States Postal Service and private and commercial interstate carriers according to the directions thereon, for the purpose of executing the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341.

**PURPOSE OF THE SCHEME AND ARTIFACE TO DEFRAUD**

32. Paragraph 27 from Counts 5 through 15 is re-alleged and incorporated by reference as though fully set forth herein as a description of the purpose of the scheme.

**MANNER AND MEANS**

33. The manner and means by which the defendants sought to accomplish the purpose of the scheme and artifice included, among other things, the following:

- a. ROBERT J. WOLFF falsely told customers of RJW Technologies, Inc. by means of e-mail and otherwise that the Microsoft computer software available for sale was the reinstallation retail version.
- b. Between September 2012 and June 2013, CLIFFORD ERIC LUNDGREN mailed thousands of units of counterfeit Microsoft Windows 7 and XP Professional Edition Dell Reinstallation versions of software to ROBERT J. WOLFF.
- c. ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN altered the packaging and labeling of the Microsoft computer software in order to hide the fact that the Microsoft computer software units were counterfeit.

**USE OF THE MAILS AND INTERSTATE CARRIERS**

34. On or about the dates specified as to each count below, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants, identified below, for the purpose of executing and attempting to execute the scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, did knowingly cause to be delivered by the United States Postal Service and private and commercial interstate carriers, according to the directions thereon, the following mail matter:

<b>COUNTS</b>	<b>APPROXIMATE DATE</b>	<b>DESCRIPTION OF MAILING</b>	<b>DEFENDANT</b>
16	August 5, 2011	5000 units MS Windows XP2 Dell software	<b>ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN</b>
17	August 5, 2011	5000 units MS Windows XP3 Dell software	<b>ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN</b>
18	September 3, 2012	1444 units MS Windows XP3 Dell software	<b>ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN</b>
19	September 3, 2012	2246 units MS Windows XP3 Dell software	<b>ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN</b>
20	October 29, 2012	1600 units MS Windows XP3 Dell software	<b>CLIFFORD ERIC LUNDGREN</b>
21	June 8, 2013	1400 units MS Windows XP3 Dell software	<b>CLIFFORD ERIC LUNDGREN</b>

All in violation of Title 18, United States Code, Section 1341 and 2.

**FORFEITURE**

34. Upon conviction of any of the violations alleged in Counts 1, 2, 3, and 4 of this superseding indictment, the defendants **ROBERT J. WOLFF and CLIFFORD ERIC**

**LUNDGREN**, shall forfeit to the United States any article, the making or trafficking of which, is prohibited under Title 18, United States Code, Sections 506, 2318, 2319, or 2320, any property used or intended to be used in any manner or part to commit or facilitate the commission of such violation, and any property constituting or derived from any proceeds obtained directly or indirectly as a result of the commission of such violation, including, but not limited to the following:

- a. At least 27,000 compact discs/DVDs.

Pursuant to Title 18, United States Code, Section 2323.

34. If any of the forfeitable property described in the forfeiture section of this superseding indictment, as a result of any act or omission of the defendants,

- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with, a third person;
- (c) has been placed beyond the jurisdiction of the Court;
- (d) has been substantially diminished in value; or
- (e) has been commingled with other property which cannot be subdivided without

difficulty; it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 2323(b)(2), to seek forfeiture of any other property of said defendants up to the value of the above forfeitable property.

All pursuant to Title 18, United States Code, Section 2323 and Title 21, United States Code, Section 853.

35. Upon conviction of the violations alleged in Counts 5-15 of this superseding indictment, the defendants **ROBERT J. WOLFF** and **CLIFFORD ERIC LUNDGREN** shall

forfeit to the United States any property constituting, or derived from, proceeds obtained directly or indirectly as a result of the said violation.

Pursuant to Title 18, United States Code, Section 982(a)(2).

36. If any of the forfeitable property described in the forfeiture section of this superseding indictment, as a result of any act or omission of the defendants,

- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with, a third person;
- (c) has been placed beyond the jurisdiction of the Court;
- (d) has been substantially diminished in value; or
- (e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1), to seek forfeiture of any other property of the defendant up to the value of the above forfeitable property.

All pursuant to Title 18, United States Code, Section 982 and Title 21, United States Code, Section 853.

37. Upon conviction of any of the violations alleged in Counts 16-21, defendants **ROBERT J. WOLFF and CLIFFORD ERIC LUNDGREN**, shall forfeit to the United States all property, real and personal, which constitutes or is derived from proceeds traceable to a violation of the afore-stated offenses.

Pursuant to Title 28, United States Code, Section 2461, Title 18, United States Code, Section 981(a)(1)(C), and Title 21, United States Code, Section 853.

38. If the property described above as being subject to forfeiture, as a result of any act or

omission of the defendants,


- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with a third person;
- (c) has been placed beyond the jurisdiction of the Court;
- (d) has been substantially diminished in value; or
- (e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendant up to the value of the above forfeitable property.

All pursuant to Title 28, United States Code, Section 2461, Title 18, United States Code, Section 981(a)(1)(C) and Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

  
WIFREDO A. FERRER  
UNITED STATES ATTORNEY

  
LOTHROP MORRIS  
ASSISTANT UNITED STATES ATTORNEY



UNITED STATES OF AMERICA

CASE NO. 16-CR-80090-HURLEY(s)

vs.

**CLIFFORD ERIC LUNDGREN,**  
**Defendant.**

**CERTIFICATE OF TRIAL ATTORNEY\***

**Superseding Case Information:**

**Court Division:** (Select One)

Miami      Key West       
FTL      WPB X FTP     

New Defendant(s)       
Number of New Defendants       
Total number of counts     

YES      NO     

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.
2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) NO  
List language and/or dialect     

4. This case will take 7 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

(Check only one)

(Check only one)

I	0 to 5 days	<u>    </u>	Petty	<u>    </u>
II	6 to 10 days	<u>X</u>	Minor	<u>    </u>
III	11 to 20 days	<u>    </u>	Misdem.	<u>    </u>
IV	21 to 60 days	<u>    </u>	Felony	<u>X</u>
V	61 days and over	<u>    </u>		

6. Has this case been previously filed in this District Court? (Yes or No) Yes

If yes:

Judge: D.T.K. Hurley

Case No. 16-CR-80090

(Attach copy of dispositive order)

Has a complaint been filed in this matter? (Yes or No) No

If yes: Magistrate Case No. N/A

Related Miscellaneous numbers:     

Defendant(s) in federal custody as of N/A (Bond)

Defendant(s) in state custody as of N/A

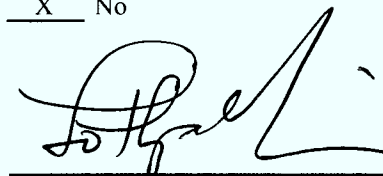
Rule 20 from the     

District of     

Is this a potential death penalty case? (Yes or No)      Yes X No

7. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003?      Yes X No

8. Does this case originate from a matter pending in the Central Region of the U.S. Attorney's Office prior to September 1, 2007?      Yes X No



**LOTHROP MORRIS**  
**ASSISTANT UNITED STATES ATTORNEY**  
Florida Bar/Court No. 0095044



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

PENALTY SHEET

**Defendant's Name:** CLIFFORD ERIC LUNDGREN

**Case No:** 16-CR-80090-HURLEY(s)

Count #: 1

Conspiracy to Traffic in Counterfeit Goods

Title 18, U.S.C. Section 2320(a)

**\* Max.Penalty:** 10 Years' Imprisonment; \$2,000,000 Fine; 3 Years' Supervised Release; Restitution

Count #: 2

Trafficking in Counterfeit Goods

Title 18, U.S.C. Sections 2320(a)(1) and (b)(1)(A)

**\* Max.Penalty:** 10 Years' Imprisonment; \$2,000,000 Fine; 3 Years' Supervised Release; Restitution

Count #: 3

Criminal Copyright Infringement

Title 17, U.S.C. Section 506(a)(1)(A) and Title 18, U.S.C. Sections 2319(a) and (b)(1)

**\* Max.Penalty:** 5 Years' Imprisonment; \$250,000 Fine; 1 Year Supervised Release; Restitution

Count #: 4

Trafficking in Illicit Labels

Title 18, U.S.C. Sections 2318(a)(1)(A)(ii) and (c)(2) and (c)(3)(B)

**\* Max.Penalty:** 5 Years' Imprisonment; \$250,000 Fine; 1 Year Supervised Release; Restitution

Counts #: 5-15

Wire Fraud

Title 18, U.S.C. Section 1343

**\* Max.Penalty: 20 Years' Imprisonment; \$250,000 Fine; 3 Years' Supervised Release; Restitution**

Counts #: 16-21

Mail Fraud

Title 18, U.S.C. Section 1341

**\* Max.Penalty: 20 Years' Imprisonment; \$250,000 Fine; 3 Years' Supervised Release; Restitution**

**\*Refers only to possible term of incarceration, does not include possible fines, restitution, special assessments, parole terms, or forfeitures that may be applicable.**

# DOCUMENT 85

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-80090-CR-Hurley/Hopkins

UNITED STATES OF AMERICA,

vs.

**CLIFFORD ERIC LUNDGREN,**

Defendant,

\_\_\_\_\_ /

**PLEA AGREEMENT**

The United States of America and CLIFFORD ERIC LUNDGREN (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to Count 1 the Indictment, which charges the defendant with conspiracy to traffic in counterfeit goods, in violation of Title 18, United States Code, Section 2320( a)(1). The defendant agrees to plead guilty to Count 3 the Indictment, which charges the defendant with criminal copyright infringement, in violation of Title 17, United States Code, Section 506(a)(1)(A) and Title 18, United States Code, Section 2319(a ) and (b)(1).

2. The defendant is aware that the sentence will be imposed by the court after consideration of the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the court relying in part on

the results of a Pre Sentence Investigation by the court's probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that the court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant understands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offense identified in paragraph 1 and that the defendant may not withdraw his plea solely as a result of the sentence imposed.

3. The defendant understands and acknowledges that the maximum penalties the court may impose under Count 1 the Indictment is up to a 10-year maximum term of imprisonment; a statutory maximum term of supervised release of 3 years; a fine of up to two million dollars (\$2,000,000.00); and must order restitution. The defendant understands and acknowledges that the maximum penalties the court may impose under Count 3 the Indictment is a 5-year maximum term of imprisonment; a statutory maximum term of supervised release of 3 years; a fine of up to two hundred fifty thousand dollars (\$250,000.00); and must order restitution.

4. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 3 of this agreement, a special assessment in the amount of \$100 will be imposed on the defendant for each count to which he is pleading guilty. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

5. The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed upon sentencing recommendations contained in this agreement, this Office further reserves the right to make any recommendation as to the quality and quantity of punishment.

6. The United States agrees that it will recommend at sentencing that the court reduce by two levels the sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the defendant's offense level is determined to be 16 or greater, the government will make a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty,


thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. The United States, however, will not be required to make this motion and recommendation if the defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the government prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to, committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

7. Although not binding on the probation office or the court, the United States and the defendant further agree that if the Court determines that the applicable Sentencing Guidelines total offense level is greater than 15, the United States agrees to recommend a downward variance to total offense level 15. Under any circumstances, the Government agrees to recommend a sentence of no greater than 18 months' incarceration.

8. The defendant is aware that the sentence has not yet been determined by the court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office, or the court. The defendant understands further that any recommendation that the government

makes to the court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the court and the court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 3 above, that the defendant may not withdraw his plea based upon the court's decision not to accept a sentencing recommendation made by the defendant, the government, or a recommendation made jointly by both the defendant and the government.

**FORFEITURE**

 9. ~~X~~ Defendant agrees to forfeit to the United States voluntarily and immediately all of his right, title and interest to any and all property which is subject to forfeiture pursuant to Title 18, United States Code, Section 2323, including the following:

- a. 1,444 Microsoft Windows XP professional CD/DVDs, FPF# 2012 2870 1002 1901.
- b. 12,764 Microsoft Windows 7 professional O.S. CD/DVDs, FPF# 2013 1001 0000 0501.
- c. 1,638 Microsoft Windows XP CD/DVDs, 2013 5204 0000 0101.
- d. 1,598 Microsoft Windows XP Service Pack 3 CDs, FPF# 2013 5204 0000 9001.
- e. 1,600 Microsoft Windows XP 3 CDs, 2013 5204 0001 3701.
- f. 1,400 Microsoft Windows XP Service Pack 3 CDs, 2013 5204 0001 8101.
- g. 1,400 Microsoft Windows XP Service Pack 3 CDs, 2013 2713 0000 7301.



The defendant agrees that the above listed property is an article, the making or trafficking of which, is prohibited under Title 18, United States Code, Sections 2319, or 2320, is property used or intended to be used in any manner or part to commit or facilitate the commission of the violations to which the defendant is pleading guilty, or is property constituting or derived from proceeds obtained directly or indirectly as a result of the commission of the violations to which the defendant is pleading guilty.

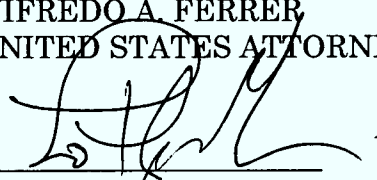
Defendant further agrees to fully cooperate and assist the Government in the forfeiture of the listed property and to take whatever steps are necessary to pass clear title to the United States, including, but not limited to, the surrender of documents of title, execution of any documents necessary to transfer his interest in any of the above property to the United States, execution of a consent to forfeiture or other documents as may be needed to fully accomplish the forfeiture and vest title in the United States. Defendant further knowingly and voluntarily waives the following rights as to property subject to forfeiture: (1) all constitutional, legal and equitable defenses to the forfeiture of the assets in any judicial or administrative proceeding; (2) any judicial or administrative notice of forfeiture and related deadlines; (3) any jeopardy defense or claim of double jeopardy, whether constitutional or statutory; (4) any claim or defense under the Eighth Amendment to the United States Constitution, including any claim of excessive fine, to the forfeiture of the property by the United States; and (5) any right to appeal any order of forfeiture entered by the Court

pursuant to this plea agreement. Defendant further understands that the forfeiture of the property shall not be treated as satisfaction or offset against any fine, restitution, cost of imprisonment, or any other penalty this court may impose on the defendant.

10. ~~X~~

This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings unless contained in a letter from the United States Attorney's Office executed by all parties and counsel prior to the change of plea.

Date: 2/28/17

By:   
WIFREDO A. FERRER  
UNITED STATES ATTORNEY  
LOTHROP MORRIS  
ASSISTANT UNITED STATES ATTORNEY

Date: 2/28/17

  
LILLY ANN SANCHEZ, ESQ.  
ATTORNEY FOR DEFENDANT

BRUCE REINHART

Date: 2/28/2017

  
CLIFFORD ERIC LUNDGREN  
DEFENDANT

# DOCUMENT 117

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-80090-CR-HURLEY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD ERIC LUNDGREN,

Defendant.

\_\_\_\_\_ /

**DEFENDANT'S MEMORANDUM IN AID OF SENTENCING**

Defendant Eric Lundgren respectfully submits this Memorandum in Aid of Sentencing. Mr. Lundgren's sentencing is scheduled for May 22, 2017. For the reasons stated below, Mr. Lundgren asks the Court to impose a non-incarcerative sentence ("the requested sentence"). Mr. Lundgren submits that the requested sentence is a reasonable sentence that is sufficient but not greater than necessary to achieve the objectives listed in 18 U.S.C. §3553(b). Most significantly, it accurately reflects that the instant offense, which Mr. Lundgren committed at a young age, is an aberrant episode. Put simply, Mr. Lundgren has demonstrated that today he is not the same person who committed these crimes 5 years ago. He has built a successful business that employs over one hundred people, become a responsible contributing member of society, a philanthropist social entrepreneur, and a respected leader in the innovative field of Hybrid Electronic Recycling. Mr. Lundgren prays that the Court give him the chance to continue on his positive trajectory.

### **DISCUSSION OF THE 18 U.S.C. 3553 FACTORS**

Title 18, United States Code, Section §3553(a) contains the factors the Court must apply in devising a reasonable sentence. Importantly, this statute contains “an overarching provision instructing district courts to impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing under that provision.” *Kimbrough v. United States*, 128 S. Ct. 558, 570 (2007). The §3553(a) factors are: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (3) the need for the sentence imposed to afford adequate deterrence; (4) the need to protect the public; (5) the need to provide the defendant with educational or vocational training or medical care; (6) the kinds of sentences available; (7) the Sentencing Guidelines range; (8) the pertinent policy statements of the Sentencing Commission; (9) the need to avoid unwanted sentencing disparities; and (10) the need to provide restitution to victims. 18 U.S.C. §3553(a)(1)-(7).

"It has been uniform and consistent in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States*, 518 U.S. 81, 113 (1996). In fashioning a reasonable sentence, the Court has considerable discretion to weigh each of the §3553(a) factors. Unless otherwise limited by law, the Court may consider, without limitation, any “information concerning the background, character, and conduct of” the defendant. 18 U.S.C. §3661; U.S.S.G. §1B1.4.

The ultimate goal is a reasonable sentence, *United States v. Talley*, 431 F.3d 784, 785 (11<sup>th</sup> Cir. 2005), and one which is no greater than necessary. 18 U.S.C. §3553(a). A sentencing

court “must not presume that the Guidelines range is reasonable” but instead “must make an individualized assessment based on the facts presented.” *Id.* “There are . . . many instances where the Guideline range will not yield a reasonable sentence.” *United States v. Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006); *see also Nelson v. United States*, 129 S. Ct. 890, 892 (2007) (holding that “the Guidelines are not only *not mandatory* on sentencing courts; they are *not presumed reasonable*”)(emphasis in the original). It is the sentencing court’s duty to “make its own reasonable application of the 3553(a) factors, and to reject the advice of the Guidelines” if after due consideration the result they suggest does not comport with the sentencing court’s view of an appropriate sentence. *Kimbrough*, 128 S. Ct at 577 (Scalia concurring).

## **THE SECTION 3553(a) FACTORS**

### **The Nature And Circumstances Of The Offense**

In 2011, at the age of 27, Mr. Lundgren was living in China and operating a business called Source Captain, Inc. Lundgren was contacted by co-defendant Robert Wolff through a mutual friend. Wolff asked for Lundgren’s help in reproducing Dell Reinstallation disks that Wolff planned to sell to Dell computer refurbishers. Wolff represented that he had acquired an authentic reinstallation disk from Dell.

At the time relevant to these offenses, Dell computers came with a Microsoft operating system pre-installed. Dell installed these operating systems pursuant to a license from Microsoft, for which Dell paid a fixed amount. The computer’s purchaser also received a license to use the Microsoft operating system; this license was included in the price of the Dell computer. As part of the price for the computer, the purchaser of the Dell computer also received a Reinstallation

Disk<sup>1</sup>. For example, a user might need the disk to reinstall the operating system as part of routine system maintenance, because of a virus, or because the operating system crashed. The Reinstallation Disk contained certain Dell software that allowed it to interface with the Dell computer hardware; it also included the Microsoft operating system software that originally came with the laptop. The Dell software automatically booted up when the Reinstallation Disk was inserted into a Dell computer, and offered the user the option to reinstall the Microsoft operating system. The user could not activate the Microsoft operating system unless the user already had purchased a valid and active license from Microsoft.

Mr. Lundgren believed that if the owner of a Dell computer lost their Reinstallation Disk, they could obtain a replacement from Dell for free. Mr. Lundgren was aware that there were also numerous other websites that offered either physical Reinstallation Disks or downloadable reinstallation software, some for free<sup>2</sup>. Wolff told Mr. Lundgren that Wolff had acquired an authentic Reinstallation Disk directly from Dell. Wolff further said that he had wanted to sell copies of this authentic Dell Reinstallation disk to computer refurbishers who would include the disks in the retail box with refurbished Dell computers<sup>3</sup>.

Mr. Lundgren understood that Wolff had connections with large computer refurbishers. Even though these refurbishers could have downloaded individual Reinstallation Disks for free over the Internet, Mr. Lundgren believed that they were willing to pay a few dollars each for

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<sup>1</sup> Dell no longer includes reinstallation disks with its computers. The reinstallation software is pre-loaded on a segregated partition of the computer's hard drive.

<sup>2</sup> Attached as Exhibit 1 is a summary of on-line locations that offer free Reinstallation Disks.

<sup>3</sup> Refurbishers purchase, repair and re-sell used Dell computers.

disks in bulk, in order to save the materials, energy and time needed to make the disks themselves.

Mr. Lundgren took the disk he received from Wolff to an electronics broker in China, who duplicated the disk. The duplicated disks included a label that was substantially indistinguishable from the labels that were affixed to authorized Reinstallation Disks.

Mr. Lundgren knew he was not authorized to reproduce and re-sell the disks. He also knew that he was not authorized to place a label on the disk that purported it to be an authentic Dell Reinstallation Disk. Nevertheless, Mr. Lundgren justified his actions to himself on the theory that the unauthorized disks contained software that was identical to the authentic disks, so they would be fully operational, and (because the disks could be obtained individually for free) there would be no financial loss to Dell or Microsoft. Mr. Lundgren also believed that including these disks in the retail box with the refurbished computer would help a consumer who may not have known how to download and burn a disk for free from the Internet.

The offenses of conviction were non-violent crimes. The financial benefit to Mr. Lundgren was small. He received only approximately \$45,000 in gross revenue and \$13,000 in net profit.

#### **History And Characteristics Of The Defendant<sup>4</sup>**

Eric Lundgren is a 32 year old single man with no children. Mr. Lundgren had three minor convictions when he was 18 years old. Other than the instant offense, he has no criminal convictions since then. He devotes almost all of his time to social entrepreneurship, that is, promoting business practices that are both profitable and socially beneficial.

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<sup>4</sup> Under separate cover, Mr. Lundgren is submitting letters from friends, family, and business associates.



As was discussed during his change of plea colloquy, Mr. Lundgren has been a self-employed entrepreneur since he was 16 years old. Most recently, beginning in 2013, Mr. Lundgren started an electronics recycling company (ITAP, Inc.) that now employs over 110 people. His current business has nothing to do with manufacturing or importing computer disks or with other actions that were part of the crimes of conviction. Rather, his company is the first hybrid recycler in the United States; processing over 41,000,000 pounds of electronic waste in the United States annually. Hybrid recycling involves taking apart a recycled item, using the good parts for new applications, minimizing the amount that goes into landfill, and disposing of any waste in an environmentally-sound manner<sup>5</sup>. The company is an approved and authorized electronics recycler for Nintendo, IBM, Motorola, LENOVO, Alcatel, TCL, Sprint, F.C.A, T.W.C, Samsung, Ingram Micro, LG, Verizon and many more. Notably, despite knowing the offenses to which Mr. Lundgren has pled, customers continue to do business with ITAP.

By way of example, ITAP sells screens and memory chips from old cellphones to companies that incorporate them into smart-video doorbell units. ITAP and its business partners also convert used laptop batteries into new cellphone chargers, broken Electric Vehicle batteries into smart-grid solar power arrays and old cable-box batteries into eWheelchairs. These new products are sold around the world. Mr. Lundgren passionately believes that current electronic waste management practices in the United States are wasteful and harmful to society. His self-professed purpose in life is to keep hazardous electronics out of landfills by repairing or re-using all working components.

Through ITAP, Mr. Lundgren also investigates and develops innovative uses for recycled parts. At <https://www.youtube.com/watch?v=InWSsghejdE> the Court can see a recent project

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<sup>5</sup> Attached to this Memorandum as Exhibit 2 are materials that describe ITAP's business practices in more detail, as well as ITAP's innovative recycling projects.

where ITAP built an alternative energy electric vehicle from 88% recycled consumer waste; that vehicle went 340 miles on the highway on a single charge.

Mr. Lundgren is the face of ITAP and the sole person involved in daily global procurement for the company. ITAP's ability to function and to acquire inventory is wholly dependent on Mr. Lundgren's personal relationships with electronics manufacturers, retailers and service providers. Mr. Lundgren is a recognized leader in his industry. For example, he was recently a speaker at two significant conferences where he explained efficient hybrid recycling concepts to the CEO's of Fortune 500 Companies such as SAP, Slack, and IPsoft. Should Mr. Lundgren be incarcerated and unable to continue operating the company, ITAP will likely go out of business, its employees will lose their jobs, and its customers will lose a unique resource for electronic waste disposal.

In addition to operating a socially-responsible company, Mr. Lundgren has a long history of charitable works. Attached as Exhibit 3 is a summary of some of his most significant efforts. Beginning when he was still in high school, Mr. Lundgren has participated in Habit For Humanity projects, donated electronic equipment to sheltered women and children, assisted the Government of Ghana with toxic waste disposal problems, been the benefactor for a shanty town in India, donated electronics to the military and to educational pursuits, and much more.

**The Need For The Sentence To Reflect The Seriousness Of The Offense, To Promote Respect For The Law, And To Provide Just Punishment**

The offense of conviction was the sale of Reinstallation Disks containing labels that falsely represented that the disks were manufactured by an authorized manufacturer. Mr. Lundgren submits that the requested sentence sends the proper message that this kind of conduct will be punished appropriately, but not excessively. Respect for the law is undermined both by

sentences that are too short and sentences that are too long. The requested sentence is a just punishment.

**The Need To Afford Adequate Deterrence To Others**

The Court should give some, but limited, weight to this sentencing factor. This factor incorporates the concept of general deterrence, or “sending a message” to others that this kind of behavior is unacceptable and will be punished. In applying this factor, the Court must balance the need to impose a sentence that is severe enough to deter others with the need to not unduly punish Mr. Lundgren. General deterrence looks to what punishment is necessary to persuade others not to commit similar crime. As such, it allows for punishment that is disproportionately greater than what is necessary to punish and deter the specific offender. For that reason, if this factor is given too much weight, it can undercut respect for the law by sending the message that the unlucky individual who gets caught will be overly punished whereas the offender who does not get caught will not be punished at all.

Here, an incarcerative sentence is not necessary to send the appropriate message. Mr. Lundgren is a well-known figure in his industry. It is widely known in the industry that he is being prosecuted. Moreover, the marginal difference between the requested sentence and the Government’s recommended sentence is unlikely to materially diminish the deterrent effect of the sentence. For these reasons, the Court should give limited weight to this sentencing factor.

**The Need To Protect The Public**

This sentencing factor incorporates the concept of direct deterrence, that is, the need to prevent future crimes by Mr. Lundgren. The Court should give this factor very little weight.. There is every reason to believe that Mr. Lundgren will be a law-biding citizen in the future.

Most probative of this fact is the maturity and personal growth exhibited by the way that Mr. Lundgren has lived his life since 2013.

**The Need To Provide The Defendant With Educational Or Vocational Training Or Medical Care**

Mr. Lundgren has no specialized educational, medical or vocational needs.

**The Kinds Of Sentences Available**

Title 18, United States Code, permits the Court to impose several different kinds of sentences, ranging from probation and home detention to a period of incarceration. The Presentence Report concludes that Mr. Lundgren has the ability to pay a fine within the Guideline range. As the PSI demonstrates, however, Mr. Lundgren's most significant assets are illiquid. He is continuing to reinvest most of his funds into building his company. Therefore, Mr. Lundgren asks that, if the Court imposes a fine, that fine be at the low end of the fine range and allow him to make payments over time.

**The Sentencing Guidelines Range And The Pertinent Policy Statements Of The Sentencing Commission**

Using Guideline §2B5.3, the PSI computes an advisory sentencing range of 37-46 months based on a Total Offense Level 21 and criminal history category I. Mr. Lundgren has filed objections to the Guidelines calculation. The Government is recommending a sentence of 18 months, corresponding to a Total Offense Level 15 and criminal history category I.

Application note 5(C) to Guideline §2B5.3 states:

5. Departure Considerations.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:

...

(C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

Mr. Lundgren submits that the infringement amount computed by the PSI, if correct, substantially overstates the actual pecuniary harm to the copyright and trademark owner. By agreeing to a downward variance from the Guideline corresponding to that amount, the Government appears to agree. Depending on the results of the valuation hearing, Mr. Lundgren may further assert that a downward departure under Application Note 5(C) is warranted.

**The Need To Avoid Unwanted Sentencing Disparities**

Mr. Lundgren's co-defendant Robert Wolff will be sentenced on the same day as Mr. Lundgren. Mr. Wolff initiated the instant offenses and recruited Mr. Lundgren to join them. It is anticipated that Wolff will receive a 5K1.1 motion for substantial assistance for his cooperation against Mr. Lundgren.

Other individuals who sold unauthorized copies of more valuable software were either not prosecuted at all, or received sentences less than 18 months. For example, in *United States v. Inder Deot*, 01-CR-333 (N.D. Tx. 2002), the defendant was part of a conspiracy to manufacture and sell over 200,000 unauthorized copies of Windows 95 software, with a retail value of over

\$41,000,000. The conspirators, including Deot, provided counterfeit manuals, packaging materials, certificates of authenticity, and trademarks. Deot was sentenced to 8 months imprisonment and ordered to pay \$10,000,000 in restitution. His co-defendant was sentenced to 27 months and ordered to pay \$14,296,000 in restitution.

In *United States v. Casey Lee Ross*, 15-CR-196 (W.D. Mo. 2015), the defendant was part of a six-year \$100,000,000 fraud scheme to sell over 170,000 counterfeit copies of Microsoft and Adobe software, complete with valid registration codes and certificates of authenticity. Ross was sentenced to 5 years of probation.<sup>6</sup>

In *Microsoft Corp. v. EZPC Recycling, Inc and Miguel Bautista*, 14-CV-986 (C.D. Ca. 2014), the defendants sold refurbished computers containing unauthorized copies of Windows Vista. They persisted in this conduct even after receiving a cease-and-desist letter from Microsoft. The case was pursued as a civil copyright and trademark action, without a criminal prosecution.

There are numerous other example, worldwide, where infringers of software trademarks and copyrights have not been prosecuted, even though their conduct was much more egregious than the conduct here.

### **The Need To Provide Restitution To Victims**

As noted in his Objections to the Presentence Report, Mr. Lundgren contests whether restitution is owed and, if so, the amount of any restitution.

## **CONCLUSION**

Neither the advisory Guideline range nor the Government's recommendation accurately reflects Mr. Lundgren's individual culpability; they do not balance the §3553 factors in a way that

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<sup>6</sup> Although not entirely clear from the docket sheet, it appears that Deot and Ross received a sentencing reduction for cooperation. This option was not available to Mr. Lundgren.

results in a sentence that is sufficient but not greater than necessary to achieve the goals of §3553. Mr. Lundgren's actions in the five years since this offense demonstrate that he has learned from his errors and is capable of being a productive, job creating, law-biding, tax paying member of society. Balancing all the §3553 factors, a period of incarceration would not be a sentence that is sufficient but not greater than necessary to achieve the goals of federal sentencing. Mr. Lundgren prays that he be given the opportunity to continue to run and grow his company, keep his employees working, keep supporting charitable organizations around the world, continue to develop innovative uses for recycled materials, and continue to contribute in a positive way to society.

**WHEREFORE**, it is respectfully requested that the Court impose a non-incarcerative sentence, and a fine (if any) at the low end of the fine range.

Respectfully submitted,

/s/ Bruce E. Reinhart  
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Miami, Florida 33131  
Telephone: 305-503-5503

Counsel for Clifford Eric Lundgren

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on May 18, 2017, I electronically filed the foregoing Memorandum in Aid of Sentencing with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and on U.S. Probation Officer Nicole Pender, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Bruce E. Reinhart



# DOCUMENT 117-1

RE: US V. CLIFFORD ERIC LUNDGREN

**12 HISTORIC AND CURRENT WEBSITES PROVIDING FREE**

**MICROSOFT RESTORE IMAGE DOWNLOADS.**

May 16, 2017

**QUALIFICATIONS:**

I, Daniel Haste, am an IT Consultant, Project Manager, and Forensic Analyst based in Long Beach, CA. I have been a certified Information Technology consultant for over thirty (30) years. As an IT Consultant; I have been a reseller and servicer of Dell computers for over twenty (20) years, and have purchased and used hundreds of Dell restore CDs to service my clients over this period.

**Dell Restore CD availability and Formats of Delivery:**

Dell has traditionally provided its users with a free Dell restore CD for every computer sold. Dell Restore CD's are provided through these methods,

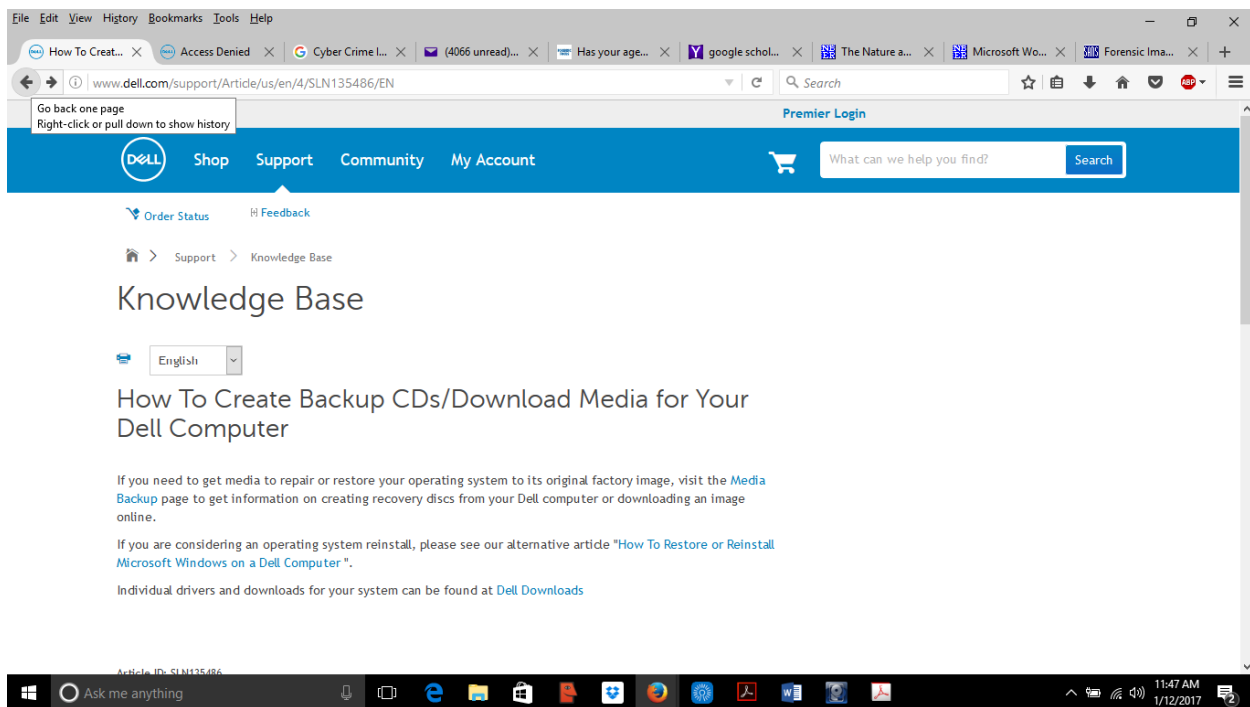
- (1.) Dell Restore CD's are included for free inside a Dell retail computer product
- (2.) Dell Restore CD's are pre-installed as a "partition" on the computer hard drive provided in a Dell Computer, or
- (3) Dell Restore CD's are made available by download for owners at no cost; directly from Dell.com or other computer OEM websites.

**Websites Providing Free Microsoft Windows restore media.**

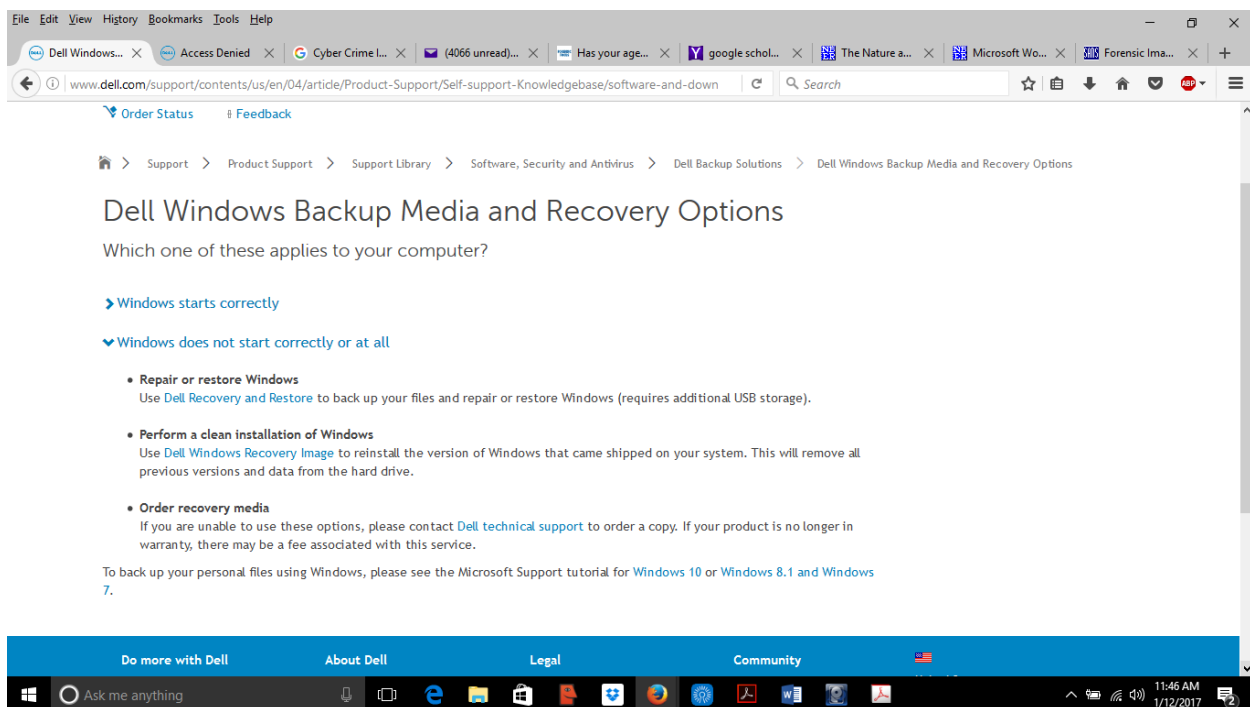
**1. DELL**

Dell restore CDs have been provided for free to download on Dell.com to registered Dell computer owners upon confirmation of ownership using the machine's Dell Service Tag # or Express Service Code found affixed to every Dell Computer.

## **Dell instructs its users on "How To Create Dell restore cd's"<sup>1</sup>**



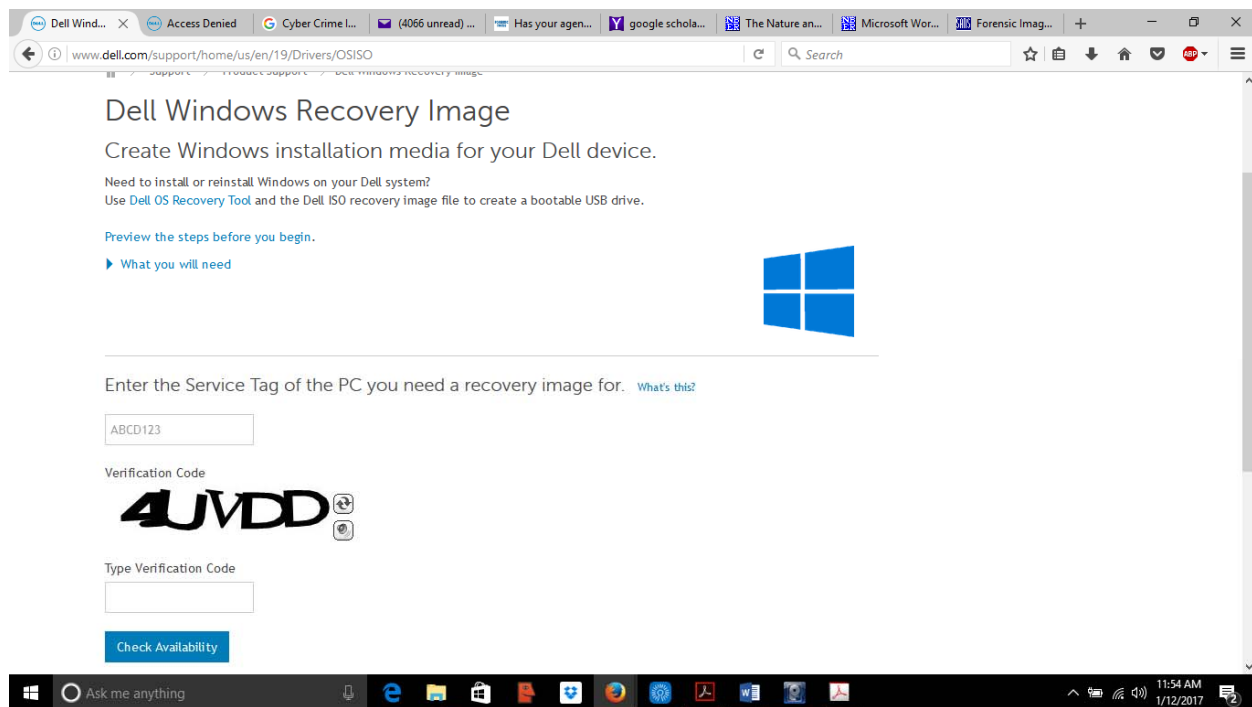
## **The Dell website informs users they can create or order replacement media from Dell.<sup>2</sup>**



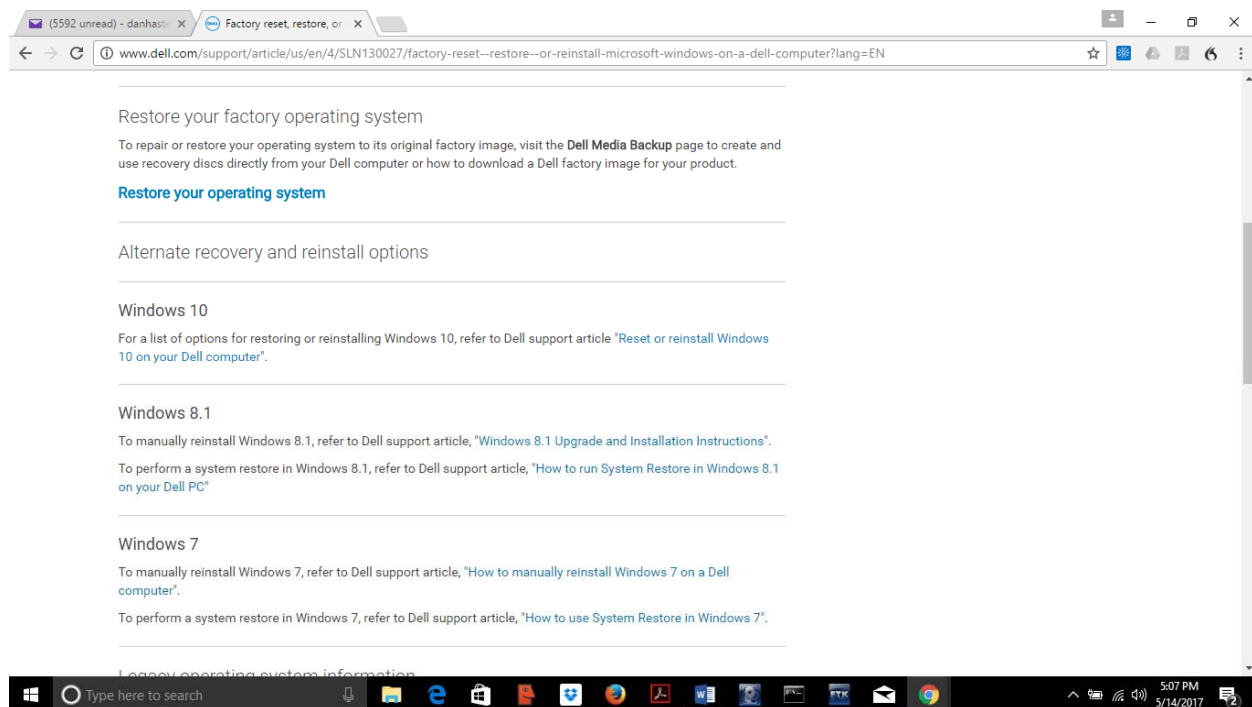
<sup>1</sup> Retrieved from <http://www.dell.com/support/Article/us/en/4/SLN135486/EN> on 1/12/2017.

<sup>2</sup> Retrieved from <http://www.dell.com/support/contents/us/en/04/article/Product-Support/Self-support-Knowledgebase/software-and-downloads/dell-backup-solutions/Media-backup> on 1/12/2017.

### Authenticated Dell users can create their own Dell Installation CD.<sup>3</sup>



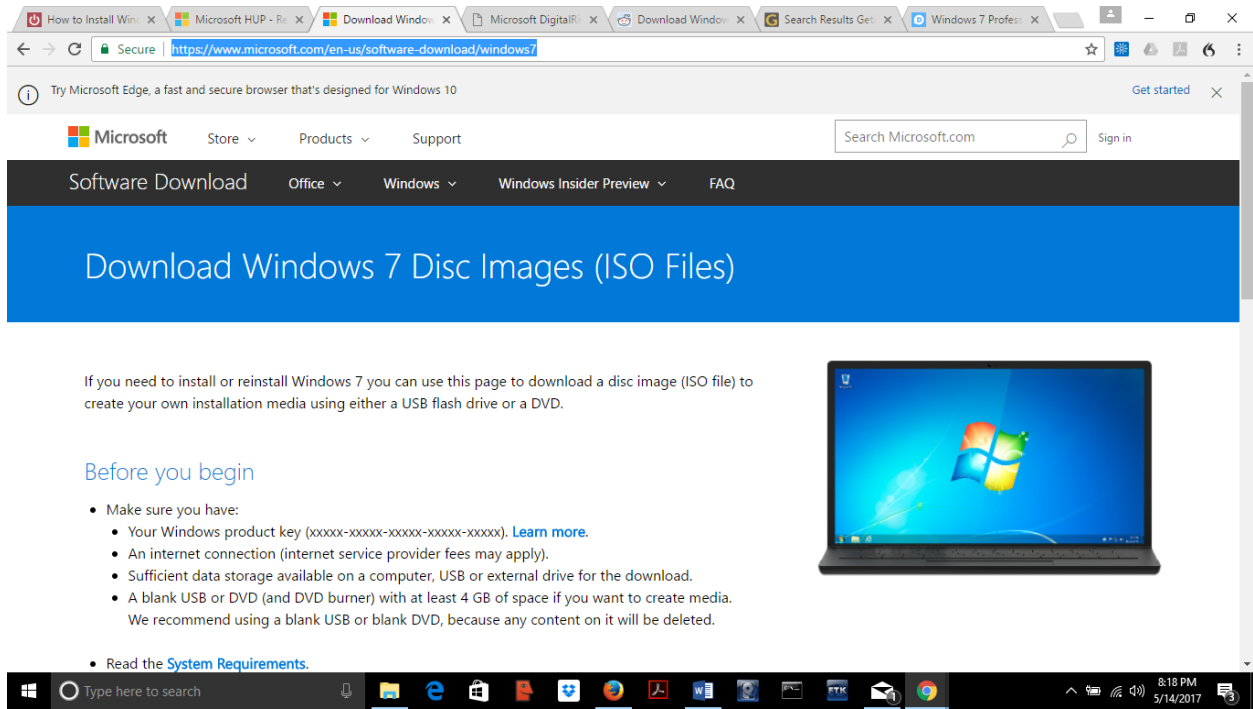
### Online downloads available from “*Dell.com/support*” as of May 14, 2017<sup>4</sup>:



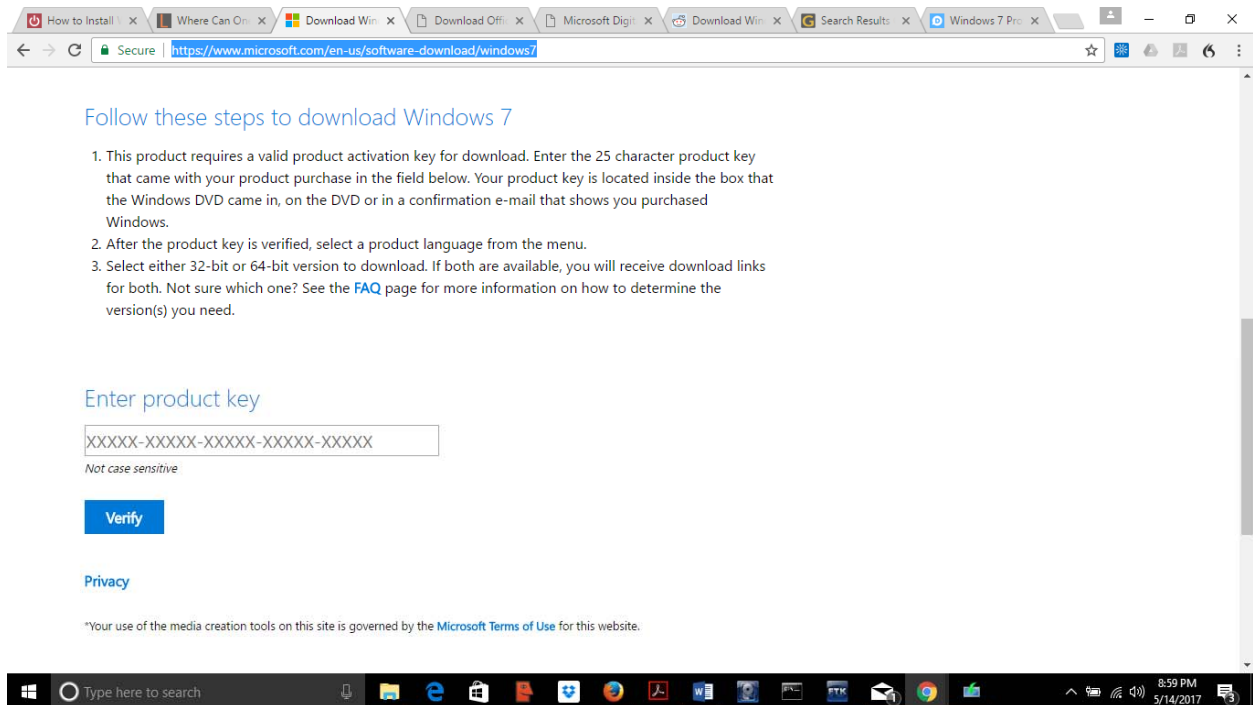
<sup>3</sup>Retrieved from <http://www.dell.com/support/home/us/en/19/Drivers/OSISO> on January 12 2017.

<sup>4</sup> Retrieved from <http://www.dell.com/support/article/us/en/4/SLN130027/factory-reset--restore--or-reinstall-microsoft-windows-on-a-dell-computer?lang=EN> on May 14, 2017.

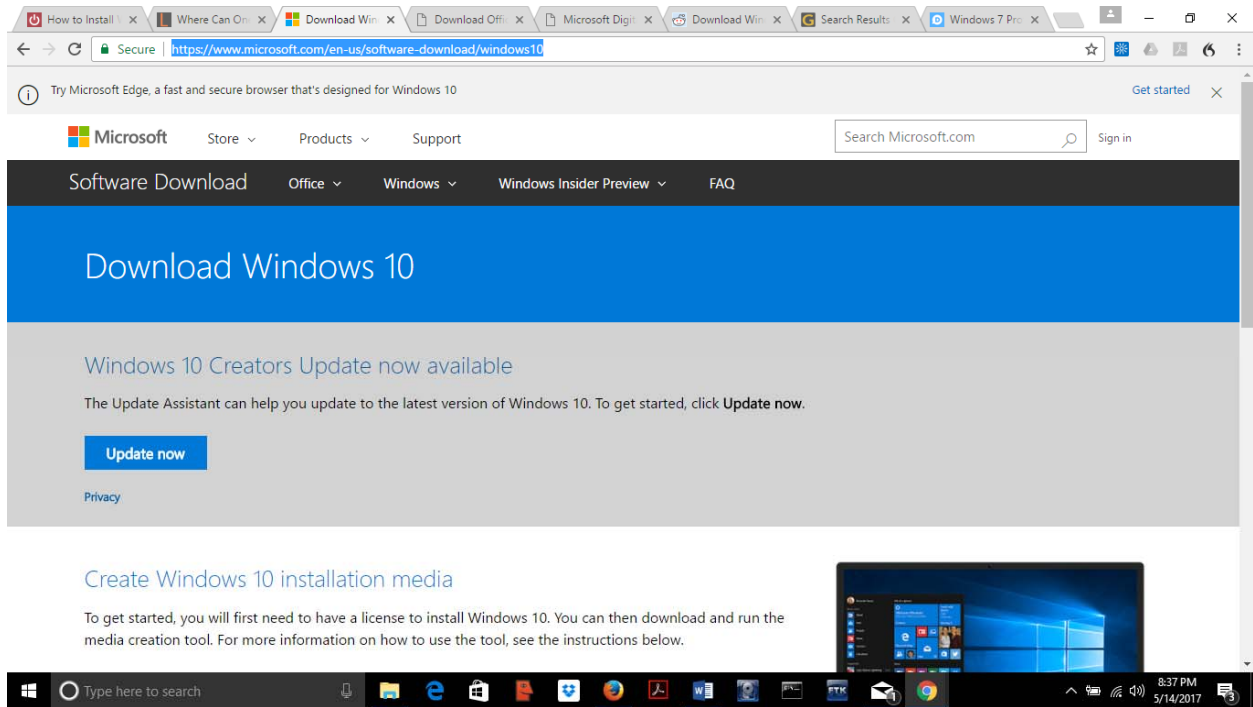
**2. Online free Download of Windows 7 CD from Microsoft. Retrieved from <https://www.microsoft.com/en-us/software-download/windows7> on May 14, 2017.**



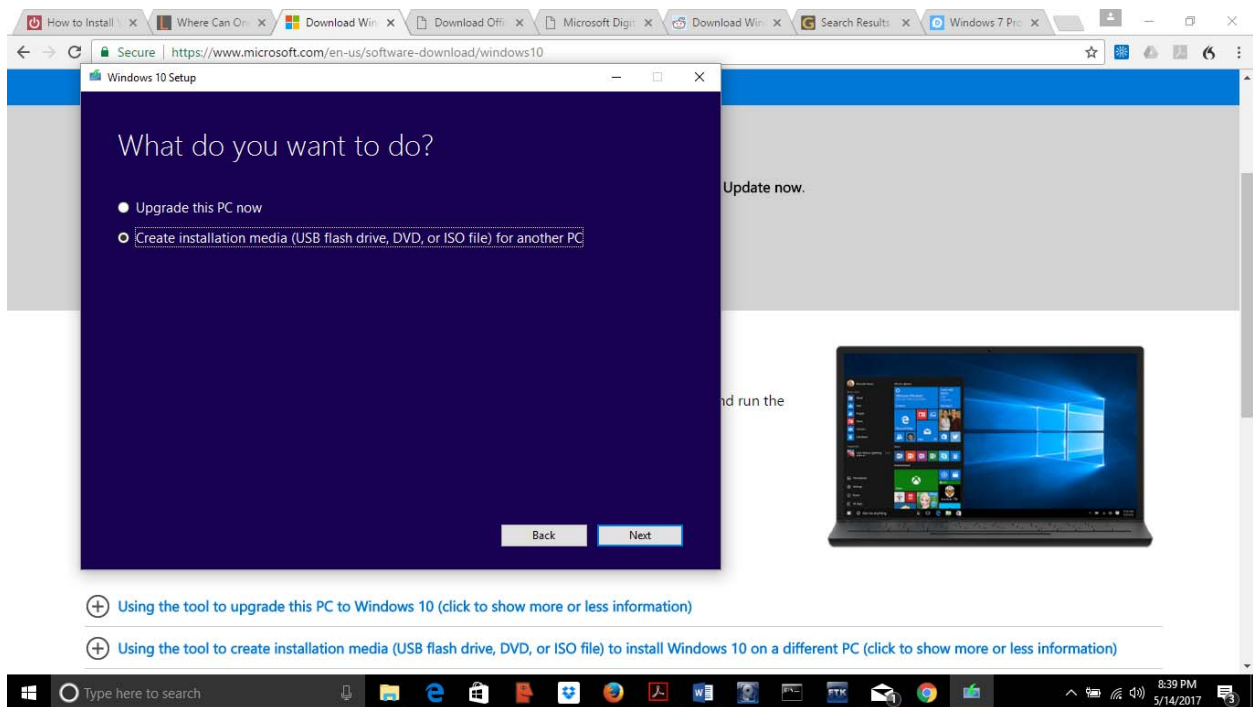
**The downloaded Windows 7 Disc Image requires a valid product key.**



**Free Online Download of Windows 10 CD from Microsoft. Retrieved from <https://www.microsoft.com/en-us/software-download/windows10> May 14, 2017.**

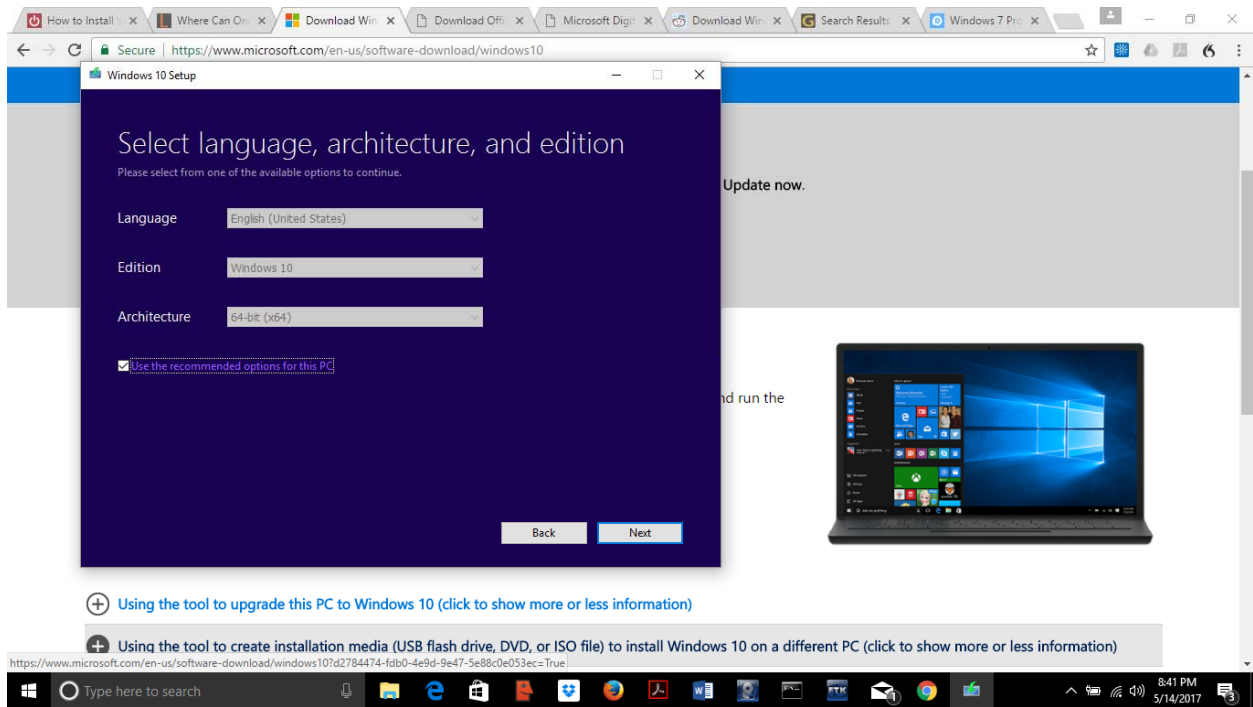


**Microsoft provides a free download called “*MediaCreationTool*”, and users on how to “Create Installation Media for another pc”<sup>5</sup>**

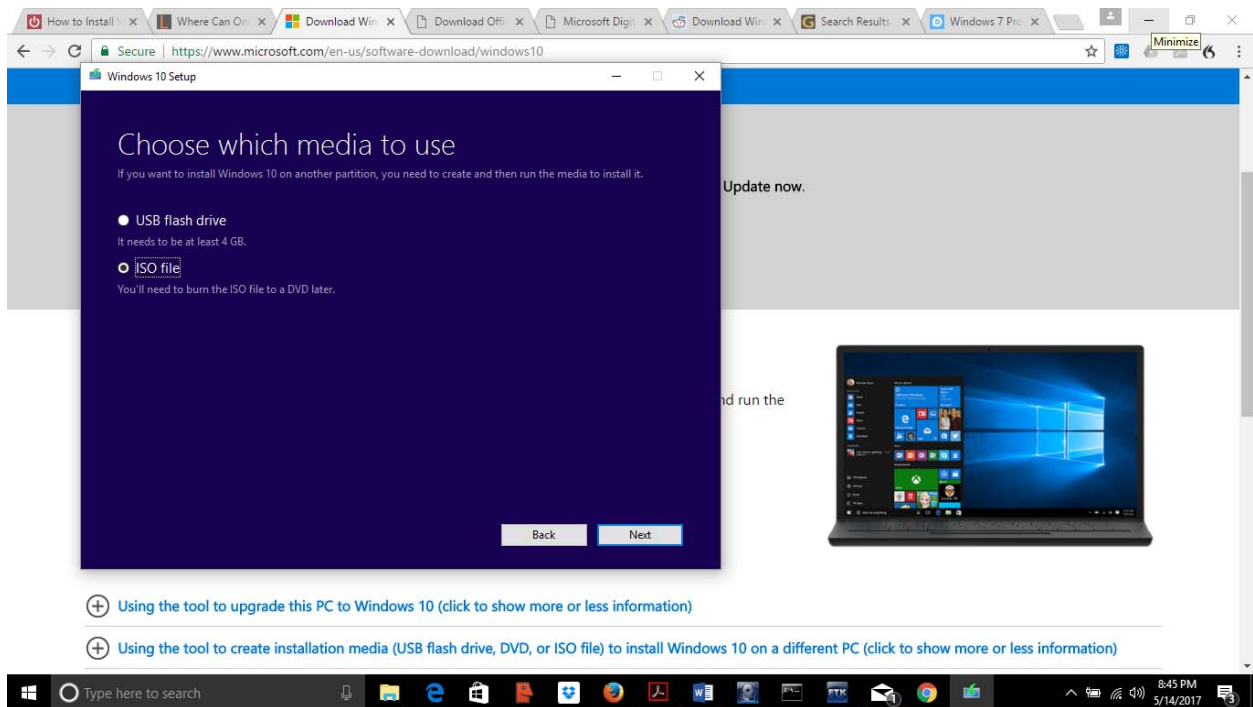


<sup>5</sup> MediaCreationTool from <https://www.microsoft.com/en-us/software-download/windows10> on May 14, 2017

**Microsoft's MediaCreationTool allows downloaders to customize a restore dvd.<sup>6</sup>**



**Microsoft's MediaCreationTool can create restore DVD's or USB restore media.<sup>7</sup>**

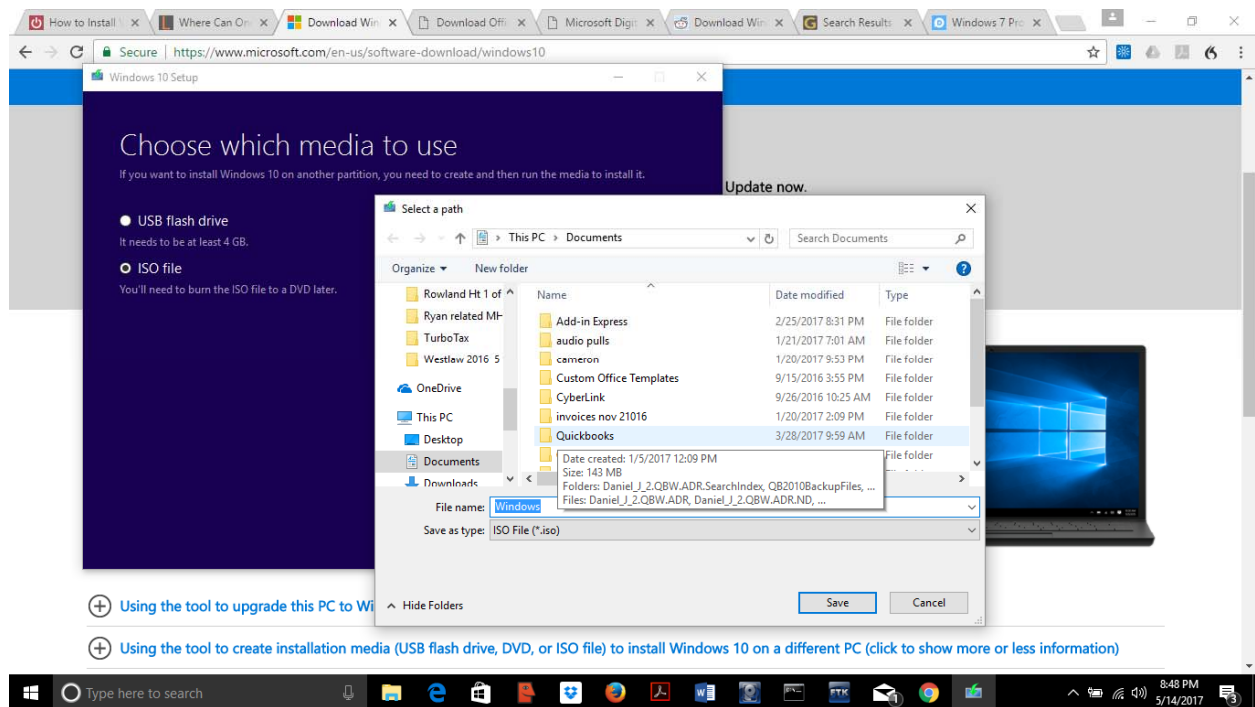


<sup>6</sup> MediaCreationTool from <https://www.microsoft.com/en-us/software-download/windows10> on May 14, 2017

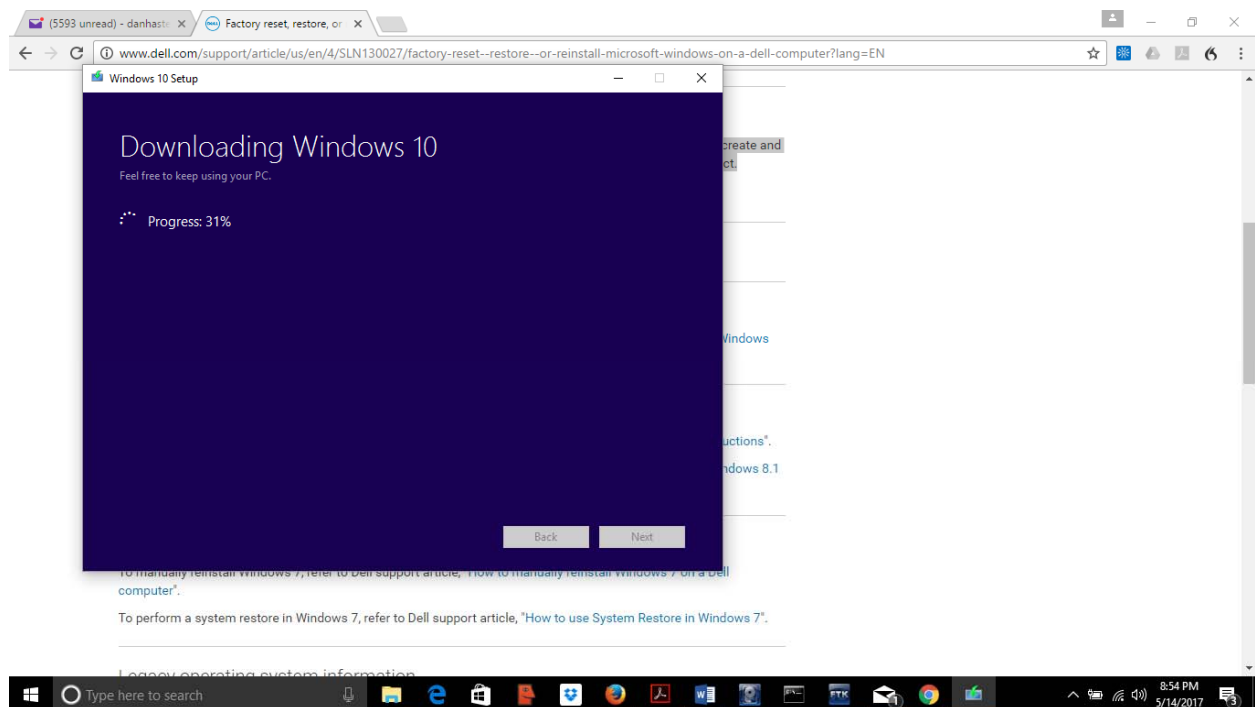
<sup>7</sup> MediaCreationTool from <https://www.microsoft.com/en-us/software-download/windows10> on May 14, 2017



**Microsoft's *MediaCreationTool* users can create many copies of restore DVD's.<sup>8</sup>**



**The free *MediaCreationTool* downloads Windows 10 directly from Microsoft.<sup>9</sup>**

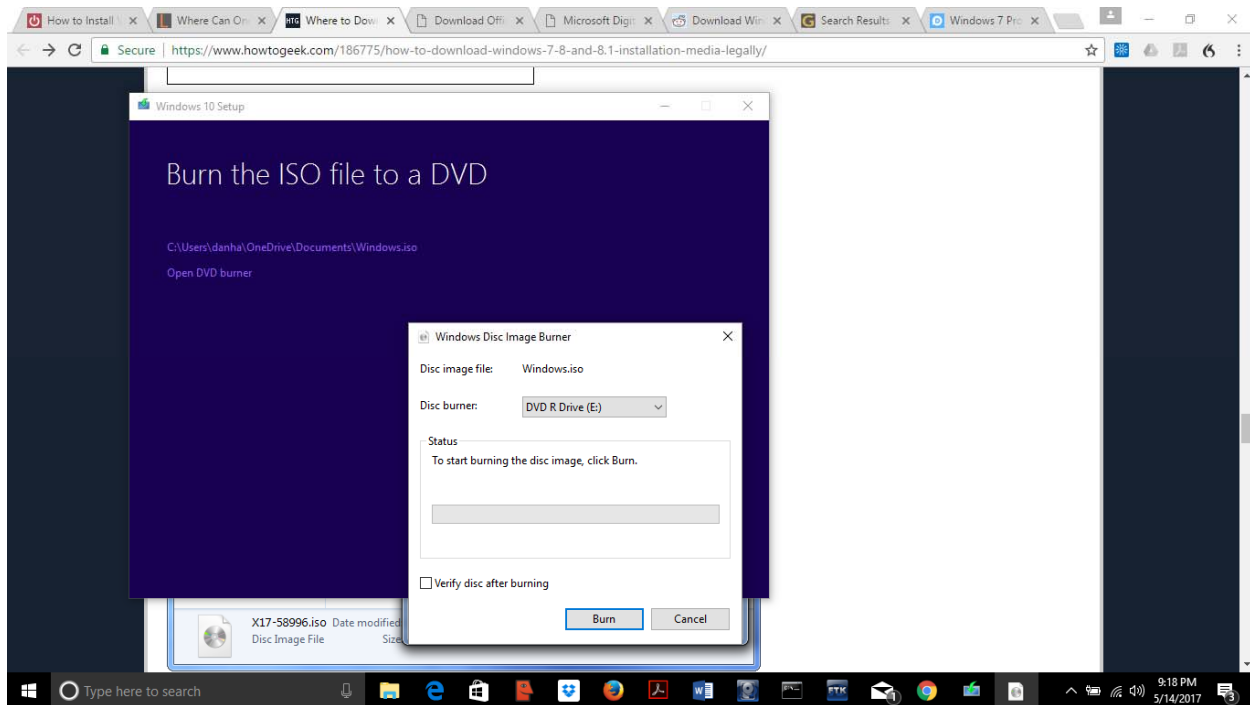


<sup>8</sup> MediaCreationTool from <https://www.microsoft.com/en-us/software-download/windows10> on May 14, 2017

<sup>9</sup> MediaCreationTool from <https://www.microsoft.com/en-us/software-download/windows10> on May 14, 2017



When *MediaCreationTool* is finished, users click “*Open DVD Burner*” to create DVD’s.<sup>10</sup>



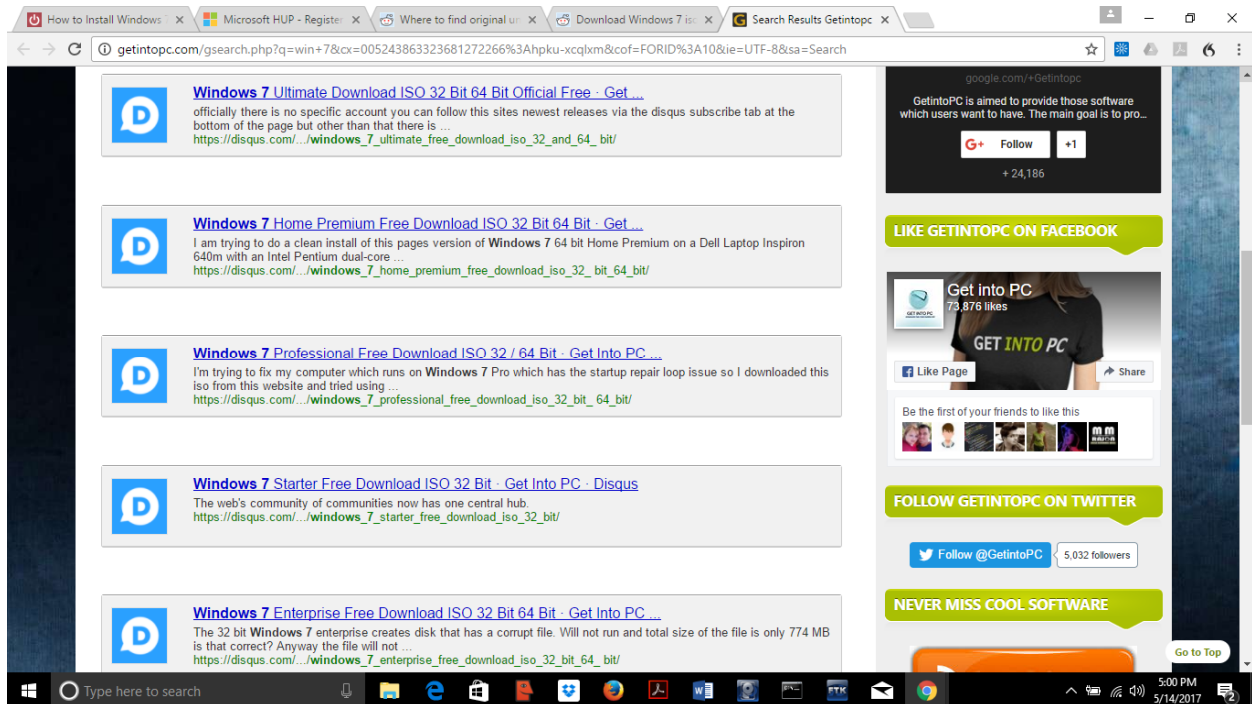
### 3. Online Downloads from “Digital River”:

Until July 2015, Microsoft Windows cd’s were available to authenticated users from digitalriver.com, Below is the download link for Windows 7 from digitalrivercontent.net. “*Home Premium SP1 (English, 64-bit)*”, links were also available for other versions of Windows 7.

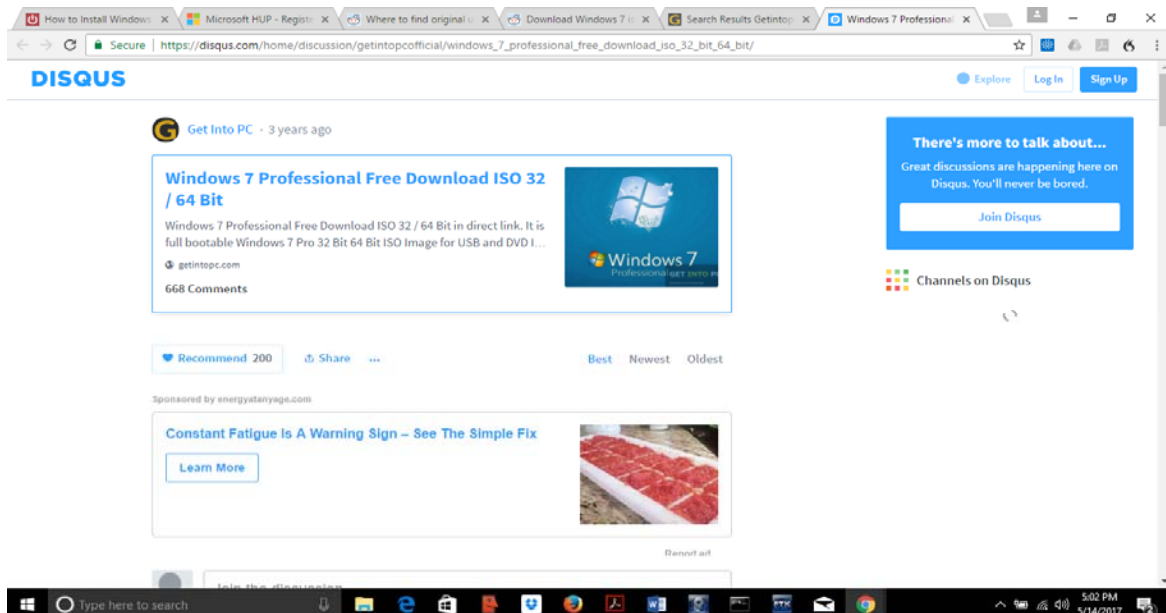
<http://msft.digitalrivercontent.net/win/X17-58997.iso>

<sup>10</sup> MediaCreationTool from <https://www.microsoft.com/en-us/software-download/windows10> on May 14, 2017

4. Free online Microsoft Windows downloads from getintopc.com. Retrieved from: <http://getintopc.com/gsearch.php?q=win+7&cx=005243863323681272266%3Ahpku-xcqlxm&cof=FORID%3A10&ie=UTF-8&sa=Search> retrieved on May 14, 2017.



5. Online download from Disqus.<sup>11</sup>



<sup>11</sup> Retrieved from [https://disqus.com/home/discussion/getintopcofficial/windows\\_7\\_professional\\_free\\_download\\_iso\\_32\\_bit\\_64\\_bit/](https://disqus.com/home/discussion/getintopcofficial/windows_7_professional_free_download_iso_32_bit_64_bit/) on May 14, 2017.

## 6. Online free download from “[mirror.corenoc.de](http://mirror.corenoc.de)”.

Since April 2, 2015, this German site by Florian Strankowski has offered free downloads of Microsoft Windows versions previously available from *Digital River* or *Microsoft TechNet*. Significantly, the site appears advertiser supported. One such advertiser is the Financial Times. (below top) another is concert promoter Live Nation. (bottom)

Retrieved from <http://mirror.corenoc.de/digitalrivercontent.net/> on May 14, 2017.

04.02.2017  
Thanks for supporting this server by visiting an ad after you got what u needed :-).  
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For the full perspective, turn to the FT

## DIGITALRIVER ##	## TECHNET ##	## MD5 ##	## SHA-1 ##	## MSDN ##
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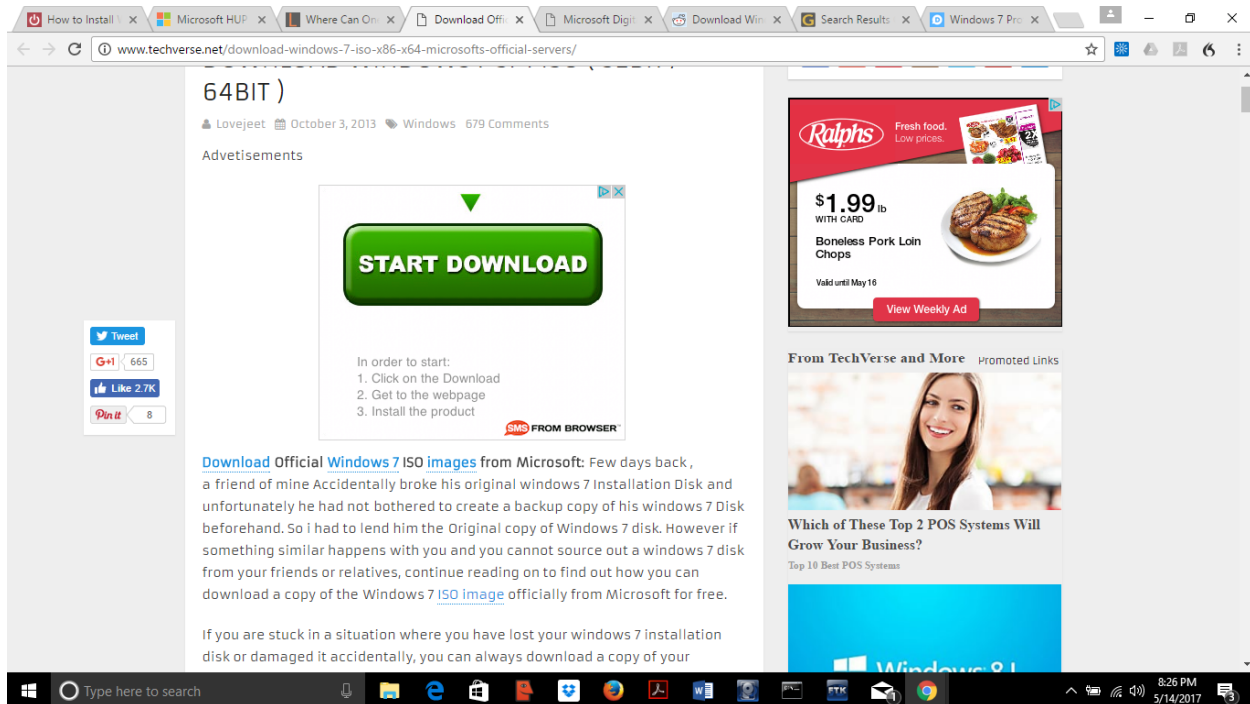
For the full perspective, turn to the FT

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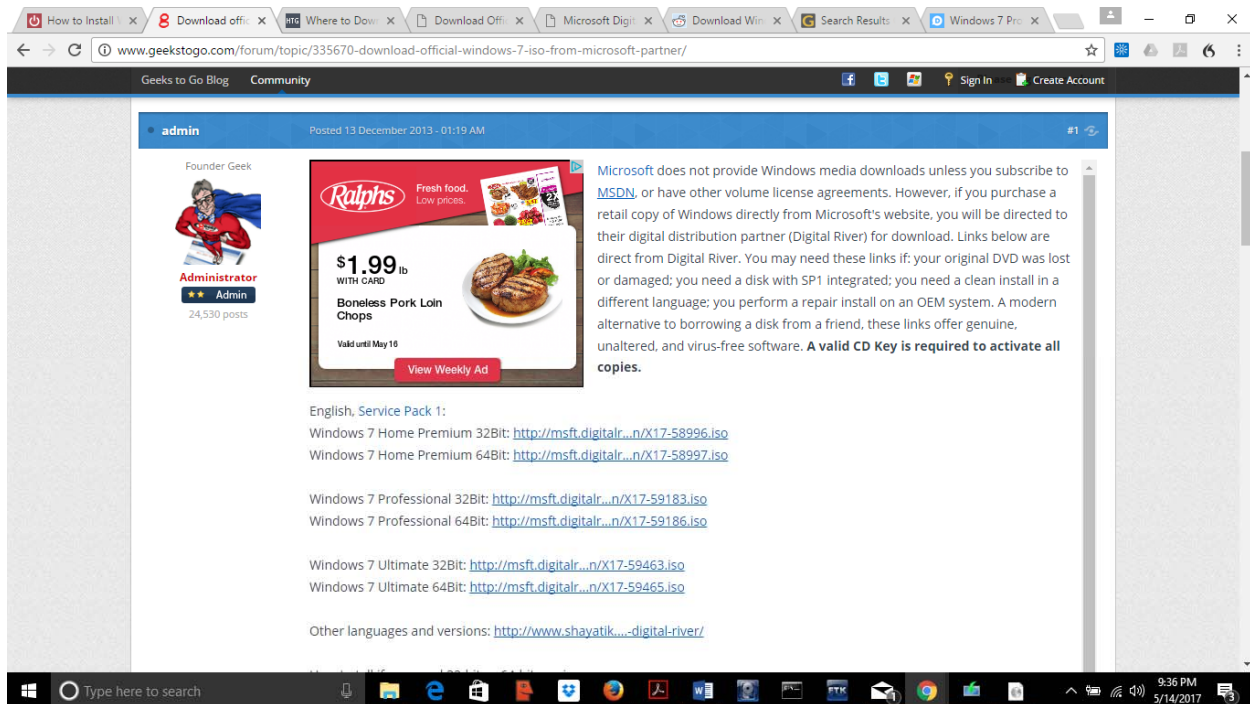
KIDZ BOP KIDS  
2017 TOUR  
BEST TIME EVER  
OFFICIAL PARTNER  
SPLASHERS  
JUNE 4  
HONDA CENTER  
SATURDAY, JUNE 10  
GREEK THEATRE  
LIVE NATION  
GET TICKETS NOW

## DIGITALRIVER ##	## TECHNET ##	## MD5 ##	## SHA-1 ##	## MSDN ##
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7. **Online free download from “Techverse”: Retrieved on May 14, 2017 from <http://www.techverse.net/download-windows-7-iso-x86-x64-microsofts-official-servers/>**

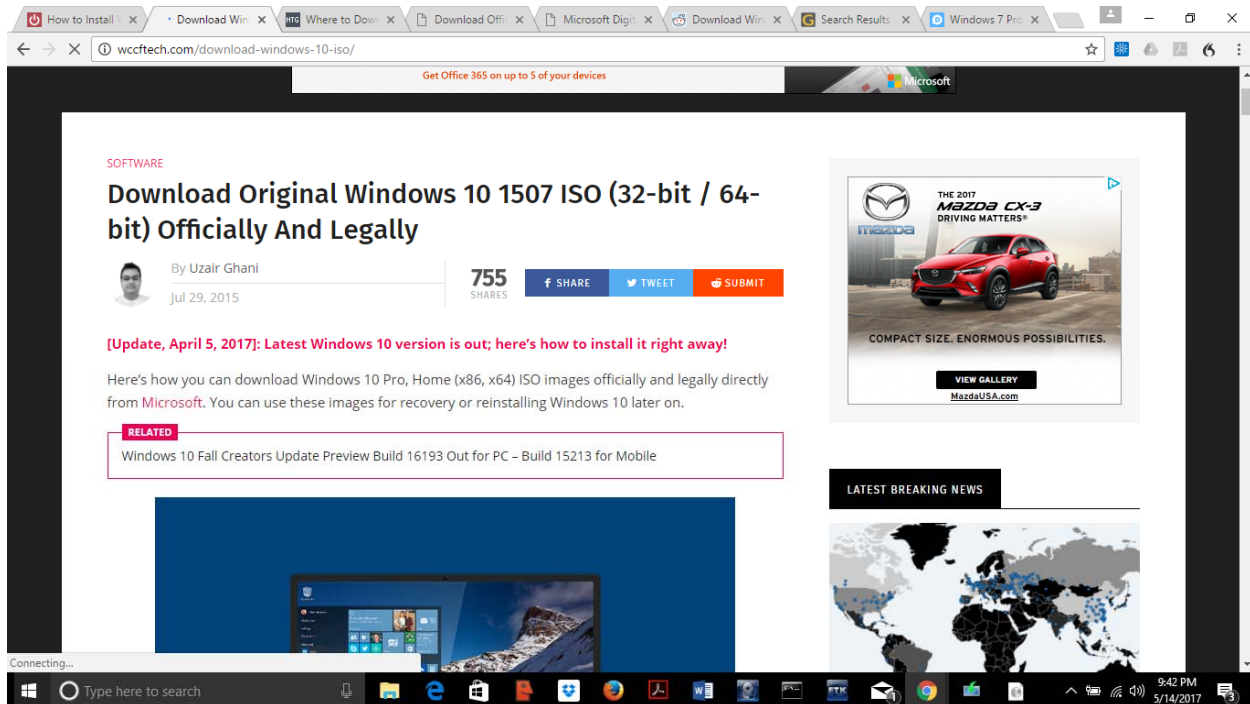


8. **Online free download from “Geekstogo”: Retrieved on May 14, 2017 from <http://www.geekstogo.com/forum/topic/335670-download-official-windows-7-iso-from-microsoft-partner/>**

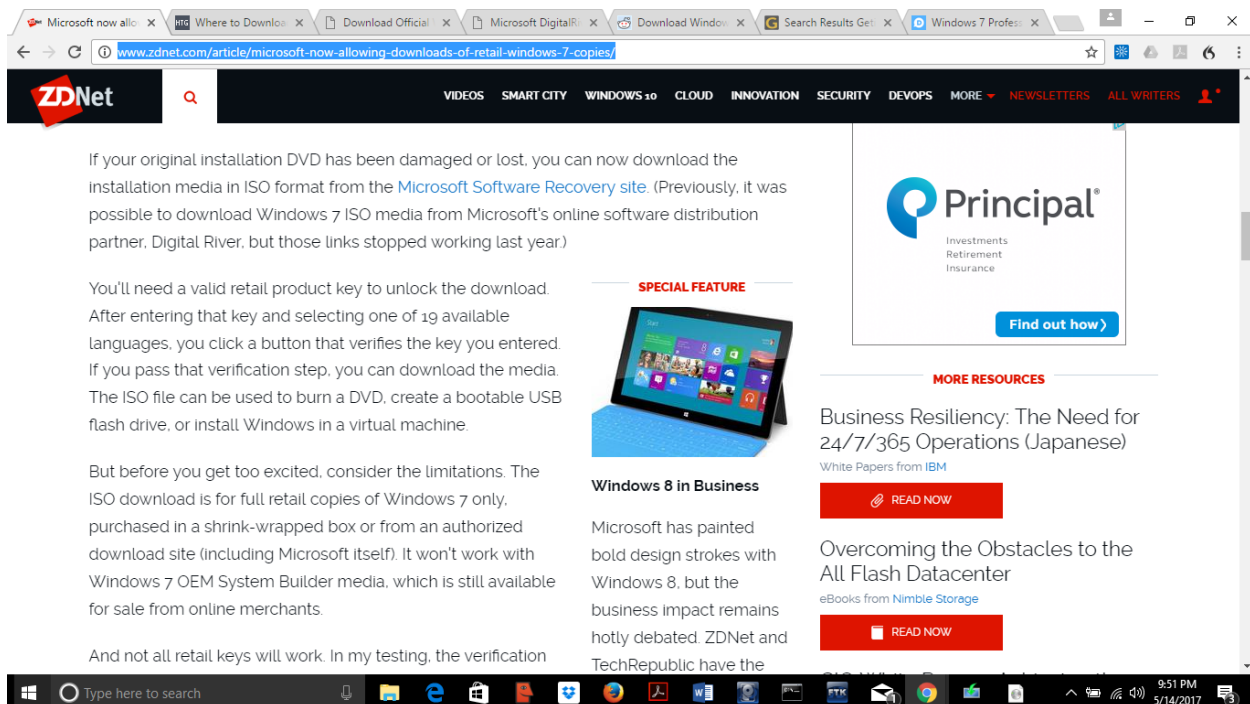




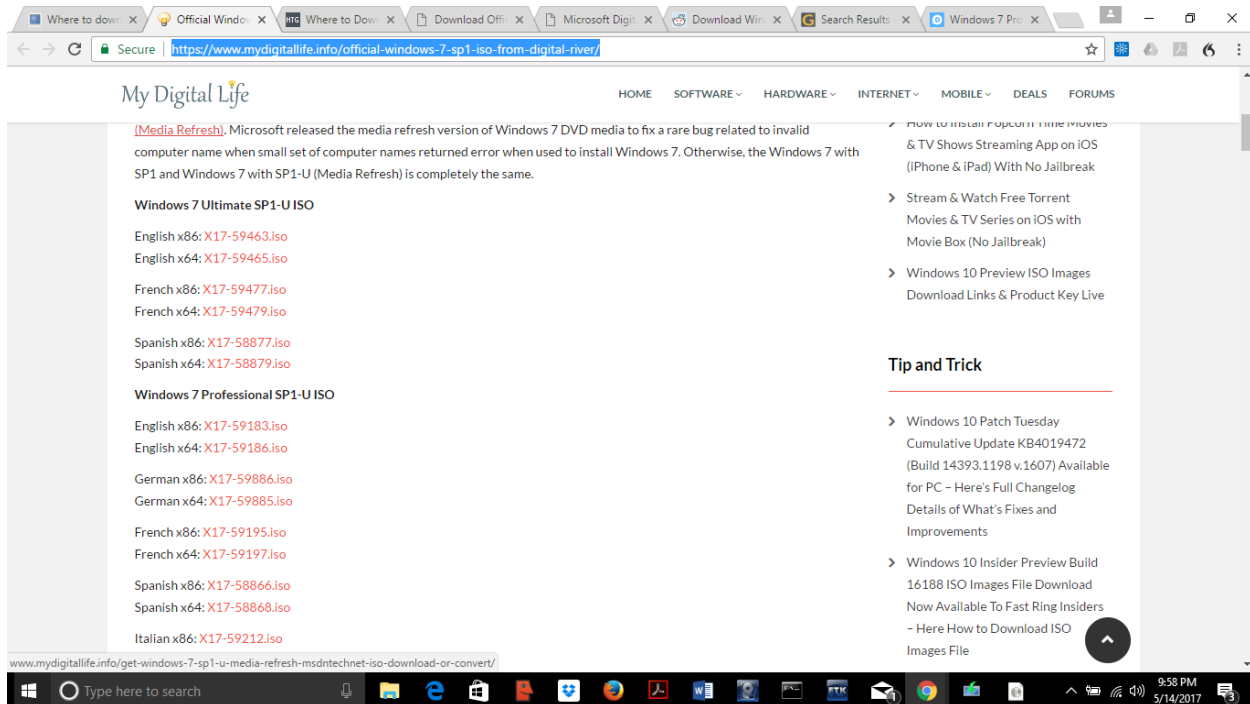
9. Online free download from “Wccotech”: Retrieved on May 14, 2017 from <http://wccftech.com/download-windows-10-iso/>



10. Online free download link from “zdnet”: Retrieved on May 14, 2017 from <http://www.zdnet.com/article/microsoft-now-allowing-downloads-of-retail-windows-7-copies/>



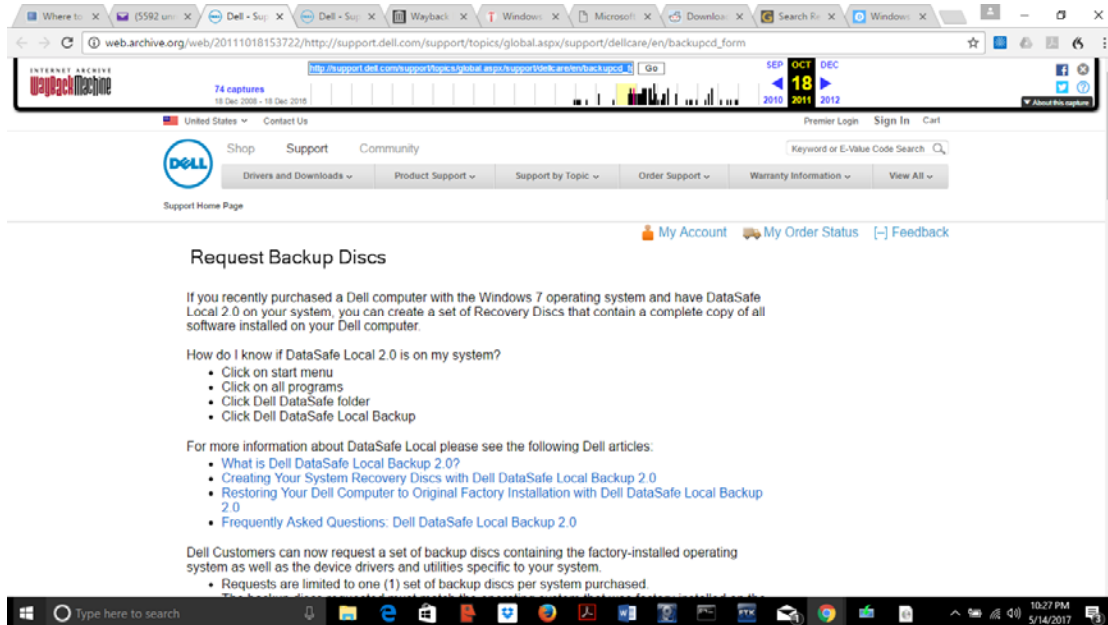
**11. Online free download from “My Digital Life”: Retrieved on May 14, 2017 from <https://www.mydigitallife.info/official-windows-7-sp1-iso-from-digital-river/>**



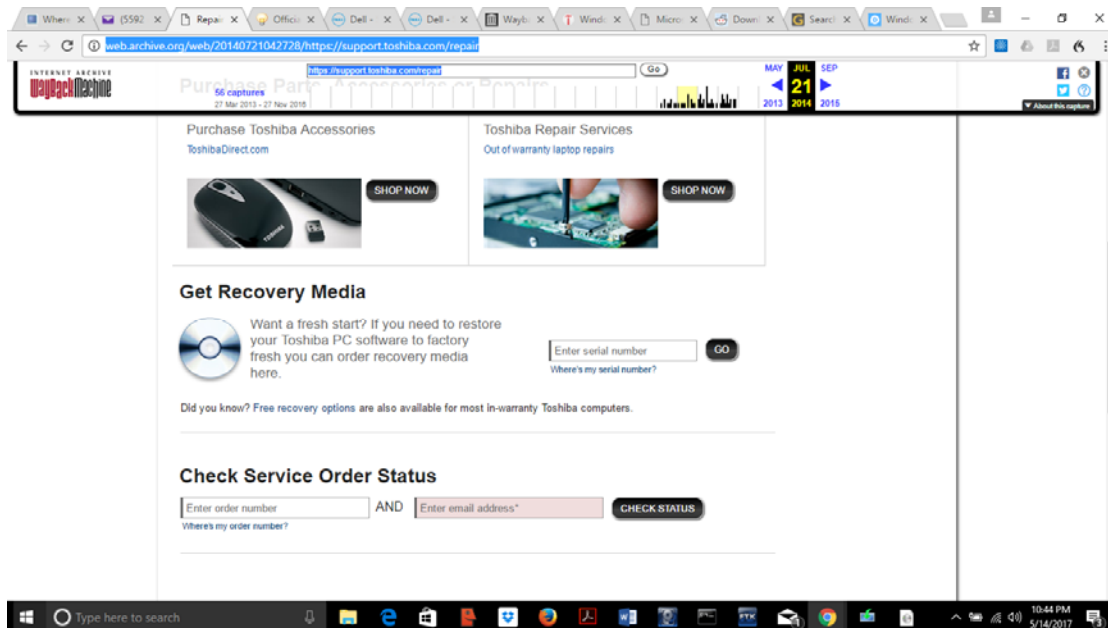
**Online free downloads of Windows 7 from “My Digital Life” were already available for free download in this September 2011 archive retrieved from <http://www.mydigitallife.info:80/windows-7-iso-x86-and-x64-official-direct-download-links-ultimate-professional-and-home-premium/>**



Free Dell Restore cd's were available on Dell.com were listed on archive dated Oct 18, 2011 of [http://support.dell.com/support/topics/global.aspx/support/dellcare/en/backupcd\\_form](http://support.dell.com/support/topics/global.aspx/support/dellcare/en/backupcd_form)



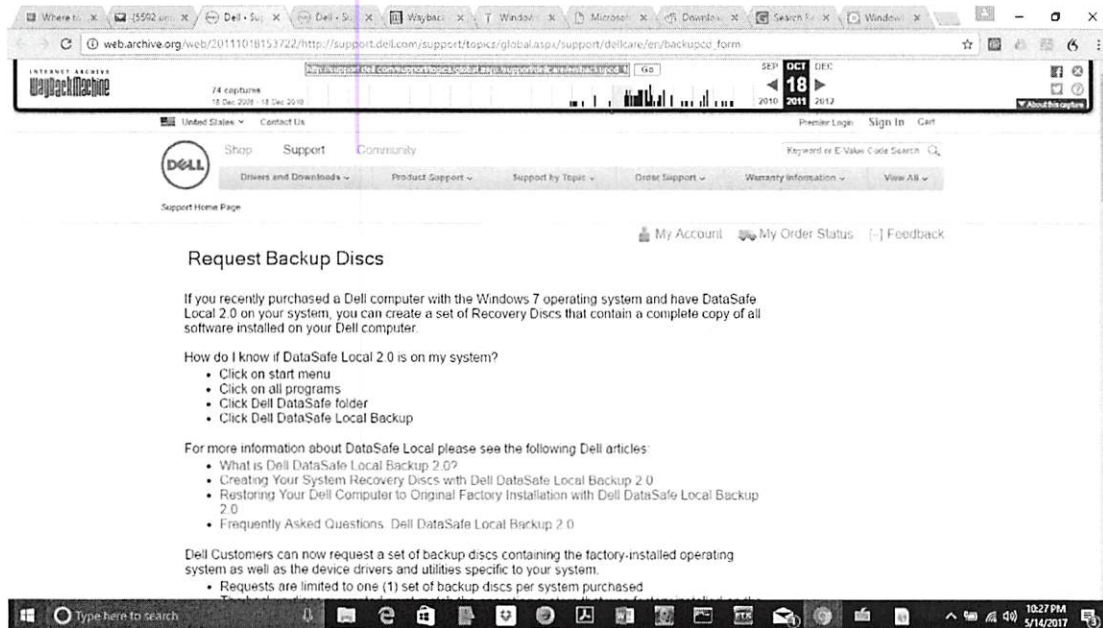
12. Free Toshiba Restore cd's available an archival of <https://support.toshiba.com/repair> dated March 27, 2013. The archive was retrieved from <http://web.archive.org/web/20140721042728/https://support.toshiba.com/repair> May 14, 2017.



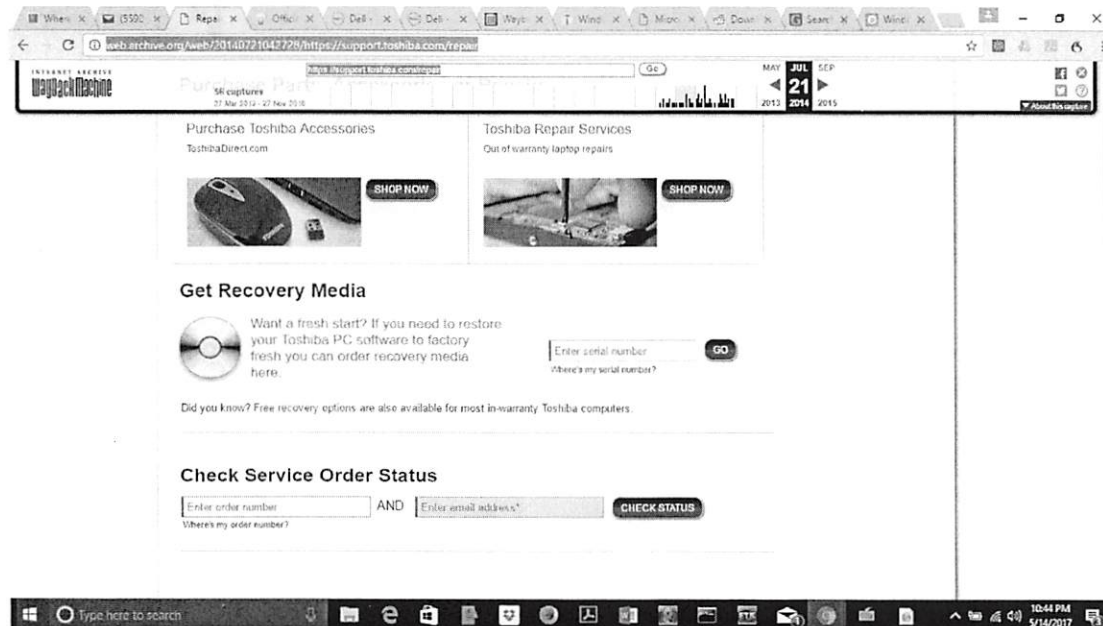
DANIEL JAMES HASTE

DATE

Free Dell Restore cd's were available on Dell.com were listed on archive dated Oct 18, 2011 of [http://support.dell.com/support/topics/global.aspx/support/dellcare/en/backuptcd\\_form](http://support.dell.com/support/topics/global.aspx/support/dellcare/en/backuptcd_form)



12. Free Toshiba Restore cd's available an archival of <https://support.toshiba.com/repair> dated March 27, 2013. The archive was retrieved from <http://web.archive.org/web/20140721042728/https://support.toshiba.com/repair> May 14, 2017.



Daniel James Haste  
DANIEL JAMES HASTE

May 16, 2017  
DATE



# DOCUMENT 129

**UNITED STATES DISTRICT COURT****Southern District of Florida****West Palm Beach Division****UNITED STATES OF AMERICA****v.****CLIFFORD ERIC LUNDGREN****JUDGMENT IN A CRIMINAL CASE**Case Number: **.16-80090-cr-DTKH**USM Number: **13623-104**Counsel For Defendant: Lilly Ann Sanchez/Bruce  
Reinhart

Counsel For The United States: Lothrop Morris

The defendant pleaded guilty to count(s) 1 &amp; 3.

The defendant is adjudicated guilty of these offenses:

<u>TITLE &amp; SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. 2320(a)(1)	Conspiracy to Traffic in counterfeit goods	10/02/2012	1
17 U.S.C. 506 (a)(1)(A)	Criminal Copyright Infringement	10/20/2012	3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

**All remaining counts are dismissed on the motion of the government.**

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: **5/23/2017**  
Daniel T. K. Hurley  
United States Senior District JudgeDate: May 23, 2017

DEFENDANT: **CLIFFORD ERIC LUNDGREN**

CASE NUMBER: **.16-80090-cr-DTKH**

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **15 months. This term consists of 15 as to each of the counts One and Three to be served concurrently.**

*The court recommends to the U.S. Bureau of Prisons:*

*Designation to FCI Camp at Sheridan, Oregon*

**The defendant shall surrender to the U.S. Marshal on or before July 14, 2017 by noon, at the Federal Courthouse, Los Angeles, California.**

**RETURN**

I have executed this judgment as follows:

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Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

\_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **CLIFFORD ERIC LUNDGREN**

CASE NUMBER: **.16-80090-cr-DTKH**

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years. This term consists of 3 years as to count one and 3 years as to count three to run concurrent with each other.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

**The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.**

**The defendant shall cooperate in the collection of DNA as directed by the probation officer.**

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

**STANDARD CONDITIONS OF SUPERVISION**

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **CLIFFORD ERIC LUNDGREN**

CASE NUMBER: **.16-80090-cr-DTKH**

**SPECIAL CONDITIONS OF SUPERVISION**

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer, until the fine is paid.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

DEFENDANT: **CLIFFORD ERIC LUNDGREN**CASE NUMBER: **.16-80090-cr-DTKH****CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$200.00	\$50,000.00	\$0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>	<u>PRIORITY OR PERCENTAGE</u>
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\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

\*\* Assessment due immediately unless otherwise ordered by the Court.

**DEFENDANT: CLIFFORD ERIC LUNDGREN****CASE NUMBER: .16-80090-cr-DTKH****SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

**A. Lump sum payment of due immediately.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

**U.S. CLERK'S OFFICE  
ATTN: FINANCIAL SECTION  
400 NORTH MIAMI AVENUE, ROOM 08N09  
MIAMI, FLORIDA 33128-7716**

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u><b>CASE NUMBER</b></u>	<u><b>TOTAL AMOUNT</b></u>	<u><b>JOINT AND SEVERAL</b></u>
<u><b>DEFENDANT AND CO-DEFENDANT NAMES</b></u>		<u><b>AMOUNT</b></u>
<u><b>(INCLUDING DEFENDANT NUMBER)</b></u>		

**The Government shall file a preliminary order of forfeiture within 3 days.**

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

# DOCUMENT 140



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-80090-CR-HURLEY

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIFFORD ERIC LUNDGREN,

Defendant.

\_\_\_\_\_ /

**NOTICE OF APPEAL**

Notice is hereby given that Clifford Eric Lundgren, defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment entered in this action on the 24<sup>th</sup> day of May, 2017, at Docket Entry 129.

Respectfully submitted,

/s/ Bruce E. Reinhart  
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Counsel for Clifford Eric Lundgren

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on May 25, 2017, I electronically filed and served the foregoing Notice of Appeal on all counsel of record using CM/ECF.

/s/ Bruce E. Reinhart

# DOCUMENT 145

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION  
CASE NO. 16-CR-80090-HURLEY

**UNITED STATES OF AMERICA,** .  
Plaintiff, .  
vs. .  
**CLIFFORD E. LUNDGREN** . West Palm Beach, FL  
and **ROBERT WOLFF,** . May 22, 2017  
Defendants. .

VOLUME 1  
SENTENCING PROCEEDINGS  
BEFORE THE HONORABLE DANIEL T. K. HURLEY  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: **LOTHROP MORRIS**  
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Suite 400  
West Palm Beach, FL 33401  
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FOR THE DEFENDANTS: **BRUCE REINHART, ESQ.**  
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**RANDEE J. GOLDER, ESQ.**  
Randee J. Golder, P.A.  
PO Box 243756  
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COURT REPORTER: Pauline A. Stipes  
Official Federal Reporter  
Fort Pierce/West Palm Beach  
772-467-2337

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1           *THE COURT:* Good morning, everyone. This is Mr.  
2 Robert Wolff and Clifford Eric Lundgren.

3           Let me begin by allowing the lawyers to make  
4 appearances, and I will start by recognizing counsel for the  
5 Government.

6           *MR. MORRIS:* Good morning, Lothrop Morris, and  
7 standing next to me is Daniel Richichi from the Department of  
8 Homeland Security.

9           *THE COURT:* Counsel for Mr. Wolff.

10          *MS. GOLDER:* Good morning, Randee Golder on behalf of  
11 Mr. Wolff, seated next to me.

12          *THE COURT:* Good morning, welcome.

13          Counsel for Mr. Lundgren.

14          *MR. REINHART:* Good morning, Bruce Reinhart and Lilly  
15 Sanchez for Mr. Lundgren.

16          *THE COURT:* Good morning. Mr. Lundgren, nice to see  
17 you, too, sir.

18          And you correct me if I have this -- if I don't have  
19 the correct purpose of what we are doing. Both Mr. Wolff and  
20 Mr. Lundgren are scheduled for Sentencing today.

21          The Sentencing process is normally an individualized  
22 process, you look at the Sentencing Guidelines and then you  
23 look at another statute that ensures the person in an  
24 individual capacity is carefully looked at as well.

25          I take it the lawyers in both cases and both sides

1 were of the view that it is very important that the contested  
2 issue of loss needs to be resolved because it applies to  
3 both -- it applies across the board, and there needs to be  
4 consistency.

5 I think there was a motion, maybe Mr. Reinhart filed  
6 it, I am not sure, I think everybody agreed to it, that we  
7 should get together first to hold a hearing so that we could  
8 decide how does one calculate loss in a case like this, and  
9 then when that loss is determined, then we'll revert to the  
10 normal individualized Sentencing process and at the schedule  
11 call for the Sentencing of Mr. Wolff first and then Mr.  
12 Lundgren.

13 I know Mr. Lundgren's Sentencing was set for this  
14 afternoon, depending on how the schedule goes, but it is fine  
15 with me to handle one after the other, but I leave that for you  
16 to decide.

17 That is an accurate assessment of what the major issue  
18 is, the loss figure that needs to be utilized?

19 *MR. MORRIS:* Yes, Your Honor, absolutely.

20 *THE COURT:* Okay. In a normal Sentencing, what we  
21 usually do, we begin by looking at any factual objections, and  
22 we can do that, and the second consideration is legal issues.

23 I think loss is one of those -- sometimes it is  
24 difficult to pigeonhole whether something is a factual issue or  
25 a legal issue, but clearly loss is in the middle, probably only

1 a legal issue. If there is a factual issue, then one can  
2 argue, but the Government bears the burden on that.

3 If it is a legal issue, if it is something that would  
4 increase it, the Government bears the burden. If it is  
5 something that is established, but would lower the sentence,  
6 the Defendant bears the burden of persuasion.

7 It sounds to me, because of the different views where  
8 there is a loss, this is something where the Government bears  
9 the burden of persuasion.

10 Does everybody agree?

11 *MR. MORRIS:* The Government agrees.

12 *MS. GOLDER:* Your Honor, we are using the term "loss".  
13 I think this is infringement.

14 *THE COURT:* Thank you for everything you have provided  
15 to me. The guidelines actually speak to this, so we are  
16 looking at what do the guidelines say. We have a couple of  
17 cases that also speak to this, and then the question is, do we  
18 have it correct here, or is this an exception to the general  
19 rule; and if so, why?

20 So, we look at all of that, so I suppose we need to  
21 begin by getting out some really basic figures in terms of what  
22 is the retail figure, is there another figure that is more  
23 appropriate; and if so, what is it?

24 Is there a debate on that? Anything you can agree on  
25 by way of stipulation certainly would be helpful.



1 Now, we have folks who have come to testify, and I am  
2 willing to listen to anybody who has information on these  
3 issues on all sides. That is where we are.

4 Why don't I first turn to, by way of an opening  
5 statement, if you will, a synopsis of positions, and then let's  
6 turn to receiving evidence. Does that make sense?

7 MR. MORRIS: It does. Could I take care of one  
8 housekeeping matter? I have a witness list and exhibit list.

9 THE COURT: Thank you, sure.

10 MR. MORRIS: Your Honor, we are going to rely on the  
11 Sentencing memorandum that I filed with the Court.

12 We believe it does fall in the section enumerated in  
13 2B5.3.

14 THE COURT: What we are looking at is the Federal  
15 Sentencing Guidelines have attempted to -- they were  
16 promulgated to try to achieve greater uniformity across the  
17 United States.

18 The theory was, the people who committed the same  
19 crime and have pretty much the same background should be  
20 treated as much alike as possible.

21 The hope was that if you had greater uniformity, there  
22 would not be inexplicable highs or lows, that the whole process  
23 should be more fair.

24 So, the guidelines have attempted to look at different  
25 aspects of different crimes and assign weights to them, so the

1 section we are looking at now is 2B.5 --

2 MR. MORRIS: 2B5.3, specifically --

3 THE COURT: Wait, now. 2B5.3.

4 MR. MORRIS: Commentary note number 2 is the one we  
5 are addressing.

6 THE COURT: Hold on for a second, if you would.

7 2B5.3 deals within infringement and copyright or  
8 trademark.

9 MR. MORRIS: Correct.

10 THE COURT: The whole thing in this case, trademark  
11 software products were being infringed. I take it the  
12 Government's view is this particular guideline is specific and  
13 applicable.

14 MR. MORRIS: That is correct. We believe it falls  
15 within commentary note 2, and we request the Court use the  
16 retail value of the infringed item.

17 We believe we set forth --

18 THE COURT: The Government is arguing here in  
19 determining loss, so everybody understands, and as Ms. Golder  
20 suggests, sometimes that is a different understanding for a  
21 different crime, but, for instance, in a fraud crime, the  
22 amount -- the loss that the victims have suffered, that drives  
23 the guidelines.

24 So, in this case, we are looking, if you will, at the  
25 loss -- I am not sure if that is the right word, but we are

1 looking at how you evaluate what is happening here, and you are  
2 suggesting it is the retail value that Microsoft or Dell would  
3 have sold the software for.

4 MR. MORRIS: We say it is the retail value that  
5 Microsoft would have sold. That is our position.

6 THE COURT: All right. I understand that.

7 Does Defense want to speak for a moment?

8 MR. REINHART: Yes, Your Honor.

9 THE COURT: Mr. Reinhart.

10 MR. REINHART: We agree 2B5.3 is the correct  
11 guideline, we agree the retail value of the item was the  
12 correct measure.

13 MS. GOLDER: No.

14 THE COURT: I knew that was too good to be true.

15 MR. REINHART: One of the issues Your Honor is going  
16 to have to resolve this morning is what is the infringed item.

17 It is our position here the item -- the infringing  
18 item was a reinstallation disc, and in the relevant market,  
19 which is what the guideline speaks to, it is the value of the  
20 infringed -- or the infringing item that the item is sold for  
21 that is negligible, perhaps a dollar.

22 The reinstallation disc on its own, without things you  
23 have to buy from Microsoft, has no value.

24 THE COURT: Let me ask you this, and I know the  
25 evidence that you folks present will probably flesh this out,

1 but does Microsoft sell a disc exactly like this?

2 MR. REINHART: No.

3 THE COURT: They don't.

4 MR. REINHART: Dell does. They don't even sell it,  
5 they give it away.

6 THE COURT: Let's not get caught up on that. I know  
7 that was a real issue earlier on because, as I understand it,  
8 we had something created by Microsoft and apparently licensed  
9 to Dell, and we can talk about that if that is significant,  
10 but, does either Dell or Microsoft have a disc like this, that  
11 is like the infringing item?

12 MR. REINHART: Yes, a person can acquire the infringed  
13 item from Dell.

14 THE COURT: What does Dell sell it for?

15 MR. REINHART: Zero.

16 THE COURT: They give it away to you?

17 MR. REINHART: Yes, there is testimony that they give  
18 it away.

19 You can get it from different places, people charge  
20 you and some don't, but at the relevant time, you could get it  
21 from Dell for free.

22 THE COURT: Is the distinction you place on this, the  
23 difference is having purchased it brand new in the beginning as  
24 opposed to the reinstallation?

25 MR. REINHART: Yes, it is. If I could explain it this

1 way.

2 *THE COURT:* Sure.

3 *MR. REINHART:* When one buys a computer and it has  
4 Microsoft installed, Microsoft gets paid for the installation  
5 system, and that operating system is given to that machine in  
6 perpetuity. Whoever owns that machine is entitled to have that  
7 operating system, say Windows XP. If they want to buy it, I  
8 can give it to you, you can give it to Mrs. Stipes. The  
9 reinstallation disc is a mechanism to put that software on the  
10 machine if it gets corrupted or ruined.

11 *THE COURT:* I see. If I bought a laptop and I have a  
12 problem with it, I go out and get a reinstallation disc.

13 *MR. REINHART:* In the old days, the reinstallation  
14 disc came with the computer. You take out the reinstallation  
15 disc and reinstall it.

16 *THE COURT:* Let's assume you don't have one in the box  
17 in which your laptop came. Can you go out today and purchase a  
18 reinstallation disc?

19 *MR. REINHART:* Nowadays you just download it. Yes,  
20 you contact -- and there will be evidence of this. You go on  
21 line to Dell and they give you the software for free.

22 *THE COURT:* Do they double check as to whether you  
23 actually have the original, or you had the original?

24 *MR. REINHART:* Again, I believe this will be the  
25 evidence. That is hard coded into the computer, and when you

1 go to install it, the computer checks --

2 *THE COURT:* It would stop you if it is not legit?

3 *MR. REINHART:* Correct. If you take that disc and try  
4 to install it on the HP computer, you cannot get through unless  
5 you prove you have a license to install it on the HP computer.

6 That is the issue this morning.

7 *THE COURT:* Thank you. Ms. Golder, would you like to  
8 come up?

9 *MS. GOLDER:* Yes, Judge. First of all, Judge, I agree  
10 with almost everything Mr. Reinhart said, except I took the  
11 position in my objections that there are two parts of the  
12 guideline. In the same 2B5.3, note 2, it lists certain  
13 exceptions, but the rule in that guideline is that you use the  
14 value of the infringing item as opposed to the infringed item.

15 The infringing item would be the discs that our  
16 clients were providing. The infringed item would be like an  
17 original Dell installation.

18 *THE COURT:* Is the general rule that you use the value  
19 of the infringed item, what we are talking about, the Microsoft  
20 item?

21 *MS. GOLDER:* No, the general rule is you use the  
22 infringing item unless it fits into certain exceptions that the  
23 Government is saying it fits in and I take issue with that.  
24 That is the additional issue I have over what Mr. Reinhart  
25 discussed.

1           *THE COURT:* And the value of the infringing item, that  
2 is the one Mr. Wolff and Mr. Lundgren ultimately produced, has  
3 a much lower cost than the Microsoft or Dell?

4           *MS. GOLDER:* Significantly, it is what they were  
5 selling it for, and it is a much easier number to arrive at.

6           *THE COURT:* Thank you. Anything else anybody wants to  
7 say?

8           All right. Let me allow the Government to call your  
9 first witness.

10          *MR. MORRIS:* We are going to call Daniel Richichi.

11          *THE COURT:* Agent Richichi, come up to the witness  
12 stand and make yourself comfortable. Pull that chair up to the  
13 microphone there.

14          DANIEL RICHICHI, GOVERNMENT'S WITNESS, SWORN

15          *THE COURT:* Sir, would you begin by introducing  
16 yourself; would you state your full name, and would you spell  
17 your last name for the court reporter.

18          *THE WITNESS:* Daniel Richichi, R-I-C-H-I-C-H-I.

19          *THE COURT:* Thank you. Counsel, you may proceed.

20          *MR. MORRIS:* I had a conversation with Mr. Reinhart,  
21 he said he will stipulate to the admission of the evidence that  
22 we are going to produce.

23          *MR. REINHART:* The exhibits in specific, Your Honor.

24          *THE COURT:* Let's go forward, and at the appropriate  
25 time we will do that.

**DIRECT EXAMINATION**

BY MR. MORRIS:

Q. Mr. Richichi, let me show you what is marked Government Exhibit Number 2.

What is that?

A. It is one of the seized discs, specifically a Dell reinstallation disc for XP, a Microsoft reinstallation pack.

THE COURT: How do you identify it? What do you call it? Give me the name you have been using to refer to it.

THE WITNESS: A Dell reinstall for XP.2.

THE COURT: All right. Thank you. You may proceed.

MR. MORRIS: Your Honor, at this time we move Government Exhibit 2 into evidence.

MR. REINHART: No objection, Your Honor.

THE COURT: Government's Exhibit 2 received into evidence without objection.

(Whereupon Government Exhibit 2 was marked for evidence.)

BY MR. MORRIS:

Q. Mr. Richichi, I show you Government Exhibit 3. What is that?

A. This is another disc we seized, but this is for XP.3.

MR. MORRIS: The Government moves Exhibit 3 into evidence.

MR. REINHART: I think it is SP.3 on the exhibit list.

THE COURT: They call it XP.3.



1           MR. REINHART: We have no objection.

2           THE COURT: Government Exhibit 3 received into  
3 evidence without objection.

4           (Whereupon Government Exhibit 3 was marked for evidence.)

5 BY MR. MORRIS:

6 Q. Mr. Richichi, I am showing you Government Exhibit 4. What  
7 is that?

8 A. This is another disc we seized through the course of the  
9 investigation, this is for a Windows 7 reinstallation.

10          THE COURT: Thank you.

11          MR. MORRIS: At this time we move 4 into evidence.

12          MR. REINHART: No objection.

13          THE COURT: All right. No objection. Government  
14 Exhibit 4 in evidence without objection.

15          (Whereupon Government Exhibit 4 was marked for evidence.)

16          MR. MORRIS: Your Honor, may I use the ELMO?

17          THE COURT: Yes, sure.

18          MR. MORRIS: While we get the ELMO working, I have  
19 copies for everybody, so we can move forward.

20 BY MR. MORRIS:

21 Q. Government's 5, showing you Government Exhibit 5, what is  
22 that?

23 A. This is an email recovered from Mr. Wolff's laptop, Dell  
24 laptop computer.

25          MR. MORRIS: It doesn't appear to be plugged in, the

1 ELMO.

2 We move Government Exhibit 5 into evidence.

3 *THE COURT:* Would there be an objection to 5?

4 *MR. REINHART:* No, Your Honor.

5 *THE COURT:* Hold on a second, if you would. Okay.

6 (Whereupon Government Exhibit 5 was marked for evidence.)

7 *BY MR. MORRIS:*

8 *Q.* Government's 5, what is Government Exhibit 5?

9 *A.* This is an email between an email account associated with  
10 Mr. Lundgren and an email account associated with Mr. Wolff,  
11 April 10, 2013.

12 *Q.* If you look at that, they mention an IFPI number?

13 *A.* That's correct.

14 *Q.* What is that?

15 *A.* It's a number assigned by the International Federation of  
16 Phonographic Industry, an identification number for a CD ROM.

17 *THE COURT:* You are dropping your voice.  
18 Identification number for what?

19 *THE WITNESS:* For the actual factory that produced a  
20 disc, whether it be a CD or DVD.

21 *THE COURT:* Okay.

22 *BY MR. MORRIS:*

23 *Q.* So, everybody can see it.

24 Who does this appear to be from?

25 *A.* From Mr. Lundgren.

1 Q. And who is it to?

2 A. Mr. Wolff.

3 Q. And then the actual content there, what is that discussion?

4 A. They are discussing a picture that is further down the  
5 email stream, asking where -- Mr. Lundgren asked Mr. Wolff if  
6 the CDs that they have in their possession would pass the test  
7 with a customer.

8 Q. And is this the photograph that was attached? This is  
9 black and white, the Court has the color version, but that is  
10 the photograph?

11 A. That is correct.

12 Q. Now, as part of your investigation, when did that become  
13 relevant to your investigation?

14 A. Pretty much right at the beginning. We sent the discs to  
15 Microsoft for determination of authenticity, and that is one of  
16 the determining factors they use.

17 Q. As part of your investigation, was there a problem with Mr.  
18 Wolff or Lundgren relating to the IFPI codes?

19 A. There was.

20 Q. Would you explain it?

21 A. During the course of the time that the CDs were being  
22 cloned, one of Mr. Wolff's clients, Mr. Cisneros in Texas, Mr.  
23 Wolff sent him approximately five thousand CD's during the time  
24 of the investigation. That customer, Mr. Cisneros, went with a  
25 friend of his in the computer industry -- he brought the CD to

1 a friend of his who examined it with a magnifying glass and I'm  
2 not sure whether he could determine whether they were  
3 counterfeit or not.

4 Q. And do you happen to know who that individual was, the  
5 person that he sold it to originally?

6 A. Marcos Cisneros.

7 Q. Okay. I am going to show you what has been marked for  
8 purposes of this as Government's Exhibit 21.

9 Showing you Government's Exhibit 21; what is that?

10 A. This is a purchase order from Phase2 International Traders,  
11 which is Marcos Cisneros' company, and between him and R. J.  
12 Wolff of RJW Technologies.

13 MR. MORRIS: We move 21 into evidence.

14 THE COURT: Any objection?

15 MR. REINHART: No.

16 MS. GOLDER: No.

17 THE COURT: Government Exhibit 21 received into  
18 evidence without objection.

19 (Whereupon Government Exhibit 21 was marked for  
20 evidence.)

21 THE COURT: By the way, if there is an objection, it  
22 need only be made once and it can apply to everybody.

23 If anybody does have an objection to an exhibit, you  
24 let me know. If I hear no objection, I assume that is okay for  
25 both, okay for both Defendants.

1 MR. REINHART: Yes.

2 BY MR. MORRIS:

3 Q. Now, you see on the screen, in the upper left, what is  
4 that?

5 A. Upper left, that is the Phase2 International Traders, LLC.

6 Q. Who is the vendor?

7 A. RJW Technologies.

8 Q. Who owns RJW Technologies?

9 A. Mr. Wolff.

10 Q. You see the item and the description and quantity. Do you  
11 see that?

12 A. I do.

13 Q. The rate and the amount, correct?

14 A. Correct.

15 Q. And then the total at the bottom?

16 A. That's correct.

17 Q. Now, you had an opportunity to talk to the owner of Phase2,  
18 correct?

19 A. Yes, I did.

20 Q. And as part of your investigation, what did he tell you?

21 A. He was purchasing Dell reinstallations from Mr. Wolff, and  
22 at a point, they became aware they were counterfeit and they  
23 stopped conducting business and Mr. Cisneros requested his  
24 money back from Mr. Wolff.

25 Q. How did he determine they were counterfeit?

1 A. He had suspicions, brought them to the friend of his, and  
2 he couldn't confirm or not that they were counterfeit, but he  
3 had suspicions they were counterfeit.

4 Q. I show you Government Exhibit 6. What is that?

5 A. This is an email from Mr. Lundgren to Mr. Wolff recovered  
6 from Mr. Wolff's laptop.

7 MR. MORRIS: We move Government Exhibit 6 into  
8 evidence.

9 THE COURT: Any objection to number 6?

10 MR. REINHART: No, Your Honor.

11 THE COURT: Received in evidence without objection.

12 (Whereupon Government Exhibit 6 was marked for evidence.)

13 BY MR. MORRIS:

14 Q. Okay. So, let's start on page two, okay, and tell me if  
15 you can read it. Can you read that?

16 A. Yes, sir.

17 Q. Okay. So this particular email -- let's go to the top.  
18 Who is it from?

19 A. It is from Eric Lundgren to Bob Wolff.

20 Q. Okay. Going to the content right there at the top of the  
21 screen, do you see that?

22 A. Yes.

23 Q. The date?

24 A. Yes, December 6, 2011.

25 Q. And then it says "Eric"?

1 A. Correct.

2 Q. Who is that? Who do you believe that is?

3 A. That is Mr. Wolff.

4 Q. And what is Mr. Wolff saying?

5 A. "The large order that I have has fallen through. Below are  
6 the reasons from the customer:

7 "I received the samples on Friday and I am afraid there are  
8 several indications that they are in fact counterfeit."

9 Q. Okay.

10 A. "First of all, the service pack 2 CD sets say on the label  
11 'Made in USA, but the disk inside the sleeve says 'Made in  
12 Canada'. We have never seen any genuine software be mismatched  
13 like that, ever. But a mismatch like that is very common in  
14 counterfeit software. The retail boxes of counterfeit Adobe  
15 software that are circulating have a similar type of problem."

16 Q. Do you see the content within the parentheses?

17 A. I do.

18 Q. Who is that?

19 A. That is Mr. Lundgren.

20 Q. Why do you believe that?

21 A. The content of the sentence leads you to believe that, as  
22 well as the fact when the email is downloaded through the  
23 computer, there is no way to tell with the format, but in the  
24 parentheses you can tell -- in the top it says "my replies are  
25 in highlight below", where in the top paragraph and bottom

1 paragraph there are also parentheses and the content of that  
2 indicates that is Mr. Lundgren responding.

3 Q. What do you believe Mr. Lundgren is saying?

4 A. "We purchased the units from Ebay, had them shipped to  
5 China and produced from here. The OEM units being sold all  
6 over Ebay have the same 'Made in USA' and 'Made in Canada'  
7 issue. I believe it is because the CD's are made in Canada and  
8 selves" -- I believe that is sleeves -- "or stickers in USA or  
9 vice versa."

10 Q. Going down to the next paragraph, who do you believe that  
11 is -- who is typing that?

12 A. Both Mr. Wolff and Mr. Lundgren. The first part towards  
13 the top, where it starts with "secondly", that is Mr. Wolff,  
14 and in parentheses about midway down the paragraph where it  
15 says "these issues are very, very minor", that would be Mr.  
16 Lundgren.

17 Q. Go to the top where it says "secondly". What is Mr. Wolff  
18 saying?

19 A. "Secondly, the SP3 discs have a labeling/printing error on  
20 the inner ring of the disc. The genuine discs we have seen all  
21 say made in USA and have a IFPI number of L028. The discs we  
22 received from you say made in U.S.A, no period after the A, and  
23 have an IFPI number of L028, they used the letter O instead of  
24 a zero.

25 "You may think these are small issues, but you must



1 understand that the Chinese counterfeiters have become  
2 extremely adept at make counterfeit software and it is getting  
3 harder to spot it. Fortunately for us, they are very prone to  
4 making grammatical and punctuation errors like this and that is  
5 how can catch them. Do the discs look good? Sure they do. Do  
6 they work? They probably work fine, but bear in mind that if  
7 they didn't look good or work properly, then no one would buy  
8 them."

9 Q. Starting with the content in parentheses, who is that?

10 A. That is Mr. Lundgren's response.

11 "These issues are very, very minor. You would have to be  
12 an expert with a magnifying glass to know and/or see such tiny  
13 differences. You must have been trying to supply these units  
14 to Amazon directly or someone who is an expert in this field.  
15 Anyone who buys these would not notice an O or 0 when it comes  
16 to a font this size, U.S.A. or U.S.A" -- without the period.  
17 "C'mon, Bob, you should be able to sell these units to anyone  
18 whom is not trying to sell them directly back to Bill Gates.  
19 If they are not perfect, it is because the unit we received  
20 from the USA retail on Ebay is not perfect. We made an  
21 identical copy of said unit from the same factories that  
22 manufacture for Dell."

23 And it goes on. "If you can retain this buyer, I am sure  
24 that I can get him another batch with a period after the A and  
25 0 instead of an O. But for now, please sell some of these

1 units. You must have other buyers for this product, and if you  
2 do not, then find some. It has been months and I have not seen  
3 the return that I was expecting to use for my India project,  
4 buddy. Don't leave me hanging on this one. Work hard and get  
5 these moved to any other buyer. No normal company or buyer  
6 will notice such issues and every month that you spend sitting  
7 on this product is another month XP gets older" --

8 Q. Starting the top of page two: Can you read that?

9 A. Yes.

10 Q. Continue?

11 A. -- "and my assets become worthless. Come through on this  
12 one, Bob. Get it done. Make it happen. Make me proud so that  
13 our business can grow and we can keep winning. The choice is  
14 yours, but no matter what you choose, keep in touch.

15 "I have attached pictures showing everything that I  
16 mentioned. I regret that will be canceling our PO with you and  
17 returning these sample discs. Please let me know where you  
18 would like them sent."

19 Q. And "although this is a setback"?

20 A. That is correct. This is -- where "I have attached  
21 pictures showing everything I mentioned", this is where it goes  
22 back to Mr. Wolff now.

23 Q. Okay. And then he says --

24 A. "Although this is a setback, this was a new customer and  
25 clearly not the type of customer we are going after. I am

1 working very hard at moving the product and although it is  
2 taking a bit longer I am still bullish on the project. My main  
3 customer still has some inventory, and as soon as some of the  
4 inventory in the market diminishes, he will be purchasing more  
5 from us. I am willing to make this commitment to you. If by  
6 year's end the inventory doesn't move to our satisfaction, I  
7 will become a full financial partner so that you don't wait  
8 longer to get whole on at least your investment, Bob."

9 Q. Going down, there is another email from Eric Lundgren,  
10 correct?

11 A. Correct.

12 Q. And what is going on there?

13 A. This email is from Eric Lundgren to Bob Wolff.

14 "Bob, what is going on? Why have you not moved any units  
15 yet? I trusted that you would take care of your side and now  
16 this is getting ridiculous. We must wrap this up ASAP. Best  
17 regards," and it says "Eric Lundgren."

18 Q. Showing you what is marked Government Exhibit 7, what is  
19 that?

20 A. This is an email between Mr. Lundgren and Mr. Wolff.

21 MR. MORRIS: The Government moves Exhibit 7 into  
22 evidence.

23 MR. REINHART: No objection.

24 THE COURT: Exhibit 7 is received into evidence  
25 without objection.

1 (Whereupon Government Exhibit 7 was marked for evidence.)

2 BY MR. MORRIS:

3 Q. Who is this email from?

4 A. From Mr. Lundgren to Mr. Wolff.

5 Q. And what is the date?

6 A. April 16, 2012.

7 Q. And who do you believe is starting there with Bob?

8 A. That is Mr. Lundgren.

9 Q. And just continue. What is Mr. Lundgren saying or do you  
10 believe he is saying?

11 THE COURT: Do you have an extra copy of that one?

12 MR. MORRIS: We do.

13 THE COURT: Thank you.

14 BY MR. MORRIS:

15 Q. What is Mr. Lundgren saying?

16 A. "Bob, I'm sorry. We cannot produce subgrade SP3. I do not  
17 want to risk the funds making product that does not work and  
18 expecting you to sell such product. Maybe send me a few of the  
19 last CD's made with the batch of OEM so that I may show the  
20 factory where they messed up last time.

21 "I have already started making the W7 32 & 64 molds.

22 Please advise:

23 "1. What do you think W7 will sell for?

24 "2. How many W7 64 can you move?

25 "3. How many W7 32 can you move?

1 "4. How many SP3 XP can you move?

2 "5. What other model/brand besides Dell - can you sell in  
3 bulk?

4 "6. What kind of bulk of said model in ? number 5 can you  
5 sell?

6 "Thank you, E"

7 Q. And do you see at the top there?

8 A. I do.

9 Q. What is that? Number one, who is that from?

10 A. That is from Mr. Wolff back to Mr. Lundgren.

11 Q. Can you read it?

12 A. It says, "Eric, I am ordering today SP3 from Dell. By the  
13 time they send to me and I send to you, you will have them in  
14 your possession probably some time next week. I will  
15 expedite on my end as best I can. I have requirements right  
16 now. Just a thought, to make one more load with the copies you  
17 currently have to speed up the delivery process. If the  
18 software will be 98 percent accurate, I believe I can get away  
19 with that."

20 Q. And then the second page?

21 A. "Your thoughts, Bob Wolff," and a telephone number.

22 Q. Showing you Government's Exhibit 8, what is that?

23 A. This is an email from Eric Lundgren to Mr. Wolff.

24 MR. MORRIS: The Government moves Exhibit 8 into  
25 evidence.

1           THE COURT: Would there be an objection?

2           MR. REINHART: No.

3           THE COURT: Government Exhibit 8 received into  
4 evidence without objection.

5           (Whereupon Government Exhibit 8 was marked for evidence.)

6 BY MR. MORRIS:

7 Q. Who is this email from?

8 A. From Mr. Lundgren to Mr. Wolff, dated April 10, 2012.

9 Q. What is this regarding?

10 A. It says, "Bob, thank you for filling your promise and  
11 getting these liquidated. We will not have to sell any more at  
12 1.75 each because we are making the newer version, right? The  
13 market is still plenty high for SP3 and W7, correct? What is  
14 the breakdown for such product?

15 "Percent will want W7 32? Percent will want W7 64?  
16 Percent will want wxp sp3?

17 "As for CD's shipped, I'll pay for local shipping on my 1  
18 percent to friends. However, since it is less than 1 percent  
19 of what is shipped to you to sell, you are packing as a favor  
20 to me and I thank you, sir.

21 "Now moving on, I just traveled six hours by train to visit  
22 the molding factory for our product. I had to sit next to a  
23 fat woman which smelled like rotten rice and get drunk with a  
24 bunch of country bumpkin factory owners just to get our mission  
25 done over here. I think I spent 214 USD on this side for the

1 molds, etc. and a down payment of 2500 USD, 30 percent, which  
2 is for solely supporting our business and product to come.

3 "In ten days I will receive the mold for SP3 from the  
4 northern city of Guanxi and then I will have to go back up with  
5 the sample when it arrives hence another two days in travel.

6 "But once we have these two molds made, we will be only  
7 ones capable of factory grade production."

8 Q. Going back, factory grade production, what do you think  
9 that to mean?

10 A. To be an identical copy of the software.

11 Q. All right.

12 A. "This will ensure a steady income for the next year to  
13 come. I salute you, Bob. Good work. Best regards, Eric  
14 Lundgren."

15 Q. Showing you what is marked Government Exhibit 9, what is  
16 that?

17 A. This is an email from Mr. Lundgren to Mr. Wolff, dated  
18 September 21, 2011.

19 MR. MORRIS: The Government moves 9 into evidence.

20 THE COURT: Would there be an objection?

21 MR. REINHART: No.

22 THE COURT: Government's Exhibit 9 received into  
23 evidence without objection.

24 (Whereupon Government Exhibit 9 was marked for evidence.)  
25

1 BY MR. MORRIS:

2 Q. Who is this email from?

3 A. This is from Mr. Lundgren to Mr. Wolff dated, September 21,  
4 2011.

5 Q. What is the content? What do you believe he is saying?

6 A. "I was told from my source over here that all were  
7 delivered. I will talk to him today. Let me know when the  
8 other two boxes land. I can look into the missing boxes.

9 "Usually in my history, Customs just ships them to you  
10 three weeks later. If they call you, play stupid and just tell  
11 them that you ordered from an asset management broker overseas.  
12 Tell him that the product was guaranteed to be real and that  
13 you paid a very high price for it. Act upset as to why you had  
14 not received your product yet. Then give me an update for the  
15 boxes received. You said you have 6K sold already, right? You  
16 have 16,000 there.

17 "I'll await your update in the future. Thank you for your  
18 reply. Thanks, E."

19 Q. Showing you Government's Exhibit 7, what is that?

20 A. 10.

21 Q. 10, sorry.

22 A. This is an email from Mr. Lundgren to Mr. Wolff.

23 MR. MORRIS: The Government moves 10 into evidence.

24 THE COURT: Would there be an objection?

25 MR. REINHART: No.



1           THE COURT: Government Exhibit 10 received into  
2 evidence without objection.

3           (Whereupon Government Exhibit 10 was marked for evidence.)

4       BY MR. MORRIS:

5       Q. Who is that from?

6       A. From Mr. Lundgren to Mr. Wolff.

7       Q. And what is the content? What do you believe he is saying?

8       A. "I knew they would eventually come in. Customs can't tell  
9 the difference and therefore is not legally allowed to hold  
10 them. hehe

11       "I'm in India now setting up my office here. I look  
12 forward to having you move this product so that we may continue  
13 our business relationship. I have many more products I would  
14 like to send to you from India and China. Just focus on moving  
15 there first then I will shoot you over samples of the other  
16 products and we can talk. Best regards, Eric Lundgren, Source  
17 Captain, Inc."

18       Q. Now, the next email, who is that from?

19       A. This is from Mr. Lundgren to Mr. Wolff.

20       Q. And what does Mr. Lundgren say?

21       A. "Bob, I need to move this product quickly. I need you to  
22 ship 450 units" --

23       THE COURT: Are we looking at Government's 10?

24       MR. MORRIS: Yes.

25       THE COURT: Okay.

1           *THE WITNESS:* It goes on, "Neil Rodrigues Coretek  
2 Enterprises LLC, 290 B International Drive, Concord, North  
3 Carolina, 280271, 704-792-2221.

4           "Call me when you read this email. It is very  
5 important I send these today. I was supposed to send them a  
6 week ago and forgot so the buyer is pretty pissed at me.  
7 Please assist. Please send me tracking information when this  
8 has been completed."

9           Q. Showing you 15.1, what is that?

10          A. These are photographs -- this is a photograph of the discs  
11 that were seized. It was the one delivery that was sent -- it  
12 was seized out in San Francisco and addressed to Mr. Wolff in  
13 Boca Raton, Florida.

14          Q. Showing you Government's Exhibit 15.2, what is that?

15          A. This is a box containing CD's or DVD's. It was seized from  
16 Mr. Cisneros out in Dallas, Texas.

17          Q. Showing you Government Exhibit 15.3, what is that?

18          A. These are photographs of those which were seized in the  
19 undercover ordering of CD's done by Mr. Wolff at our request to  
20 Mr. Lundgren.

21          Q. Showing you Government --

22                *THE COURT:* Those discs were seized where?

23                *THE WITNESS:* Here in West Palm Beach. Mr. Wolff  
24 assisted us and we ordered them from Mr. Lundgren in  
25 California.

1           *THE COURT:* Thank you.

2           *BY MR. MORRIS:*

3           *Q.* Government Exhibit 15.4?

4           *A.* These are more CD's seized, this is during the second  
5 undercover operation.

6           *Q.* And showing you Government Exhibit 15.5, what is that?

7           *A.* These are CD's seized out in San Francisco addressed to Mr.  
8 Wolff's father in New York.

9           *MR. MORRIS:* Thank you. Your Honor, the Government  
10 moves Exhibits 15.1 through 15.5 into evidence.

11           *THE COURT:* Would there be any objection?

12           *MR. REINHART:* No.

13           *THE COURT:* Government Exhibits 15.1 through 15.5 are  
14 all received into evidence without objection.

15           (Whereupon Government Exhibits 15.1 - 15.5 were marked  
16 for evidence.)

17           *BY MR. MORRIS:*

18           *Q.* These are pictures you took as part of the seizures,  
19 correct?

20           *A.* Correct.

21           *Q.* Why did you take these pictures?

22           *A.* They were -- because they were seized, and as we were  
23 preparing the case, we maintained photographs of all of the  
24 evidence.

25           *Q.* Okay. Again, many of them coming from different places?

1 A. Correct.

2 Q. Just to refresh my recollection, where were all the  
3 different places that you got seizures from?

4 A. San Francisco, California, New York, West Palm Beach,  
5 Florida, Los Angeles, and Dallas, Texas.

6 Q. Now, as part of your investigation, did you do some, I  
7 guess, spreadsheets relating to information that you thought  
8 the Court might be interested in, such as the breakdown of the  
9 discs that were seized?

10 A. I did.

11 Q. Showing you Government 16.1, what is that?

12 A. This is a spreadsheet I created and it lists the seizures  
13 associated with this investigation, location of the seizures,  
14 number of discs seized and the type of software it corresponded  
15 to.

16 MR. MORRIS: The Government moves 6.1 into evidence.

17 THE COURT: Any objection?

18 MR. REINHART: No, Your Honor.

19 THE COURT: Sixteen point one received in evidence  
20 without objection.

21 (Whereupon Government Exhibit 16.1 was marked for evidence)

22 BY MR. MORRIS:

23 Q. Explain to the Court what you were trying to do in creating  
24 that sheet.

25 A. I was numbering the seizures and type of software to come

1 up with a total number of discs seized and itemized. W7 is  
2 Windows 7. XP3 is XP service pack 3, and XP2 is Windows  
3 service pack two.

4 Q. So, the largest number of discs that were seized -- that  
5 were sold in this case were Windows 7?

6 A. Correct, seized.

7 Q. XP3 is the second largest?

8 A. That is correct.

9 THE COURT: Well, may I ask you, these are items that  
10 were actually seized?

11 In other words, I take it this is not what you believe  
12 is the total amount that were produced.

13 THE WITNESS: That is correct, these are the ones we  
14 seized.

15 THE COURT: You actually seized these?

16 THE WITNESS: That is correct.

17 MR. MORRIS: Now, Your Honor is giving away the ending  
18 here. We do have a chart that we intend to introduce not for  
19 purposes of the guidelines, but for purposes of actually  
20 rebuttal on the variance, and it does give a complete picture  
21 on what we believe was imported.

22 BY MR. MORRIS:

23 Q. What is this?

24 A. This is a spreadsheet I made detailing the wire transfers  
25 from Mr. Wolff to Mr. Lundgren.

1           THE COURT: For the record, that exhibit you have been  
2 shown is what?

3           THE WITNESS: 16.3.

4           THE COURT: Thank you. What is that?

5           THE WITNESS: A spreadsheet detailing wire transfers  
6 from Mr. Wolff to Mr. Lundgren.

7           THE COURT: Thank you.

8           MR. MORRIS: Your Honor, at this time we move 16.3  
9 into evidence.

10          THE COURT: Any objection to 16.3?

11          MR. REINHART: No, Your Honor.

12          THE COURT: 16.3, Government's exhibit, is in evidence  
13 without objection.

14          (Whereupon Government Exhibit 16.3 was marked for  
15 evidence.)

16          BY MR. MORRIS:

17          Q. What does this spreadsheet show?

18          A. It details 11 wire transfers from Mr. Wolff to Mr.  
19 Lundgren, they all originated from Mr. Wolff's Chase Bank  
20 account and went to several -- two different ones of Mr.  
21 Lundgren's and then the corresponding dollar amount for each  
22 wire transfer.

23          Q. So -- and the dates, of course, are within the time frame  
24 of this particular indictment?

25          A. That is right.

1           THE COURT: Do you have an extra copy of that?

2           MR. MORRIS: Yes, I do.

3           THE COURT: I have it here, thank you.

4       BY MR. MORRIS:

5       Q. Basically, you see an HSBC Hong Kong account?

6       A. Yes.

7       Q. And you documented that that is Mr. Lundgren's?

8       A. Yes.

9       Q. And you see US Bank being Mr. Lundgren's as well?

10      A. Yes.

11      Q. And you totaled that number, those are wire transfers, you  
12      totaled that number?

13      A. That is correct.

14      Q. Showing you 16.4, what is that?

15      A. This is a spreadsheet I made consisting of PayPal payments  
16      made from Mr. Wolff to Mr. Lundgren.

17           MR. MORRIS: We move 16.4 into evidence.

18           THE COURT: Would there be an objection?

19           MR. REINHART: No, Your Honor.

20           THE COURT: 16.4 received into evidence without  
21      objection.

22           (Whereupon Government Exhibit 16.4 was marked for evidence)

23       BY MR. MORRIS:

24      Q. Can you see that?

25      A. I can.

1 Q. Is that clear?

2 A. That is a little blurry.

3 Q. All right. Is that better?

4 A. Yes.

5 Q. Okay. So, what is it that you are trying to show the Court  
6 on this?

7 A. So, this lists the date of PayPal payments made from Mr.  
8 Wolff to Mr. Lundgren, they originated from Mr. Wolff and were  
9 received by Mr. Lundgren, the amount of the PayPal payment and  
10 the fees that PayPal charged and the total that Mr. Lundgren  
11 would have received.

12 Q. It is approximately what?

13 A. The total he would have received is \$12,883.97.

14 MR. MORRIS: Those are all the questions I have.

15 THE COURT: Thank you. Cross-examination.

16 MR. REINHART: Yes, thank you.

17 **CROSS-EXAMINATION**

18 BY MR. REINHART:

19 Q. Good morning, Special Agent Richichi, how are you?

20 A. Good morning.

21 Q. I have a couple of questions about Mr. Cisneros. You said  
22 he was a customer of Mr Wolff's in Dallas?

23 A. That is correct.

24 Q. And you interviewed him; is that correct?

25 A. I did.



1 Q. Mr. Morris provided us with a copy of that interview this  
2 morning.

3 Mr. Cisneros was buying the reinstall discs from Mr.  
4 Wolff; is that correct?

5 A. That is correct.

6 Q. And Mr. Cisneros had a company that manufactured white box  
7 computers?

8 A. Correct.

9 Q. What is a white box computer?

10 A. I don't recall the specifics of it. I believe it was a  
11 term to use to assemble computers from various parts, not like  
12 Dell.

13 Q. A Cisneros brand computer?

14 A. Yes, multiple different people do it, just parts.

15 Q. Okay. What he told you was, the reason he was acquiring  
16 these reinstallation discs was because Microsoft required those  
17 discs to be provided to the customer if you sold the customer a  
18 white box computer; is that correct?

19 A. I believe it is. I am not positive.

20 Q. Do you have a copy of the report there?

21 MR. REINHART: May I approach, Your Honor?

22 BY MR. REINHART:

23 Q. To refresh your recollection, I think I underlined it  
24 there. If that refreshes your recollection, let me know.

25 A. Yes, Microsoft installed disc, Microsoft was required in

1 order to sell white boxes. That was Mr. Cisneros' statement.

2 Q. And you didn't do any research as to what a white box  
3 computer is or what requirements Microsoft had?

4 A. I personally have not, but through discussions with  
5 Microsoft, they addressed it with resale.

6 Q. We will have a separate witness later this morning?

7 A. Yes.

8 Q. I will save my questions for that witness, thank you.

9 THE COURT: Thank you. Ms. Golder.

10 MS. GOLDER: Just a couple, Judge.

11 **CROSS-EXAMINATION**

12 BY MS. GOLDER:

13 Q. Good morning.

14 A. Good morning.

15 Q. When we looked at Exhibit 16.1, which I think is the list  
16 of what was seized, is it fair to say that the XP2's were the  
17 oldest operating system, correct?

18 A. Correct.

19 Q. Then came XP3?

20 A. Correct.

21 Q. Windows 7, that was the newest operating system, correct?

22 A. At the time, yes.

23 Q. So, at the time of the seizures, you see XP2's, and a  
24 significant amount of XP3's, correct?

25 A. That is correct.

1 Q. And they were into a newer operating system which is  
2 operating system 7?

3 A. Correct.

4 Q. Now, these transfers and payments that we are talking  
5 about, these occurred over a two-year period of time, correct?

6 A. I believe that is correct.

7 Q. So, if they total like over \$80,000, that is \$80,000 in two  
8 years, correct?

9 A. Correct.

10 Q. All right. So the amount of money, really, is only about  
11 40,000 a year, correct?

12 A. Approximately. I believe the total was around 92,000, so  
13 it would be like 46 a year.

14 If you break it down -- I didn't break it down yearly, I  
15 couldn't say, if you divide by 50 for each year.

16 Q. And you don't know how much of that money going to Mr.  
17 Lundgren were reimbursement for expenses as well, not just for  
18 profit, right?

19 A. I don't.

20 Q. Okay. So, is it fair to say nobody is doing millions of  
21 dollars worth of business here?

22 A. I would say that is fair to say.

23 MS. GOLDER: No further questions.

24 THE COURT: Redirect?

25 MR. MORRIS: None, Your Honor.

1           THE COURT: Agent, thank you very much.

2           Let me turn back to the Government and call your next  
3 witness.

4           MR. MORRIS: We call John McGloin.

5           THE COURT: Good morning, sir. Please sit down and  
6 make yourself comfortable.

7           JONATHAN MCGLOIN, GOVERNMENT'S WITNESS, SWORN

8           THE COURT: Sir, you may lower your hand. Would you  
9 begin by introducing yourself and state your full name and  
10 spell your last name for the court reporter.

11          THE WITNESS: Jonathan McGloin, M-C-G-L-O-I-N.

12          THE COURT: Thank you. You may proceed.

13                           **DIRECT EXAMINATION**

14   BY MR. MORRIS:

15   Q. Where are you employed?

16   A. Microsoft in Ireland.

17   Q. And what is your job title?

18   A. I am an operation program manager within the OEM operations  
19 division of Microsoft.

20   Q. What are your duties?

21   A. Our duties are to oversee the manufacture and supply of  
22 Microsoft software and related IP to our OEM customers.

23   Q. Explain to the Court what is an OEM?

24   A. Original equipment manufacturer is a company that produces  
25 hardware devices, PC's or other related computer hardware.

1 Q. Approximately how many -- are there different types of  
2 OEM's?

3 A. Yes, there are large OEM's like the one that everyone would  
4 be familiar with, Dell, HP, Lenovo, and smaller OEM's who you  
5 may not be familiar with, right down to mom and pop shops here  
6 in the U.S. with very small system builders producing small  
7 volumes of devices.

8 Q. Focusing on larger ones like Dell, does Microsoft have  
9 agreements with the OEM's?

10 A. Microsoft has a direct licensing agreement with those  
11 OEM's.

12 Q. Are they permitted to install on --

13 A. They are allowed to reinstall on new devices that they are  
14 producing.

15 Q. We heard how Microsoft, through the license, is sort of  
16 like a marriage of the license to the machine.

17 A. Correct, the machine is licensed, a perpetual license for  
18 that machine.

19 Q. What are the conditions that Microsoft applies to that  
20 license, and not everyone, obviously, but generally speaking?

21 A. The OEM has to pre-install a copy of the software on the  
22 device, and the OEM has to provide a recovery for the solution  
23 of the end user, and that is there to provide a means for the  
24 end user to recover a device should something happen to the  
25 hardware.

1           THE COURT: Could I stop you. I understand the  
2 pre-install, and what do they have to provide, what do you call  
3 that?

4           THE WITNESS: They --

5           THE COURT: What was the term you used?

6           THE WITNESS: Recovery solution.

7           THE COURT: Recovery solution?

8           THE WITNESS: Yes, there are different ways OEM's  
9 provide recovery solutions.

10          THE COURT: If they provided a disc, would that  
11 satisfy the recovery solution, like the discs here?

12          THE WITNESS: Yes, Your Honor.

13          THE COURT: So you get your -- as an example, you get  
14 your laptop in a nice box and it is all with styrofoam around  
15 it and everything else to protect it, but also among the things  
16 in that box is going to be the recovery solution,  
17 reinstallation disc?

18          THE WITNESS: That is correct.

19          THE COURT: Thank you.

20 BY MR. MORRIS:

21 Q. Now, we were discussing, I guess in terms of the license,  
22 are they -- aside from the fact that they are there to provide  
23 a recovery solution, what is the concept of end user; can you  
24 explain that to the Court?

25 A. The concept of an end user is the actual person using the

1 device, the end customer in the chain.

2 Q. Is that end user -- they are allowed to sell that computer,  
3 correct?

4 A. That is correct.

5 Q. And that would include the software that is contained on  
6 it?

7 A. That is correct.

8 Q. And they would be able to sell the recovery disc with it,  
9 correct?

10 A. The end user can sell the computer device complete with the  
11 original software supplied with it, correct.

12 Q. For now, let's talk about the COA. What is a COA?

13 *THE COURT:* Spell that.

14 *THE WITNESS:* C-O-A, Your Honor. It stands for  
15 certificate of authenticity.

16 *THE COURT:* Thank you.

17 *THE WITNESS:* It is a paper base label that contains  
18 the security features, much like a bank note or passport that  
19 is adhered to a device, at least was adhered to the device in  
20 the days when there was XP and Windows 7.

21 *BY MR. MORRIS:*

22 Q. I will show you Exhibit 1, do you know what that is?

23 A. Yes, this is a document containing two screen shots of a  
24 computer and also a picture of the certificate of authenticity  
25 and label.

1 Q. Do you recognize it?

2 A. I do.

3 Q. How do you recognize it?

4 A. That is my device, I created this.

5 MR. MORRIS: Your Honor, we offer Government Exhibit 1  
6 into evidence.

7 THE COURT: Is there an objection?

8 MR. REINHART: No.

9 THE COURT: Government Exhibit 1 received in evidence  
10 without objection.

11 (Whereupon Government Exhibit 1 was marked for evidence.)

12 BY MR. MORRIS:

13 Q. For Microsoft, what is the significance of the COA?

14 A. The COA serves a number of functions, it is a means to  
15 deliver or transmit the product key you see listed on the  
16 picture.

17 THE COURT: You said the product key, K-E-Y?

18 THE WITNESS: Yes, Your Honor.

19 And it is a label that is designed to provide proof  
20 it's genuine, so through the inclusion of security features,  
21 like threads embedded in the paper, other techniques, it is a  
22 way for an end user to determine that is a genuine label.

23 It is also intended to provide proof of license --

24 THE COURT: You said so the end user can look at it,  
25 and an end user can determine what?



1           THE WITNESS: That it is a genuine label which  
2 indicates a genuine license was put on to that device.

3           THE COURT: In other words, you know the -- you look  
4 at the -- are we talking about the -- what do you call that, a  
5 code?

6           THE WITNESS: A COA, Your Honor.

7           THE COURT: Help me out. What is the COA, what is the  
8 certificate of authenticity, is it this or this?

9           THE WITNESS: The middle picture.

10          THE COURT: The one that has a bar code on it?

11          THE WITNESS: Yes.

12 BY MR. MORRIS:

13 Q. There is a difference between the product key and the COA,  
14 correct?

15 A. That is correct.

16 Q. But the COA generally, at least in those days, it would  
17 contain the product key?

18 A. It would, correct.

19 Q. And what is the function of the product key?

20 A. The product key is used to activate the software and verify  
21 the license.

22 Q. Now, if you, in 2011, received -- you purchased a Dell  
23 computer that had a pre-installed Windows on it, would you have  
24 to use that product key to activate the computer?

25 A. Not necessarily, no.

1       The larger OEM's were given the technology by Microsoft,  
2       who do volume manufacturing of devices, to bypass activation  
3       which would allow the device to activate from the factory,  
4       which means you didn't have to type in the 25 digit alpha  
5       numeric product key.

6               *THE COURT:* So, if somebody bought a Dell laptop, and  
7       got it home, they plug it in and operate it?

8               *THE WITNESS:* Yes.

9               *THE COURT:* But operating it with the Windows software  
10      pre-installed on that?

11              *THE WITNESS:* Correct.

12              *THE COURT:* And the end user does nothing else?

13              *THE WITNESS:* Correct. It gives the end user a nice  
14      experience, it works.

15              *THE COURT:* It works.

16      *BY MR. MORRIS:*

17      *Q.* If that is the case, let's say in this particular case the  
18      independent user received the Dell computer and it was  
19      pre-loaded, which was pretty common, if not almost entirely the  
20      way you got it in those days, and you did not enter that  
21      product key, would that product key still remain a valid  
22      product key?

23      *A.* Yes, it would.

24      *Q.* So, you could take that product key, theoretically, if you  
25      hadn't used it before, and you could use it on another version

1 of Microsoft software to activate it, correct?

2 A. That is correct.

3 Q. And that is pretty common?

4 A. That is pretty common.

5 Q. By people who want to circumvent the security feature of  
6 the product key?

7 A. That is correct.

8 Q. And maybe not everybody knows this, but every computer that  
9 is sold that goes out from the Dell manufacturing plant has  
10 this COA on it?

11 A. In the days of Windows 7 and XP it did. Technology has  
12 changed somewhat, Windows 8 and 10, we no longer apply a COA  
13 label. In the case of Windows 7 and XP, they shipped with a  
14 COA.

15 *THE COURT:* Is this something -- you said the word  
16 "adhere". Is it stuck on the machine itself?

17 *THE WITNESS:* It is an adhesive label, sometimes it is  
18 hidden behind the battery, but it is there somewhere in that  
19 region.

20 *THE COURT:* If you got it, and I forget the different  
21 gradations of the software, but you wanted to advance, say, to  
22 Windows XP7, or whatever the correct designation is, does the  
23 user have to go back to this key or is that something that is  
24 done automatically? Am I making sense?

25 *THE WITNESS:* I am not entirely correct on the

1 question.

2           *THE COURT:* Okay. I buy a Dell and it has the earlier  
3 version of Microsoft software, and Microsoft comes up with  
4 Windows 7 and I want to install that. Do I have to use the key  
5 or do I download Windows 7 somehow.

6           *THE WITNESS:* You have to purchase the license.

7           *THE COURT:* You say you purchase it?

8           *THE WITNESS:* You are given a new key.

9           *THE COURT:* When you purchase it and you make the  
10 decision to upgrade, part of the package you receive is in fact  
11 the new key?

12           *THE WITNESS:* That is correct.

13           *THE COURT:* Thank you.

14 *BY MR. MORRIS:*

15 Q. What does the term "unconsumed product key" mean?

16 A. That is a product key that has not been used, and we show  
17 no activation of events or records.

18 Q. So it could be used again?

19 A. It has never been used.

20 Q. What happens to the product key once it has been used?

21 A. It will show a Microsoft activation event.

22 Q. That is how you keep track of it?

23 A. That is how we keep track of it.

24 Q. You have a service that scans the computers to make sure  
25 the product key has not been used before?

1 A. That is correct.

2 Q. Have you, in your experience, ever seen instances where  
3 people, whether it is a refurbisher or somebody else who wants  
4 to circumvent the product key, where they take the COA off one  
5 and put it on another?

6 A. Yes, it happens all the time.

7 Q. Very common?

8 A. Very common.

9 Q. Let's get back to what you do. You deal with refurbishers  
10 as well as the OEM's?

11 A. Correct, I manage the operation program for the refurbisher  
12 program.

13 Q. Let's talk about the difference between a refurbisher and  
14 an OEM.

15 A. An OEM is a new device and a refurbisher is taking the old  
16 device and refurbishing that.

17 Q. Microsoft has a program where it registers refurbishers,  
18 correct?

19 A. That is correct.

20 Q. In this particular case, the Defendants could have filed an  
21 application, right, to be a Microsoft refurbisher?

22 A. That is correct, the program is open to any commercial  
23 entity that wants to join the program.

24 Q. Did you check to see whether Mr. Lundgren applied to be a  
25 registered refurbisher?

1 A. I did.

2 Q. What did you find?

3 A. I saw an application in January or February of this year.  
4 That was the only record I could find.

5 Q. It was for his company?

6 A. It was for his company.

7 Q. He did it this year?

8 A. This year, correct.

9 Q. Was he granted that registered refurbisher designation?

10 A. The application was never fully completed, so it expired.  
11 No, he is not a member of the program today.

12 *THE COURT:* Could I take you back to a question Mr.  
13 Morris asked you.

14 You explained to us that if a person bought a Dell  
15 computer, this is one of the recognized OEM's, the key is never  
16 utilized, the software is all pre-installed, so your records  
17 would not show that that key has ever been actually used; is  
18 that correct?

19 *THE WITNESS:* In around 98 percent of cases, Your  
20 Honor.

21 *THE COURT:* Okay.

22 *THE WITNESS:* In the event there is a hardware failure  
23 and you have to use the key, you see an event registered.

24 *THE COURT:* Sure. What Mr. Morris was asking you,  
25 have you experienced that knowledgeable people, realizing this,

1 actually do detach the label and then use it on a new device, a  
2 refurbished device or something else?

3 *THE WITNESS:* Yes, Your Honor, that happens all the  
4 time.

5 *THE COURT:* When that happens, what occurs? In other  
6 words, assuming they have the reinstallation feature or  
7 reinstallation disc, does that just mean the software gets  
8 installed and up and running?

9 *THE WITNESS:* It will work and perform to the end  
10 customer as a genuine authorized copy, yes, sir.

11 *THE COURT:* Does Microsoft recognize that as a  
12 pirating of its product?

13 *THE WITNESS:* Yes, the licensing is for the device.

14 *THE COURT:* For the machine?

15 *THE WITNESS:* Correct.

16 *THE COURT:* So, if somebody who is knowledgeable  
17 effectively -- because it is the key that signifies the  
18 device -- that signals here is something for this device, so if  
19 that key is put on another device, maybe, for lack of a better  
20 term, and it is imprecise, but Microsoft is getting the signal  
21 that the reinstallation is occurring on the original device,  
22 and it is appropriate.

23 *THE WITNESS:* Correct. The label is the proof of  
24 license for that device.

25 *THE COURT:* If somebody highjacked it and put it on

1 another device, that is not licensed?

2           *THE WITNESS:* This is to OEM licensing, we do sell  
3 retailing licensing, that could be shared. OEM, in terms of  
4 what is pre-installed and comes off the -- out of the factory  
5 works off that model.

6           *THE COURT:* Thank you.

7           *BY MR. MORRIS:*

8           *Q.* Does Microsoft make Windows XP available as a download?

9           *A.* No.

10          *Q.* Is Windows 7 a download today?

11          *A.* It is available for an end customer in possession of a  
12 valid key.

13          *Q.* Let's say a product key that was sold by Dell on a  
14 pre-loaded machine would not work for a download of a Windows  
15 7?

16          *A.* No, it will not.

17          *Q.* Now, we talked a little bit before today about downloads of  
18 operating system images from OEM's and whether or not they are  
19 accessible to customers who have a valid device.

20          Can you explain to the Court that whole concept? I think  
21 we are going to hear a lot about that today.

22          *A.* Microsoft allows OEM's to replace reinstall discs. If an  
23 end user were to lose them or something happened to them, an  
24 OEM is allowed to replace the actual re-install disc.

25          *THE COURT:* So, a person who buys their computer and



1 it comes with the reinstallation disc, if they lose it, threw  
2 out the box, didn't realize that this is something that is  
3 important, the OEM is allowed to provide a second copy?

4 *THE WITNESS:* A second copy to the customer directly.

5 There are also download services that an OEM can offer  
6 as well to an end customer.

7 *BY MR. MORRIS:*

8 *Q.* The OEM can download that to an end customer?

9 *A.* They can download that.

10 *Q.* Does Microsoft try to assure that when this download or  
11 sale occurs, that it is to somebody that actually purchased --  
12 that was the original end user?

13 *A.* That is effectively controlled by the licensing agreement,  
14 so it would be where we come across the infringement, we take  
15 action against the OEM.

16 *Q.* As part of the licensing agreement, Dell -- let's say in  
17 this particular case, if Mr. Wolff has a Dell computer that had  
18 pre-installed Windows XP, and he -- let's say he has a  
19 system -- catastrophic system failure, and he wants to buy a  
20 Dell reinstall recovery disc, and he goes to Dell, he can do  
21 that, correct?

22 *A.* Yes, correct.

23 *Q.* Let's say Mr. Lundgren wants to get that particular  
24 recovery disc, he never purchased the Dell computer, it is Mr.  
25 Wolff's, he would not be allowed to get that recovery disc,

1 correct?

2 A. No. Correct.

3 Q. And that would be a violation of your licensing agreement?

4 A. Correct.

5 *THE COURT:* Just to clarify that, though, is it fair  
6 to say the entity that implements that is the OEM?

7 *THE WITNESS:* Yes, Your Honor, it is a sub license, we  
8 grant the license to sub license to an end user.

9 *THE COURT:* So, Microsoft says to Dell, we grant you  
10 the right to replace a reinstallation device, but you have the  
11 obligation of making sure to the best of your ability that the  
12 person seeking this is the person who bought the Dell, or can  
13 show to you that they legitimately have gotten it from someone  
14 who bought a Dell product.

15 *THE WITNESS:* That is correct, Your Honor.

16 *THE COURT:* Okay.

17 *BY MR. MORRIS:*

18 Q. So, let's change the scenario. Mr. Wolff, his machine is  
19 working perfectly fine. Mr. Lundgren wants to take a pirated  
20 version of Windows and he wants to activate it on the newly  
21 built machine that he built himself, okay. And Mr. Wolff says  
22 to Mr. Lundgren, well, that is no problem, here is the product  
23 key, number one, if it worked, which it should, correct?

24 A. Correct.

25 Q. That would be an example -- that is an unlicensed -- an

1 infringement on the original license agreement between you and  
2 Dell and Dell and Mr. Wolff?

3 A. That is correct.

4 MS. GOLDER: My only objection, that doesn't mean it  
5 happened.

6 MR. MORRIS: I am just using that as an example.

7 THE COURT: Go ahead.

8 BY MR. MORRIS:

9 Q. That would be an infringement on the licensing agreement  
10 you have with Dell?

11 A. Correct.

12 Q. And Dell has with the end user, because you ensure that the  
13 end user has a licensing agreement back with Microsoft?

14 A. That is correct, there is an end user licensing agreement  
15 as part of the software.

16 Q. Just as the licensing agreement is married to the machine,  
17 it also is married to the end user?

18 A. Correct.

19 Q. The end user can sell it to somebody else, but that person  
20 becomes the new end user?

21 A. Correct.

22 Q. Now, let's again briefly make it more in depth. What can a  
23 person do to their machine that would alter it to a point where  
24 Microsoft would no longer consider them to be an end user?

25 A. There are certain allowances for hardware changes in the

1 device up to the mother board and processor. Once you change  
2 the mother board and processor, it is deemed to be a new  
3 device, and the license effectively is for the older device,  
4 you need to repurchase a new license.

5 Q. Let's go back to the refurbisher. You deal with  
6 refurbishers a lot?

7 A. Correct.

8 Q. And many refurbishers, they purchase from large  
9 corporations. Is that common?

10 A. That is very common for a large corporation who may be  
11 refreshing the hardware, devices, second copies, we'll buy the  
12 old devices off them.

13 Q. Let's say American Airlines wants to sell a bunch of their  
14 computers to Mr. Lundgren and have him refurbish them.

15 A. Correct.

16 Q. Let's use that as an example. Have you ever dealt with a  
17 company similar to American Airlines?

18 A. Not personally, but I deal with refurbishers who deal on  
19 that scale.

20 Q. What is done with the hard drives of those devices prior to  
21 the sale?

22 A. In my experience, most of the hard drives that come from  
23 large companies are either wiped or removed. More often than  
24 not, they are wiped or cleaned of all of the data. They may  
25 contain sensitive data the company doesn't want to release, and

1 they clean it before they sell the devices to the refurbishing  
2 companies.

3 Q. Let's use a bank, a large bank like Wells Fargo, Chase  
4 Manhattan, J.P. Morgan Chase, they want to sell 10,000  
5 computers to a refurbisher. What is the likelihood they are  
6 not going to protect the information on that hard drive?

7 A. It is unlikely they will not have protected the  
8 information, it is very likely they wiped the data.

9 Q. That means the hard drive?

10 A. The hard drive.

11 Q. When they wipe the hard drive, what happens to the  
12 operating system?

13 A. They remove the operating system from the hard drive.

14 Q. Now, what is the value of a computer with a hard drive that  
15 has been wiped?

16 A. The component value minus the software license.

17 Q. In that particular case, can you then use a reinstall disc  
18 that you obtained somewhere else, wherever, to reinstall the  
19 operating system?

20 A. No, you cannot.

21 Q. In that example, the example we talked about, how would you  
22 get software from Microsoft to get an operating system back on  
23 that machine?

24 A. If the device did not have the original software to  
25 accompany the machine, you would have to purchase it from -- a

1 commercial license from a distributor or purchase a retail  
2 license from Best Buy or some large retailer, a new license,  
3 effectively.

4 Q. Let's say these are registered refurbishers that are part  
5 of the Microsoft program -- and you have large refurbishers,  
6 correct?

7 A. Correct.

8 Q. How do they get a license from Microsoft in order to  
9 reinstall the system?

10 A. Microsoft provides access at a lower cost to refurbish the  
11 device and put on a new license, a new copy of the software, to  
12 the refurbisher company.

13 THE COURT: This represents a recognition on the part  
14 of Microsoft that there is an industry out there that can take  
15 older computers, refurbish them, and still they would have  
16 value and use, and so Microsoft entered into this and provides  
17 licenses to these people?

18 THE WITNESS: Exactly, Your Honor.

19 THE COURT: Sure, okay.

20 I am looking at the clock, we have been going for  
21 awhile. Why don't we take a 15-minute break, and we'll come  
22 back and move forward.

23 MR. MORRIS: Thank you, Judge.

24 *(Thereupon, a short recess was taken.)*

25 THE COURT: Ladies and gentlemen, please be seated.

1           When we stopped we were in direct examination. Let me  
2 turn back to Mr. Morris.

3           MR. MORRIS: Thank you, Your Honor.

4 BY MR. MORRIS:

5 Q. I am going to show you Government Exhibit 18.

6           What is this?

7 A. This is a table that shows the different Microsoft royalty  
8 rates that we charge for our software.

9 Q. Do you recognize that chart?

10 A. I do, I created this chart.

11           MR. MORRIS: We move Exhibit 18 into evidence.

12           THE COURT: Would there be an objection?

13           MR. REINHART: No.

14           THE COURT: Government Exhibit 18 received into  
15 evidence without objection.

16           (Whereupon Government Exhibit 18 was marked for evidence.)

17 BY MR. MORRIS:

18 Q. All right. So, what is it that this chart depicts?

19 A. On the left-hand side it depicts the type of customer,  
20 whether it is a large OEM, use the example of Dell, or a  
21 smaller OEM, a small company using the devices.

22           The retail price that it would be sold for through Best  
23 Buy, retail market. I also included categories for a large  
24 refurbisher, up to 20,000 units, and a smaller refurbisher, a  
25 handful or a couple thousand.

1 The categories on the left, across the top you have  
2 different Microsoft software editions, 7 and 10, and the  
3 royalty rates for the home and professional editions for each  
4 of the ones.

5 Windows home for a Dell is \$74 retail.

6 Q. So, if Mr. Lundgren wanted to sell through Mr. Wolff 16,000  
7 versions of software for a Dell machine, retail, how much would  
8 it cost per unit of XP, Windows XP Pro?

9 A. If you had to buy new licenses of a retail product, he  
10 would have to pay \$299,000.

11 Q. 16,000 times 299?

12 A. Correct.

13 Q. If he were to sell 16,000 units of Windows 10 Pro for Dell,  
14 for use on Dell machines, refurbished machines, how much would  
15 he have to pay retail?

16 A. Retail, \$199 for Windows 10 Pro.

17 *THE COURT:* Could you explain for me, sir, the  
18 difference between -- I understand the large OEM, original  
19 equipment manufacturer, the example we have been using is Dell.  
20 Is Pro suggesting a professional use in someone's office or  
21 something like that?

22 *THE WITNESS:* It refers -- there is an edition of the  
23 software XP Professional more often than not intended for  
24 professional use in an office.

25 *THE COURT:* A bank or office, something like that?



1           THE WITNESS: Yes.

2           THE COURT: The small OEM, you talked about this,  
3 there are companies out there less well-known, I suppose  
4 because they don't generate the quantity of a larger company.  
5 Microsoft charges them a higher amount; is that right?

6           THE WITNESS: That is correct.

7           THE COURT: Okay. So we have the home and the pro.  
8 Help me understand what the retail price is.

9           THE WITNESS: The retail price is for a retail copy of  
10 the software you purchase. If you walked into Best Buy  
11 tomorrow, that is the price you would pay for the software.

12          THE COURT: In other words, if I did not have a Dell  
13 laptop as an example?

14          THE WITNESS: If you --

15          THE COURT: I had whatever I had, but I want to buy  
16 the software to install in a device that I happen to have at  
17 home, if I simply walked into a retail store, what would have  
18 been \$59 if it was included in the Dell is now 199 because it  
19 is being sold all by itself?

20          THE WITNESS: That is correct, and that license, as we  
21 talked earlier, is a transferable license. That is a license  
22 you could take with you from one to another. It is a different  
23 type of license.

24          THE COURT: I see. It is not to the machine, but to  
25 the purchaser.

1           THE WITNESS: Correct.

2           THE COURT: So, there are different reasons why the  
3 price is different.

4           THE WITNESS: Correct.

5           THE COURT: You have that both for home and  
6 professional.

7           THE WITNESS: That is correct.

8           THE COURT: Is the next category refurbishers?

9           THE WITNESS: Yes, two, large and small.

10          THE COURT: Large and small. That seems like a rather  
11 remarkable thing that Microsoft is doing, charging  
12 significantly less. Why is that?

13          THE WITNESS: I guess -- I wasn't there when the  
14 program was originated, Your Honor, but the thinking is the  
15 device has a license on it already, it is a secondhand device,  
16 it is a used device, we charge a lower rate for that. It is  
17 not up-to-date.

18          THE COURT: Help me so I can understand it. Analogies  
19 are never quite apt. You think about the used car market.  
20 Here is somebody who has a computer, the device itself, and  
21 they spent some money to upgrade it, to make sure it is working  
22 properly and so on.

23                 Is the price that Microsoft is charging, is that a  
24 reinstallation price?

25          THE WITNESS: It is the price for a new license

1 effectively, but a refurbished license.

2           *THE COURT:* Well, just as an example, let's say you  
3 got that, and -- let's think about it for a minute.

4           Is the assumption that there had originally been a  
5 license with that machine?

6           *THE WITNESS:* That is correct, Your Honor.

7           *THE COURT:* This is not a white box?

8           *THE WITNESS:* No.

9           *THE COURT:* This is an old Dell refurbished, so there  
10 is a recognition there was a license with it in the beginning.  
11 It has kind of taken on a new life, in a sense, and for this  
12 amount of money, which is really significantly less than what  
13 Microsoft would have charged for a new Dell, Microsoft agrees  
14 to relicense and to give a reinstallation disc, too, if  
15 requested.

16           *THE WITNESS:* Yes, Your Honor.

17           *THE COURT:* So that is a good deal.

18           *THE WITNESS:* Yes. Refurbish devices go into  
19 charitable organizations, low income families, people who can't  
20 afford to pay the full price.

21           *THE COURT:* There is a whole market developed for  
22 this, a recognition that these computers, their life can be  
23 extended by refurbishing and so on?

24           *THE WITNESS:* Correct.

25           *THE COURT:* Okay.

1 BY MR. MORRIS:

2 Q. Didn't this originate, the refurbisher program, as a way to  
3 help hospitals, charities and NGO's?

4 A. A big part of this is citizenship programs, for charities,  
5 non-Government organizations, low income families providing  
6 computing resources to those organizations.

7 Q. And where it says large Microsoft authorized refurbisher,  
8 and it has the lower price, is that part of the program?

9 A. Not specifically part of that program, that is the  
10 commercial arm of that, but there is the citizenship program,  
11 and those licenses are sold for less, it is six dollars per  
12 license, and that is for larger and small refurbishers.

13 Q. For education purposes?

14 A. Charities, people may donate hundreds of computers, people  
15 send a hundred machines to the school or something, it is part  
16 of that program.

17 Q. Okay, let's get back to the registered refurbishing  
18 program.

19 I guess Microsoft recognizes the value of the computer is  
20 less, therefore they discount the software that is being  
21 installed on that, correct?

22 A. Correct.

23 Q. But there is no way for Mr. Lundgren or anybody else, Mr.  
24 Wolff or anybody else to go directly to Dell and purchase an  
25 operating system for a Dell computer, correct?

1 A. Correct. A Dell license is for a pre-installation on new  
2 devices.

3 Q. So, if you have 16,000 -- American Airlines has Dell  
4 computers, and you need a license -- you need software for  
5 that, what are your options?

6 A. Your options are, you can join the Microsoft program and  
7 get access to genuine software. If you are not in that  
8 program, you could buy the higher price in retail, or a  
9 commercial license, it is called small OEM system builder.  
10 That is a license you can purchase from a refurbisher.

11 Q. What was the first program you referred to?

12 *THE COURT:* The large OEM, picking up on Mr. Morris'  
13 example, what did you say?

14 *BY MR. MORRIS:*

15 Q. If you had 16,000 computers you purchased from American  
16 Airlines, and you wanted to get licenses for them and install a  
17 Windows operating system, let's say Windows XP Pro, what are  
18 your options to do that? How would you go about doing that?

19 A. The first option, join the Microsoft refurbishing program  
20 and that would give you access to the licenses.

21 *THE COURT:* Let's say you purchase this number of Dell  
22 computers. They have already been licensed, haven't they?

23 *THE WITNESS:* They have been, Your Honor.

24 *THE COURT:* If they don't need to be refurbished,  
25 aren't you allowed to, if you have a problem, get a free

1 installation disc?

2           *THE WITNESS:* If they came with the original software  
3 that was with the device, you could reuse them and resell them.

4           *THE COURT:* I guess this picks up on Mr. Morris'  
5 earlier point, and that is, if you go to a company like  
6 American Airlines or Chase, any of those, one assumes that in  
7 the process of divesting themselves of this, they have  
8 effectively wiped this thing clean.

9           *THE WITNESS:* Correct, Your Honor.

10           *THE COURT:* So, you now have to somehow legitimately  
11 relicense.

12           *THE WITNESS:* Yes.

13           *THE COURT:* So you fall under the refurbisher.

14           *THE WITNESS:* Yes, if you are a member of the program  
15 you fall into the refurbisher.

16           *THE COURT:* One tends to think of refurbishing as, I  
17 don't know, fixing up somehow.

18           But your point is, if a company wiped the hard drive  
19 clear, they cleared out everything from that, that is a good  
20 example of a machine that has effectively become susceptible to  
21 refurbishing.

22           *THE WITNESS:* That is exactly right, Your Honor.

23           *THE COURT:* And it really needs now a reconnection  
24 through the authorized refurbishing program which would give  
25 them the Microsoft software. It is like starting the whole

1 thing over again.

2 *THE WITNESS:* That is correct.

3 *THE COURT:* Okay, thank you.

4 *BY MR. MORRIS:*

5 Q. Now I am going to show you Government's 12.

6 What is Government's 12?

7 A. This is an appendix from part of the licensing  
8 documentation that Microsoft provides to OEM, a recovery media  
9 template that Microsoft provides to OEM's to communicate the  
10 information that they must display on the artwork of the CD or  
11 DVD.

12 *MR. MORRIS:* Your Honor, at this time we would ask to  
13 enter Government's 12 into evidence.

14 *MS. GOLDER:* Objection, relevance.

15 *THE COURT:* I tell you, it is hard for me at this  
16 point to rule on that.

17 I will overrule it, subject to a motion to strike if  
18 the relevancy is not established.

19 I will receive 12 into evidence over the relevancy  
20 objection. You may proceed.

21 (Whereupon Government Exhibit 12 was marked for evidence.)

22 *BY MR. MORRIS:*

23 Q. Can you read that?

24 A. Yes.

25 Q. What does that chart depict?

1 A. It is the artwork template for a Windows 7 product.

2 Q. Now, can you explain to the Court what types of rules  
3 Microsoft has with OEM's in terms of what they can put on the  
4 discs that they create?

5 A. As part of the manufacturing process, Microsoft gives OEM's  
6 a master copy of the software. OEM's are entitled to create a  
7 customized version of that. They are allowed to put their logo  
8 in the software. When you start the machine it displays the  
9 Dell logo and additional hard drive elements within the device.  
10 So, it effectively creates a custom image for that device that  
11 has Microsoft software and some other elements within that.

12 THE COURT: I take it, just so we explain what we are  
13 looking at, it looks to me we have a picture of a disc  
14 indicating the -- visually what one would see if you actually  
15 have that disc in the box when you purchased your computer,  
16 this is the recovery disc.

17 We don't see what is actually digitally on it, but you  
18 are telling us that Microsoft, for instance, using Dell as our  
19 example, allows the Dell logo, we have all seen it, the blue  
20 screen with the dipping D and so on and so forth, but visually  
21 when you look at that disc, if it fulfilled the requirements,  
22 it would have all of this information and so on. Is that  
23 right?

24 THE WITNESS: That is correct, Your Honor.

25 THE COURT: Okay.



1 BY MR. MORRIS:

2 Q. Getting back to what you were discussing regarding the  
3 master software image, could you explain what that is to the  
4 Court?

5 A. We use the term OEM pre-installation kit in Microsoft, and  
6 that is a master copy of the software an OEM received directly  
7 from Microsoft to a special software order center service,  
8 accessible to licensed OEM's.

9 Q. That allows you to create certain software features for  
10 those machines?

11 A. Correct.

12 Q. Does Microsoft limit what they are allowed to do with  
13 respect to the master software image?

14 A. Yes, we do. They can add to it and include their logos.

15 Q. The master software image is what makes the operating  
16 system run; is that correct?

17 A. That is correct.

18 Q. And that is contained on the reinstallation disc, correct?

19 A. An exact copy of what was preloaded on the computer is  
20 contained on the disc.

21 Q. So it is in effect, as for purposes of the master software  
22 image, the same as you get with the retail version, at least  
23 that portion of it?

24 A. That portion of it, the Microsoft software portion of it.

25 Q. Effectively the computer doesn't know the difference?

1 A. The computer doesn't know the difference.

2 Q. You might know the difference, but the computer doesn't?

3 A. Correct.

4 Q. It will operate the same?

5 A. Correct.

6 Q. As long as you have the activation and product key, and we  
7 will get into that later.

8 A. That is correct.

9 Q. Now, Microsoft also has agreements with the authorized  
10 replicators, correct?

11 A. That is correct.

12 Q. And with the OEM's?

13 A. That is correct.

14 Q. Can you explain that to the Court?

15 A. We use a -- we employ the services of third-party companies  
16 to manufacture discs, manufacture those COA labels and create  
17 the software kit, the disc plus the label, and ship those to  
18 the OEM's. Those third-party vendors or replicators, they are  
19 authorized to replicate and distribute to Dell and other OEM's.

20 Q. Even if Dell contracts with a replicator, it has to be a  
21 replicator with Microsoft?

22 A. Yes, it is a three-way agreement with Microsoft and other  
23 parties.

24 Q. Microsoft is a party to that relationship by agreement?

25 A. Yes.

1 Q. And you have direct agreements with the replicators?

2 A. Yes.

3 Q. Anybody who is replicating --

4 MS. GOLDER: I object to leading. We need to hear  
5 from the witness.

6 THE COURT: Let's agree we don't have speaking  
7 objections, but I sustain the objection to the form of the  
8 question.

9 BY MR. MORRIS:

10 Q. What happens if a replicator creates Microsoft software and  
11 doesn't have an agreement with Microsoft?

12 A. That is infringing the Microsoft copyright, effectively  
13 counterfeiting.

14 Q. And what happens if a replicator creates a Dell Microsoft  
15 recovery disc without an agreement with Microsoft?

16 A. Again, that is infringing the Microsoft copyright.

17 MS. GOLDER: Objection, calls for a conclusion.

18 THE COURT: I will overrule the objection.

19 BY MR. MORRIS:

20 Q. Is that within the agreement?

21 A. That is within the agreement.

22 Q. So, they would be violating that agreement?

23 A. That is correct.

24 Q. Microsoft has mandatory rules with Dell regarding how Dell  
25 may use the recovery discs?

1 A. That is correct.

2 Q. You also have -- you are in charge of the supply chain for  
3 Microsoft relating to OEM's, correct?

4 A. Not right now. They have been in the past during my  
5 tenure.

6 Q. You have experience overseeing the Microsoft supply chains  
7 for these types of Microsoft software?

8 A. Yes, I do.

9 Q. And you are familiar with the agreements that Microsoft has  
10 with the people within that chain?

11 A. Yes, I am.

12 Q. Microsoft, is it a very strict chain, in other words, do  
13 you have agreements with every party in that chain?

14 A. We do, yes.

15 Q. Do you oversee that chain closely?

16 A. We do, in a supervisory capacity we conduct periodic  
17 security audits on the vendors, replicators, and we define the  
18 program policies for the operation.

19 Q. What is the purpose of that?

20 A. The purpose is to secure the supply chain and secure the  
21 distribution of our IP.

22 Q. What is the reason Microsoft does that?

23 A. It is securing our copyright and IP so the business can  
24 continue, and protecting and making sure the end user gets a  
25 genuine copy that hasn't been contaminated with malware or a

1 virus, anything like that. You can stand over its authenticity  
2 and it will function.

3 Q. Does Microsoft require the OEM to put on the IFPI mold  
4 code?

5 A. Yes, we do.

6 Q. Could you explain, what is the IFPI mold code?

7 A. In the process of CD or DVD manufacture, you have a molding  
8 that creates the code, and within the mold there is a unique  
9 code within that code that will stamp the number into the CD  
10 and DVD when it is manufactured. The idea of that, you can  
11 retrace back to the plant or the original mold where that was  
12 manufactured.

13 Q. What is the purpose of that, security?

14 A. Security, quality. If there is a quality issue in the  
15 field with a disc that wasn't performing, you could track it  
16 back to the mold and say how many discs were produced with that  
17 mold. It serves a number of functions, primarily industry  
18 security standard.

19 Q. Does Microsoft also require a SID code to be --

20 *THE COURT:* Before we leave this now, just a minute --  
21 for a second here, what does that stand for, IFPI.

22 *THE WITNESS:* International Film and Phonographic  
23 Institute. You might have to help me.

24 *THE COURT:* What is that second word?

25 *THE WITNESS:* Film and phonographic. It relates to

1 the music industry.

2 THE COURT: What is the International Film and  
3 Phonographic Institute?

4 MR. MORRIS: It is in the statute, I believe.

5 THE COURT: Let's stay, though -- I understand what  
6 you said. Is this in fact a number?

7 THE WITNESS: Yes.

8 THE COURT: What does it consist of?

9 THE WITNESS: A four digit code, alpha numeric,  
10 typically two letters, two numbers, it could be one letter and  
11 three numbers. It is an alpha numeric code.

12 THE COURT: Is this code visible on the disc?

13 THE WITNESS: It is very small, Your Honor. It is  
14 visible if you have good eyesight or if you have a magnifying  
15 glass.

16 THE COURT: The reason I am asking you this, in this  
17 case, apparently under the Sentencing Guidelines, this issue of  
18 whether the alleged counterfeit discs are indistinguishable  
19 from the legitimate discs becomes important.

20 So, you are telling us that this IFPI code is on the  
21 legitimate discs?

22 THE WITNESS: That is correct, Your Honor.

23 THE COURT: It is very small, an alpha numeric code,  
24 so, if somebody else on a counterfeit disc put a code like  
25 that, that would be significant, would it?

1           *THE WITNESS:* It would be very significant, Your  
2 Honor, it would be an attempt to mimic a genuine disc.

3           *THE COURT:* One of the reasons you told us the code is  
4 important, it allows Microsoft discs, if necessary, to trace  
5 back to the point of origin for the disc itself, and you  
6 suggest if there is a problem, it tells you the scope of a  
7 recall that might be necessary for that.

8           *THE WITNESS:* That is one of the reasons, Your Honor,  
9 and also provides security for the industry.

10          *THE COURT:* Sure, okay. Thank you.

11          I think you were moving on to something else.

12   *BY MR. MORRIS:*

13   Q. Microsoft also requires an SID code to be on the disc?

14   A. Correct.

15   Q. What is an SID code?

16   A. There is a second code typically on the disc which is  
17 relating to some more of the production equipment that created  
18 the disc. In many cases, it refers to the laser beam recorder  
19 that effectively mastered the discs being created, the master  
20 as part of the production of the disc.

21   Q. Explain that in detail.

22          *THE COURT:* Can we stop for a minute. What does that  
23 stand for, SID, if you know?

24          *THE WITNESS:* I can't recall, Your Honor.

25          *THE COURT:* Okay. Tell me once again what does it

1 look like? If I saw this on a disc, what would I see?

2 *THE WITNESS:* You see information printed on the inner  
3 rim of the disc, typically on the under side, sometimes names  
4 of companies are printed there, also some coding information.

5 *THE COURT:* This is all part of the SID?

6 *THE WITNESS:* All part of the information, the SID.

7 *THE COURT:* Sometimes the names of what companies?

8 *THE WITNESS:* The manufacturing companies that produce  
9 the disc, maybe the origin of the disc. It can contain  
10 multiple types of information.

11 *THE COURT:* There was some reference in one of the  
12 emails to America or Canada, the difference between the two.

13 Would it tell you what country the disc being was  
14 produced in?

15 *THE WITNESS:* Yes, Microsoft has a plant itself in  
16 Puerto Rico, and we put on there Puerto Rico.

17 *THE COURT:* Do you make things in China?

18 *THE WITNESS:* We do not. The OEM's do most of the  
19 manufacturing in China, so all of the plants that manufacture  
20 the hardware, laptop or desk top, that is originated more often  
21 than not in China.

22 *THE COURT:* Are we talking something now specific to  
23 the disc, the recovery disc?

24 *THE WITNESS:* Yes, Your Honor.

25 *THE COURT:* So, if I understood you correctly,



1 Microsoft would allow Dell, subject to the requirements that  
2 you talked about earlier, to manufacture or have manufactured  
3 the reinstallation discs?

4 *THE WITNESS:* That is correct.

5 *THE COURT:* So, if Dell chose to have the  
6 reinstallation discs manufactured in China, would it say "made  
7 in China"?

8 *THE WITNESS:* Sometimes it would, it's not a hard and  
9 fast requirement. Sometimes it may and sometimes not.

10 *THE COURT:* With respect to the SID, it would tell us  
11 the name of the manufacturing company and the physical location  
12 of that company?

13 *THE WITNESS:* Perhaps.

14 *THE COURT:* Anything else significant?

15 *THE WITNESS:* There is another code, LBR, laser beam  
16 recorder code.

17 *THE COURT:* What does that look like?

18 *THE WITNESS:* Very similar to the alpha numeric code,  
19 very similar to that.

20 *THE COURT:* Thank you.

21 *BY MR. MORRIS:*

22 Q. Does Microsoft hire people with special expertise to  
23 identify whether or not these discs are authentic or not?

24 A. We do, we have a digital crimes team that specializes in  
25 counterfeit and anti-counterfeit activity.

1 Q. Why do they hire a specialized person to do that?

2 A. Because counterfeiting is a major competitor, if you like,  
3 for Microsoft, it is a big business, and we lose a lot of  
4 revenue to counterfeiting. So we employ a team to police, do  
5 test purchases, find rogue plants maybe or rogue operators  
6 counterfeiting our software.

7 Q. If somebody handed you a counterfeit disc, would you  
8 personally feel you were capable of determining whether it was  
9 counterfeit or not?

10 A. I would know what to check for and what codes to look for  
11 and I would contact the experts to say is this a genuine code.

12 Q. Just looking at it yourself, could you determine?

13 A. If it were a high quality counterfeit, it would not be  
14 immediately obvious it was counterfeit.

15 Q. You mentioned checking the code. If the code looked real,  
16 you wouldn't know without checking the source?

17 A. I would have to check the source and confirm whether it is  
18 a genuine code or not.

19 We see all levels of counterfeit, high quality, low  
20 quality, some are and some are not.

21 Q. Is there any provision you are aware of under Microsoft's  
22 agreement that allows the sale of recovery discs in the retail  
23 market?

24 MR. REINHART: I object to form.

25 THE COURT: Let's hear the question again.

1 BY MR. MORRIS:

2 Q. Is there a retail market for recovery discs, outside of  
3 OEM's?

4 A. Microsoft does not allow OEM's to sell recovery discs  
5 separately in a commercial means. It is not viewed as a  
6 standard on the product, it has to be sold with the device.

7 Q. An OEM can't say I have an extra 30,000 recovery discs, I  
8 am going to sell them to Mr. Lundgren?

9 A. That is not allowed.

10 Q. We mentioned it before, I want to go over it again.

11 How would you describe the market for legacy codes? And  
12 explain to the Court what five by five product keys are.

13 A. A five by five product key is the alpha numeric code that  
14 we saw on the certificate of authenticity. That is termed the  
15 product key and used to activate the software when you install  
16 it.

17 Q. Are you aware of a market for legacy codes?

18 A. Oh, yes, there is quite a large market for obtaining  
19 product keys from other devices and reselling them through a  
20 particular market, on Ebay or other means.

21 Q. Okay. What is the purpose for that market to exist?

22 THE COURT: Stop for a second.

23 What is a legacy code? What do you mean by that?

24 THE WITNESS: I would term it as a previous generation  
25 of the software, an older version. We would use the term

1 legacy.

2 *THE COURT:* I am not sure I understand that.

3 You talked about a physical label attached to the  
4 device. Is that what you are referring to?

5 *THE WITNESS:* The certificate of authenticity, yes, at  
6 any time we sell a new version. An older version, minus one  
7 and minus two, we phrase those as legacy editions being phased  
8 out over time.

9 *THE COURT:* I see, you have one, you upgraded, you  
10 have gone to something new.

11 *THE WITNESS:* Yes.

12 *THE COURT:* Okay. Where are we going with that? What  
13 are you talking about?

14 *BY MR. MORRIS:*

15 Q. Where is the value in that, it has never been activated?

16 A. The value is it has never been activated and could be used  
17 to sell in the refurbished market as a genuine license.

18 *MR. REINHART:* I object to relevance. There is no  
19 allegation of counterfeit certificates of authenticity. I  
20 don't know why we are hearing about secondary markets in  
21 counterfeit.

22 *THE COURT:* I understand, if it is not relevant, I  
23 won't use it. Let's go ahead.

24 *BY MR. MORRIS:*

25 Q. Now, you also mentioned as part the of the program, they

1 get a refurbished certificate of authenticity; is that correct?

2 A. That is correct.

3 Q. You can't sell the license, the actual refurbisher has to  
4 do that?

5 A. The refurbisher will receive a new certificate of  
6 authenticity and adhere it to the device.

7 Q. This may sound like something we have gone through, but in  
8 the after market, in your experience, what percentage would you  
9 say of refurbishers wipe their machines or have machines that  
10 are wiped in order to maintain privacy?

11 A. I would estimate over 90 percent of them entering the  
12 refurbisher market has the hard drive removed or wiped clean.

13 Q. What is it typically that they do to refurbish a computer?

14 A. Refurbishing can take different forms, install a larger  
15 hard drive, more memory, new peripherals, like a monitor,  
16 keyboard. They can refresh it and bring it up-to-date.

17 Q. And would any of those steps require new software,  
18 licenses?

19 A. If the original software is not supplied with the device,  
20 then you would need a new license regardless of whether you put  
21 a new hard drive in. The only exception is if you change the  
22 mother board on the processor, you are deemed to change the  
23 device and you need a new license.

24 Q. Would you say there is a large barrier to entry -- or what,  
25 if any, barrier to entry is there of becoming a registered

1 refurbisher?

2 A. We have a simple test to part of the application, which is  
3 the program policies, a multiple choice test, and there is an  
4 agreement you sign saying you sign up to the terms of the  
5 program and I am providing you past -- we do check companies  
6 for piracy activities. Provided you haven't done any pirated  
7 activity in the past, you will be admitted to the program. So  
8 the barriers are relatively low.

9 Q. How would you describe the black market for illegitimate or  
10 counterfeit Microsoft software in the world?

11 A. I would describe it as very vibrant. There is a huge  
12 demand for free or low cost software. People like things at  
13 reduced prices, there is a large market out there for lower  
14 cost software.

15 Q. How does that affect the buyer and seller of the software,  
16 how does the black market affect both buyers and sellers?

17 A. It displaces the sale of a genuine software license, so if  
18 you purchase the license on the black market it means you  
19 haven't purchased a new device with a new license from Dell or  
20 you haven't purchased a new license from Microsoft, it is  
21 taking a sale away from a genuine license.

22 Q. When you are talking about the quantities in this case,  
23 4,000 to 16,000 units, those types of quantities, in your  
24 experience, what type of people are in that after market, 4,000  
25 units, 16,000 units?

1 MS. GOLDER: Objection, relevance.

2 THE COURT: Sustained.

3 BY MR. MORRIS:

4 Q. What is the typical size of a refurbisher for Microsoft,  
5 what is the ordinary volume?

6 A. For the most part, the prorated runs probably less than  
7 five thousand units per annum, and 20 percent are the larger  
8 refurbishers, 10, 20,000 units.

9 Q. Is that how many per year or month?

10 A. Per year.

11 Q. That is per year. So, you are saying a large refurbisher  
12 is over 5,000 units per year?

13 A. Per year.

14 Q. Now, what other security measures does Microsoft employ in  
15 the protected chain?

16 A. We -- covert and piracy, we provide resources for an end  
17 user to look for this, look for that, and this is how you tell  
18 it is genuine, and we apply CD and DVD anti-piracy technology  
19 for the retail products I spoke about that we sell through  
20 retail or commercial distribution.

21 So, we take efforts where we don't have a direct  
22 relationship and agreement to enforce, we enforce and control  
23 the software by protecting the products.

24 Q. What is bypass activation technology?

25 A. Bypass activation technology is a technology that larger

1 OEM's use for mass manufacture of devices and allows them to  
2 pre-install the software in the factory and for that software  
3 to activate without needing to type in the five by five or 25  
4 digit product code.

5 Q. Why would you provide the extra product key on situations  
6 like Dell, where they have the bypass activation system?

7 A. It is there primarily for the end user should they need to  
8 recover or install the operating system using the installation  
9 discs, if they have a problem reactivating, they could  
10 reactivate using that code.

11 Q. And we mentioned that these discs contain the operating  
12 system installed by the OEM. Does it contain the technology  
13 you talked about?

14 A. Yes, whereby past activation is used, the code is part of  
15 that technology, the handshake between the computer and the  
16 hardware.

17 Q. Explain that to the Court. How does that work?

18 A. On the computer mother board you have what is called --  
19 sometimes called the bias or firm ware, and that is a low level  
20 of computer software and contains certain information that is  
21 on the mother board on the hardware. And then -- so, the  
22 technology works by putting a marker into the firm ware, and  
23 there is a check by the operating system that looks for the  
24 presence of this marker, and there is a secure handshake  
25 between the two to verify that is genuine and correct.



1 It is like a private key, public key relationship, and  
2 verifies it is genuine and allows it to activate it and work.

3 Q. What is a BIOS lock?

4 THE COURT: I am sorry, what?

5 BY MR. MORRIS:

6 Q. BIOS lock.

7 A. That is the BIOS system, that is the lowest level of  
8 operating the system software, sometimes called the firm ware,  
9 it contains data. A BIOS lock is where -- the OEM sometimes  
10 puts the name of the OEM into the BIOS. The software will look  
11 for that, and if it finds that, it would allow you to install  
12 and work fine. If it finds the presence of another OEM it  
13 wouldn't work. That is kind of a secure feature.

14 Q. Showing you what is marked as Government's 13, what is  
15 that?

16 A. This is a page describing a test installation that I  
17 performed. It has two pictures, one of the operating system  
18 recovery disc, and the device that I performed a test on.

19 Q. And you recognize this?

20 A. Yes, I created this.

21 MR. MORRIS: We offer 13 into evidence.

22 THE COURT: Would there be an objection?

23 MR. REINHART: No.

24 THE COURT: Government Exhibit 13 received into  
25 evidence without objection.

1 (Whereupon Government Exhibit 13 was marked for evidence.)

2 BY MR. MORRIS:

3 Q. Now, what is it that you are showing here?

4 A. In the top picture I am showing is the disc that I was  
5 provided, which is the sample disc of the XP Professional,  
6 reinstallation CD.

7 THE COURT: Is that a legitimate disc or one of the  
8 alleged infringing discs?

9 MR. MORRIS: This is one of the alleged infringing  
10 discs.

11 THE COURT: Okay.

12 BY MR. MORRIS:

13 Q. You are taking a picture of it?

14 A. Yes, documenting this, with the steps I followed and  
15 pictures of the tests where I performed the reinstallation.

16 THE COURT: Can I ask you, looking at this, Government  
17 Exhibit 13, and looking at the disc depicted on the top of page  
18 one, how does that comport with an authorized legitimate  
19 reinstallation disc? I am talking now visually.

20 If I were the purchaser of a Dell computer and in the  
21 process of that obtained a reinstallation disc along with my  
22 laptop, how does this comport with a -- visually how does it  
23 comport with a legitimate disc?

24 THE WITNESS: It is visually identical.

25 THE COURT: Visually identical?

1           THE WITNESS: Correct.

2           THE COURT: We talked about the two different codes.  
3 I assume you need a magnifying glass to find the codes.

4           THE WITNESS: You can see them if you have sharp eyes,  
5 they are pretty small.

6           THE COURT: We can't see them on this picture?

7           THE WITNESS: No, you can't.

8           THE COURT: Could you look for those codes?

9           THE WITNESS: If I look for those, I can see them,  
10 yes.

11           THE COURT: I assume you had that disc in your  
12 possession.

13           THE WITNESS: Yes.

14           THE COURT: When you had it, did you see those two  
15 codes?

16           THE WITNESS: I can't remember.

17           THE COURT: All right. Back to Mr. Morris.

18 BY MR. MORRIS:

19 Q. Actually, anticipating where you are going with this,  
20 showing you Government Exhibit 22.

21 A. This is a genuine reinstallation disc that I obtained from  
22 my sample collection for a Dell computer, Windows XP service  
23 pack two, this is the genuine article.

24 Q. And showing you Government Exhibit 2, which is the alleged  
25 counterfeit version.

1 A. Yes, this is the sample I was provided of the Windows XP  
2 Professional pack two, the unauthorized sample.

3 MR. MORRIS: Can I enter 22 into evidence, Your Honor?

4 THE COURT: Any objection to the receipt of  
5 Government's Exhibit 22?

6 MR. REINHART: No, Your Honor.

7 MS. GOLDER: Are they both 22?

8 THE COURT: 21 is already in evidence. This is  
9 Government Exhibit 22. Any objection to that?

10 MS. GOLDER: No, fine, Judge.

11 THE COURT: 22 is in evidence without objection.

12 (Whereupon Government Exhibit 22 was marked for evidence.)

13 THE COURT: 2 is the counterfeit and 22 is the real  
14 one.

15 MR. MORRIS: Correct.

16 THE COURT: Thank you.

17 BY MR. MORRIS:

18 Q. So, step one, what did you do?

19 A. Step one, this is the start of the installation of the  
20 software on to an older laptop device that I obtained from a  
21 colleague, a Compaq Presario.

22 The first thing I did is insert the CD into the CD drive to  
23 start the installation process.

24 Q. Can you read that, or is that hard for you to read?

25 A. This was --

1 Q. How is that?

2 A. This is a screen shot of one of the steps in the  
3 installation process. It displays the licensing agreement that  
4 you have to accept while doing the installation. That is the  
5 first step in the process.

6 Q. Why did you think that was significant when you took your  
7 screen shot?

8 A. That is essentially where you agreed to the licensing  
9 terms.

10 Q. So, when you log on, that is one of the first things you  
11 are required to do?

12 A. When you are installing software, part of the installation  
13 process is to accept the UL, the user license, and the  
14 agreement.

15 Q. The next screen?

16 A. This screen shot is a shot of the installation process  
17 itself. The first steps it does is reformatting or formatting  
18 the hard drive to perform the installation. This is displaying  
19 how the installation process is progressing as intended.

20 Q. Okay. By the way, when did you this, was your hard  
21 drive -- what did you use for purposes of a hard drive?

22 A. I used the live device that I had been running, an earlier  
23 version of Windows, it was running a millennium edition, quite  
24 an old device.

25 Q. What is this?

1 A. This represents one of the screenings displayed during the  
2 installation process, the steps done to give you a progress  
3 indicator on how it is progressing.

4 This shows the installation is progressing as intended.

5 THE COURT: Is this Government's 2 you are using, is  
6 this the counterfeit?

7 THE WITNESS: This is the counterfeit, Your Honor.

8 THE COURT: Okay. How does this compare with yours in  
9 terms of what you would see had you been using a legitimate  
10 disc?

11 THE WITNESS: Exactly the same.

12 THE COURT: Are they indistinguishable?

13 THE WITNESS: You would not know any different.

14 THE COURT: Okay.

15 BY MR. MORRIS:

16 Q. Now, I can show you, if you like, if it is helpful to read  
17 what is at the bottom of the screen shot and show you the  
18 screen shot. Step two?

19 A. Yep.

20 Q. Okay. What do you see there?

21 A. This is showing the screen shot of effectively the  
22 completed installation process, which is one of the screens  
23 that is displayed to the user, welcomes you to XP, the out of  
24 box experience, the installation is completed. It starts the  
25 software and shows you the new features.

1 Q. The same question the judge asked, does it look  
2 indistinguishable to you?

3 A. It is identical.

4 THE COURT: You may not be able to answer this.

5 In your experience, what happened here, did somebody  
6 get an original version of a reinstallation disc and somehow  
7 simply copy it, or has somebody --

8 THE WITNESS: There are different ways you could do  
9 it.

10 If you went to the plant that is producing the  
11 software, you could use the -- the stamper is the metal plate  
12 to create the actual discs themselves. If they had the genuine  
13 stamper --

14 THE COURT: You mean if somebody had access to the  
15 factory where Dell had a license agreement with that factory to  
16 produce the reinstallation disc?

17 THE WITNESS: That is correct.

18 THE COURT: If somebody else got access to it and  
19 slipped somebody some money and went in at night, for example,  
20 and just ran the disk, they would have an exact copy of the  
21 original?

22 THE WITNESS: An exact copy of the original.

23 THE COURT: You don't know how this happens, all you  
24 can look at is the finished product.

25 I take it you are telling us that, first, visually

1 inspecting the disc, is there anything that would tell you this  
2 is not legitimate?

3 *THE WITNESS:* Unless I looked at the codes and  
4 analyzed that forensically, there is nothing.

5 *THE COURT:* Visually looking at what is on the  
6 computer and you run the disc and reinstall, is there anything  
7 that would suggest it is not a legitimate Microsoft program?

8 *THE WITNESS:* The only one I noted, it didn't prompt  
9 me for a product key, I don't know why it didn't.

10 *THE COURT:* That is significant. If it is legitimate,  
11 one would ask for the product key. Someone eliminated that?

12 *THE WITNESS:* I would expect it to. I can't speculate  
13 why, I was expecting that to happen in my experience.

14 *THE COURT:* What about if you didn't have a product  
15 key, that would prompt you, wouldn't it?

16 *THE WITNESS:* It would prompt you to activate, and it  
17 did in the latter part of the task.

18 *THE COURT:* But it didn't at the point where you  
19 expected it?

20 *THE WITNESS:* Correct.

21 *THE COURT:* All right. Thank you.

22 *BY MR. MORRIS:*

23 *Q.* Step three?

24 *A.* Yes, that is what we just talked about. After you boot it  
25 up and operate it the first time, you see the background desk



1 top, it did display you have 30 days to activate effectively.  
2 That was displayed during the process.

3 Q. Now, I think we need a little more of a background of what  
4 that activation requires and what is the purpose of it.

5 Let's start, generally speaking, what is going on there  
6 with the 30 day activation period?

7 A. The function of activation is effectively a handshake of  
8 Microsoft to confirm the license, and you use the product key  
9 to do that, it is unique to that device, that is the prompt.  
10 Microsoft has built into the software a phone home handshake.  
11 You could continue to use the computer off line without  
12 connecting to the internet and it will work.

13 THE COURT: What will happen if you don't do anything?

14 THE WITNESS: Within XP, it would prompt you for  
15 activation.

16 THE COURT: What I am saying is, let's assume the  
17 person who is using the computer does not do whatever is  
18 required to activate it. At some point, would it shut down?

19 THE WITNESS: On Windows XP, it didn't. There are  
20 lots of prompts.

21 THE COURT: It would know you didn't get these things?

22 THE WITNESS: You would not get updates, but it would  
23 work.

24 Later versions, Windows Vista, we did introduce a  
25 functionality step.

1           *THE COURT:* These are what Microsoft has taken?

2           *THE WITNESS:* In Windows 7, that functionality step  
3 was not there. It continues to nag you, and prompt you, but  
4 you could continue to use it.

5           *THE COURT:* Going back to the issue about whether  
6 there are indications of legitimacy, I assume the business  
7 about prompting and saying please activate is something that  
8 would suggest to you that it is legitimate.

9           In other words, here is Microsoft presumably saying we  
10 need you to activate it, do this, that and the other thing and  
11 make contact with it. I suppose if the user doesn't do  
12 anything, they have to know something is wrong.

13           But it has all of the indicators, impressions of  
14 legitimacy.

15           *THE WITNESS:* Yes, Your Honor.

16       *BY MR. MORRIS:*

17       *Q.* Is there a way to turn off the -- you going into the  
18 settings, Microsoft operating settings, to turn off the contact  
19 with Microsoft altogether? Can you opt out of that? The  
20 default is that it will communicate with Microsoft, but can you  
21 opt out of that?

22       *A.* I am not overly familiar with that process, I can't say.  
23 If you didn't ever connect it to the internet, it wouldn't  
24 phone home, effectively.

25           *THE COURT:* That is not a reasonable expectation I

1 suspect.

2 *THE WITNESS:* Maybe in these days, Your Honor.

3 *BY MR. MORRIS:*

4 Q. Step four?

5 A. Step four was a step I did to look at the disc itself and  
6 what the disc contains, what kind of a disc. The screen shot  
7 here I am showing is a prompt, when you go to activate it  
8 brings you to a series of screens to register if you want to  
9 with Microsoft. It steps you through the process.

10 Q. You can say I don't want to register?

11 A. You can defer further process.

12 Q. And there is no reduced functionality of the actual  
13 operating system?

14 A. In XP and 7 it wasn't a functionality step.

15 Q. All right.

16 A. This screen shot shows -- I looked at the disc itself and  
17 the software on the disc, and there is a setup program that  
18 runs the installation, looking at the properties and verifying  
19 they have copyrights and information relating to Microsoft,  
20 giving an impression this is genuine software and looks genuine  
21 and authentic.

22 Q. Just getting back to what you said, so far in the process,  
23 you have not had to enter any product key at all?

24 A. No.

25 Q. You just stuck it in and it was not a Dell computer?

1 A. It was a Compaq Presario computer.

2 Q. It worked on a computer other than Dell?

3 A. Correct.

4 Q. And it loaded a full operating system of XP?

5 A. Loaded a full operating system of XP.

6 Q. So, without the nagging, you are basically left -- without  
7 using the product key, you have a full operating system of  
8 Windows XP?

9 A. Correct.

10 Q. If you want to get rid of the nagging, you could do that  
11 with a product key?

12 A. Yes.

13 Q. As you discussed earlier?

14 A. Yes, you could go down to the activation step and get rid  
15 of the nagging.

16 Q. What does this show?

17 A. Another step in verifying the software on the disc, looking  
18 at the setup software, it describes the description of the file  
19 through who the copyright sits with. It is a Microsoft  
20 copyrighted product.

21 Q. And the final screen shot, what does that show?

22 A. That is a screen shot, I believe that is -- so, this was a  
23 Compaq PSI that I installed a Dell system on, and it creates a  
24 Dell folder within the operating system creating -- showing  
25 Dell information. It is a Dell disc doing the installation, so

1 it added additional information relating to Dell, even though  
2 it was not a Dell issue.

3 Q. Indicating not only did they do -- on the top of the disc  
4 to make it look like Dell, it appears to you to not only look  
5 like a Dell, it is a Dell?

6 A. A copy of the Dell installation disc, yes.

7 Q. Showing you Government's Exhibit 14.

8 A. This is a document documenting an installation step I also  
9 performed using the Windows 7 Professional reinstallation disc  
10 on a Lenovo tablet, a Lenovo tablet with the Dell disc.

11 These are the steps I performed and screen shots I took.

12 MR. MORRIS: All right. The Government offers 14 into  
13 evidence.

14 MR. REINHART: No objection.

15 THE COURT: Government Exhibit 14 received in  
16 evidence.

17 MR. MORRIS: I give you Government's 14, which is the  
18 alleged counterfeit disc for Windows 7.

19 THE COURT: Thank you.

20 (Whereupon Government Exhibit 14 was marked for evidence.)

21 BY MR. MORRIS:

22 Q. What is this?

23 A. This is a screen shot of the counterfeit disc I used to  
24 perform the Windows installation.

25 Q. Based on your experience, does it have that language that

1 Microsoft requires Dell to put on their reinstallation discs?

2 A. Yes, visually it looks like it should and contains all of  
3 the information as we saw from the template.

4 Q. And you said that the device in this case is --

5 A. It was an older device of mine, a Lenovo tablet.

6 Q. Not a Dell computer?

7 A. Not a Dell computer, it had been upgraded to Windows 8.1,  
8 and I used the disc to reinstall 7 on the device.

9 Q. Step one, what did you do there?

10 A. Step one was the first step, inserting the disc into the  
11 DVD drive to initiate the installation process.

12 Q. What did you find when you did that?

13 A. Again, I wasn't prompted for a product key and the  
14 installation process started up and proceeded to go at it.

15 Q. Would you expect it to be prompted for a product key at  
16 that point?

17 A. I can't remember if it is this early stage or some part of  
18 the process, I would have expected at some time to prompt it  
19 for that.

20 Q. And it eventually boots up and starts the installation  
21 process?

22 A. Correct.

23 Q. Step two?

24 A. Talks to the fact that the installation process completed  
25 as intended, again, reiterated I was not prompted to enter a

1 product key and it booted the device up, it looked fine and  
2 operating fine.

3 Q. It operated like you would expect?

4 A. Like I expected.

5 Step three, I did go into the device, there was an  
6 activation window where you could check the status of that. I  
7 took a screen shot of that. It did display -- it says the  
8 professional product key I typed is an invalid activation.

9 Q. Explain to the Court what is going on there.

10 A. It is saying, when you go looking, that it is not activated  
11 and the key -- saying a key that was used or typed is not the  
12 right key, but I did not type any key during the installation  
13 process.

14 It is prompting you to take action by buying a key on line,  
15 change your product key or contact Dell. That says you  
16 purchased a device from Dell, you contact them for support.

17 Q. If you contacted Dell to buy a product key on line, how  
18 would that work?

19 MR. REINHART: Objection, Judge, speculation.

20 THE COURT: If you know, you may answer.

21 THE WITNESS: If you contact Dell, they would try to  
22 understand why the original key that was supplied did not work,  
23 they would ask you to look for the certificate of authenticity  
24 and ask you to look again to make sure it was correct.

25

1 BY MR. MORRIS:

2 Q. Dell should have provided you with the key?

3 A. By the activation process, this showed activated would be  
4 normal and you never see this point, and you would have the  
5 product key, the COA, certificate of authenticity adhered to  
6 the device.

7 Q. Let's go back to the scenario where you didn't have the  
8 product key. What happened?

9 A. It displayed this message, but it continued to work. It  
10 didn't display any prompts and still has not displayed any  
11 prompts to me.

12 Q. Step four?

13 A. Step four, similar to the last test, I verified the  
14 contents of the DVD by looking at the set of files used to  
15 initiate the reinstallation process and reconfirmed the  
16 messaging to Microsoft.

17 Q. It looks like what a reinstallation should look like?

18 A. So far, it is indistinguishable.

19 Q. What is that screen shot there?

20 A. Again, a screen shot of a digital signature, which is a way  
21 to demonstrate where the file is originated and who created it.

22 It is a step not everybody knows to verify the authenticity  
23 of what is on the disc.

24 Q. What did it tell you when you did do that?

25 A. It tells me it is a file created by Microsoft, pretending



1 to be created by Microsoft and copied to Microsoft.

2 Q. Okay. What is that screen shot?

3 A. Again, that is a screen shot of the properties of the file,  
4 which talks about the file itself, and reference to copyright  
5 in there that shows copyright to Microsoft Corporation.

6 Q. It is working like you expect it to work?

7 A. It is working like I expect it to work.

8 Q. Step five?

9 A. Step five, I documented one of the issues I had. Because I  
10 used a Dell disc on a Lenovo machine, the drivers were missing  
11 so it was not able to recognize the hardware on the device.

12 In this case, it was not able to connect to either the  
13 ethernet, which is the network adaptor your network would have,  
14 or to the wireless network, I was not able to access it at that  
15 time.

16 Q. What did you do to get around that?

17 A. I went to the internet and downloaded a device which  
18 allowed me to use the networking hardware on the computer.

19 Q. Drivers are pretty easy --

20 A. All manufacturers make drivers available for free download,  
21 typically they are cleared on a reinstallation disc. If you  
22 don't have the disc, you could go to Dell.com or Lenovo.com to  
23 get the drivers.

24 Q. And after you did that, what does it show?

25 A. It is verifying it can't find the hardware because it

1 doesn't have the driver, does not communicate with the  
2 hardware.

3 Again, the message below confirms I downloaded the driver  
4 to the USB sticker and got the part of the hardware working and  
5 this screen shot shows I was able to access the internet.

6 This is a screen shot of the website.

7 Q. And the COA?

8 A. This is a picture we saw earlier, this was the actual COA,  
9 certificate of authenticity, on the original device. You see  
10 the device I had, and what I was able to do and take this  
11 product key and activate the Dell software. The next screen  
12 shot shows that activation step was successful, and I got the  
13 message back from Microsoft saying the genuine Microsoft  
14 logo --

15 *THE COURT:* In the device you were using, the Lenovo  
16 device, it had a key on the back of it?

17 *THE WITNESS:* It did, Your Honor.

18 *THE COURT:* When this program asked for the activation  
19 key you were able to type that in?

20 *THE WITNESS:* At the time of the installation I was  
21 not asked for the product key, but you could activate it  
22 through the next step.

23 *THE COURT:* You did that, you entered the product key  
24 on the Lenovo, and the software recognized that?

25 *THE WITNESS:* Yes, Your Honor.

1           *THE COURT:* We talked before about stopping the  
2 nagging effect of the repetitive request for activation, and  
3 this is satisfactory?

4           *THE WITNESS:* Yes, this is a fully activated device,  
5 and there would be no problems and you get all the updates.

6           *THE COURT:* That is a problem, I suppose, for  
7 Microsoft more than anybody else.

8           *THE WITNESS:* Yes, Your Honor.

9           *THE COURT:* The long and short of this, if I  
10 understand your testimony, if anyone looked visually at the  
11 disc, your testimony is, as I understand it, it is  
12 indistinguishable from a legitimate disc, and following through  
13 on that, if you ran the contents, the programs, they, too, are  
14 indistinguishable from what one would see if you had a  
15 legitimate reinstallation device.

16           Is that the thrust of what you are saying?

17           *THE WITNESS:* That is correct.

18           *THE COURT:* Okay. The only fly in the ointment, if it  
19 is at all, is this business where the activation prompt occurs,  
20 and the fact that it subsequently repeats itself, but you just  
21 told us if you happen to have a device that has an activation  
22 key on it that seems to be good enough, you could silence the  
23 prompt.

24           *THE WITNESS:* I did perform another test subsequent to  
25 this, and didn't enter the product key, and it performed and

1 hasn't prompted me at all.

2 *THE COURT:* Okay. Looking at the clock, I can see I  
3 was unduly optimistic saying would we be able to move forward.

4 Mr. Morris, where are you in your testimony?

5 *MR. MORRIS:* I estimate an hour more. Not more than  
6 that. I will try to pick up the pace. We are getting there.

7 *THE COURT:* I don't want to prejudge anything. As  
8 Ms. Golder told me, the general rule is, we use the value of  
9 the infringing device, unless -- and I take it, it is the  
10 unless the Government is relying on, and they are relying on  
11 the guideline provision and the Eleventh Circuit's opinion in  
12 the Lozano case that says if the infringing device and the  
13 copyrighted device are indistinguishable, then you use the  
14 value, if you will, the retail value of the copyrighted -- the  
15 infringed device, the legitimate Microsoft.

16 If we could focus on the issues -- and I understand  
17 Mr. Reinhart has a different take on the market, so on and so  
18 forth.

19 This clock is a little slow in the courtroom. We are  
20 at a point where we ought to take a break for the luncheon  
21 recess. Why don't we do that.

22 I suspect it is everybody's desire -- I don't minimize  
23 the importance of what we are doing at all because finding the  
24 legitimate standard regarding the general concept of loss or,  
25 as Ms. Golder points out, the infringement value, however we

1 phrase it, that is critical, because that drives everything  
2 else. I assume everybody is hopeful we will have a Sentencing  
3 today for all parties to try to bring this to conclusion.

4 Anything we can do to move forward, I think we can  
5 appreciate it.

6 MS. GOLDER: Any idea how late we will go today?

7 THE COURT: We normally go to five o'clock.

8 MS. GOLDER: I don't know how far we will get to this  
9 date.

10 MR. REINHART: If we start back at 1:15, and he goes  
11 an hour, we will not finish today.

12 THE COURT: We have to confront this, so we will do  
13 the best we can and move forward.

14 MR. MORRIS: I can tell you how many exhibits we have  
15 left. We are getting towards the end. Two exhibits left,  
16 should be a half hour.

17 THE COURT: Let's see how we are doing. People have  
18 come from a distance. There is an anxiety level in these  
19 proceedings, I recognize that. We have to get all of this  
20 information out.

21 Let's take a break for lunch. We will back at 1:15  
22 and we will continue on with the Government's presentation.

23 The Court is in recess.

24 *(Thereupon, a luncheon recess was taken.)*

25 *(Thereupon, trial reconvened after recess.)*

1           *THE COURT:* Ladies and gentlemen, please be seated.  
2       Sorry to have kept you waiting.

3           When we stopped for the luncheon break, we were in the  
4       direct examination with the witness. You may proceed.

5       *BY MR. MORRIS:*

6       *Q.* What is that?

7       *A.* That is the screen shot from the Microsoft tool that we use  
8       on the Microsoft side to see it as the event hits our servers,  
9       to show the event has taken place.

10      *Q.* How would you describe the difficulty of counterfeiting a  
11      recovery disc versus a retail disc?

12           *THE COURT:* Let's back up. What is a retail disc so I  
13      can understand the difference?

14           *MR. MORRIS:* Let me approach, Your Honor, showing the  
15      Government's 24, this is not on the exhibit list.

16           That is Government's 24.

17           *THE COURT:* Just so I can understand, I believe you  
18      indicated earlier, Mr. McGloin, that if somebody did not have a  
19      recovery disc and maybe didn't even have an originally licensed  
20      computer, say bought one of the white boxes, they could walk  
21      into Best Buy as an example and buy the software retail, it is  
22      expensive, but you can do it.

23           *THE WITNESS:* Correct.

24           *THE COURT:* Is that what you are talking about?

25           *THE WITNESS:* Yes.

1 BY MR. MORRIS:

2 Q. What is Government Exhibit 24?

3 A. This is a retail product that you would get if you bought  
4 retail.

5 Q. Do you recognize it?

6 A. Yes, this is my product.

7 MR. MORRIS: We move Exhibit 24 into evidence.

8 MS. GOLDER: Objection, relevancy.

9 THE COURT: What is the relevancy of this?

10 MR. MORRIS: Windows 7 has many more features and is  
11 more difficult to counterfeit. The recovery disc does the same  
12 way, but does not have nearly as many security features, so it  
13 is much easier to counterfeit a recovery disc.

14 THE COURT: Again, I am not sure this is relevant, I  
15 would rather admit it. I will be able to distinguish what is  
16 relevant for the legal issue that is going to crystalize as we  
17 move on.

18 Once again, unless I am missing something, I think the  
19 issue is, can the Government show me -- or show and establish  
20 in this case that the infringing device, the infringing is  
21 indistinguishable from the legitimate copyrighted, because that  
22 is, as I understand it, the leg the Government is relying on,  
23 saying we shouldn't use the value of the infringing device, we  
24 should use the retail value of the Microsoft device.

25 I assume we all agree it is the reinstallation device.

1 MS. GOLDER: We also need to establish the value.

2 THE COURT: Right.

3 MR. MORRIS: From the Government's perspective, we are  
4 opening up the criminal copyright infringement, the  
5 infringement is on the Microsoft software inside the Dell  
6 recovery disc.

7 THE COURT: I understand that.

8 MR. MORRIS: We are trying to say it is harder --

9 THE COURT: Let's move forward, I overrule the  
10 objection.

11 I will receive Government Exhibit 24 into evidence,  
12 but over the specified relevancy objection.

13 (Whereupon Government Exhibit 24 was marked for  
14 evidence.)

15 BY MR. MORRIS:

16 Q. So, what is that?

17 A. That is a DVD that comes within the retail package.

18 THE COURT: To buy Windows XP?

19 THE WITNESS: To buy Windows 7, Your Honor.

20 THE COURT: Is that the newest?

21 THE WITNESS: No, Windows 10 is the newest.

22 THE COURT: Okay, I am behind on it. The disc serves  
23 two purposes, to install, and remains as your recovery disc as  
24 well.

25 I will tell you that in the middle of this morning's



1 testimony, Dell closed down my computer, I finally got it back  
2 on. It is not Windows 7.

3 *THE WITNESS:* Never is, Your Honor.

4 *MR. MORRIS:* At least Microsoft didn't do it.

5 *BY MR. MORRIS:*

6 Q. Explain the security features you see on that that is not  
7 present on the recovery disc.

8 A. The outside feature is called Edge to Edge, a proprietary  
9 technology that is part of the disc manufacturing process and  
10 intended to make the disc hard to replicate.

11 *THE COURT:* So I understand, this is the disc that I  
12 would purchase if I walked into Best Buy buying it at retail?

13 *THE WITNESS:* That is correct.

14 *THE COURT:* Help me out. Why is that relevant to  
15 anything we are talking about?

16 *MR. MORRIS:* Let me ask the question.

17 *THE COURT:* All right.

18 *BY MR. MORRIS:*

19 Q. Is the software, the operating system for the Windows 7,  
20 that disc the same software that is present on the Dell  
21 recovery disc?

22 A. In terms of the Microsoft software, yes.

23 Q. In terms of the Microsoft software?

24 A. Yes.

25 Q. It is the same?

1 A. Yes.

2 Q. Indistinguishable?

3 A. It would look the same.

4 Q. And perform the same?

5 A. It may not have the Dell branding but --

6 Q. The Microsoft software image is the same as what you get on  
7 that?

8 A. Originated from the same software.

9 Q. It is the same software?

10 A. It is the same software.

11 MR. MORRIS: Your Honor, I will pass this up.

12 THE COURT: Thank you, all right.

13 MR. MORRIS: Now, I understand there are some  
14 objections to my next exhibit. This is Exhibit 23.

15 BY MR. MORRIS:

16 Q. Showing you Government Exhibit 23.

17 A. This is a copy of Windows Professional 10, the latest  
18 version sold through the distribution channel for small system  
19 builders.

20 Q. Do you recognize it?

21 A. I do, this is a sample I have in my possession.

22 MR. MORRIS: The Government offers Exhibit 23 into  
23 evidence.

24 THE COURT: Any objection to the receipt of 23?

25 MS. GOLDER: The objection is relevance, Judge, we are

1 not dealing with Windows 10 in this case.

2 *THE COURT:* All right. Response.

3 *MR. MORRIS:* As a result of the piracy that has been  
4 taking place with respect to recovery discs and software discs  
5 in general, they have to create additional security features to  
6 get around all of the security features we saw today to improve  
7 it.

8 *THE COURT:* One would understand this, as Mr. McGloin  
9 said, this is a -- piracy is tremendous for Microsoft.

10 I sustain the objection, this is irrelevant. I  
11 sustain the objection to Government Exhibit 23.

12 *BY MR. MORRIS:*

13 *Q.* Now, as we mentioned before, the loss to Microsoft as a  
14 result of people pirating the software, what -- how many  
15 different ways does it result in harms to Microsoft?

16 *A.* The primary --

17 *MS. GOLDER:* Objection, relevance.

18 *THE COURT:* I will overrule that objection, I will  
19 permit it.

20 *THE WITNESS:* One impact is loss of revenue. Number  
21 two, in some cases, it -- counterfeit software would contain  
22 viruses or malware and do bad things to end users, and leaves  
23 customers with an experience that it may not function correctly  
24 or --

25 *THE COURT:* Diminishment of the reputation.

1           *THE WITNESS:* Diminishment of the brand and  
2 reputation.

3           *BY MR. MORRIS:*

4           *Q.* Just this week there was a major hack of Microsoft  
5 software?

6           *MS. GOLDER:* Objection, relevance.

7           *THE COURT:* Sustained.

8           *BY MR. MORRIS:*

9           *Q.* Everything that Microsoft is protecting, IP, brand,  
10 reputation?

11          *A.* Correct.

12          *Q.* That is the purpose of it?

13          *A.* Correct.

14          *MR. MORRIS:* No further questions.

15          *THE COURT:* Cross-examination, Mr. Reinhart.

16          *THE COURT:* Let me help you out if I might. I will  
17 reconsider my ruling, that is as to 24. I am going to sustain  
18 my ruling and sustain the objection to Government's Exhibit 24.

19          *MR. REINHART:* Okay. I was going to ask a question,  
20 that is okay.

21                                   **CROSS-EXAMINATION**

22          *BY MR. REINHART:*

23          *Q.* Mr. McGloin, do you remember Government Exhibit 14, the  
24 imprint you did from the disc on the Lenovo computer?

25          *A.* Yes.

1 Q. That was an XP install -- no, it was Exhibit 13. Exhibit  
2 13 was an XP install on to a Compaq Presario?

3 A. Correct.

4 Q. Your testimony was -- I will circle back to this later, but  
5 your testimony was, ultimately, you were able to install the  
6 demonstration mode of XP on to the reinstallation disc?

7 A. No, it was not the demonstration mode.

8 Q. I thought you said what you installed was a demo mode that  
9 had 30 days activation.

10 A. It was a functional operating system that was required --  
11 or required activation within 30 days.

12 Q. What was actually up and running on the computer, based on  
13 what you did, was not the full version of Windows XP, was it?

14 A. It was the full version.

15 Q. Did it have all of the functionalities of Windows 7?

16 A. Windows XP.

17 Q. So I could get security upgrades?

18 A. No.

19 Q. I could get service from Microsoft?

20 A. No.

21 Q. It didn't have all the same things I would get if I paid  
22 2.99, 18 or \$6 to get the retail version?

23 A. They are add ons, they don't come with the disc. If they  
24 are added on services they are enabled afterwards.

25 Q. You couldn't avail of that?

1 A. Correct.

2 Q. Because you didn't have a product key?

3 A. Correct.

4 Q. Without the product key you do not get the full value of  
5 the software?

6 A. You do not get additional services.

7 Q. I don't get the full value of the software, correct?

8 *THE COURT:* You are arguing over semantics, let's go  
9 ahead. I understand the point you are making.

10 *BY MR. REINHART:*

11 Q. I will come back to that.

12 Let me go back to some principles you talked about, and I  
13 want to be sure I am following correctly.

14 If I understand, Mr. McGloin, when we were talking about a  
15 purchase, I am going to use -- I can understand better if I  
16 give you hypotheticals. If it is okay, walk through the  
17 hypotheticals with me.

18 I decide I am going to buy a Dell laptop computer with XP  
19 on it. Going back to 2008 or 9, I buy a Dell laptop computer  
20 with XP pre-installed.

21 A. Okay.

22 Q. And with that I get a restore solution.

23 A. Yes.

24 Q. That is either -- a separate disc, correct?

25 A. Could be.

1 Q. Or it could be pre-installed on a partition on the hard  
2 drive; is that correct?

3 A. That is correct, another option.

4 Q. Do you know back in 2008, 9, 10, how Windows XP restore was  
5 put on the Dell?

6 MR. MORRIS: Objection, that is not the time frame on  
7 the indictment.

8 THE COURT: What is the time frame?

9 MR. REINHART: Up to 2010, and 11.

10 THE COURT: All right. Go ahead.

11 BY MR. REINHART:

12 Q. Do you know whether Dell installed the restore solution  
13 onto the hard drive of the computers in addition to providing  
14 reinstallation discs back in 2010, 11?

15 A. Based on my experience, you never do both, one or the  
16 other, and the sample I provided today is the disc solution.  
17 Based on that, it would be the disc solution.

18 Q. But one way or another, you got a solution?

19 A. Correct.

20 Q. Back to my hypothetical.

21 I bought a Dell computer with Windows XP on it, and I have  
22 my restore CD. I now want to upgrade my hard drive. Okay?

23 I take out the hard drive, which means all the software  
24 went away, put a blank hard drive in and use my reinstall disc  
25 to reinstall Windows XP. Any problem?

1 A. No problem.

2 Q. Didn't cost Microsoft a dime?

3 A. No.

4 Q. I paid for the XP license when I bought the computer from  
5 Dell?

6 A. You are allowed to do that.

7 Q. Okay. Let's say I lost that disc and I go to Dell and say  
8 I lost my disc, and they sent me a new one and I reinstall  
9 that. Any problem?

10 A. No. That is provided for.

11 Q. Microsoft hasn't lost any money under that scenario?

12 A. Correct.

13 Q. I give the computer to my son, who takes it to college and  
14 decides to upgrade the hard drive again. He takes out the hard  
15 drive, puts in a blank hard drive and uses a reinstall disc to  
16 reinstall the XP. Any problem?

17 A. If it is the original device?

18 Q. Either the one that accompanied the device or the one I got  
19 from Dell.

20 A. Yes.

21 Q. No problem with that?

22 A. No problem.

23 Q. I have two sons, so I do that twice.

24 A. Do what?

25 Q. Two Dell laptops, two separate reinstall discs and give it



1 to my children.

2 A. Providing original software, no problem.

3 Q. I am using authentic reinstallation solution I got when I  
4 bought the computer or bought directly from Dell.

5 A. Okay.

6 Q. Same computer, and instead of giving it to my children, I  
7 sell it to my neighbor, and he installs the disc. Any problem?

8 A. As long as it is the original, no problem.

9 Q. Either it is the reinstallation disc in the box or the  
10 reinstall from Dell?

11 A. I believe no problem, and he is the end user, no problem.

12 Q. Because I think you said the Microsoft license, the license  
13 for Microsoft XP travels with that box whoever owns it?

14 A. Yes, travels with the box.

15 Q. In perpetuity?

16 A. In perpetuity.

17 Q. Unless the person who is in possession of the box swaps out  
18 the mother board or processor, it doesn't matter if that is  
19 sold to one end user or 17 end users?

20 A. Correct.

21 Q. The 17 end users can get an XP reinstall and wipe the hard  
22 drive and reinstall?

23 A. Yes.

24 Q. Coming back to me, I want to -- I see I could make some  
25 money, so now I buy ten of these with the original

1     reinstallation disc in it and resell it to ten people and  
2     they -- I reinstall the software and sell it to ten people. Is  
3     that a problem?

4     A. If each of the devices have the original, no problem.

5     Q. No financial loss because Microsoft got paid when I  
6     originally bought those computers, right?

7     A. Yes.

8     Q. You don't charge twice for the same thing, do you?

9     A. No.

10    Q. How about I do a thousand of them, same scenario, a  
11    thousand of them used, got the reinstallation disc in the box,  
12    wipe the hard drives, reinstall from the authentic  
13    reinstallation disc and sell it to a thousand people; any  
14    problem?

15    A. No.

16    Q. I am effectively now a refurbisher?

17    A. Yes.

18    Q. I am not part of the Microsoft refurbishing program, am I?

19    A. No.

20    Q. I could do what I did?

21    A. Yes.

22    Q. I could do it a hundred times as long as I get the original  
23    computer, Dell XP, and I buy it from Dell or get it out of the  
24    box?

25    A. If you are still the end user of the device, or deemed to

1 be the end user, you can do that.

2 Q. The only way I cease to be the end user is if we change the  
3 mother board or processor, correct?

4 A. That is more to do with the computer, deemed to have  
5 changed computer, it is a new computer which you place the  
6 mother board in, which is the heart.

7 Q. As long as the person has been deemed to be an end user,  
8 why would you not be an end user?

9 A. If you did it on a commercial basis and not using it  
10 yourself, you're not deemed to be the end user.

11 Q. You are doing what on a commercial basis?

12 A. Just purchasing software from reinstalled discs.

13 Q. No, what I am talking about, I am buying computers -- I  
14 will use the example I used earlier.

15 I to go American Airlines and say I will buy 40,000. You  
16 made a buy of 40,000 Dell Windows XP computers, they are  
17 obsolete, I will buy them all. Give me the 40,000  
18 reinstallation discs, I will wipe all the hard drives,  
19 reinstall the XP and -- I can do that?

20 A. Yes.

21 Q. I do not have to join the Microsoft registered refurbisher  
22 program?

23 A. You do not.

24 Q. Only if --

25 A. You could do what you said you are doing even if you are

1 part of the program.

2 Q. I want to come back to the refurbisher program in a second.

3 So -- I will leave that for the time being.

4 So let's go back, I want to sort of walk through a little  
5 bit with you from the beginning.

6 So, when I buy -- I will switch away from laptops.

7 I buy a Microsoft XP desk top computer.

8 A. Uh-hum.

9 Q. That comes pre-installed with Microsoft XP?

10 You have to say yes or no. Do not nod your head,  
11 Mrs. Stipes will get mad at you.

12 A. Sorry. Yes.

13 Q. I think you testified about the BIOS, the basic input,  
14 output system?

15 A. That is right.

16 Q. That is the hardware that is in the hard board?

17 A. It runs the mother board.

18 Q. The lowest level of software?

19 A. Correct.

20 Q. And I think you talked about -- I forgot what the program  
21 was called, but you will help me out on that.

22 In the BIOS on the Dell computer, it will say to the right,  
23 question, this is a Dell computer, right?

24 A. In some cases it will. We haven't set that up like that.

25 Q. It will say this is a Dell computer that came with original

1 XP installed?

2 A. I can't give that you information.

3 Q. Okay. So you talked about the -- are you familiar with the  
4 term SLP?

5 A. Yes, I am.

6 Q. What is an SLP?

7 A. System look pre-install.

8 Q. Could you tell me what that is?

9 A. Bypass activation technology that I talked about earlier.

10 Q. Refresh my memory, when you use the term the "bypass  
11 technology", it is the portion of the BIOS that would check to  
12 see whether the operating system I am trying to install has  
13 been paid for or authorized?

14 A. It is a handshake between the BIOS and the hard drive or  
15 the software to verify that it is genuine for activation.

16 Q. That is my question, if I buy a Dell computer, that  
17 handshake, what is the BIOS looking for? Is it looking for a  
18 disc saying hi, I am a Windows XP disc, hi, I'm a Microsoft  
19 disc? What is that looking for?

20 A. It is a digitally signed certificate on the disc and the  
21 marker in the BIOS, the software would look for the presence of  
22 both, use a private key encryption, and part of the process is  
23 to verify that certificate or digital signature is correct and  
24 it is a genuine relationship.

25 Q. What is it trying to authenticate, I am trying to install

1 Windows XP on a Windows XP to see that it is a Dell disc?

2 A. It is looking to say that this is a Windows XP, verifying  
3 the edition, XP machine, and it is a Dell disc trying to  
4 install on the Dell device.

5 Q. So Dell to Dell, XP to XP?

6 A. Yes.

7 Q. So, if I wipe my hard drive and took a Windows 7, which is  
8 a later version, and put that reinstallation disc into my  
9 computer, the handshake wouldn't occur properly, correct?

10 A. It would occur because the -- the media side or software  
11 side, you have it on the disc, and the BIOS is still intact.  
12 The handshake would happen.

13 Q. The handshake would happen, but I am not trying to install  
14 Windows 7 software on to a machine that originally came with  
15 Windows XP?

16 A. Windows 7 to a machine --

17 Q. That originally came --

18 A. That handshake wouldn't work.

19 Q. The machine wouldn't allow me to do that unless I had a  
20 product key?

21 A. The machine would not use the activation technology, it  
22 would go to the next activation. There is a hierarchy, and if  
23 it doesn't find that, it goes to product key activation.  
24 Essentially, you type in the code into the prompt to activate.

25 Q. Let me go back a step.

1 If I put an XP disc into a machine it will behind the  
2 scenes do that handshake, recognize it as an XP disc,  
3 authenticate the XP software and fully install it and I am good  
4 to go?

5 A. If that is supplied by the manufacturer and that is the  
6 same model that was put onto it, the handshake would happen.

7 Q. Just to simplify things, unless I say to you otherwise, if  
8 I am talking about installing a disc, assume it is the original  
9 disc from the manufacturer.

10 A. Sure.

11 Q. The XP would be good to go?

12 A. Correct.

13 Q. Somewhere on my device there is going to be a label, COA,  
14 that has a product key on it?

15 A. Correct.

16 Q. Which I could theoretically use if I were dishonest to  
17 install on another machine?

18 A. Yes.

19 Q. If I did that, I could not use that product key because it  
20 would be a consumed product key?

21 A. It would be a consumed product key, but there are  
22 allowances that would allow a number of reattempts or  
23 reactivations.

24 Q. Usually three?

25 A. I can't remember the settings for XP.

1 Q. Fair enough. Back to my other hypothetical.

2 Instead of XP, I want to make my computer better, I want a  
3 reinstallation disc for 7.

4 A. Yes.

5 Q. The machine would not let me do that because I didn't put  
6 in the product key?

7 A. There would not be a handshake, you have to have a product  
8 key.

9 Q. I would have had to pay Microsoft to get that product key?

10 A. You could purchase it through different ways, it would have  
11 to be a genuine key.

12 Q. Microsoft is getting money in its pocket because I am  
13 getting Windows 7?

14 A. Yes, the newest and greatest.

15 Q. We have Best Buy, and the money flows down?

16 A. Yes.

17 Q. And the example you gave us here is the flip side of that,  
18 which is I take -- well, I take an XP disc that is designed for  
19 Dell and I try to put it on to a Lenovo or Compaq or an HP  
20 computer. That shouldn't work, should it?

21 A. It would install, but it should never do the handshake that  
22 we talked about.

23 Q. And in fact, it didn't do the handshake in the two examples  
24 you did?

25 A. It appears to not.



1 Q. At some point, it asked for a product key?

2 A. It didn't ask for a product key at any point through the  
3 installation, which I would have expected that, but it did show  
4 that the license was not active.

5 Q. In order for you to get the full functionality use of the  
6 internet and everything else, you would need a product key?

7 A. You could still use the internet, you could still access  
8 the internet on a nonactivated machine, and the anti-virus  
9 program -- you don't get the additional services of an upgrade  
10 or a patch.

11 Q. If there is a security risk and you don't get the patch  
12 there could be a serious problem?

13 A. Correct, which we saw this week.

14 Q. I am obligated to activate the key within 30 days; is that  
15 correct?

16 A. That is the request.

17 Q. It is a term of the end user licensing agreement, isn't it?

18 A. It's copyrighted and I imagine it is. I don't know  
19 copyright in detail.

20 MR. REINHART: I will mark this Exhibit 1.

21 MR. MORRIS: Your Honor, may I see that?

22 MR. REINHART: I apologize, Your Honor, I only have  
23 two copies.

24 BY MR. REINHART:

25 Q. While Mr. Morris is looking at this, I will ask you:

1 The independent user has a contract with the person buying  
2 the software?

3 A. Yes.

4 Q. The person buying the software says I will comply with the  
5 end user license agreement?

6 A. Yes.

7 Q. You can't copy the software and sell it to a third party?

8 A. Correct.

9 Q. And there are other obligations?

10 A. Correct.

11 Q. In the end user license agreement it says the software  
12 license travels with this physical computer in perpetuity,  
13 right?

14 A. I believe so. I haven't read it in detail.

15 Q. You testified earlier that is a fact. I am assuming that  
16 is a fact you are aware of based on Microsoft's agreement with  
17 who buys the software?

18 A. That is the license agreement.

19 Q. Let me show you what I have marked Defendant's 1.

20 If you'd look at that paragraph there?

21 A. Uh-hum.

22 Q. Do you recognize that to be the Microsoft Windows XP home  
23 edition end user license agreement?

24 A. I haven't read it in detail, I can't say definitively.

25 Q. If you'd look at the one paragraph, mandatory activation,

1 see if it refreshes your recollection that Microsoft requires a  
2 person to activate their software within 30 days.

3 A. It states that the license rights -- it states that the  
4 license rights granted under this ULA agreement will activate  
5 30 days after you -- (reading) license copy in the manner  
6 described during the setup sequence unless manufacturer  
7 activated it for you.

8 Q. In the situation where you installed Windows XP on this, it  
9 was on the Lenovo computer, you have 30 days under the contract  
10 to put in a product code, right?

11 A. That is what the agreement that you accept states.

12 Q. But when you buy exhibit -- what was formerly Exhibit 23,  
13 Windows 7, retail and you activate it, when you activate it,  
14 you have it forever?

15 A. You accept the same ULA agreement, and you accept the ULA  
16 terms.

17 Q. In both cases you need to purchase the product key from  
18 Microsoft in order to lawfully use the Microsoft software?

19 A. You need to use the genuine product you obtained, directly  
20 or indirectly, to activate it.

21 MR. MORRIS: Your Honor, what was that exhibit that  
22 Mr. Reinhart was referring to? What was the number?

23 MR. REINHART: 1.

24 BY MR. REINHART:

25 Q. The point of that is, it prevents someone who hasn't paid

1 for the software from using the software?

2 A. That is the premise, yes.

3 Q. That is the whole purpose of the product key, correct?

4 A. The product key is verification, if you like, of the  
5 genuine license installed.

6 Q. If I have a valid product key, it means I paid Microsoft  
7 for the right to have this software?

8 A. You can demonstrate to Microsoft you have a genuine copy  
9 and you are in possession of that, and the activation is a  
10 phone home handshake.

11 Q. If I haven't paid Microsoft to get that product key, if all  
12 of your measures work correctly, I can't ever use your  
13 operating system?

14 A. It will actually allow you to use this, despite what it  
15 says. It doesn't completely shut down or prevent you from  
16 using it.

17 Q. The idea is that your software -- I should not be able to  
18 use Microsoft's software unless I have properly purchased a  
19 product key so that Microsoft got revenue for the software I  
20 use?

21 A. That is the theory behind this. In practice, we let you  
22 use this until we supply you with a genuine key.

23 There are genuine cases where a customer may have a problem  
24 with activation, we don't want to shut down the operability of  
25 the device.

1 Q. You give them 30 days to get it fixed?

2 A. We give them 30 days to utilize the installment process.

3 Q. Now, I think you testified about certified -- so many  
4 different -- people who burn the discs for Dell?

5 A. Well, the actual replica, the CD, DVD replicators, they  
6 work with authorized replicators.

7 Q. I am Dell, I am an OEM. I am going to need a supply of  
8 reinstallation discs back in 2010, 11 and 12.

9 A. Right.

10 Q. What you are telling me is, Microsoft's agreement with Dell  
11 is, Dell can only get those through a vendor that Microsoft has  
12 approved?

13 A. Correct, that Microsoft has an agreement with.

14 Q. So, Dell acquires those from the replicator?

15 A. That is correct, for purchase.

16 Q. Microsoft doesn't get any money for that?

17 A. No.

18 Q. Microsoft doesn't incur any cost for that?

19 A. No.

20 Q. Whether Dell wants a hundred thousand reinstall discs or  
21 ten, Microsoft has no interest in that?

22 A. Correct.

23 Q. If Dell says we will give them away for free, or \$25 for  
24 them, it has no revenue effect on Microsoft?

25 A. Well, there are limitations in terms of the give-away for

1 free or charging \$25.

2 Q. Explain that to me.

3 A. They can't give them away and sell them off the back, and  
4 put them on a broker site.

5 Q. Fair enough. My question was imprecise.

6 What I mean is, if someone can call up and prove to us that  
7 they are a legitimate Dell end user, we give it to them for  
8 free as opposed to charging them \$25 or \$50?

9 A. That is up to them whether they want to give it free or  
10 charge \$25.

11 Q. There is no impact financially on Microsoft one way or the  
12 other in terms of what Dell does?

13 A. In terms of that scenario, correct.

14 Q. Because Microsoft -- as long as the owner, end user, as  
15 long as someone in the life of the computer purchased the COA,  
16 Microsoft got paid for the software?

17 A. As long as the computer originally had a genuine license  
18 installed, and you can demonstrate and provide evidence, you  
19 can get a replacement disc.

20 Q. Okay. As you sit here today, you have no idea what, if  
21 anything, Dell charges for providing a reinstallation disc to  
22 an authorized user?

23 A. I can't tell you precisely, I have a figure of \$25 in my  
24 head.

25 Q. That is a Dell -- you think Dell charges for a

1     reinstallation disc to someone who has a Dell computer?

2     A.   They changed the model to provide the disc with the device  
3     and not -- and if someone says, hey, I need a recovery disc,  
4     they were charging more.   That happened later in life.

5     Q.   If we focus on the period 2011, 2012, you don't know, do  
6     you?

7     A.   I don't know.

8     Q.   Can we go back and talk more about the refurbisher market?

9     A.   Okay.

10    Q.   I think we talked about earlier, there are refurbishers out  
11    there who have no contractual relationship with Microsoft,  
12    correct?

13    A.   Correct.

14    Q.   As long as they are using reinstallation discs lawfully  
15    obtained by the then end user, they can use that disc to  
16    install an operating system and resell that computer, and  
17    Microsoft has no involvement in that process?

18    A.   Correct.

19    Q.   When you were testifying about things that refurbishers can  
20    do and can't do, and allowed and not allowed, you are talking  
21    about refurbishers who entered into a contract with Microsoft  
22    in relation to the refurbisher program?

23    A.   Not specifically, I was talking about the type of license  
24    on that device and the limitations on that license in the hands  
25    of anyone, including the refurbisher.

1 Q. There are more restrictions on the Microsoft registered  
2 refurbisher than there are with someone who does not have the  
3 license?

4 A. There are -- whether you view that as a restriction or  
5 not --

6 Q. The scenario I just described to you where the ultimate  
7 refurbisher is an end user and reinstalls the original  
8 software, you can't do that if you are in the MRR program?

9 A. You can.

10 Q. You have to pay Microsoft for another COA, don't you?

11 A. You do not.

12 Q. What is it that the people in the Microsoft refurbisher  
13 program that people not in that program have to do?

14 A. If you purchase 10,000 devices from American Airlines and  
15 don't have the software, the refurbisher program allows you to  
16 purchase a new relicensing at a reduced rate.

17 Q. So, if I am in the MRR program and I can get from Dell --  
18 because I am the end user and in lawful possession of that, if  
19 I go to Dell and say give me the reinstallation disc, I don't  
20 have to pay Microsoft anything extra?

21 A. No.

22 Q. Microsoft stopped making Windows XP in or about 2007 or 8,  
23 correct?

24 A. I believe Microsoft stopped shipping it through the OEM  
25 channel in terms of OEM's being able to pre-install in devices,



1 somewhere around that period, I can't be entirely sure.

2 Q. Assume it was 2008. In 2011 or 12, that would be two year  
3 old or three year old software?

4 A. Yes.

5 Q. When did Windows 7 roll out?

6 A. Windows 7 launched in, I believe 2009, sometime in the  
7 fall.

8 Q. And what was the successor to Windows 7?

9 A. Windows 8 was the successor.

10 Q. When did that launch?

11 A. October 2012.

12 Q. I think you testified earlier that Microsoft doesn't  
13 require the OEM or the refurbisher to include an actual  
14 reinstallation disc any longer, you just have to provide a  
15 solution one way or the other?

16 A. Which is always the occasion with the license, provide a  
17 recovery solution.

18 Q. Today, is the disc not the primary recovery solution?

19 A. It is still --

20 MR. MORRIS: Objection, relevance.

21 THE COURT: Sustained.

22 BY MR. REINHART:

23 Q. Are you aware whether other marketing platforms like Ebay  
24 or Amazon require refurbishers or resellers to include a  
25 physical disc when they resell --

1 MR. MORRIS: Objection, irrelevant.

2 THE COURT: I will permit it. You may answer the  
3 question if you know it.

4 THE WITNESS: I am not aware of any requirements put  
5 in place by anyone else.

6 BY MR. REINHART:

7 Q. Okay. By the way, do you know what percentage of  
8 refurbishers in the marketplace are Microsoft registered  
9 refurbishers?

10 A. I don't have a number, sorry.

11 Q. If I understand your testimony, then, you really can't  
12 use -- if everything works correctly, you can't use a  
13 reinstallation CD or DVD to upgrade your operating system?

14 A. Um-m-m --

15 Q. Unless you purchase a new product key or COA?

16 A. Unless you install the -- it lets you install, but prompts  
17 you to the activation.

18 Q. Have you done a comprehensive study whether reinstallation  
19 discs as a general matter can be reinstalled like that?

20 A. I have only done the five or six that I have done in my  
21 experience.

22 Q. Generally speaking, they should not.

23 If I have a Windows XP computer and I want to upgrade it to  
24 8, and I get a Windows 8 reinstallation disc somehow, and I try  
25 to upgrade that, it shouldn't work unless I get a new product

1 key from Microsoft for Windows 8, correct?

2 A. As I said, it will install the software, but will not be  
3 activate until you get a new --

4 Q. Do you know whether it will activate?

5 A. I know for a fact, I have done it myself, providing the  
6 hardware it is capable of running in terms of the  
7 specifications, you can install Windows 8 on top of Windows 7.

8 Q. Using reinstallation?

9 A. Reinstallation and you get the same activating prompts.

10 Q. You get basically 30 days of free Windows 8?

11 A. You get 30 days of operating nonactivated.

12 Q. Okay.

13 MR. REINHART: Sorry, Judge, just checking.

14 BY MR. REINHART:

15 Q. Let me, if I could, go back with you -- let's go back and  
16 walk through this one more time.

17 Exhibit 13, do you have that in front of you?

18 A. I don't.

19 Q. We'll do 14 while he is looking for 13.

20 MR. REINHART: Does Your Honor have a copy?

21 THE COURT: I do.

22 BY MR. REINHART:

23 Q. Start on page one of Exhibit 14.

24 A. Yes.

25 Q. At the bottom, you inserted the DVD, I think you said --

1 was there a hard drive -- what was the status of the hard drive  
2 on this Lenovo tablet when you were running this test?

3 A. This was running 8.1.

4 Q. There was a hard drive in it with an existing hard drive  
5 system up and running?

6 A. That is right.

7 Q. When you installed this disc, and we are going through the  
8 process, is the machine running off of the disc or off the  
9 existing software on the machine?

10 A. In step one, what I was doing in terms of the clean  
11 install, I booted from the disc, which means the machine is  
12 running from the disc.

13 Q. So, Windows 8 that is on there may as well not be on there?

14 A. Correct.

15 Q. The disc, between step two and three, is that when it is  
16 trying to make that handshake?

17 A. Between step one and step two.

18 Q. Okay. It tried to make the handshake and it didn't work,  
19 then the system defaults to the next level of authentication?

20 A. Correct.

21 Q. That is when it asks for a product key?

22 A. Yes, it would ask for a product key, except in this case it  
23 didn't ask for a product key.

24 Q. I am confused because the screen you are showing me, the  
25 Windows Professional product key you typed is invalid for

1 installation?

2 A. I did not type the key, and that is when in step three you  
3 could enter the device and enter the status, and that is the  
4 step I took after the installation process.

5 Q. Someone or something attempted to input a product key as  
6 part of that process?

7 A. I can't answer what happened. It is unexpected.

8 Q. But is it possible, then, what the machine reflected as a  
9 failed attempt to input the product key is the fact that the  
10 handshake wouldn't go through?

11 A. I can't answer exactly what happened without further  
12 investigation.

13 Q. Okay. And then, let's jump all the way down to five, if  
14 you would?

15 A. Uh-hum.

16 Q. So, even though the disc booted up, it erases Windows 8,  
17 correct, as part of the install?

18 A. With Windows 7 it created -- it works differently on XP, it  
19 creates an old folder, keeps a lot of the old files, doesn't  
20 reformat it completely. With Windows 8 it completely wipes it.

21 Q. So when you get to step five, and the computer is trying to  
22 connect to the internet through the port on the computer, it  
23 does not recognize that port?

24 A. Correct.

25 Q. Because it is lacking a driver?

1 A. Correct.

2 Q. It is a utility that allows the mother board to recognize  
3 this?

4 A. Correct.

5 Q. You might have a drive for the video card or the audio  
6 card?

7 A. Most of the hardware you have a --

8 Q. Does Microsoft come equipped with most of the drivers?

9 A. Some of the drivers, because there are lots of different  
10 manufacturers of different hardware components. At the time of  
11 launch, Microsoft tries to include most of the drivers, but  
12 doesn't contain everything. Any new driver post launch won't  
13 be in the software, so you need to go and get it.

14 Q. That is what you did?

15 A. That is what I did.

16 Q. It allowed you to talk to the internet and got you on to  
17 the internet?

18 A. Right.

19 Q. That is when it asked you to put in the product key?

20 A. It did not ask me, I took the proactive step to enter a new  
21 product key field to enter a product key. It did not prompt me  
22 to do that.

23 Q. Was this a demo model that would have asked you and you  
24 didn't wait long enough? Why did it not ask you for a product  
25 key?

1 A. I have no understanding why it has done that.

2 Q. Other than you are trying to run a Dell disc on a Lenovo  
3 system, it might have done strange things?

4 A. I can't answer that.

5 Q. The product key you put in was a product key that somebody  
6 paid Microsoft for when the Lenovo device was purchased?

7 A. Yes, it was my old work device.

8 Q. At the end of the day, was the software that Microsoft had  
9 been paid for?

10 MR. MORRIS: Objection.

11 THE COURT: Basis.

12 MR. MORRIS: The relevance of that --

13 THE COURT: What is the legal objection?

14 MR. MORRIS: Relevance.

15 THE COURT: I will permit it. You may answer the  
16 question.

17 THE WITNESS: The software I put on here was not  
18 obtained through --

19 BY MR. REINHART:

20 Q. Microsoft got paid for the Windows 7 software?

21 A. Not that copy of it.

22 Q. The copy could not be made fully operational without the  
23 product key?

24 A. It installed the software, I am able to use it, I could  
25 connect to the internet, I could continue to use it.

1 Q. It is not equivalent to the software you sell for \$295?

2 A. Same functionality in terms of the software.

3 MR. REINHART: One moment, Your Honor.

4 THE COURT: Surely.

5 BY MR. REINHART:

6 Q. Just to be clear, your total experience with trying to use  
7 an installation disc from OEM number one on a machine  
8 manufactured by OEM two is five times?

9 A. Somewhere in that region, yes.

10 MR. REINHART: That is all.

11 THE COURT: Ms. Golder.

12 MS. GOLDER: Just a couple.

13 **CROSS-EXAMINATION**

14 BY MS. GOLDER:

15 Q. Good afternoon, Mr. McGloin?

16 A. It is indeed. Good afternoon.

17 Q. The discs in this case, you have no idea what they were  
18 going to be used for?

19 A. Correct.

20 Q. That is correct. You don't know who they were being sold  
21 to, correct?

22 A. Correct.

23 Q. Let's talk about these discs.

24 If somebody put them in a box with a computer that had an  
25 authentic, valid COA from Microsoft for that particular



1 software, that certificate of authenticity, that license for  
2 the software travels with the computer, correct?

3 A. The certificate of authenticity is not the license, it is  
4 proof of license. The original software in the device is the  
5 licensed copy of that software, the certificate of authenticity  
6 proved that license. If you remove the original software  
7 installed, you effectively don't have that original copy.

8 Q. Yes, but you still have the license for that software?

9 A. You have proof of license for the software that you don't  
10 actually have any more.

11 Q. But you paid for that software, correct?

12 A. At some point, somebody paid for the software on the  
13 device. If the software is gone from the device, you lose the  
14 software.

15 Q. Are you telling me I buy legitimate -- I buy legitimate  
16 software, and say lightning strikes and everything is wiped out  
17 on my hard drive, I don't have the original software, now you  
18 are telling me Microsoft wants me to go and pay for software I  
19 already paid for?

20 *THE COURT:* Is that true, or can you go and say I have  
21 a machine and I want a second reinstallation disc for free?

22 *THE WITNESS:* If the OEM was willing to provide you  
23 that, yes.

24 *THE COURT:* Assuming you could prove that you have the  
25 original machine, and you lost the reinstallation disc?

1           THE WITNESS: Yes.

2           THE COURT: So you get it free from Microsoft?

3           THE WITNESS: Or the OEM.

4           THE COURT: From Dell?

5           THE WITNESS: Yes.

6       BY MS. GOLDER:

7       Q. What you need to get are the numbers that appear on the  
8       COA?

9       A. Most OEM's use the serial number, and you have to provide  
10      the serial number from the device and they will be able to  
11      check their systems and say, yes, we recognize that serial  
12      number, it was installed with the software you are requesting.

13      Q. You don't even need the COA, right?

14      A. Not for that particular step.

15      Q. Okay. So -- and, of course, that software, the right to  
16      use that software travels with that computer in perpetuity,  
17      right?

18      A. The license travels with the computer in perpetuity.

19      Q. Okay. So, if something happens to that computer and the  
20      software disappears, as somebody who owns that computer and has  
21      that license, I have a right to get and reinstall the software  
22      that I have a license for on that computer.

23           Am I making sense?

24      A. If you can go back, you have the right to go back to your  
25      OEM and request another copy of the reinstallation disc. If

1 they are unwilling or can't supply that to you, unfortunately,  
2 you have to purchase a new license.

3 *THE COURT:* Is it your understanding in normal  
4 circumstances they do give the free installation disc?

5 That is what we are all assuming.

6 *THE WITNESS:* Yes, Your Honor, except today they will  
7 not provide XP any more because it is not an end of life  
8 product for them.

9 *THE COURT:* Okay.

10 *BY MS. GOLDER:*

11 Q. The disc that you worked with in this case -- you worked  
12 with the discs in this case?

13 A. Yes.

14 Q. We are talking about the samples of what was seized in this  
15 case?

16 A. Correct.

17 Q. To your knowledge, they contained no viruses, correct?

18 A. I can't answer that, I didn't look for their presence. I  
19 didn't see any, no viruses presented themselves. I can't  
20 categorically state that.

21 Q. To the best of your knowledge, you did not find any malware  
22 on the discs?

23 A. In the time I went through the process, I did not see  
24 evidence of that.

25 Q. No ransom ware, no viruses, nothing that would do harm that

1 you encountered?

2 A. Nothing that I encountered.

3 Q. I believe you said during your direct testimony there is  
4 really not a market out there for these recovery discs because  
5 you can just go get them for free, right?

6 MR. MORRIS: Objection, form of the question. When  
7 are we talking about?

8 THE COURT: Give a time frame, counsel.

9 MS. GOLDER: 2011, 2012, which is the time frame for  
10 the case.

11 THE WITNESS: For an end user there is no market, but  
12 I believe there is a market for commercial for resale.

13 THE COURT: Was there a market for counterfeit copies?

14 THE WITNESS: Absolutely, Your Honor, absolutely, a  
15 huge market.

16 BY MS. GOLDER:

17 Q. The reason was, because refurbishers were required, when  
18 they sold a computer, to have some sort of recovery for that  
19 computer?

20 A. Refurbishers want to sell it with an operating system on  
21 it. People don't want to buy a device if you don't have an  
22 operating system on it.

23 The proper way, they should have the original software, but  
24 there are other ways to get it, to choose another means as a  
25 way to legitimize a device with licensed software.

1 Q. If a device has a legitimate COA, the main market for these  
2 recovery discs was to refurbishers because they needed to  
3 provide a recovery system when they are selling a computer?

4 A. For refurbishers to provide it, if they chose to do it,  
5 they do that. It is not the license, it is proof of license.

6 Q. The XP and Windows 7, in 2011, 2012, that was two to three  
7 year old software?

8 A. Correct.

9 Q. In fact, in 2012, Microsoft stopped supporting XP  
10 altogether?

11 A. I believe you are right. We stopped selling it and through  
12 the channel, it was continued to be supported until, I believe,  
13 2014. We continued to provide updates and patches to customers  
14 until that date.

15 Q. Right around then it got to be really hard to get ahold of  
16 Windows XP, right?

17 A. I wouldn't agree with that. I would say there was still a  
18 lot of product in stock in the channels, particularly in retail  
19 or distribution, they actually stocked up on XP at that time.  
20 As they were approaching the end of sales, they bought a lot of  
21 it and continued to resell past the end of the sales date.  
22 There was a lot of genuine product in the channel.

23 Q. But once you exhausted that supply, you couldn't get more,  
24 right?

25 A. Correct.

1 Q. Okay.

2 Now, we heard about different editions of Windows, and  
3 we've talked about Windows Home versus Windows Pro.

4 Windows Home, those are more solutions that an end user  
5 would use?

6 A. It is a consumer market.

7 Q. Windows Pro is an enterprise market?

8 A. Yes, but you could buy Windows Pro for home use.

9 Q. Considerably more expensive?

10 A. Considerably.

11 Q. Maybe three times as much than the home edition?

12 A. I think it was \$199 versus \$119. I may not recall that  
13 correctly.

14 Q. The main advantage to Windows Pro, it worked with big  
15 network systems, correct?

16 A. I believe so. I can't state the exact differences, but it  
17 did have additional functionality over the home version.

18 Q. Okay.

19 MS. GOLDER: No further questions.

20 THE COURT: Thank you. Anything further, Mr. Morris?

21 **REDIRECT EXAMINATION**

22 BY MR. MORRIS:

23 Q. The example Mr. Reinhart used, Microsoft, he said, was not  
24 paid for -- was paid for the software that was loaded onto the  
25 Lenovo machine even though you were using a Dell reinstallation

1 disc, and you used the COA from a Lenovo machine, correct?

2 A. Correct. I would state that my use of the software was  
3 non-genuine in terms of what I did.

4 So, because of that, to do what I did, I should have  
5 purchased a new license, so, therefore, I lost the sale of a  
6 new genuine copy.

7 Q. That is the point, you can take the counterfeit disc, load  
8 it on a machine that never had a software license for this  
9 user, and you can arrive at the same functionality, you could  
10 have the same functional operating system even on a different  
11 kind of computer?

12 A. Correct. You could use it to make the appearance that that  
13 was the original software on that computer.

14 MR. MORRIS: Let me see Defense Exhibit 1. Can I see  
15 that?

16 THE WITNESS: Yes, here.

17 MR. MORRIS: Thanks.

18 BY MR. MORRIS:

19 Q. Tell me if you can read that highlight. Do you see that?

20 A. Yes.

21 Q. So it says -- it says that --

22 MR. REINHART: Your Honor, technically, this is not in  
23 evidence.

24 MR. MORRIS: I move it into evidence.

25 THE COURT: What is the exhibit that you are using?

1 MR. MORRIS: Defense Exhibit 1.

2 THE COURT: Any objection?

3 MR. REINHART: No.

4 THE COURT: Defendant's Exhibit 1 in evidence without  
5 objection.

6 (Whereupon Defense Exhibit 1 was marked for evidence.)

7 BY MR. MORRIS:

8 Q. We talked about software as a component of the computer?

9 A. Right.

10 Q. At the bottom it says you may transfer it, right, but it  
11 also says, if you keep going past the highlight, if you  
12 transfer -- well, it says if you use -- if you transfer  
13 software, including all component parts, upgrade this ULA and  
14 certificate. The recipient agrees with the terms of the ULA,  
15 right?

16 A. Correct.

17 Q. It also says as part of that, if you use software that is  
18 not genuine, then it completely destroys your license, right?

19 A. I believe it does, yep.

20 Q. Here's what it says, let me show it to you. Starting right  
21 here. (indicating) Do you see that?

22 A. Yes, I do.

23 Q. Read that.

24 A. "If you are not using a licensed copy of the software you  
25 are not allowed to install the software or future software



1 updates. Microsoft Corporation and its subsidiaries will not  
2 collect any personal identifying information from your computer  
3 during this process."

4 Q. Every person who loaded software, if they had legitimate  
5 software, they would lose their license, correct?

6 A. Yes.

7 Q. There is harm not just to Microsoft, there is harm to the  
8 users who think they are buying a genuine article?

9 A. A legitimate user would think they have a legitimate copy.

10 Q. And that could be the value to those people of whatever  
11 cost for a new license?

12 A. Correct.

13 MR. REINHART: Objection, calls for speculation.

14 THE COURT: I will overrule the objection. You may  
15 proceed.

16 BY MR. MORRIS:

17 Q. Now, there was a question by Mr. Reinhart regarding  
18 upgrading, you could upgrade --

19 THE COURT: Mr. Morris, could I suggest you really  
20 want to draw to a close, we need to stop.

21 MR. MORRIS: All right.

22 Okay, having said that, I will stop.

23 THE COURT: All right. I have one question, though, I  
24 would like to ask you, because I am concerned about this.

25 Ms. Golder asked you -- let me back up for a minute.

1           Mr. McGloin, one of the exhibits that you spoke about  
2       was Government's Exhibit 18. You remember that this exhibit  
3       was prepared by you, I understand, and set forth the retail  
4       price that Microsoft would have paid for the various software  
5       programs, XP, Windows 7, Windows 10.

6           Ms. Golder has raised with you the issue that each of  
7       these programs, I suppose at some point began to be dated and  
8       in anticipation, there would be a new program.

9           Do any of Ms. Golder's questions along those lines, do  
10      they in any way change your view as to what was and should be  
11      the legitimate retail value that Windows -- that Microsoft  
12      ascribed to a particular program?

13           *THE WITNESS:* No, Your Honor, they don't.

14           *THE COURT:* So, if you got to the end of XP, and  
15      everybody understood Windows 7 was around the corner, is it  
16      your testimony that \$59 would have been the retail price even  
17      at the end of that program's life?

18           *THE WITNESS:* Yes, Your Honor. The OEM would have  
19      paid that.

20           *THE COURT:* Assuming it was available for sale, that  
21      is what the OEM would have paid?

22           *THE WITNESS:* Yes.

23           *THE COURT:* All right. We need to turn to the next  
24      witness now. We need to take a break for the mid-afternoon  
25      recess. Is this a good time?

1 Is there a next witness for the Government?

2 MR. MORRIS: No, Your Honor.

3 THE COURT: All right. Are there witnesses from the  
4 Defense?

5 MR. REINHART: There are, Your Honor.

6 THE COURT: Why don't we take the mid-afternoon break,  
7 let's take a 15-minute break. We will come back and pick up.

8 Is Mr. McGloin going to stay? I know he is coming a  
9 great distance, I think it may be helpful for me. There may be  
10 questions I want to put to Mr. McGloin after whatever testimony  
11 should come in.

12 Let's take that 15-minute break and we will come back  
13 and turn to the Defense case.

14 The Court is in recess for 15 minutes.

15 *(Thereupon, a short recess was taken.)*

16 THE COURT: The record will reflect that all parties  
17 are present. Counsel for all parties are present and Defense  
18 called its first witness.

19 Sir, raise your right hand.

20 GLEN WEADOCK, DEFENSE WITNESS, SWORN

21 THE COURT: Sir, you may lower your hand. Would you  
22 be good enough to introduce yourself; would you state your full  
23 name and spell your last name, please, for the court reporter.

24 THE WITNESS: My full name is Glen Edward Weadock,  
25 W-E-A-D-O-C-K.

1           THE COURT: Thank you.

2                           **DIRECT EXAMINATION**

3       BY MR. REINHART:

4       Q. If you would tell the Judge where you live and what you do  
5       for a living?

6       A. Yes, I live in Lakewood, Colorado, outside of Denver, and I  
7       am a consultant, and have been for about the last 30 years, in  
8       the IT world providing primarily education and training  
9       services in the Microsoft space.

10      Q. And we will get to your background and training in a  
11      second. Have you testified as an expert in court proceedings?

12      A. Yes.

13      Q. How many times?

14      A. I've testified in court proceedings about five times.

15      Q. Have you served as an expert witness on behalf of the  
16      software industry?

17      A. Yes, I have. I have been involved in about 17 cases, most  
18      of them concerning patent lawsuits and USB Microsoft antitrust  
19      cases.

20      Q. Let me show you Exhibit Number 2.

21           THE COURT: Can I ask you what Mr. Weadock is going to  
22      say? What will his testimony say?

23           MR. REINHART: Five or six questions regarding the  
24      value of the discs, how these discs are used in the industry,  
25      and following up on a few technical matters.

1           THE COURT: Again, I want to draw the parties'  
2 attention to what is the legal issue, that is the one I have to  
3 decide.

4           You may give me some basis to understand this or  
5 differentiate this, but I believe that the Court is obligated  
6 to find that we need to use the retail value of the infringed  
7 device. The Microsoft device, if that device -- if the  
8 infringing device, the counterfeit device is or appears  
9 reasonably -- to a reasonably informed purchaser to be  
10 identical or substantially equivalent to the infringed device.

11           So, I think the issue I have to look at, or find a  
12 reason why that does not apply is, is what we have been calling  
13 the counterfeit device, the counterfeit disc, does that appear  
14 to a reasonably informed purchaser to be identical or  
15 substantially equivalent to an authorized -- to an authentic  
16 device.

17           In other words, if I compared visually the  
18 reinstallation disc that I got with my computer and I looked at  
19 it and compared it to the disc prepared, and if I put it on the  
20 computer and pulled up the various screens, would a reasonably  
21 informed purchaser understand that these were different or are  
22 they substantially equivalent to the infringed item.

23           That is what I am looking at.

24           I want to tell you, it is very interesting hearing  
25 about the IT industry and everything else, but the issue I am

1 called upon to decide is whether this is true or not true.

2 *MR. REINHART:* Your Honor, where I am going is --  
3 whichever way you decide that issue, you have to get to the  
4 next question, which is what is that item worth. That is what  
5 the testimony goes to.

6 *THE COURT:* That is fine. If you want to take the  
7 step they are similar and what are they worth, we are --  
8 Defense is contesting that Mr. McGloin's valuation is not  
9 correct, that is fine. It would be helpful for me to know  
10 where you are.

11 *MR. REINHART:* That is where we are.

12 *THE COURT:* I haven't understood that to be true at  
13 all. We spent hours, and I have not understood that to be the  
14 case if that is what you all agree on, and the issue is, is the  
15 financial cost accurate or not.

16 Mr. McGloin came in and said he works for Microsoft,  
17 this is what Microsoft sells these for.

18 *MS. GOLDER:* No, no, no, that is what the original  
19 operating system cost.

20 *THE COURT:* That is what Mr. McGloin testified to.  
21 Nobody cross-examined him on that. The testimony is, this is  
22 the retail price that Microsoft attaches to these devices.

23 If you have other testimony, I want to hear that.

24 Let's refine the issue.

25 Do both parties agree that the copyrighted disc and

1 information on it is exactly the same or substantially the same  
2 as the Microsoft produced disc?

3 *MR. REINHART:* Yes. As part of the plea, as part of  
4 the stipulated facts, we stipulated to that.

5 *THE COURT:* Do you agree to that, Ms. Golder?

6 *MS. GOLDER:* I do, except there was an email that  
7 talks about when you get to the numbers, there are some discs  
8 that were not good, they couldn't sell because they didn't  
9 substantially look alike.

10 So I preserved the objection for the numbers.

11 I agree what the Government has put forth here --

12 *THE COURT:* Now the issue is valuation.

13 *MS. GOLDER:* We may need to call Mr. McGloin. What  
14 the Court is looking at was the original operating system on  
15 the original COA.

16 *THE COURT:* It would help me if everybody would focus  
17 on the issue. There is no question we all agree it is the  
18 cost, the retail cost of the Microsoft product.

19 *MR. REINHART:* No, retail value of the Dell  
20 reinstallation disc.

21 *THE COURT:* I call it the Microsoft product. You can  
22 argue until you are blue in the face, I have reached that  
23 conclusion. It may be produced by Dell, but it is under a  
24 license. I am calling it the Microsoft product.

25 The question I want to know is, what is the valuation

1 of that product. You are telling me you agree it is the retail  
2 cost of that item.

3 The question is, what is that retail cost? I  
4 understand Mr. McGloin's testimony to be the retail cost is on  
5 Exhibit 18. That is my understanding. If you have different  
6 information, I am open to hear it.

7 It would help me if I could focus on what is relevant.

8 *MR. REINHART:* I think the issue for the Court, the  
9 terminology you are using -- I think the issue is, what is the  
10 retail value, that is what the Guidelines speak to, of the  
11 reinstallation disc? It has some Dell software on it and  
12 Microsoft software, it is not on what is Exhibit 18, which is  
13 the retail value that you buy at Best Buy.

14 *THE COURT:* That is not what it is, it has Best Buy  
15 and Dell and OEM and various others.

16 If you look at 18, there are different prices for each  
17 system.

18 Here is my point, just so we all stay focused, I am  
19 going to have to decide whether this is an accurate exhibit or  
20 not.

21 If Defense has testimony that these prices are not  
22 correct, I would appreciate that. It seems to me we have gone  
23 wide of the mark today in terms of what is the issue.

24 It sounds to me like you all agree now it is the  
25 retail cost of the reinstallation disc, which I have been



1 referring to as the Microsoft disc. I understand it is  
2 produced by Dell and others as OEM manufacturers.

3 Is that the Government's view as well?

4 MR. MORRIS: It is, Your Honor. Again, the reason we  
5 used this chart, the only way you can get that disc is --

6 THE COURT: I don't want you to argue that.

7 I am looking at 18.

8 MR. MORRIS: Yes.

9 THE COURT: Are you relying on the figures on 18?

10 MR. MORRIS: Yes, we are.

11 THE COURT: All right. That is the Government's point  
12 of view. The question is, what is Defense point of view? We  
13 are not looking at anything else, and not saying what is the  
14 cost of the infringing item. I thought that there was an  
15 argument that is what was being suggested. We are looking at  
16 the retail cost of the Dell/Microsoft reinstallation disc.

17 That is what was being counterfeited?

18 MR. REINHART: Correct.

19 THE COURT: Good.

20 MR. REINHART: That is what Mr. Weadock is here for.

21 THE COURT: Good.

22 MR. REINHART: Let me mark Exhibit 2. May I approach?

23 THE COURT: Sure.

24 BY MR. REINHART:

25 Q. This is a resume' and CV?

1 A. Yes.

2 MR. REINHART: I offer Exhibit 2.

3 THE COURT: Any objection to the receipt of Defense  
4 Exhibit 2, Mr. Lundgren's 2, the resume'?

5 MR. MORRIS: No objection.

6 (Whereupon Defense Exhibit 2 was marked for evidence.)

7 BY MR. REINHART:

8 Q. If you would give the Judge a brief summary of your  
9 experience with Microsoft product, Microsoft software, etc.?

10 A. I have been working with Microsoft products in a  
11 professional capacity before there was a Windows. I first  
12 started teaching Windows per work groups 3.11, going back  
13 pretty far.

14 I have been involved with Microsoft products in various  
15 ways. I have taught the products in the professional seminar  
16 world, created videos, written and coauthored a number of  
17 books, 18 total, most of which have to do with Windows. I  
18 offered Microsoft curriculum, course ware, and in the last  
19 couple years I created and have been on-camera talent for  
20 Microsoft instructional videos and a program called Microsoft  
21 on Demand.

22 I have been involved in Microsoft products in litigation, I  
23 was an expert witness for the Government, DOJ, in the antitrust  
24 proceedings.

25 THE COURT: In Washington before Judge Jackson?

1           THE WITNESS: Yes, Your Honor.

2           THE COURT: Right.

3           THE WITNESS: And I continue to teach Windows and  
4 taught all of the products discussed here today and the subject  
5 of these classes, and written about them as well, and worked  
6 with Microsoft products as well in my consulting business in  
7 terms of advising mostly small businesses, but in some cases  
8 large.

9           I worked with Ernst and Young in the year 2000, when  
10 they rolled out Windows 2000, not the ones we have discussed  
11 today. I worked with Windows in large organizations and small.

12          THE COURT: When you were doing that, were you  
13 advising them as to whether the Microsoft product is one that  
14 would be suitable for their business, whether there were  
15 alternatives and things of that nature?

16          THE WITNESS: Yes, Your Honor, in some cases, but most  
17 has been in the area of employment, configuration, support,  
18 management, trouble shooting.

19          THE COURT: If you get it, here is what you need to do  
20 to implement it?

21          THE WITNESS: Yes, Your Honor.

22          THE COURT: Have you worked for Microsoft yourself?

23          THE WITNESS: I worked for Microsoft in the  
24 development of the curriculum and more recently in video  
25 training available worldwide.

1           THE COURT: Good. Back to Mr. Reinhart.

2       BY MR. REINHART:

3       Q. You were present during Mr. McGloin's testimony?

4       A. Yes.

5       Q. Let me ask you --

6           THE COURT: Are you offering Mr. Weadock --

7           MR. REINHART: We offer him as an expert on the issues  
8 of software and the implementation of software.

9           THE COURT: Are you offering him in the evaluation of  
10 the software?

11          MR. REINHART: Yes.

12          THE COURT: Does the Government wish to explore this?

13          MR. MORRIS: Yes, please.

14          THE COURT: All right.

15                           **VOIR DIRE EXAMINATION**

16       BY MR. MORRIS:

17       Q. Do you know how much Dell would pay for OEM software --  
18 starting with Windows XP, do you have any idea how much they  
19 charge?

20       A. No, sir, not off the top of my head.

21           THE COURT: Who is the "they"?

22          MR. MORRIS: Microsoft.

23       BY MR. MORRIS:

24       Q. Do you know how much Microsoft charges for Windows Home  
25 Edition, XP?

1 A. I saw the testimony from Mr. McGloin earlier and the chart  
2 he presented, and those figures seem to be in line with my  
3 expectation, but I would not be able to cite them to you  
4 dollars and cents off the top of my head.

5 Q. Do you have any background in terms of knowing what the  
6 value of the different products are?

7 A. Yes, I have been teaching the different products and  
8 consulting on them for many years and I worked with a variety  
9 of companies that have had to make decisions between one  
10 version or one edition of Windows and another.

11 And in particular, in my work with smaller organizations  
12 over the years I have been responsible for helping to achieve  
13 IT goals with minimal expenditures, dollars are always  
14 important, so I have some experience in those areas.

15 Q. You advise them on evaluation and things like that, prices?

16 A. Yes.

17 MR. MORRIS: We accept him.

18 THE COURT: Fine.

19 BY MR. REINHART:

20 Q. Let me show you a copy of Exhibit 18.

21 MR. REINHART: May I approach?

22 THE COURT: Surely.

23 BY MR. REINHART:

24 Q. Are you familiar with the reinstallation CD's we have been  
25 talking about?

No. 17-12466

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,**  
*Plaintiff-Appellee,*

v.

**CLIFFORD ERIC LUNDGREN,**  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Southern District of Florida  
Criminal Case No. 9:16-cr-80090-DTKH-2

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**APPENDIX  
VOLUME II**

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(CONT.)



1 A. Yes.

2 Q. When I say with them, conceptually with the reinstallation  
3 CD's?

4 A. Yes.

5 Q. Have you dealt with those in your career?

6 A. Yes, many times.

7 Q. Contrast the difference between a reinstallation CD and a  
8 retail version of Microsoft software.

9 A. A reinstallation CD does not come with a license.

10 Q. So, Exhibit 18, which is in front of you there, lists a  
11 bunch of prices that Microsoft charges for different versions  
12 of Microsoft software.

13 Is it your understanding if I pay on Exhibit 18, I get a  
14 license as part of that?

15 A. Yes, sir.

16 Q. If I -- what does that allow me to do? Now that I paid \$59  
17 or \$98, what have I bought? What can I do with it?

18 A. That gives you a right to be a legitimate user of that  
19 product.

20 Q. On which computer?

21 A. On the computer -- well, with the OEM license, the licenses  
22 follow the computer, rather than the user. There was some  
23 confusion a little earlier in Mr. McGloin's testimony, but with  
24 the OEM license, they follow the computer.

25 Q. What about if I procure -- what is the value of any of this

1 software if I don't get a license with it?

2 A. If you don't get a license with it, then you are -- it  
3 essentially has no value.

4 The value of software without a license, unless you are  
5 willing to be a Sokolov and operate with the end user license  
6 agreement, the value is zero. You are not a legitimate user  
7 unless you have a license for it. Beyond that, you may be  
8 required in many cases, such as Microsoft Windows, to prove  
9 that you have a legitimate license before you get the  
10 functionality of the software.

11 Q. So, it says here Windows XP Home Edition sold to Dell is  
12 \$59. Are you saying all \$59 is for the value of a license?

13 A. Basically, yes, because in an OEM edition there might be  
14 some other small components of that that might pertain to  
15 packaging. Most OEM software is pre-installed, so you don't  
16 have expensive packaging costs. That represents, really, the  
17 cost of the license.

18 Q. What about the different categories; small OEM, same thing?

19 A. Yes, for the small OEM, when you get to the retail price  
20 some is going to pay for packaging and marketing and other  
21 expenses that Microsoft incurs in marketing its products.

22 Q. Can I lawfully acquire Microsoft software without getting  
23 the license for it?

24 A. You can. They have software websites that you can download  
25 software, but you don't get the license with it.

1 Q. Can I activate that software if I don't have a license?

2 A. No.

3 Q. Some people break the law and figure out how to do it.

4 Consistent with the end user licensing agreement and other --

5 MR. MORRIS: Objection to the form of that last  
6 question, it wasn't --

7 THE COURT: What is the legal objection?

8 MR. MORRIS: Form of the question, it wasn't clear  
9 which type of software.

10 THE COURT: Rephrase the question.

11 BY MR. REINHART:

12 Q. Let's go by example. What kinds of Microsoft operating  
13 systems can you download for free?

14 A. Today I have seen websites hosted by Microsoft where one  
15 can download Windows 7 and Windows 10.

16 MR. MORRIS: Objection, Windows 10 is outside the  
17 indictment.

18 THE COURT: I sustain as to 10.

19 BY MR. REINHART:

20 Q. In the past, were you able to download XP?

21 A. Yes.

22 Q. In either of the cases, XP or 7, could the user lawfully  
23 activate -- in compliance with the end user license agreement,  
24 activate that software if they didn't have a valid product key  
25 or COA from Microsoft?

1 A. The only way they could do that is the system lock. They  
2 own a computer that has a BIOS code that indicates that  
3 computer has been licensed to run that.

4 Q. They have paid for the software license from the OEM?

5 A. Yes.

6 Q. Contrast, if you would, for the Judge what you testified  
7 about the retail software and reinstallation discs, what is the  
8 difference and the difference in value?

9 A. Again, boiling it down to the bare bones, the  
10 reinstallation disc that is the subject of this proceeding, the  
11 discs seized and discussed as being counterfeit, they do not  
12 come with the license, they do not have the tag with the  
13 product key. They come with no such proof of license, no  
14 license conveyed. They are expressly for the purpose of  
15 installing on a computer that has been licensed or equipped  
16 with the BIOS code that indicates a license has been paid to  
17 Microsoft.

18 Q. In your opinion, without a code, either product key or COA,  
19 what is the value of these reinstallation discs?

20 A. Zero or near zero.

21 Q. Why is that?

22 A. Because -- well, several reasons; one, the license is what  
23 you are paying for when you get Windows, as we discussed  
24 looking at Exhibit 18.

25 Two, any product that I could obtain for free from

1 legitimate sources, OEM's, Microsoft, would reasonably be  
2 valued at zero or near zero. If I can obtain something for  
3 free from Dell, an OEM, upon request, paying for shipping and  
4 handling, the value of that product would be zero or near zero.  
5 Q. Okay.

6 Are you familiar with OEM's who allow downloads of  
7 reinstallation discs for free?

8 A. Yes, indeed. Dell does so over the years and still does so  
9 to this day.

10 Q. Specifically back in 2011 and 12, Dell and/or Windows XP,  
11 and/or Windows 7, did Dell make free downloads of the  
12 reinstallation discs available?

13 A. Yes, there are websites with an archive, which is a  
14 facility where you can go back in time and look at websites,  
15 not completely accurately in all cases, but you can often get  
16 the gist, and I located self service Dell web pages whereby  
17 users can go, I don't want you to mail me a disc, I want to  
18 download the software that is the same software on the  
19 reinstallation CD.

20 Q. As part of your work and research, do you keep abreast of  
21 industry publications and alerts relating to software piracy  
22 and hacking?

23 A. Yes, I do my best to stay on top of the industry.

24 Q. I think you heard testimony today about the idea that one  
25 could take a reinstallation CD for OEM number one, Dell in this

1 case, and try to install a full operating system on a different  
2 computer.

3 First of all, have you heard in your research or work in  
4 the industry, is that a big problem? Is that something people  
5 are doing?

6 A. I have never heard of that being a widespread practice, and  
7 some of the work I did preparing for testimony in this case, I  
8 tried that very operation and was unsuccessful. I tried to  
9 take a Dell reinstallation CD and tried to install it on a  
10 Lenovo computer, and that failed.

11 A different version of Microsoft that I purchased on Ebay,  
12 with a Dell laptop I tried to install software, and it would  
13 proceed through the various screens, but the problem is, this  
14 would not activate. There was not that handshake that Mr.  
15 McGloin was talking about.

16 Even if you were able to do that and do cross installation  
17 between Dell and other OEM's, you would have to provide proof  
18 of license, a product code in order to have a valid functioning  
19 and properly licensed version of Windows.

20 No, in answer to your question, I have not heard that being  
21 a widespread practice.

22 Q. How many different -- you said you tried a number of  
23 different installations. You called them cross installations?

24 A. Right.

25 Q. How many of those did you do?

1 A. I did four.

2 Q. Okay. Did any of them succeed?

3 A. No.

4 Q. I think you were present for Mr. McGloin's testimony about  
5 how he was able to, I believe on a Lenovo, get the system to  
6 boot up and never asked for a product key.

7 Did you have a chance to review his slides and his report  
8 on that?

9 A. I did.

10 Q. What is your conclusion on that?

11 A. The request of a product key can occur in different times.  
12 We saw in one exhibit, as we saw earlier today, a balloon  
13 notice shows up saying you have a certain amount of time to  
14 activate.

15 You may get that prompt initially in some cases. In some  
16 versions, you may have it pop up and that appears as a reminder  
17 you need to activate.

18 Q. And we heard testimony earlier that in some versions you  
19 just get nagged?

20 A. It is a bit more dire than what Mr. McGloin presented. In  
21 XP it is more than nagging, not only do you go outside the end  
22 user agreement, beyond that, the system will not function. You  
23 will receive a message saying you need to activate or log off.

24 Q. What happens if you let the 30 days pass and you try to log  
25 on to your computer?

1 A. You will not be able to do so, you must activate.

2 Q. Microsoft will not boot up?

3 A. In the case of XP, correct.

4 Q. What about Windows 7?

5 A. Windows 7 is more tolerant, and Microsoft made a decision  
6 to make it less intrusive and disruptive to customers, a  
7 decision Microsoft made.

8 But you will not only get the periodic reminder messages,  
9 you will see a legend on your screen saying, for example, this  
10 copy of Windows is not genuine.

11 You will not be able to perform the genuine Windows  
12 activation which permits downloading various kinds of updates.  
13 You might not be able to get all the Windows updates that are  
14 generally very important both to individuals and to commercial  
15 users in terms of dealing with security vulnerabilities, making  
16 sure that bugs are fixed over time, and so forth.

17 If I have a computer not activated, I would not be able to  
18 have that worked on by a legitimate dealer or get any technical  
19 support for that.

20 Even in the case of Windows 7, which may be less  
21 disruptive, a choice that Microsoft made, they are downsized,  
22 out of compliance with the end user agreement. The end user 7  
23 and license agreement has a 30-day period, and if you are out  
24 of compliance, if you don't register or are not active, there  
25 are degradations of functionality.



1 Q. It would not be a fully functioning, fully activating  
2 Microsoft system?

3 A. No, not at all.

4 Q. You said the discs aren't worth anything. Why would  
5 anybody pay for one?

6 A. There is a convenience factor associated with them.

7 In fact, now that some of the discussion in this case to  
8 date has revolved around the scenario that, gee, is Microsoft  
9 losing out by the proliferation of the reinstallation CD's, I  
10 would think the opposite position, the more these are out there  
11 the better off Microsoft is. It needs to be convenient. If  
12 you are a Microsoft customer, if lightening strikes your  
13 computer, you want to install that.

14 Not everyone is comfortable downloading software through  
15 the internet, so having a disc may be a convenience. They  
16 don't have to contact OEM and have that phone conversation.

17 There might be a customer convenience or satisfaction  
18 reason that there might be a value to a reinstallation CD, but  
19 it would be low. It would not be anywhere near the retail  
20 value of the product when you go into Best Buy and purchase a  
21 reinstallation version.

22 Q. You are not saying that a counterfeit has a value to the  
23 customer?

24 A. No.

25 MR. REINHART: One second, Your Honor.

1           *THE COURT:* Surely.

2           I want to understand what you just said.

3           Mr. Reinhart asked you, do you think a counterfeit CD  
4 has value to the customer, and did you say no?

5           *THE WITNESS:* Perhaps I could get the question  
6 clarified. I am not sure I fully understood your last  
7 question.

8           *BY MR. REINHART:*

9           Q. The point I was making, one shouldn't do anything illegal  
10 if it -- even if it is a benefit to the customer. You are not  
11 suggesting that?

12          A. No. And to the issue is there is copyright and trademark  
13 issues, no, I don't suggest anyone do anything illegal for  
14 their own convenience.

15           *MR. REINHART:* Nothing else, thank you.

16           *THE COURT:* Thank you. Cross-examination.

17                           **CROSS-EXAMINATION**

18           *BY MR. MORRIS:*

19           Q. Good afternoon.

20           A. Good afternoon.

21           Q. Now, I think I understood your last question -- first, I  
22 think the question was whether or not the counterfeit  
23 reinstallation recovery discs had a value, and the  
24 clarification would be a value to the customer, correct?

25           Do they have a value to the customer, a person who is

1 purchasing them?

2 A. I would presume, in general, anybody who is purchasing  
3 something perceives it to have some value to them.

4 Q. Okay.

5 That value is, if they have a key, they have an operating  
6 system, correct?

7 A. My understanding is there was no trafficking in keys in  
8 this case.

9 Q. Let's talk about hypothetically.

10 Let's say somebody has an unconsumed COA. Are you aware  
11 what that is?

12 A. Yes, I am.

13 Q. Let's assume somebody has one. Would a counterfeit  
14 Microsoft software recovery disc such as one that was sold in  
15 this case have value to that person if they were inclined to  
16 use it?

17 A. Well, I suppose it might if they intended to use it  
18 illegally, but even there, the value would be pretty low  
19 because they could get the same software for free on the  
20 internet.

21 Q. Let's assume they don't know how to get it off the  
22 internet.

23 A. We are making lots of assumptions. Okay.

24 Q. Let's assume they are going to use this disc. How can they  
25 get it free off the internet using your, I guess logic, without

1 a key, and without a registration number?

2 I am talking Windows 7 and Windows XP, how can they get it  
3 without a COA, product key or registration number?

4 A. I am confused. I thought you said we are presuming that we  
5 do have a key.

6 Q. I am turning it around. Talking about your logic, you are  
7 saying they have no value.

8 Let's assume you have a product key, Dell product key, and  
9 you want to get this downloaded for free. Wouldn't you need a  
10 product key and a serial number?

11 A. I'm sorry, when you refer to a Dell product key, what are  
12 you referring to?

13 Q. Let's back up.

14 You made the statement that a person can get Microsoft XP  
15 and Windows 7 software on line and download it for free.

16 Is that what your testimony is?

17 A. Windows 7 today, yes.

18 Q. I am not talking about today, I am talking 2010 and 2011.  
19 Could you do that?

20 A. Yes.

21 Q. What would you need to do that?

22 A. A computer and internet connection, depends on the source.

23 If you were going to get Windows 7 from Microsoft, I  
24 believe that the self service website may have required you to  
25 enter a product key initially in order to perform the download.

1 As we heard earlier today, if you are getting it from Dell  
2 or another OEM, as Mr. McGloin testified, in my experience and  
3 research, you may only need a service tag number or serial  
4 number, or something like that that identifies the computer on  
5 which you want to install the software.

6 Q. You have to prove that you were actually a Dell customer?

7 A. You have to prove that if you want to activate the  
8 downloaded copy of Windows.

9 Q. You could download it, but not activate it?

10 A. That is correct.

11 Q. In order to get -- why are people paying if it is so easy?  
12 It strikes me, if you can download it for free, why are people  
13 paying retail \$299 for Windows XP Pro, if you can download it  
14 for free?

15 A. Because you get the license when you pay that money.

16 You don't get the license when you get the reinstallation  
17 CD or the downloaded reinstallation CD. The license is where  
18 the money is.

19 Q. So, then, a person who is maybe not as concerned about  
20 having the license, wants to use the computer and operating  
21 system and doesn't care about the license, isn't worried that  
22 the police are going to come after them, right, you don't think  
23 there would be any value to them to have that operating system?

24 A. I'm sorry, can you ask your question more specifically;  
25 what operating system?

1 Q. Windows XP.

2 A. In the form of a reinstallation CD?

3 Q. Let's talk about an operating system.

4 A. That is vague, I don't know how to answer your question.

5 Q. Let's start with the retail Windows operating system, in  
6 2010, 2011, you say you can download it for free?

7 A. I didn't say you can download a licensed copy of it for  
8 free.

9 Again, Your Honor, this is the key distinction, when we  
10 talk about retail prices, \$100, \$150, 200, \$299, that is  
11 something they pay for a system and license agreement to get  
12 full functionality of the product.

13 When I am talking about a free download from Dell or a free  
14 set of discs I request from Dell, Toshiba, HP, and all of  
15 them -- it's not just Dell that offered free CD's upon  
16 request -- I am not getting a license. I am getting software  
17 to install on to a computer that has already been licensed,  
18 that license has already been paid for, that is what has zero  
19 or little value.

20 Q. Do you know where you could download 16,000 versions of XP  
21 in 2011?

22 A. Yes. If I bought 16,000 computers from Dell, I could go to  
23 their website and provide each of the service tag numbers for  
24 each of the computers and download all of those copies.

25 Q. Right, you have to buy 16,000 computers?

1 A. Yes, sir.

2 Q. So, the same thing with Windows 7?

3 A. Well, I think so. If your question is, if I want a  
4 legitimate installation of Windows 7 on 16,000 computers, I  
5 could buy the 16,000 computers or go to Best Buy and buy the  
6 Windows 7, or I can buy a refurbishing program.

7 The reinstallation does not come with the license, but it  
8 is a convenience.

9 Q. Can you get 16,000 of them?

10 A. I answered your question.

11 Q. If you had 16,000 computers?

12 A. Are you postulating a different scenario?

13 Q. If you don't have 16,000 computers, could you get 16,000  
14 versions of the recovery disc?

15 A. I don't think so.

16 Q. You don't?

17 A. No. When you go to Dell, you have to provide them -- if  
18 you want a reinstallation CD, you have to provide a serial  
19 number or service tag number, some proof you licensed that  
20 computer for that operating system.

21 MR. MORRIS: No further questions.

22 THE COURT: Redirect.

23 **REDIRECT EXAMINATION**

24 BY MR. REINHART:

25 Q. Mr. Weadock, I think you said the reinstallation disc only

1 has a value if it is coupled with a license of some kind,  
2 correct?

3 A. Yes.

4 Q. That is money already paid to Microsoft?

5 A. In most of the scenarios we have been discussing today,  
6 yes.

7 Q. If you lose your license or lose the COA and now you want  
8 to reinstall software, do you have to buy new software or get a  
9 replacement?

10 A. If it is a Dell computer and the COA got torn off,  
11 sometimes it degrades and is not legible, there might be a  
12 scenario where you could call the OEM and explain the  
13 situation, and at their discretion, they might issue a new COA.

14 Q. They have to issue a new license number?

15 A. Yes.

16 Q. Short of them issuing a new license at no cost, you have to  
17 pay for a new license?

18 A. That is right. You will never get a new license for no  
19 cost.

20 Q. If you lose the reinstallation CD, and keep the license,  
21 you can get the new reinstallation disc for nothing?

22 A. Yes. I have not run into a situation where someone could  
23 not obtain an installation disc from a COA.

24 *THE COURT:* Mr. Weadock, what is your take on this  
25 case? If I understand what you said, it seems to be beyond



1 dispute that Dell or any other manufacturer will provide the  
2 reinstallation disc. What is your view why somebody is going  
3 to China to have 16,000 counterfeit discs produced? What do  
4 you think they are doing? Is this a charitable thing?

5 I don't mean to be -- what is your take on this? You  
6 say it has no value, it might be convenient for the customer.  
7 What do you think is going on?

8 They spent \$80,000, if I understand one of the  
9 exhibits, to produce this. What do you think was happening?

10 *THE WITNESS:* I can't speak for the Defendant, Your  
11 Honor.

12 *THE COURT:* But you need to speak. You came in and  
13 told me, in your expert opinion, these have no value at all,  
14 which I understand that.

15 *THE WITNESS:* Right.

16 *THE COURT:* Here is clearly a criminal enterprise,  
17 these gentlemen have pled guilty to crimes, and we know from  
18 the exhibits -- again, I don't have it right in front of me,  
19 but looking at the monies from Chase and so on, it is about  
20 \$80,000. What is your sense as to what was being done?

21 *THE WITNESS:* My sense is that the discs have value as  
22 a convenience to the end user who will be able to install  
23 Windows on those computers. A lot of people even today aren't  
24 necessarily --

25 *THE COURT:* Wait a minute.

1           You think the discs have value to the end users who  
2 will use the disc to install the Microsoft software?

3           *THE WITNESS:* On to a licensed system that has --

4           *THE COURT:* What gives you that view, that people who  
5 would buy a counterfeit disc presumably at a price  
6 significantly below what Microsoft would charge, that they are  
7 going to go out and get a license to do this?

8           Isn't the more likely scenario that this is totally an  
9 outlaw operation from manufacturer to user?

10          *THE WITNESS:* Your Honor, I don't think so because, as  
11 I testified, the value of that disc is very limited if you  
12 don't have a license. So, I don't know all the details of the  
13 case --

14          *THE COURT:* When you say the value is limited, what  
15 about the functionality?

16           I get a computer and I want it to work. What about  
17 its functionality with the disc that has been used to install  
18 the Microsoft software, what is that capable of doing?

19          *THE WITNESS:* This gives you 30 days.

20          *THE COURT:* You say that. Mr. McGloin's testimony is  
21 completely contrary to you.

22          *THE WITNESS:* I don't think so. He testified, if my  
23 memory is correct, this morning that he made the installation  
24 and had a functioning system with XP.

25          *THE COURT:* What about Windows 7?

1           THE WITNESS: I don't know that he took it past XP.

2           THE COURT: What about Windows 7?

3           THE WITNESS: Less limited.

4           THE COURT: You could use Windows 7 and function, you  
5 wouldn't get the updates, you wouldn't get a license.

6           THE WITNESS: You wouldn't have it serviced, get  
7 technical support. There are significant limitations.

8           THE COURT: Don't you think there is a market for that  
9 type of outlaw material, for lack of a better term? I am  
10 trying to get one we can better understand.

11           Here are people who are going to some extremes --  
12 maybe you could, I certainly couldn't, we wouldn't know -- who  
13 go to China and have it manufactured and come up and be as  
14 seemingly as accurate as it is. It doesn't sound like there is  
15 some illegal -- from a monetary point of view, some  
16 justification for why these people did what these people were  
17 doing.

18           THE WITNESS: I understand your question. I will  
19 answer it this way.

20           If I were engaged in a criminal enterprise whereby my  
21 intent was to provide fully functioning versions of Windows, I  
22 would be dealing with COA's, not reinstallation.

23           THE COURT: You are not. You came in to testify as an  
24 expert, you are knowledgeable in this field. Why were they  
25 doing this and what is the market, if you know, for illegal

1 counterfeit software?

2 That is what is being produced and sold or attempted  
3 to be sold.

4 *THE WITNESS:* Your Honor, I think it is -- I think  
5 really it is largely a convenience, and also, we need to be  
6 very careful here and distinguish between a kind of counterfeit  
7 software that violates trademark and copyright, but  
8 essentially it is free --

9 *THE COURT:* No, I am talking about software that  
10 Microsoft did not authorize, but it is being counterfeited, it  
11 is being produced and presumably there is a market for this.

12 Do you deny there is a market for this?

13 *THE WITNESS:* No, obviously there had to be some  
14 market for the enterprise to have been --

15 *THE COURT:* What is the market in your experience, if  
16 you know?

17 *THE WITNESS:* I am not an expert in all of the  
18 possible illegal markets that might be out there, but I do  
19 think I can understand why a CD that allows me to easily  
20 install Windows has a certain convenience value.

21 And so, if a reseller of used computers which may or  
22 may not have the COA, but giving the purchasers of these CD's  
23 the benefit of the doubt, they may have a lot of computers,  
24 they have a COA, a sticker on the bottom, they wipe the hard  
25 drives, they make it easy for the user to install Windows.

1           Here is a CD, maybe that has a value of a few dollars.

2           *THE COURT:* I suppose if you are selling the CD's and  
3 say, look, we plug it in and hit the turn on button and  
4 something comes up, that probably assists in the sale.  
5 Somewhere down the road the buyer may realize they need to go  
6 somewhere else to buy software with a license.

7           You think there are some values.

8           If I understood your testimony, you have given expert  
9 testimony here that you think that it has no value whatsoever.  
10 Do you stick by that?

11           *THE WITNESS:* What I stick by is the phrase I used,  
12 zero or little, zero or low.

13           *THE COURT:* When you say low, what do you mean by  
14 that?

15           *THE WITNESS:* If I can get something for free over the  
16 internet, it is not worth \$200 for me to get it on a CD.

17           *THE COURT:* No, as Mr. Morris pointed out to you, if  
18 you can get it, and people know they can get it, they wouldn't  
19 bother to buy the disc.

20           Presumably this disc is being sold, so the buyer made  
21 some decision they are going to buy it, either in ignorance  
22 because they don't know they can get it over the internet or  
23 for some reason they elect to buy it.

24           Do you have an opinion what monetary value would  
25 ascribe to those buyers for what they are doing, for the disc?

1           THE WITNESS: I can't see how it would have any value  
2 more than a few dollars.

3           THE COURT: Okay, all right. Thank you.

4           Let me go back -- let me allow you to step down, thank  
5 you for coming today.

6           Mr. Reinhart.

7           MR. REINHART: One other witness briefly.

8           THE COURT: Okay.

9           MR. REINHART: I call Brent Kelley, Your Honor.

10          THE COURT: Mr. Kelley, come up to the witness stand  
11 and make yourself comfortable. After you are seated, I will  
12 ask you to pull the chair up to the desk area.

13                   **BRENT KELLEY, DEFENSE WITNESS, SWORN**

14          THE COURT: Sir, lower your hand. Would you be good  
15 enough to introduce yourself, say your full name and spell your  
16 last name for the court reporter.

17          THE WITNESS: Brent Douglas Kelley, K-E-L-L-E-Y.

18                   **DIRECT EXAMINATION**

19          BY MR. REINHART:

20          Q. Thank you. Mr. Kelley, tell the Judge where you work and  
21 what you do for a living.

22          A. I work at Power On Computer Services, I am the CEO.

23          Q. What is Power On Computer Services?

24          A. Power On Computer Services is a trading partner for major  
25 companies and retailers.

1 Q. I know we have been using terminology today, you are  
2 essentially a secondhand buyer and seller?

3 A. Yes, secondhand dealer, yes, sir.

4 Q. We have used the term refurbisher. Is that a generic  
5 description of what you do?

6 A. Generic, yes.

7 Q. How long have you been in the market?

8 A. 26 years and 23 years as CEO.

9 Q. Okay. About how many -- are you familiar with the  
10 secondhand computer market?

11 A. I would say so.

12 THE COURT: Where is your company located?

13 THE WITNESS: Sacramento, California, Roseville,  
14 California.

15 THE COURT: Thank you.

16 BY MR. REINHART:

17 Q. We heard about the Microsoft refurbisher program. Do you  
18 have any affiliation with Microsoft?

19 A. No.

20 Q. In your experience, what percentage of people in the  
21 secondhand computer markets are Microsoft registered  
22 purchasers?

23 A. Hard to say how many people are out there doing this, doing  
24 Microsoft refurbishing and selling used computers.

25 THE COURT: Are you certified?

1           THE WITNESS: We have not asked for that, no.

2           THE COURT: So you are not?

3           THE WITNESS: We do it for all sorts of different --

4           THE COURT: All right.

5       BY MR. REINHART:

6       Q. Do you acquire computers, wipe them and resell them?

7       A. Your example, American Airlines, we do corporate business  
8       enterprises, education, Government, retail on line for the  
9       largest computer companies in the world.

10      Q. And over the course of your business, have you had occasion  
11      had to acquire reinstallation CD's?

12      A. Yes.

13      Q. Why do you do that?

14      A. Often times, when you get in all the units, they come in  
15      with them.

16      Q. Be careful with they and them. Computer discs?

17      A. I am not as experienced as some of these guys that sat  
18      here.

19           THE COURT: The thrust of the question was, in your  
20      company have you had experience to buy these reinstallation  
21      discs?

22           THE WITNESS: We typically get them from the customers  
23      when the computers come in.

24           THE COURT: Other than that, do you ever acquire them?

25           THE WITNESS: No.



1           THE COURT: That you can think of.

2           THE WITNESS: No. What we do with them, I guess could  
3 be the question, but we don't go out and purchase them.

4           THE COURT: Back to Mr. Reinhart.

5 BY MR. REINHART:

6 Q. Are you familiar with other people in the industry who do  
7 acquire reinstallation discs?

8 A. Yes.

9 MR. MORRIS: Objection.

10 THE COURT: Are you offering him as an expert?

11 MR. REINHART: No, just his experience in the business  
12 and what colleagues do.

13 THE COURT: I sustain the objection.

14 BY MR. REINHART:

15 Q. You have been in the reselling business for 26 years --

16 MR. REINHART: I offer him as an expert in the  
17 secondhand market and reinstallation discs.

18 THE COURT: Do you want to question? Why don't we  
19 save a lot of time. He has been in the business how long?

20 THE WITNESS: 26 years.

21 THE COURT: Refurbishing?

22 THE WITNESS: That is a legal term.

23 THE COURT: What do you call it?

24 THE WITNESS: Refurbishing is a term a manufacturer  
25 would use when they bring a unit back to factory

1 specifications. I call them used computers or secondhand  
2 computers.

3 *MR. MORRIS:* No objection.

4 *THE COURT:* You can proceed. That means you can give  
5 opinions if he asks that.

6 *THE WITNESS:* I like opinions.

7 *BY MR. REINHART:*

8 *Q.* You have been here all day?

9 *A.* Yes.

10 *Q.* You heard some of the questions the Judge was asking to Mr.  
11 Weadock a second ago?

12 *A.* Yes.

13 *Q.* Could you address his question about why would somebody  
14 purchase these discs, believing them to be counterfeit or  
15 believing them to be real?

16 Why would somebody buy a reinstallation disc?

17 *A.* It is about customer satisfaction, customer use, a  
18 customer's ability.

19 Often times we get the units in with them.

20 Remember, the computers that are in the secondhand market  
21 are two, three, four years old, so the OS is really past it by  
22 now. So the people like myself, if we happen to get the disc  
23 in, as a purchase convenience to our customers, we'll drop them  
24 into the box.

25 It might save us one customer support call, but there is

1 nothing worse than having a problem -- think about it, if your  
2 only option is to download something, how do you that with a  
3 computer that doesn't work? Having something to allow yourself  
4 to boot or the customer to boot up is the customer's  
5 satisfaction, that is the real reason for it.

6 Q. You mentioned to the Judge Apple and PC based secondhand  
7 computers. Do you resell them with an operating system in them  
8 or no operating system?

9 A. No operating system.

10 Q. Who do you sell them to to install an operating system?

11 A. Typically the folks at MRRS, M-R-R-S, Microsoft  
12 refurbishers.

13 THE COURT: So, you get a used computer, fix it up and  
14 sell it to a Microsoft refurbisher?

15 THE WITNESS: Yes. We actually process the entire  
16 unit, often times -- not often times. We go through the entire  
17 process and do data wipe, we remove any PII, personal  
18 identifiable information on the outside, whatever our clients  
19 stipulate in their agreement all the way through the entire  
20 process. Even, at one point on the PC, on the OEM PC's, we  
21 will go ahead and download free a Windows 10 demo version, we  
22 will put it on there, do all the tests for functionality.  
23 After we are done, we wipe that off, okay.

24 THE COURT: So you have a computer that you are  
25 satisfied, if you sell it to somebody, they can go out, then,

1 and either buy the software or whatever, but you are giving  
2 them a piece of hardware that is going to serve their purposes.

3 *THE WITNESS:* That is right. One more thing.

4 *THE COURT:* Sure.

5 *THE WITNESS:* We don't use the recovery disc to put  
6 the OS back on there, by then it is usually old.

7 Again, it is a convenience. The recovery disc, if  
8 they weren't using them, takes it back to whatever the old  
9 software is and wipes out everything.

10 Again, it is a last case emergency, nice to have, and  
11 some people like myself like to have some discs.

12 *MR. REINHART:* That is all, thank you.

13 *THE COURT:* Cross-examination.

14 **CROSS-EXAMINATION**

15 *BY MR. MORRIS:*

16 *Q.* Remember, we are going back to 2011, 2012.

17 There were people using Microsoft 7 and XP, correct?

18 *A.* I believe so.

19 *Q.* In those days, those were considered to be viable operating  
20 systems, correct?

21 *A.* They had been discontinued for some time, XP.

22 *Q.* 7?

23 *A.* I am sorry, 7. I thought you meant XP.

24 *Q.* Now, you said that if you got a recovery disc with the  
25 computer you would throw it in the box after you had done

1 whatever you did to refurbish -- you don't like refurbished.

2 What word do you use?

3 A. Used.

4 Q. You have done work on the computer, you only give the  
5 recovery disc to the person -- in other words, you only marry  
6 the recovery disc to each computer that has one. If it doesn't  
7 have one, you don't go out and buy one?

8 A. No.

9 Q. You only use the recovery disc with the machine that it  
10 came with?

11 A. We may get 40,000 on a pallet. If we get 40,000  
12 computers --

13 Q. Where do you get 40,000 computers?

14 A. American Airlines. If they return the discs, we have the  
15 discs.

16 Q. Go ahead.

17 A. In the time frame 2011 and 12, you are talking about  
18 computers manufactured in '08 or '09.

19 It is not like whatever is convenient or occurring in 2012,  
20 was what I am getting, I will get those in 2015 or 16. Does  
21 that make sense?

22 Q. Why do you sell the computer without an operating system?

23 A. It is not cost effective for us.

24 The folks that want to go through and do refurbishment,  
25 they might have a customer base that wants Windows, other ones

1 want other limits. For us, the way we do things in a typical  
2 sale, everyone out there, all right. I mean, it just depends  
3 on what our clients are wanting to purchase.

4 Q. And you said you only sell to Microsoft registered  
5 refurbishers?

6 A. The majority of our items, PC computers, will go -- we call  
7 it MRRS, I learned a new word, MRRS, possibly.

8 Q. When you sell to the Microsoft registered refurbisher, you  
9 don't sell the disc?

10 A. They don't need them.

11 Q. Because they have the software?

12 A. They have already finished, everybody signed the agreement.

13 Q. Why would you include software that is old with a computer  
14 with no operating system when you expect they will get an  
15 upgrade?

16 A. We drop them in the box if it is convenient.

17 If you have something newer, right, if you have something  
18 more current, we are not going to -- something more useable,  
19 laptops tend to be in that area.

20 We will go ahead and if we have the disc, we will give it  
21 to the customer for the most part. The discs have to be in  
22 perfect condition. I will not test the disc, I will not verify  
23 the disc, they have to be picture perfect. I am not going to  
24 create a customer issue by giving them a faulty disc.

25 If they come in and they are perfect, here is your disc.

1 If we get huge amounts of them, if they are in perfect  
2 condition, we may provide them to the refurbisher or whomever,  
3 particularly when we scrap them.

4 Q. What percentage of the time, if you have a large volume,  
5 say five thousand computers and higher, would you say you get  
6 recovery discs?

7 A. Well, we do get some in, not in direct proportion to the  
8 units we get.

9 Q. Give me a percentage.

10 A. Let's say we process 50 percent, maybe.

11 Q. And of those 50 percent, how many do you get a recovery  
12 disc for each machine?

13 A. That is what I said, 50 percent of the -- what we call  
14 Windows PC or personal computer.

15 Q. Okay.

16 A. We also do other computer companies, and we also have a  
17 contract, let's say, with Apple to reload their OS's, so we do  
18 those on thousands of units per week as well.

19 MR. MORRIS: No further questions.

20 THE COURT: All right. Any redirect, Mr. Reinhart?

21 MR. REINHART: No.

22 THE COURT: Mr. Kelley, thank you for coming.

23 Mr. Kelley, did you testify in another proceeding in  
24 this first case?

25 THE WITNESS: No, sir, this is the first time, must

1 have been a great looking guy.

2 *THE COURT:* Thank you for coming, sir.

3 Does that conclude all of the testimony on both sides?

4 *MR. MORRIS:* It does for the Government.

5 *THE COURT:* All right.

6 *MR. REINHART:* Nothing further, Your Honor.

7 *THE COURT:* Thank you. Argument, Government.

8 *MR. MORRIS:* Your Honor, it's the Government's  
9 position that in this particular case, what is going on is that  
10 they are using software manufactured in China that is the  
11 easiest software to counterfeit, that will give you a full  
12 operating system, that will allow you to install on a computer  
13 the version of XP Professional and Windows 7 Professional,  
14 which again are the more expensive versions.

15 We believe this does fall under one of the enumerated  
16 situations under 2B5.3, and the ones that we mentioned -- and I  
17 think we showed today -- is that the infringing item is or  
18 appears to a reasonably informed purchaser to be identical or  
19 equivalent to the infringed item.

20 Now, the infringed item we believe was infringed was  
21 the Microsoft operating system software, called the software  
22 image contained on the Dell installation disc.

23 That is, as you heard testimony, it is a full  
24 operating system. All it needs is a product -- well, you heard  
25 that you don't even need a product key if you wanted to --



1           *THE COURT:* If I can for a second, to clarify this, I  
2 take it the software that you claim -- that the Government  
3 asserts has been infringed is the Microsoft software which  
4 is -- which may be contained on a computer and an exact copy  
5 may be contained on a reinstallation disc that normally  
6 accompanies the hardware when it is sold.

7           Is that right?

8           *MR. MORRIS:* That is correct. In fact, what we point  
9 to is the copyright infringement count.

10           You could argue if we just charged the conspiracy to  
11 copy and traffic in copyright goods, it might not contain the  
12 actual software contained in the goods.

13           I can't argue that the infringement count doesn't go  
14 to -- that is what was infringed, the Microsoft operating  
15 system.

16           *THE COURT:* And you are saying the Defendants  
17 infringed on this copyrighted software because they effectively  
18 produced or had produced a device that had an exact copy of it.

19           *MR. MORRIS:* Correct. We think we demonstrated that  
20 and we think it is no accident that they used the recovery disc  
21 because as -- well, what we believe, and we believe we had  
22 testimony that demonstrated it, that is the easiest software to  
23 copy, the software disc to copy.

24           Now, there is a second way that I think also applies  
25 which is, it is a digital or electronic reproduction of the

1 infringed item, and we think that one is spot on.

2 That is exactly what they had. It is a digital  
3 electronic reproduction of the Windows operating system, XP and  
4 Windows 7.

5 Once you fall within the enumerated situations, which  
6 we believe you do, then you apply the retail price. Now, then  
7 it becomes a little more complicated, I grant you that, but  
8 we -- Microsoft, we actually went -- we talked a lot about  
9 this.

10 If you were to do this, which is what we think they  
11 were doing, finding a way to load the operating system on to  
12 computers being refurbished, the most expensive way would be to  
13 pay the retail price, and that would have sent the guidelines  
14 up astronomically, into the millions.

15 But we thought --

16 *THE COURT:* Let me stop, I want to make sure what you  
17 are saying.

18 I see. Well, I am not sure I do.

19 If your theory is -- if your theory is that the  
20 Microsoft software was going to be installed on a refurbished  
21 device, aren't the prices for that significantly lower?

22 *MR. MORRIS:* They are, that is where I am going with  
23 this.

24 What you have to do is go to a Microsoft registered  
25 refurbisher to get that low price, which you could do. If you

1 didn't to go a Microsoft registered refurbisher, you would have  
2 to pay the retail.

3 We talked to Defense and we believed, they are not  
4 bound by our agreement, what we believe the \$25 price for --  
5 and we actually went \$25 for Windows XP, and we agreed to \$25  
6 for Windows 7, and we found out that is higher.

7 *THE COURT:* Where are you going for those figures? I  
8 am looking at Government Exhibit 18.

9 *MR. MORRIS:* That is correct, I am, too.

10 *THE COURT:* All right.

11 *MR. MORRIS:* Small Microsoft registered refurbisher,  
12 with the Pro.

13 *THE COURT:* Okay. Right.

14 *MR. MORRIS:* Now, I suppose you could find --

15 *THE COURT:* What are the two systems involved in this  
16 case?

17 *MR. MORRIS:* You mean the XP, and Windows 7?

18 *THE COURT:* Are there more than that or just two?

19 *MR. MORRIS:* There are really two, XP, two different  
20 versions, we have a breakdown. There was SP3, I believe, there  
21 were some XP2 -- it is Windows XP?

22 I suppose there is another alternative --

23 *THE COURT:* Before you go to the alternative, I want  
24 to understand the first point.

25 Do I understand you to be saying the Government is

1 taking the position that rather than using the Microsoft retail  
2 price, you are assuming --

3 MR. MORRIS: The refurbished, yes --

4 THE COURT: -- that in this case, the effort was going  
5 to be to sell these discs to non-authorized refurbishers?

6 MR. MORRIS: Correct.

7 THE COURT: And therefore, you use the prices set here  
8 which is either 20 or \$25 -- 20 for the XP and 25 for Windows  
9 7?

10 MR. MORRIS: That is correct, but it is the  
11 professional. So, we agreed to the \$25 for both. At the time,  
12 that was the figure I was given.

13 THE COURT: I want to make sure I understand.

14 The Pro is 25 rather than 20?

15 MR. MORRIS: Yes.

16 THE COURT: And Windows 7 is 40 rather than 25?

17 MR. MORRIS: Right, we agreed to 25.

18 THE COURT: The point is, the Government is putting  
19 forth the scenario that, looking at the unique facts of the  
20 case, together with the testimony about the markets that exist  
21 out there, that you are suggesting that Mr. Wolff, the likely  
22 target for his sales would have been a non-registered Microsoft  
23 refurbisher; is that right?

24 MR. MORRIS: That is correct.

25 THE COURT: Okay.

1           MR. MORRIS: To put it in a nutshell, we believe in  
2 cases like this you just can't break the law, create an illegal  
3 black market with a retail price that is lower than the value  
4 of the harm Microsoft suffered and try to use that lower value,  
5 that harm against Microsoft in the calculation.

6           So, what we are asking you to do is apply it as if  
7 they actually went through the real Microsoft program.

8           That is the way --

9           THE COURT: I am not sure I understand what you just  
10 said.

11          MR. MORRIS: What we are saying is Microsoft has the  
12 program which they elected not to use. That is the program  
13 that lost the sale by the fact that they went --

14          THE COURT: I do understand now.

15          Both of these refurbishers are registered to  
16 Microsoft.

17          MR. MORRIS: Correct.

18          THE COURT: One is larger, one is smaller.

19          MR. MORRIS: Correct.

20          THE COURT: You are saying your view is the market, or  
21 the target for the sales would have been presumably a  
22 registered or non-registered, but you are suggesting you hold  
23 them to the registered Microsoft refurbisher, but the small  
24 which produces the lower number.

25          MR. MORRIS: Correct.

1           *THE COURT:* Your view is you have established this is  
2 an identical copy.

3           *MR. MORRIS:* Yes.

4           *THE COURT:* Mr. Reinhart.

5           *MR. REINHART:* Thank you, Your Honor.

6           Again, Your Honor, we never contested it is an  
7 identical copy, I think it is one of the elements of the  
8 marking.

9           There are two counts, illegal markings, and an element  
10 of the marking is that it is indistinguishable, and what is the  
11 item infringed.

12           *THE COURT:* What item do you think was infringed?

13           *MR. REINHART:* A reinstallation CD which, with a  
14 license not attached to it, has minimum value.

15           *THE COURT:* Think about it for a minute.

16           The recovery disc is simply a second copy of the  
17 Microsoft software. So, what is infringed, if anything, is the  
18 Microsoft software, is it not?

19           The disc is the second means of providing a copy of  
20 it.

21           *MR. REINHART:* The question is, what is the value of  
22 the disc?

23           *THE COURT:* Is that it or is it the value of the  
24 Microsoft software?

25           The two possibilities, what is the value of the

1 Microsoft software? Defense's contention, if I hear you, is  
2 what is the value of the reinstallation disc with the Microsoft  
3 software which doesn't have a license, and as Mr. Weadock said,  
4 zero to very low.

5 *MR. REINHART:* Your Honor, I think the Government's  
6 argument is speculative. I can point you to evidence in the  
7 record that you can rely upon.

8 Look at Exhibit 8, an email between Mr. Wolff and Mr.  
9 Lundgren in April of 2012. In the very first full paragraph --

10 *THE COURT:* Hold on if you would. I don't know if I  
11 have eight.

12 *MR. MORRIS:* Your Honor, we have a copy.

13 *THE COURT:* I have it, thank you.

14 *MR. REINHART:* The guideline standard is retail value.  
15 So here you have Mr. Wolff -- I'm sorry, Mr. Lundgren and Mr.  
16 Wolff talking about not selling these anymore at \$1.75.

17 If you look at Exhibit 20 --

18 *THE COURT:* What is the point you make?

19 This is the retail value that the infringers put on  
20 theirs. If we've agreed it is the retail value of the  
21 authentic device, the authentic software --

22 *MR. REINHART:* The testimony in the record is, if you  
23 go to Dell to get the authentic disc, you get it for free.

24 *THE COURT:* Let me tell you right off the bat, I don't  
25 buy your argument at all it is the disc. I am sorry, I hear

1 you, I think that is a specious argument.

2 What has been infringed here is Microsoft's software,  
3 the disc is a second copy of it.

4 So, what we are looking at is what is the value of  
5 that Microsoft software.

6 *MR. REINHART:* Your Honor, I point you to Exhibit 21,  
7 the discs to Mr. Cisneros. Mr. Cisneros paid \$3 for Windows 7  
8 and \$4 for Windows XP.

9 *THE COURT:* How is that relevant to anything?

10 What you are citing to me the prices -- I hate to say  
11 this about Mr. Cisneros, you are talking to me about the prices  
12 that the violators would pay. That is not the standard.

13 The standard here, if it is an exact copy, and we all  
14 agree it is an exact copy, if it is an exact copy, the question  
15 as a matter of law is, what is the retail price of Microsoft,  
16 not what the infringers are paying or able to get.

17 They are obviously engaging in an outlaw market, an  
18 illegal market that has a depressed value. That is why they  
19 are there, because the product is cheaper, not in Redland,  
20 California buying from Microsoft.

21 *MR. REINHART:* I understand the Court's position. It  
22 is not our position, we disagree.

23 I don't know how you value this from Microsoft's  
24 perspective, I truly don't. You don't have to be a Microsoft  
25 refurbisher to use these discs.



1           *THE COURT:* Right.

2           *MR. REINHART:* If I am Mr. Kelley, not a Microsoft  
3 refurbisher, he can get the discs from Dell legitimately.

4           *THE COURT:* He does not do that. He said he may put  
5 it on there to verify for himself that it works, and probably  
6 be able to show it to the purchaser who walks in, but then they  
7 wipe it off.

8           *MR. REINHART:* There are other people who could use  
9 that as a business model. If they did, there is no loss to  
10 Microsoft.

11           It is not costing Microsoft anything in that retail  
12 market because whoever is installing that has at some point  
13 paid for it. They are the end user from the original OEM sale.

14           I know I am frustrating you because I am not answering  
15 your question. I don't know how to answer it.

16           If it is your view in 18, you should take it for the  
17 lowest number that Microsoft sells it for.

18           *THE COURT:* I understand, we take the absolute low, we  
19 don't want to engage in speculation.

20           All right. I hear what you are saying.

21           *MR. REINHART:* I don't have it in front of me. I  
22 think six dollars is the lowest number on 18.

23           *THE COURT:* Ms. Golder, what is your position? Do you  
24 see this differently?

25           *MS. GOLDER:* Let me tell you where I think the

1 confusion and sticking point is.

2 Frankly, I am not totally against the Government's  
3 number, the number we looked at. My client acquired legitimate  
4 reinstallation discs from Dell for 10 or \$11 apiece. This is  
5 why I wanted to get to the infringing item and not the  
6 infringed item, because it is hard in this case.

7 The person ultimately that ends up with the disc and  
8 this computer has a license that is already paid for.

9 In other words, our position, and I agree with Mr.  
10 Reinhart on this --

11 *THE COURT:* Well, is that necessarily true? How about  
12 if somebody has the white box computers, they put it together,  
13 but for whatever reason they want to buy one of Mr. Wolff's  
14 discs, Mr. Lundgren's discs, and it turns out to be a  
15 counterfeit disc. They don't have the product key or licensing  
16 agreement, do they?

17 *MS. GOLDER:* They weren't sending it to an end user,  
18 they were selling to refurbishers. If you do that and you  
19 don't have one of the COA's, as you explained, you are not  
20 going to get the full functioning version of XP and after a  
21 period of time it shuts down.

22 I hate it, I went over to Apple, I hated dealing with  
23 the Microsoft stuff, the things wouldn't work. It says you  
24 don't have the right version, it might give you a 30 day trial,  
25 but then it will lock you out.

1           And, so, I mean, what is 30 days use of -- worth of  
2 use to somebody?

3           *THE COURT:* If you have your data in it, they have  
4 you, you will pay whatever it is --

5           *MS. GOLDER:* Then you have to pay Microsoft. The only  
6 way these discs have value, it is a convenience to the  
7 customer. I hated when they stopped giving me discs. They say  
8 you have a problem with your computer, you can't access the  
9 damn internet. They want me to download something, I have no  
10 internet access, it is something in the operating system.  
11 Whereas if you have a bootable disc, you can get up and running  
12 and somebody on the phone to help you.

13           Even with the counterfeit discs, you can still get  
14 support because you have that COA, and Microsoft got their  
15 money for a legitimate operating system. And remember the  
16 testimony, that license travels with that hardware for the life  
17 of the hardware unless you replace the hard drive and mother  
18 board. That was not going on here.

19           I have gone through this with a new hard drive and I  
20 tried to install the operating system and it wouldn't. I had  
21 to take it into a place, Comp USA back then, Best Buy, and they  
22 actually have --

23           *THE COURT:* We are moving outside the record, I think.  
24 They have discs that they use to fix it.

25           *MS. GOLDER:* I can only tell you when you start

1 looking at the value, it is not the value of a legitimately  
2 purchased licensed piece of software. What our clients  
3 produced didn't have that kind of value.

4 The value really is in the legitimate licensing of  
5 this. And so, in a way, when you are looking at it, if you try  
6 to attach a retail value, as I think the Court would like to  
7 do, it is really an unfair evaluation.

8 At least the Government came with for a compromise for  
9 us, even that tends to be on the high side because you could  
10 take that service tag or serial number, whatever, and go to  
11 Dell, and they will give you the disc for minimal cost, \$10 a  
12 disc, or whatever it is, and they will help you get it  
13 reinstalled on your computer.

14 As one of the experts said, Judge, if our clients were  
15 trading in the COA's, that would have value, now you are  
16 talking about the value of the license.

17 *THE COURT:* Sure, you would be talking about  
18 tremendous enhanced functionality down the road.

19 *MS. GOLDER:* Absolutely.

20 When you look at the numbers on Exhibit 18, that is  
21 what you are talking about, the licensing value, and that is  
22 not what my clients have trafficked in here. Mr. Wolff has  
23 taken responsibility for the fact that he shouldn't have done  
24 this and this isn't right. He did it because he rationalized  
25 that people already paid for the licenses, and really what they

1 were doing wasn't so bad, and that was in their minds.

2 He knew enough about computers to know you had to have  
3 the COA to make it work.

4 When we come up with a fair valuation, I don't think  
5 it is fair to use the value with the license, you need to find  
6 something else, some compromise value.

7 *THE COURT:* Thank you very much.

8 Well, first, this has been an interesting day. It has  
9 been long, but we certainly covered the waterfront in terms of  
10 the computer industry, and I suppose we have all learned a lot  
11 more than we knew, I can speak for myself.

12 Based on the testimony and evidence that was  
13 presented, I will make the following findings of fact.

14 First, we all agree, it is undisputed that Microsoft  
15 Corporation creates and markets a computer software and a  
16 computer operating system.

17 One of the ways that it brings about the sale of this  
18 is by entering into licensing agreements with other, I think we  
19 called them OEM's, Dell being the classic example. What does  
20 that stand for exactly?

21 *THE WITNESS:* Original equipment manufacturer, Your  
22 Honor.

23 *THE COURT:* We used Dell today because it stands out  
24 in some of our minds, and what Microsoft does with an original  
25 equipment manufacturer is it allows that original equipment

1 manufacturer to pre-install its software into the -- for  
2 example, the laptop computer that is developed.

3 We've all seen them when people buy these expensive  
4 and nice to look at computers, and they usually come securely  
5 encased in styrofoam and everything else, and I suspect a lot  
6 of us didn't appreciate the significance of that disc that was  
7 also in there.

8 I know I didn't. I vaguely recall having thrown one  
9 away, but that is what we are talking about, it is an insurance  
10 program. When you buy your laptop or desk top one assumes it  
11 is going to work.

12 Here is the very important reinstallation disc, but  
13 they become passe today. We know there is testimony about some  
14 of the reinstallation can be done in other ways.

15 What is significant is, when the purchaser, the end  
16 user buys the hardware and software, they obtain this  
17 reinstallation disc. Significantly, the reinstallation disc  
18 contains an exact copy of the Microsoft software that was  
19 pre-installed by the original equipment manufacturer.

20 And as has been indicated, again, I don't think there  
21 is any dispute about this, the purpose of the reinstallation  
22 disc would be if for some reason there is a catastrophic event  
23 to your computer, you would have the capacity to reinstall what  
24 you originally purchased.

25 We all understand when you purchase that software, you

1 obtain a license, and the license in this case travels with the  
2 equipment.

3 Now, that becomes important because someone can sell  
4 their computer and the new purchaser essentially inherits the  
5 license and has the right, if they lose the reinstallation  
6 disc, to be able to go to the original equipment manufacturer  
7 and the testimony is really, without dispute, that you can  
8 obtain a free copy of it.

9 The word "free" has become important because one of  
10 the tasks that the Court has today is to determine what is  
11 called the infringement amount, and that becomes important  
12 because it effectively drives the guidelines.

13 You know, I mentioned before the purpose of the  
14 guidelines is to try to achieve greater uniformity in  
15 Sentencing, and it does so by looking at different aspects of a  
16 criminal endeavor, and assigning values to it.

17 Unfortunately, but to use an example that is much more  
18 common in my experience, when we are in the drug area, we know  
19 there is a difference among different drugs, and there is a  
20 list, and we know heroin is way at the top of that list, but  
21 other drugs, other controlled substances are on that list, so  
22 we have to identify the drug that seems to be relevant and we  
23 have to identify the amount. Someone dealing in multiple  
24 kilograms of a drug is treated more seriously than someone  
25 engaging in smaller amounts.

1 In the fraud area, we look at the amount of the fraud,  
2 the amount gained or the loss to the victim.

3 I recognize some of these can be very arbitrary  
4 because we have amounts that we have set, and once you exceed a  
5 particular amount, the offense level goes up, and so on and so  
6 forth, and someone can say that doesn't make sense, my client  
7 was a couple thousand dollars below that and ought to be  
8 treated differently, but he gets bumped up and so on.

9 I acknowledge some of these things can be arbitrary,  
10 but I want to point out that the guidelines represent a  
11 concerted effort to look at different aspects of criminal  
12 activity and assign values to it.

13 We can argue whether those valuations totally  
14 encapsulate or accurately encapsulate the criminal activity.

15 But in this case, as Ms. Golder pointed out in her  
16 opening approach, normally one would use the value of the  
17 infringing article unless, unless certain exceptions occur, in  
18 which case you turn and you use the retail value of the  
19 infringed -- of the authentic item. And one of those  
20 situations is when the infringing item is or appears to a  
21 reasonably informed purchaser to be identical or substantially  
22 equivalent to the infringed item or is a digital or electronic  
23 reproduction of the infringed item.

24 Now, as I said earlier, what Mr. Wolff and Mr.  
25 Lundgren did -- and what they have acknowledged that they



1 did -- is that they produced and obtained -- had produced these  
2 exact copies of the legitimate reinstallation discs.

3 Now, I recognize there has been a dispute in the  
4 testimony about what you could do with one of these things, and  
5 I have certainly listened to Mr. Weadock's testimony and Mr.  
6 McGloin's testimony.

7 I find Mr. McGloin's testimony to be credible and  
8 worthy of belief that he did take the installation device and  
9 was successful in installing it on two different computers and  
10 that it worked. That is, it worked in the sense that it  
11 functioned.

12 I understand Mr. Weadock tried to do it and he was  
13 unsuccessful. I understand, too, that Microsoft, probably with  
14 the XP or one of them -- I may have them mixed up. One would  
15 close down after 30 days. Windows 7, apparently was more  
16 tolerant and you might have to put up with a continuing prompt  
17 that would ask you to activate it and follow those steps, but  
18 ultimately, if you didn't do it, what happened is, apparently a  
19 legend would come up telling you that you had software that is  
20 not genuine.

21 Now, one has to assume that in doing what they did  
22 that Mr. Wolff and Mr. Lundgren, both of whom are very  
23 intelligent people and have had a lot of experience in this  
24 field, that they understood the market that was out there, and  
25 I think the Government's suggestion that what unlikely was the

1 intended object -- I know there is a little bit of speculation,  
2 but the speculation here redounds to the Defendant's benefit --  
3 is that the aim was to sell these counterfeit copies to small  
4 refurbishers who would be able to use them and be able to  
5 provide the user with a functioning computer and operating  
6 system.

7 Now, I've looked at some of the case law in this area.

8 The Eleventh Circuit, which is the Appellate Court  
9 that this Court is obligated to look to, sits in Atlanta, has  
10 its main headquarters there, back in 2007, in a case called  
11 Lozano, United States versus Lozano, the Court had occasion to  
12 discuss the concept of whether you utilize the infringed, the  
13 authentic item's retail value or the infringing value, and  
14 pointed out that in that case, the trial court had correctly  
15 used the retail price for the infringed device, the authentic  
16 device.

17 And it did so because there was testimony in that  
18 regard, that it would have required an expert to recognize that  
19 the infringing items were in fact counterfeit.

20 Now, I have a copy of the counterfeit disc, and I have  
21 a copy and copies of the authentic discs. Candidly, there is  
22 no way, there is no way a reasonably prudent person would be  
23 able to differentiate between the two.

24 I guess that is the expertise of the counterfeiters,  
25 and I am not talking now about Mr. Wolff or Mr. Lundgren, I am

1 talking about these folks in China who are masters in having  
2 achieved this. You just wouldn't be able to tell.

3 There is testimony, and Mr. McGloin pointed out there  
4 are these two different codes that are actually imprinted, but,  
5 I think to be able to know that you would have to have resource  
6 to Microsoft or somebody with the master list as to what code  
7 and so on.

8 So, there is no way that the normal person would be  
9 able to tell the differences.

10 Remember, when we are talking about the normal person,  
11 we are talking about a reasonably informed purchaser to be.  
12 And I am assuming, by the way, that is the person in the  
13 refurbishing business who probably does this for their business  
14 and they deal in some quantity of these.

15 There is just really no way someone would be able to  
16 tell the difference.

17 Not only that, I find credible and worthy of belief  
18 Mr. McGloin's testimony with respect to what appeared on the  
19 screen when you loaded the disc into the computers. It's  
20 identical to the legitimate screen that would appear.

21 Now, maybe somebody who is truly an expert in this  
22 field would know the failure to ask for the authentication  
23 prompt at the beginning, maybe that was a sign, but it seems to  
24 me that goes way beyond the reasonably informed purchaser to  
25 be.

1 I would also point out, and I think Mr. Morris' point  
2 is well taken, that there is alternative to the first part in  
3 2A, subsection I, and that is, is a digital or electronic  
4 reproduction of the infringed item. That is exactly what we  
5 are dealing with. We are dealing with a digital or electronic  
6 reproduction of the infringed item.

7 So, the long and short of this is, I wish we had this  
8 discussion at nine o'clock this morning rather than probably at  
9 quarter of 4:00, where I realized for the first time that  
10 everybody agrees that we ought to use the value of the  
11 infringed device, and so, then the debate becomes, if that is  
12 what you are going to do, what is the value of the infringed  
13 device?

14 Now, there is a split in testimony on this.

15 Mr. Weadock suggested that the value is either zero or  
16 nominal. Mr. McGloin has suggested that the value is one of  
17 the values set forth on Government's Exhibit 18.

18 I appreciate Mr. Weadock's testimony, he is obviously  
19 someone with experience in this area, but I reject his  
20 testimony as not credible nor worthy of belief.

21 I find that Mr. McGloin's testimony is the correct  
22 view on that, and is in fact credible and worthy of belief.

23 To begin with, you need to step back for a second and  
24 say, look, we are in the real world, why were these people  
25 doing what they were doing? As nice a man and charitable a man

1 as Mr. Wolff is, I have had a chance to learn about Mr. Wolff  
2 by reading the Pre-Sentence Investigation Report, and I know  
3 there are admirable traits about him. I am not being facetious  
4 at all. He wasn't doing this as a charitable man, this was a  
5 financial investment for Mr. Wolff and certainly indicated that  
6 in the emails to Mr. Lundgren, this was a business, a business  
7 venture in which they invested about \$80,000 in the hope,  
8 certainly, of, number one, being able to market the product,  
9 and secondly, obtain a profit.

10 Now, so, clearly there is a value to these.

11 The question is -- and you come back to Mr. Weadock's  
12 testimony, because I understand the contention is, well, this  
13 doesn't have any value if you don't have a license. But, you  
14 know, that suggests you are dealing with honorable people,  
15 law-abiding people, people who would think it is important that  
16 you have a license.

17 Think about the world out there. You go to the  
18 movies, and you know that The Promise is showing at the cinema  
19 or whatever it is here in West Palm Beach, but you open your  
20 computer and you can get it on Channel 1 from China free.

21 Come on, there is illegitimate piracy going on, and it  
22 happens. This is a huge problem in the intellectual property  
23 area, we all know it, people have an appetite for all of these  
24 things. If you can do it and save money, people do do it.

25 It is done from the manufacturing level right down to

1 the user who thinks there is something wonderful about the fact  
2 that you can get something free that someone else would have to  
3 pay the cost of admission to.

4 But in all of them, as we have seen, sometimes you see  
5 these things on TV that say, look, that is piracy. That is  
6 what we are dealing with here.

7 Now, clearly there is a value, and so, again, I come  
8 back to what I said in the beginning. I recognize that people  
9 say this is awfully arbitrary, but the guidelines are crystal  
10 clear on this. That is, you need to use the value of the  
11 infringed device.

12 In this case, the Court has several possibilities that  
13 have been set forth on Exhibit 18, which I had in front of me a  
14 moment or two ago, so give me a minute here.

15 Remember, now, we are not talking about the disc, the  
16 reinstallation disc, that is just the means of installing the  
17 software.

18 The item that has been -- or the product that has been  
19 infringed is the Microsoft software. The potential valuations,  
20 I think, are all accurate as set forth on 18, but I accept what  
21 I think is a reasonable accommodation in this case because I  
22 suspect it does accord with what was in fact the Defendant's  
23 intentions, and that is to market these counterfeit  
24 reinstallation discs to small registered refurbishers.

25 And I do think that in looking for the retail value,

1 it is correct to look to the retail value that a registered --  
2 Microsoft registered, Microsoft approved small refurbisher, the  
3 monies paid to Microsoft.

4 For Windows XP, that is \$25 per unit of Windows XP,  
5 and for Windows 7, that is \$40 for Windows 7.

6 Now, if I understand the Government's position, it is  
7 further willing to discount the Windows 7; is that correct?

8 *MR. MORRIS:* That is correct, Your Honor.

9 *THE COURT:* I will accept that, although it is at odds  
10 with what I think is the credible testimony, but I want to do  
11 it in a way that is beneficial to the Defense that the  
12 Government is willing to accede.

13 What did Probation use?

14 *PROBATION OFFICER:* We used the \$25 figure.

15 *THE COURT:* That is what I will use. I will use the  
16 \$25 figure for each unit of Windows XP and each unit of Windows  
17 7.

18 Now, I don't want anyone to step back from the  
19 positions that are advanced, they are in the record and they  
20 can be raised before the Eleventh Circuit if any party cares to  
21 do that.

22 Now, it is 4:35 and we have two sentencings. My  
23 suggestion is that we recess for the evening and come back  
24 tomorrow at 10:30. I think I will have time, and I want to  
25 make sure we have adequate time for each Sentencing.

1 I am sorry if folks have come a great distance for the  
2 Sentencing, but there isn't any way to do this and do it  
3 properly, with justice to each gentleman in the time we have  
4 allotted.

5 How does that work out for the lawyers' schedule for  
6 tomorrow?

7 *MR. MORRIS:* That is fine. We will have our witnesses  
8 available.

9 *MR. REINHART:* I am checking, Judge.

10 *MS. GOLDER:* I have some stuff that has to get done at  
11 9:30 in the morning. I have to go for pre-op blood work.

12 *THE COURT:* What time could you be here?

13 *MS. GOLDER:* I could try to be here at 10:30. I will  
14 have that done and come straight up.

15 If it is okay, I know Mr. Wolff was scheduled to go  
16 first, maybe we could go first with Mr. Lundgren and then Mr.  
17 Wolff. Would that be all right?

18 *THE COURT:* Sure, that is fine.

19 *MR. REINHART:* I was going to say, I did have a  
20 meeting in Fort Lauderdale in the morning, if you could let us  
21 go in the afternoon after Ms. Golder goes.

22 *THE COURT:* I can't.

23 *MR. REINHART:* I will change it. We will deal with  
24 that. I will be here at 10:30.

25 *THE COURT:* Let me tell you this just as an advisory.



1           There is a matter set at 9:00, and I asked the  
2 courtroom deputy to call the lawyers to get a sense of the  
3 time.

4           Now, I wonder whether anyone called you to get a sense  
5 of what was today, and we have gone significantly over this,  
6 but I know we had to, we had to cover what we did.

7           But I really do hope I will be done at 10:30. That is  
8 a half hour longer. If we could do that, that would allow me  
9 to finish Mr. Lundgren's case hopefully before lunch.

10          Do you anticipate there will be much testimony?

11          MR. REINHART: No, Judge, some argument, and typical  
12 character testimony, an hour.

13          THE COURT: Any other major factual objections that  
14 need to be dealt with?

15          MR. REINHART: Nothing that the Court couldn't rule on  
16 based on the facts that we had today.

17          THE COURT: Why don't we do that at 10:30, and we will  
18 move on to Mr. Wolff's case as well. We will try to do it  
19 before lunch if we can. Otherwise, we will come right back  
20 after lunch, deal with Mr. Wolff's matter, and I have another  
21 matter later in the afternoon. That way we can handle all of  
22 that tomorrow.

23          We made some headway today. This was important, and  
24 the record has been developed. If need be, you can get this  
25 reviewed on the record.

1 I don't want to try to rush into what is really  
2 important and that is the Sentencing.

3 With respect to Mr. Wolff, has the Government filed a  
4 5K1 motion?

5 *MR. MORRIS:* We have, Your Honor.

6 *THE COURT:* That is all right. I wanted to be aware  
7 of that and we will see where we are on that.

8 *MR. MORRIS:* Thank you.

9 *THE COURT:* All right. What about Mr. Lundgren, has  
10 the Government filed a 5K1 on Mr. Lundgren?

11 *MR. MORRIS:* We offered Mr. Lundgren the opportunity  
12 and he declined.

13 *MR. REINHART:* I wouldn't think that is a fair comment  
14 to the Court.

15 *THE COURT:* Remember, when I took the plea I said that  
16 is something totally determined by the individual.

17 We all know even if someone does try to assist the  
18 Government, it is never a sure thing that the Government is  
19 going to say that it rises to the level, but it seemed to me,  
20 based on Mr. Lundgren's travels in China and so on, I would  
21 imagine he has information that would be extremely valuable to  
22 the Government, but I leave that with you.

23 So everybody knows, even if the Government doesn't  
24 file a 5K1 motion, there is a parallel motion called a Rule 35.  
25 We can talk about that tomorrow.

1 Please be assured, that wouldn't be held against Mr.  
2 Lundgren at all. That is his decision. There is a benefit for  
3 doing it, but no detriment for not doing it.

4 MR. MORRIS: We reiterate we are still interested.

5 MR. REINHART: The problem is, it is five years old.

6 THE COURT: All right. I understand that. We will  
7 recess until 10:30, and plan to move into Mr. Lundgren's case  
8 and then Mr. Wolff's case.

9 Thank you very much.

10 *(Thereupon, the hearing was concluded.)*

11 \* \* \*

12 I certify that the foregoing is a correct transcript  
13 from the record of proceedings in the above matter.

14  
15 Date: June 1, 2017

16 /s/ Pauline A. Stipes, Official Federal Reporter

17 Signature of Court Reporter  
18  
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20  
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23  
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25

Pauline A. Stipes, Official Federal Reporter

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# DOCUMENT 146

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF FLORIDA  
3 WEST PALM BEACH DIVISION

4 CASE NO. 16-CR-80090-HURLEY

5 **UNITED STATES OF AMERICA,** .

6 Plaintiff, .

7 vs. .

8 **CLIFFORD E. LUNDGREN,** . West Palm Beach, FL

9 Defendant. . May 23, 2017

10 VOLUME 2  
11 SENTENCING PROCEEDINGS  
12 BEFORE THE HONORABLE DANIEL T. K. HURLEY  
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

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2 Official Federal Reporter  
3 HON. ROBIN L. ROSENBERG  
4 Fort Pierce/West Palm Beach  
5 772-467-2337  
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Pauline A. Stipes, Official Federal Reporter

1           *THE COURT:* The next matter before the Court is case  
2 16-CR-80090. This is United States of America versus Mr.  
3 Clifford Eric Lundgren.

4           Let me ask counsel to make their appearances. I will  
5 start by recognizing counsel for the Government.

6           *MR. MORRIS:* Lothrop Morris and Jonathan McGloin and  
7 Daniel Richichi.

8           *THE COURT:* Welcome.

9           *MR. REINHART:* Bruce Reinhart and Lilly Ann Sanchez  
10 present for Mr. Lundgren.

11           *THE COURT:* Good morning, everyone, welcome.

12           As the parties will recall, we spent yesterday on a  
13 hearing determining an infringement amount.

14           The parties will recall that prior to that, Mr.  
15 Lundgren had come to court and he announced his decision to  
16 change his plea from not guilty to guilty.

17           Because of that, the Probation Office was asked to  
18 prepare a Pre-Sentence Investigation Report.

19           Now that report has been completed and a copy of the  
20 report has been provided to both parties.

21           Our Supreme Court has told us that in order to  
22 determine an appropriate sentence, the Court is obligated to go  
23 through a two-step process.

24           First, we need to begin by consulting what are called  
25 the Federal Sentencing Guidelines. I know we talked about that

1 yesterday but, as I mentioned, those guidelines were developed  
2 in an effort to try to achieve greater uniformity all across  
3 the United States.

4 The hope is that if there is more uniformity in the  
5 entire Sentencing system it would be more fair.

6 Now, as important as those guidelines are, what they  
7 ultimately do is they produce a nonbinding, nonbinding  
8 recommendation. Because it is nonbinding, the Court is  
9 obligated in a second stage to set out a list of factors that  
10 need to be consulted as well.

11 In a sense, by doing that, it assures that the  
12 Sentencing process is truly individualized as well, because it  
13 looks at the unique characteristics of the crime and unique  
14 characteristics of the person.

15 Coming back to the Sentencing Guidelines for a moment,  
16 our Court of Appeals has told us that in order to properly  
17 consult the guidelines, we need to make sure they are  
18 accurately calculated.

19 To do that, we want to pause for a few moments and go  
20 back and take a second look at the Pre-Sentence Investigation  
21 Report.

22 First and foremost, that the factual information, the  
23 description of what happened and so on, all of that is  
24 accurate.

25 Second, we need to be sure that the legal conclusions

1 that have been developed from those facts, that they are  
2 appropriate and justified, and finally and very important, we  
3 want to be sure the calculations generated, that they, too, are  
4 accurate.

5 Now, one other thing. I think we all realize  
6 sometimes when a Pre-Sentence Investigation Report is received,  
7 occasionally there are objections filed, and then there is a  
8 meeting with the U.S. Attorney and Probation Officer.

9 I want everyone to understand that it is my position  
10 this morning, irrespective of what may have been mentioned in  
11 an earlier proceeding, unless something is orally brought to my  
12 attention, I assume everything not raised has been resolved and  
13 no longer needs the Court's attention.

14 With that as a background, why don't I turn to Mr.  
15 Reinhart or Ms. Sanchez first to see if there are any remaining  
16 factual objections to the Pre-Sentence Investigation Report.

17 *MR. REINHART:* Your Honor, I need the guidance on  
18 whether this is factual or legal, that is the question of the  
19 amount of any restitution that is owed.

20 The Court has said Microsoft is entitled to some  
21 restitution and not a specific amount. We don't believe they  
22 are entitled to anything.

23 *THE COURT:* Okay, there are shadows of yesterday.

24 There are two things we need to talk about.

25 Restitution, of course, I would think is really --



1 probably, when you think about it, there are two components to  
2 it, there is a factual component and a legal component.

3 The factual component is what is the loss that  
4 Microsoft has sustained. We spent a lot of time yesterday on  
5 issues related to that.

6 The second thing is, everybody remembers there was a  
7 time when restitution could only be ordered if the party had  
8 the ability to pay. We are long beyond that because Congress  
9 changed the rules, and the law on that is that restitution is  
10 mandatory.

11 So, I suspect it is a factual issue, that is, as a  
12 matter of fact has Microsoft sustained a loss. Yes, that is  
13 probably a factual component.

14 I think maybe that is the better way to handle it and  
15 we can go on from there.

16 I wanted to mention one other issue that I think --  
17 you may have some other issues in addition to that, but one of  
18 the concerns I had is restitution -- not restitution, but the  
19 ability to pay a monetary fine. That is another factual issue  
20 that we needed to look at.

21 I was most concerned -- to help you out, I know Mr.  
22 Lundgren owns some stock, and I was trying to figure out  
23 whether that is an accurate valuation of that stock.

24 He had an ownership interest in his own company, but  
25 also in another company. At the appropriate time, maybe we can

1 talk about that. Sometimes stock valuations are more hopeful  
2 than real, but I thought I needed to know about that.

3 The first issue would be -- you tell me if I am  
4 phrasing this properly, but it is whether Microsoft sustained a  
5 compensable loss in this case.

6 *MR. REINHART:* The statutory language is pecuniary  
7 harm.

8 I am tying it to the Probation Report, paragraphs 107  
9 and 108, page 22.

10 *THE COURT:* Anything else other than that?

11 *MR. REINHART:* Not factually.

12 *THE COURT:* Mr. Morris, what about the Government, do  
13 you have any factual objections?

14 *MR. MORRIS:* We have a victim impact statement that  
15 addresses that issue, what Microsoft believes is the loss. I  
16 wanted to know if the Court has received that.

17 *THE COURT:* There was a letter sent, I think just  
18 received, but I think the Probation Officer has that. You  
19 don't have any factual objections, but you have some  
20 information that you would like to, at the appropriate time,  
21 offer on this issue?

22 *MR. MORRIS:* That is correct.

23 *THE COURT:* One of the reasons we approach these  
24 issues in two separate categories, the factual versus legal, is  
25 that the rules are slightly different. Whenever anybody makes

1 a factual objection to the Pre-Sentence Report, the Government  
2 bears the burden of establishing a controverted fact by a  
3 preponderance of the evidence.

4 Let me turn to Mr. Morris to allow the Government to  
5 see if the Government has evidence they want to offer.

6 MR. MORRIS: The only evidence we would offer is the  
7 one letter from the victim impact statement.

8 THE COURT: How do you mark that letter?

9 MR. MORRIS: We mark that Government Exhibit 17.

10 THE COURT: Any objection?

11 MR. REINHART: No, Your Honor.

12 THE COURT: Government Exhibit 17 received in evidence  
13 without objection.

14 (Whereupon Government Exhibit 17 was marked for evidence.)

15 THE COURT: May I also ask you, when you think about  
16 this, in resolving issues, the Court is allowed to consider any  
17 of the unobjected to facts in the Pre-Sentence Investigation  
18 Report, also, both sides have a right to offer evidence here in  
19 the proceeding.

20 I am wondering whether the Court also ought to have  
21 before it all of the testimony offered yesterday during our day  
22 long hearing where I received oral testimony from both sides.

23 MR. REINHART: We have no objection to that.

24 MR. MORRIS: Yes, we would agree.

25 THE COURT: All right. That is the evidence at this

1 point from the Government.

2 How about from Defense, does Defense care to offer  
3 evidence?

4 *MR. REINHART:* No, Your Honor.

5 *THE COURT:* All right. Argument by the Government.

6 *MR. MORRIS:* Your Honor, again, we are going to be  
7 relying on the Sentencing memorandum.

8 We believe in this particular case, the PSI correctly  
9 states what the guidelines should be, at least at the  
10 beginning.

11 So we recommend the guidelines for defendant Mr.  
12 Wolff --

13 *THE COURT:* Wait, this is Mr. Lundgren.

14 *MR. MORRIS:* For Mr. Lundgren is a base offense level  
15 of eight.

16 *THE COURT:* The issue is, what is the amount of  
17 restitution that -- if any, that Microsoft should -- that Mr.  
18 Lundgren should be required to make to Microsoft.

19 *MR. MORRIS:* Okay. So, with respect to restitution,  
20 we are going to rely on the victim impact statement which  
21 multiplies the 20,000 counterfeit Microsoft Windows XP and  
22 Windows 7 discs, and what they have done is, they used a \$20  
23 figure, which is 75 percent of the average profitability during  
24 the relevant time period, and they believe, again, because they  
25 didn't -- it is not pure profit to them, they deducted what the

1 cost would be, and came up with a total figure of \$420,000.

2 *THE COURT:* Well, let's go through this again now for  
3 a moment.

4 Yesterday in the hearing we had -- the Government  
5 offered what I think was Exhibit 18.

6 *MR. MORRIS:* Correct.

7 *THE COURT:* Which dealt with the retail price of the  
8 infringed software.

9 *MR. MORRIS:* Correct.

10 *THE COURT:* That was done to establish an infringement  
11 amount.

12 *MR. MORRIS:* Correct.

13 *THE COURT:* Restitution looks at the pecuniary harm  
14 sustained by the victim; is that right?

15 *MR. MORRIS:* Correct.

16 *THE COURT:* Help me out, how you arrive at the  
17 conclusion you arrive at.

18 *MR. MORRIS:* Microsoft calculated what they believe to  
19 be their cost which would not be profit, they didn't suffer the  
20 pecuniary harm for 25 percent of the retail value because that  
21 would have been cost.

22 *THE COURT:* You have to start at the beginning.

23 What is Microsoft's position as to the harm it  
24 suffered in this case? The Defendants produced how many  
25 counterfeit discs?

1           MR. MORRIS: 28,000, that is the amount.

2           THE COURT: Does Defense agree with that figure, there  
3 are 28,000 counterfeit discs?

4           MR. REINHART: Yes, Your Honor. That is the  
5 unobjected to fact.

6           THE COURT: 28,000 counterfeit discs. Where do you go  
7 from there?

8           MR. MORRIS: As I look at the letter, they used the  
9 \$20 number, and then they divided that -- frankly, they  
10 multiplied it by 75 percent, arriving at \$420,000.

11           From the Government's position, it should be the 25  
12 number which I think the Court correctly found, and then what  
13 Microsoft is saying is that you have to multiply that by  
14 75 percent, which equals the amount that they would ordinarily  
15 profit from the sale of each disc.

16           THE COURT: Well, I want you to take me through so I  
17 can understand what you are saying.

18           Let's deal with one disc. Which disc are we talking  
19 about here?

20           MR. MORRIS: More the Court valued, and I agree it  
21 should be valued -- we valued the discs the same.

22           THE COURT: We valued the XP, whatever, and Windows 7  
23 the same. What is XP, XP 2?

24           MR. MORRIS: More XP 2 and XP 3.

25           THE COURT: So we have referred to them as XP and

1 Windows 7.

2 MR. MORRIS: More correct.

3 THE COURT: What was the value attributed to them  
4 yesterday, retail value?

5 MR. MORRIS: The retail value, and I think it is  
6 correct, is \$25.

7 What Microsoft is saying, they do get the full retail  
8 value, but there is a cost associated with each sale which is  
9 approximately 25 percent of the retail value.

10 THE COURT: So, in other words, it cost them  
11 25 percent of the retail price to produce the item.

12 MR. MORRIS: Yes, produce, sell it and distribute it.

13 That gives the figure Microsoft believes is the  
14 pecuniary harm to them, 75 percent of the retail value.

15 THE COURT: In their words -- let's try to make this a  
16 little more simple here.

17 Microsoft is saying if somebody had not produced this  
18 counterfeit disc, we would have sold a disc, being that is a  
19 supposition, it would have cost us -- say it is a hundred  
20 dollars. It would cost us \$25 to produce it. We lost \$75 in  
21 this process.

22 MR. MORRIS: Yes, they believe that is a conservative  
23 calculation based on their numbers. They are trying to be  
24 conservative.

25 THE COURT: Now, again, just to put this back into

1 context of what was arrived at yesterday, Government Exhibit 18  
2 in yesterday's hearing listed the retail price based on certain  
3 distributors, whether it was an original -- a large original  
4 equipment manufacturer and then whether it was a large  
5 refurbisher, or small refurbisher, and so on.

6 So, in all of that, the Government utilized the lowest  
7 possible figures?

8 MR. MORRIS: Correct.

9 THE COURT: It was \$25 per disc, was it not?

10 MR. MORRIS: Correct. Yes.

11 THE COURT: Which was lower than the figure on  
12 Government's Exhibit 18. At that point, the Government said we  
13 will go with the low figure.

14 MR. MORRIS: At the time we entered into the  
15 agreement, we told them that is the figure we were going to  
16 use.

17 THE COURT: So, now, when we are looking at the  
18 restitution obligation to Microsoft, the theory that you are  
19 putting forward and that Microsoft offers through this letter  
20 is that they are entitled to 75 percent of the cost of each one  
21 of those discs.

22 MR. MORRIS: The retail value, yes.

23 THE COURT: The retail value because they deducted the  
24 cost of production.

25 MR. MORRIS: Right, 28,000 units.



1           THE COURT: That is your argument?

2           MR. MORRIS: That is our argument.

3           THE COURT: All right. Defense.

4           MR. REINHART: If I could start, I didn't cite these  
5 cases, I am sure the Court is familiar with the Eleventh  
6 Circuit law that the amount of restitution is based on the  
7 amount of loss actually caused to the victim. They don't get  
8 back more than they lost. It is to make them whole again.

9           The Government has a burden by the preponderance of  
10 the evidence to prove restitution and the Eleventh Circuit  
11 says, because the determination of restitution is by nature an  
12 inexact science, the District Court may accept a reasonable  
13 estimate of the loss based on the reason presented.

14           Microsoft's theory is it lost a sale because these  
15 discs were sold into the marketplace, at some point they were  
16 converted into full operating systems, and because of that,  
17 Microsoft lost a sale and they are entitled to be compensated  
18 for that loss.

19           The evidence is too speculative, the evidence in the  
20 record doesn't allow you to arrive at a number. We don't know  
21 whether one of those discs got converted, or all 28,000 did, or  
22 half of them did, or a third of them did.

23           THE COURT: Let's begin, if we all agree that there  
24 were 28,000 counterfeit discs produced, how many were seized?

25           MR. REINHART: I believe -- 28,000 were seized.

1           *THE COURT:* Well, maybe I am missing something, then.

2           If 28,000 were produced and 28,000 seized, isn't it  
3 reasonable to assume Microsoft sustained no damage because they  
4 had never been sold to anybody?

5           *MR. REINHART:* As much as I would like to say that,  
6 factually that is not correct.

7           We have taken the position 28,000 is the correct  
8 number for Sentencing purposes.

9           *THE COURT:* Correct number of what? That is my point.  
10 If a hundred thousand discs were produced and 25,000 were  
11 seized, wouldn't you then say there are 75,000 floating around  
12 out there and we can engage in this view of has Microsoft lost  
13 business and so on?

14           Let's go back to the figure. What does the 28,000  
15 figure represent in the Pre-Sentence Investigation Report?  
16 Where is that figure?

17           *MR. REINHART:* I will defer to the Government, that is  
18 the number they gave us.

19           *THE COURT:* Let's look at it for a minute to see what  
20 it represents.

21           *MR. MORRIS:* It does represent seizures, that is  
22 correct. We are not arguing that they were not seized, there  
23 were 28,000 discs seized by the Government. They were never  
24 sold, we still have them in our possession.

25           *THE COURT:* How can we use them for computing

1 restitution?

2 MR. MORRIS: I understand the point you are making.

3 THE COURT: You have to go back to what Mr. Reinhart  
4 cited.

5 If restitution is predicated on the pecuniary loss  
6 that they actually suffered, in a bank robbery case we say how  
7 much money was stolen from the bank.

8 MR. MORRIS: Right.

9 THE COURT: And if the police stopped the get-away car  
10 three blocks down the road and got back the \$10,000 that the  
11 teller passed to the bank robber, we would not order  
12 restitution to the bank if they got their money back.

13 So, I guess the question is, if 28,000 discs were  
14 seized, and certainly we have used that for computing the  
15 magnitude of the harm that was intended, but if restitution is  
16 looking at the loss that was actually sustained, where does  
17 that leave us?

18 MR. MORRIS: You know, I agree with the logic of that,  
19 and I will withdraw the restitution request based on that.

20 I think you are right, we did stop those 28,000 discs  
21 from entering the market, and I think in order to have a  
22 restitution figure they would have had to enter the market and  
23 they didn't.

24 THE COURT: Okay.

25 MR. REINHART: That is simple.

1           THE COURT: All right. That is simplified.

2           You know, recently I spent a lot of time in another  
3 case dealing with the concept of restitution, but the fraud was  
4 so enormous, a \$170 million fraud, that it was like we were  
5 engaging in this completely academic exercise because there was  
6 no likelihood at all that any one of the people involved could  
7 ever begin to make restitution.

8           But the law has changed and the law today is that you  
9 don't look at a person's capability of paying the restitution,  
10 nonetheless you are obligated to figure what was the harm  
11 suffered by the victims, and in those cases, they were multiple  
12 insurance companies who paid out for compounded medications,  
13 all of which were a huge fraudulent scheme.

14           In our case today, if 28,000 is the magic number that  
15 we all agree to, and all of that was seized, then, in a sense,  
16 by the action of law enforcement, Microsoft has been protected  
17 and these discs don't enter the commercial market, and yet, at  
18 the same time, the number of discs absolutely played a critical  
19 role in evaluating what was the contemplated harm. That is  
20 where we looked at the infringement amount.

21           On the one hand, it was absolutely necessary, and that  
22 is what we did yesterday.

23           Today, for restitution, I don't think we can do the  
24 opposite.

25           So, I will sustain the objection that was raised and

1 find, in light of the facts of the case, there is not a  
2 pecuniary harm that Microsoft actually suffered. If anything,  
3 through the efforts of law enforcement, Microsoft has been  
4 saved from suffering that pecuniary harm by the seizure of  
5 these counterfeit discs. Okay.

6 Let's move into the second category of issues, and  
7 that consists of legal issues within the guidelines.

8 Let's follow the very same approach.

9 I turn back to Mr. Reinhart to see if there are any  
10 legal issues within the guidelines.

11 *MR. REINHART:* We want to preserve the objections you  
12 ruled on yesterday, which were found at page eight, paragraph  
13 31, page nine, paragraph 33, and page ten, paragraph 39,  
14 relating to the evaluation of the amount of loss.

15 *THE COURT:* So we crystalize that, there is no  
16 question this is being preserved in the record. This deals  
17 with the methodology and amount of -- establishing the  
18 infringement amount.

19 *MR. REINHART:* Yes, computation of the guideline under  
20 2B5.3.

21 *THE COURT:* Yes. Does the Government have any legal  
22 issues the Government needs to raise?

23 *MR. MORRIS:* No, Your Honor.

24 *THE COURT:* As I said at the conclusion of yesterday's  
25 hearing, I don't expect anybody to step back from the positions

1 advanced, they are there and part of the record and can be  
2 susceptible to appellate review if that is what somebody  
3 desires.

4 In light of those rulings, let's walk through the  
5 Presentence Investigation Report together to make sure we have  
6 the correct calculations in front of us.

7 *MR. MORRIS:* Your Honor, may I make one request, this  
8 came to my attention this morning.

9 This Exhibit 18 which the Court relied on, it does  
10 contain -- this is the one that has the prices for -- retail  
11 prices for all these particular items.

12 It does contain information that Microsoft would not  
13 like it to be readily available to the public because this is  
14 proprietary information, so what we request is that it be  
15 sealed if possible.

16 *THE COURT:* Is there any objection to sealing 18 so it  
17 is there for appellate review, but simply not out in the public  
18 domain?

19 *MR. REINHART:* The Court has specific rules on  
20 sealing, so I defer to the Court. I just don't know.

21 *THE COURT:* I am going to grant that request. Clearly  
22 this is proprietary information. Somebody should not have to  
23 engage in disclosing proprietary information in order to  
24 preserve their own rights in litigation, and the normal way of  
25 handling it is to seal that. By doing it, it remains part of

1 the record so the Appellate Court can look at it and have the  
2 benefit of determining if pressures were made.

3 One of the figures was larger, but we used a  
4 discounted figure because representations had been made by the  
5 Government to the Defense.

6 *MR. MORRIS:* Yes.

7 *THE COURT:* Here is our problem while thinking about  
8 this.

9 We have the exhibit, but the exhibit was mentioned  
10 several times. Are you asking me to seal those portions of the  
11 record that deal with that?

12 *MR. MORRIS:* No, we don't need that.

13 *THE COURT:* All right. Let's begin, then. We start  
14 on page ten of the Pre-Sentence Investigation Report, paragraph  
15 48, that shows the total offense level for these offenses is a  
16 total offense level of 21. Moving over to page 11, 53, that  
17 shows Mr. Lundgren is placed in the lowest possible criminal  
18 history category, he is placed in criminal history category I,  
19 page 11, 53, and moving forward to page 20, page 20 at  
20 paragraph 97, the recommended guideline imprisonment range is a  
21 range of 37 to 46 months.

22 Do both parties agree that those are in fact the  
23 correct calculations within the advisory guidelines?

24 *MR. MORRIS:* The United States agrees.

25 *MR. REINHART:* Based on the Court's rulings, yes.

1           *THE COURT:* There is one other factual matter that we  
2 should resolve before we move on. That deals with Mr.  
3 Lundgren's finances and ability to pay a monetary fine.

4           As I mentioned to you, the concern that I had was the  
5 valuation of some of the stock. For instance, 30 percent  
6 interest in a company called ITAP, I-T-A-P, is valued at  
7 \$287,000.

8           His 100 percent interest in Tech Direct, which I  
9 understand is Mr. Lundgren's own company, he values at  
10 \$590,000.

11           *MR. REINHART:* May I address those issues?

12           *THE COURT:* Yes.

13           *MR. REINHART:* Your Honor, ITAP, Inc., as you well  
14 know from the letters and submissions, is the company Mr.  
15 Lundgren runs on a day-to-day basis, he's a 30 percent owner of  
16 the company, a public entity, not publicly traded. It's Mr.  
17 Lundgren and that is it.

18           287,000 represents the current value of the asset  
19 value if the company were liquidated tomorrow.

20           *THE COURT:* How about the \$590,000 in Tech Direct?

21           *MR. REINHART:* Again, not a publicly traded company,  
22 an entity Mr. Lundgren created, owns a residence that Mr.  
23 Lundgren rents. 590 is the value of the real estate.

24           *THE COURT:* Is it mortgaged?

25           *MR. REINHART:* It is not.



1           THE COURT: He owns it free and clear?

2           MR. REINHART: The entity --

3           THE COURT: Do you take the position he does not have  
4 money to pay a monetary fine?

5           MR. REINHART: It is not. We believe he is able to  
6 pay some monetary fine over time.

7           THE COURT: All right. That helps me.

8           What we have done is consulted the Federal Sentencing  
9 Guidelines, we have seen what recommendations they make.

10           They produce a nonbinding recommendation, and because  
11 it is nonbinding, the Court is obligated to turn to Title 18  
12 United States Code, Section 3553(a). Congress set out a lot of  
13 other factors, we can do that in a moment or two, but before I  
14 do that, the Court requires that I ask Mr. Lundgren a question.

15           Mr. Lundgren, are you aware of any problem or  
16 difficulty, anything that would be characterized as a legal  
17 impediment to stop the Court from pronouncing a sentence in  
18 your case? Are you aware of any problem like that, sir?

19           THE DEFENDANT: No.

20           THE COURT: Thank you. No legal cause having been  
21 shown why sentence of law should not be imposed, I would be  
22 more than happy to hear whatever you would like to say.

23           If it is okay with you, why don't I begin by turning  
24 to Mr. Reinhart or Ms. Sanchez to speak on your behalf, but I  
25 will come back to you.

1 Mr. Reinhart.

2 MR. REINHART: Thank you. For the clarity of the  
3 record, since we are talking about a fine, under paragraph 105  
4 of the Pre-Sentence Report, the guideline recommended fine  
5 range is \$7,500 up to \$2,000,000.

6 I know Your Honor reads everything we submit, I assume  
7 you read the letters.

8 THE COURT: I have.

9 MR. REINHART: I would like to introduce some of the  
10 people here yesterday and today. Mr. Lundgren's mother, Linda  
11 seem letter, brother-in-law Daniel Clark, who submitted a  
12 letter, a good friend, Kirstin Nera, who I will ask to speak in  
13 a second, and Robert Pratt who I will ask to speak to the  
14 Court. All here to support him. You got letters from his  
15 family members and all that.

16 There is one letter I wanted to comment on, that is  
17 what we filed supplementally. That is a letter from his  
18 employee, this is a gentleman who was a gang banger and down on  
19 his luck and desperately finding out what to do. He is a  
20 manager and supervisor in the warehouse, a trusted employee.  
21 There are a lot of people like that who work in Mr. Lundgren's  
22 company.

23 That is who he is today. He is a person who is giving  
24 to other people and trying to help other people.

25 He will speak to this and I will speak to this after I

1 ask the other people to speak as well.

2 Our real plea to the Court today is that in imposing  
3 sentence, you view Mr. Lundgren as who he is today, not the  
4 person for which he did the things and pled guilty five years  
5 ago.

6 I recognize he made a mistake and punishment has to be  
7 made, but proportionate, and show respect for the law in  
8 showing there are consequences for what you do, but also the  
9 law recognizes that people change and people should be given  
10 second chances, and they get it and learn from their mistakes.  
11 They should be given credit for that.

12 With that, I would like to ask myself near a to come  
13 up and speak.

14 *THE COURT:* Surely, yes.

15 Good morning, thank you so much for being here.

16 Would you be good enough to introduce yourself; would  
17 you state your full name and spell your last name, please, for  
18 the court reporter.

19 *THE WITNESS:* Kirstin Nera, N-E-R-A.

20 *THE COURT:* Kirstin.

21 *THE WITNESS:* K-I-R-S-T-I-N.

22 I did submit a letter and I am assuming that it got to  
23 you and you read it. I am nervous.

24 *THE COURT:* Take a deep breath, I want to hear what  
25 you want to say.

1           *THE WITNESS:* I am here to speak about Eric. I grew  
2 up in New Jersey before moving to Cleveland, Ohio. I did  
3 attend the United States Naval Academy, Purdue and North  
4 Carolina State, I have a bachelor of Science in industrial  
5 engineering and a Master's Degree. I grew up in a military  
6 family, and in going to the Naval Academy I had the honor and  
7 trust instilled in me at a very young age.

8           *THE COURT:* Did you graduate?

9           *THE WITNESS:* I didn't like being told what to do, I  
10 resigned and I transferred to Purdue.

11          *THE COURT:* How long were you there?

12          *THE WITNESS:* I went through the summer, I went  
13 through the hardest part.

14          *THE COURT:* Right. What did you do at Purdue?

15          *THE WITNESS:* Got my Bachelor of Science in industrial  
16 engineering, I graduated early with honors, straight with  
17 Purdue. I started at IBM in January 1999, and went directly  
18 into one of the supply chain roles. In May 2005, I was  
19 divested when IBM sold the PC division to Lenovo. I have been  
20 there since 2005, and that entire year I worked in various  
21 aspects, customer fulfillment, project management, cost  
22 engineering, serviceability, and for the last four years or so,  
23 I have been in inventory, whether it be worldwide or North  
24 America or some semblance of that.

25          *THE COURT:* Where are you headquartered?

1           THE WITNESS: I am out of Raleigh, North Carolina.

2           THE COURT: How do you know Mr. Lundgren?

3           THE WITNESS: We will get to that. Two years ago -- I  
4 don't know how much you know about the broker business, the  
5 secondary electronics market. It is a little bit underhanded  
6 still. There are some bad things that go on there, a lot of  
7 dishonest --

8           THE COURT: Back up and tell me what you are talking  
9 about.

10          THE WITNESS: So, what I do now, two years ago I took  
11 on the role --

12          THE COURT: You were discussing the broker business.  
13 What is that?

14          THE WITNESS: When a company such as Lenovo, Home  
15 Depot, any electronic devices that come back, used, damaged,  
16 open the box, we can't sell it as brand new, you have to do the  
17 hard drive wipe, any accessory world wide, parts, components  
18 from computers, up to a million dollar service, I am  
19 responsible for moving all of that inventory. I need to find  
20 trusted partners to deal with.

21               When I was brought into this at Lenovo, I was brought  
22 in to fix a person we believe had dealings with companies that  
23 weren't up to snuff. I had been contacted two, three times a  
24 week by companies that want a piece of this business because  
25 there is so much money in it, but there are so many businesses

1 that aren't trustworthy.

2           *THE COURT:* I don't understand what you mean by that.  
3 You receive equipment back, and you want to arrange for its  
4 sale so you can get money for your company, is that it?

5           *THE WITNESS:* Correct.

6           *THE COURT:* When you say you are concerned about the  
7 people the product might go to, what are those concerns, how  
8 they use it, what they do with it?

9           *THE WITNESS:* Correct. Lenovo has a lot of very  
10 strict guidelines, product that we get in North America must  
11 stay within the boundaries of North America. We were in the  
12 past selling it to brokers who were moving it overseas, which  
13 is not according to the policy agreement. It affects Lenovo's  
14 markets in those areas.

15           Some of the partners Lenovo had been working with for  
16 years and it started coming out that they were doing these  
17 things. I was brought in to fix it, and I started with the  
18 North America PC business, desk tops, tablets and notebook  
19 computers. So, looking at all of the brokers we had been using  
20 at the time and opening it up to new brokers, that is where I  
21 met Eric and his companies, ITAP and partners.

22           Within a month of coming into the job, Eric contacted  
23 myself and my manager at that time. He had previously been to  
24 Lenovo but didn't have much luck at that meeting because the  
25 people that were running it were doing underhanded things.

1           Honestly, his pitch on the phone started out like  
2           every other broker we listen to. It sounded like every other  
3           one would until he got to speak about hybrid brokering,  
4           recycling, and that is what he has done in the secondary  
5           electronics market.

6           *THE COURT:* What is special about that that caused  
7           your attention?

8           *THE WITNESS:* Rather than trying to refurbish a  
9           computer that may be very old, doesn't have a lot of resale  
10          value, it costs Lenovo a lot of money to do that, Eric found a  
11          way, if a computer more has components and pieces and was  
12          refurbished, it was sold in the secondary market to under  
13          privileged, going into school districts and whatever it may be.

14          *THE COURT:* Listening to you, I am thinking about a  
15          program I saw on television that expressed a concern about what  
16          happened to these computers. They showed an alley in Hong Kong  
17          and the waste is going into the ground water and everything  
18          else.

19          There is a market, but obviously Governments and  
20          companies are very concerned about what is really happening.  
21          So, I can imagine being concerned about having a legitimate  
22          broker who is telling the truth about where the things will go  
23          is terribly important.

24          *THE WITNESS:* Correct, and there is another OEM having  
25          been caught with the computers ending up in the wastelands in

1 China. You have child labor laws, and we were looking for  
2 trustworthy partners to show the end to end process and we knew  
3 where everything was going. We found that with ITAP, what he  
4 does with the products. I manage the sale of about 150 million  
5 products a year, I sell more than any sales person. What I do  
6 is extremely important to Lenovo, selling it to one wrong  
7 person and having one computer overseas in wasteland is  
8 millions of dollars to Lenovo.

9 Most of the computers are torn down to the level, they  
10 pull off the flash, memory, and resell the components to China.

11 Not only --

12 *THE COURT:* The components get sold so they can use  
13 them again?

14 *THE WITNESS:* They don't necessarily go into  
15 computers, but they go into talking toys or picture frames, so  
16 we are saving the world as a whole by not making new  
17 components, reusing components that have useable value and life  
18 left. When the computer battery dies, it is usually one out of  
19 the six to nine sells. He is able to go in and test all of  
20 those batteries and find which ones have useable life left and  
21 reintegrate those in China rather than melting them down for  
22 cobalt value.

23 We have a revenue -- if you melt something it is  
24 pennies on the dollar. If he is reusing them, I may get 50  
25 cents back for each of the sells. From that standpoint, Lenovo



1 is getting more money back, we are keeping products out of  
2 landfills, not polluting the environment.

3 *THE COURT:* What percentage of your business goes to  
4 Mr. Lundgren's company?

5 *THE WITNESS:* Out of the 150 million that I have been  
6 responsible for, he has gotten around 30 to 35 million of it.  
7 He gets a lot of my product, he is the preferred scrap vendor.  
8 There are areas using other partners, and they started to use  
9 Eric and his company. He moves products out of Mexico, Brazil,  
10 out of the various manufacturing plants out of China.

11 *THE COURT:* When you say he moves it out, you have  
12 access there and he is able to accept that?

13 *THE WITNESS:* Yes, we have facilities that can do his  
14 work in China, so we don't have to pay the logistic cost.

15 *THE COURT:* You move it from South America directly to  
16 China?

17 *THE WITNESS:* Yes, so he provided a solution to Lenovo  
18 that there was not that solution before.

19 To be honest, I have a budget number and since I have  
20 come into this role, I have consistently been at or below my  
21 budget because of the returns I am able to get from his  
22 company.

23 Lenovo --

24 *THE COURT:* How long have you had a relationship with  
25 his company? How long has Lenovo had the relationship?

1           *THE WITNESS:* I started my role in April 2015, and  
2 first spoke with him in May of 2015. We certified him in May  
3 2015.

4           *THE COURT:* So a couple of years.

5           *THE WITNESS:* Yes, certifying his facility --

6           *THE COURT:* Do you deal with Mr. Lundgren in that?

7           *THE WITNESS:* I do, he has a partner, Walson, as well,  
8 they run separate areas of the business, and they don't play in  
9 each other parts, they are subject matter experts in what they  
10 do.

11           *THE COURT:* I take it you have found him to be a  
12 person of integrity in terms of his business and business model  
13 that's advantageous to Lenovo, and you would argue to other  
14 concerns as well, policy concerns in terms of pollution and so  
15 on.

16           *THE WITNESS:* Correct. I one hundred percent trust  
17 him. I wouldn't be standing here on behalf of Lenovo if I  
18 didn't. The service he provides, end to end accountability,  
19 never once had an issue with any system coming back or any  
20 questions on anything. Sometimes we get reports, serial  
21 numbers from units that made it overseas, and none of them have  
22 come from Eric or his company.

23           *THE COURT:* Thank you for coming today. That is an  
24 interesting insight into someone who has created a business  
25 that has a useful purpose and works well with you.

1           THE WITNESS: Thanks.

2           THE COURT: Thank you so much.

3           MR. REINHART: You heard yesterday testimony from --

4           THE COURT: Mr. Kelley.

5           MR. REINHART: Thank you, Mr. Kelley. I would like  
6 him to speak again.

7           THE COURT: Surely. Mr. Kelley, introduce yourself  
8 again.

9           THE WITNESS: Yes, sir. Brent Kelley, K-E-L-L-E-Y.  
10 As I said yesterday, I am CEO of Power On Resources, but CEO of  
11 Glory Star Satellite Systems which --

12          THE COURT: Tell me the name.

13          THE WITNESS: G-L-O-R-Y, S-T-A-R.

14          THE COURT: Glory Star?

15          THE WITNESS: Yes, that is the largest Christian  
16 satellite distribution in North America.

17          THE COURT: You told me you didn't use the word  
18 refurbisher.

19          THE WITNESS: Did not.

20          THE COURT: That is the industry term, it is dealing  
21 in used computers. How do you know Mr. Lundgren?

22          THE WITNESS: What I do, Power On Services is -- we  
23 design, manage, process training programs for manufacturers  
24 such as Apple, Dell and large retailers as well. A lot of the  
25 secondary market, and what Lenovo, was talking about, a lot of

1 the post consumer products are really what we are talking  
2 about, after people use it.

3 And so, how I know him, actually that it is a funny  
4 story, but I met Eric overseas in Shenzhen, China.

5 *THE COURT:* Go ahead and read it slowly. People tend  
6 to go fast.

7 *THE WITNESS:* I wouldn't do that to you.

8 We were working on a large and innovative recycling  
9 project for Apple. His current partner had figured out a way  
10 to separate the LCD, the display on the phone, from the glass  
11 and there is a little something in them that's called a  
12 digitizer, a lot of words, but the thing is the glass and  
13 digitizers are proprietary, made by Apple for Apple, for their  
14 use, and has to be destroyed.

15 LCD, no big deal, it is made by a company, not form  
16 fit or functioning for anything. It has a multiple of uses as  
17 long as we could separate these pieces. Walson, he is an  
18 engineer -- when she said they serve different purposes, he is  
19 an engineer, Walson just works on stuff until he figures it out  
20 on the engineering side.

21 We figured out how to do it without damaging the LCD,  
22 and reuse the LCD.

23 Part of my role for the last 12 years is that we have  
24 been doing brand security functions for Apple. What that means  
25 is we are the largest demanufacturer or destroyer of iPhones in

1 the world.

2 *THE COURT:* Say that one more time.

3 *THE WITNESS:* At this time, right up until recently,  
4 we are the largest destroyers of iPhones in the world.

5 *THE COURT:* Somehow, when old iPhones die, they come  
6 to you and you figure out what to do with them?

7 *THE WITNESS:* A little more than that, brand security  
8 is protecting the brand. Often times you have a phone that  
9 goes back into service, can't be serviced, too old to service.  
10 The brand wants to protect itself, they don't want that  
11 particular unit going back out into the marketplace where  
12 someone else is going to have another negative brand.

13 So what we specialized in is demanufacturing and  
14 destroying iPhones for this manufacturer, as well as others,  
15 but this manufacturer in particular. What we came up with is  
16 the reuse of nonproprietary components. They have to authorize  
17 it, of course, it is not just a brand thing.

18 In this case, you are talking -- I'm trying to think  
19 of words I can say and not everyone question -- broadband,  
20 LCD's, there is componentry in there that can be taken,  
21 verified and made into new items.

22 Now, these are probably going to go into the secondary  
23 markets that can reuse the product, such as I heard picture  
24 frames, which is what we are talking about with this analogy.  
25 We could make a flash, but the idea is the same, reuse it

1 instead of rebuilding it for the same purpose, and there is a  
2 wealth of things that can be made with the highly advanced  
3 little products.

4 Again, if it is not approved, it is destroyed and not  
5 reissued. This doesn't go to a recycler, I think she alluded  
6 to this. The recycling industry is not always the best  
7 industry as far as integrity.

8 We held that position again, we are still contracted,  
9 and it is 12 years now, so they believe in our integrity.

10 *THE COURT:* What is your relationship with Mr.  
11 Lundgren? I take it your company is separate from Mr.  
12 Lundgren's.

13 *THE WITNESS:* Yes, sir, absolutely.

14 *THE COURT:* How did you get to know each other?

15 *THE WITNESS:* How we met was, when I found out, again,  
16 about the demanufacture of several million mobile devices and  
17 someone I dealt with and trusted found a way to separate the  
18 LCD that I could now remarket for three, five dollars each,  
19 multiply that out, I was there the next week. I flew out to  
20 Hong Kong and I said I am here.

21 *THE COURT:* This is Mr. Lundgren's partner?

22 *THE WITNESS:* Wasn't at that time, but is today. We  
23 are using translation now, Chinese, Mandarin, back and forth.  
24 He said no, no, no, come back in a month or two.

25 Now, any time in China the supplier wants you to wait

1 on anything, I actually start to dig in deeper quickly because  
2 it is never a good sign. And so, I let him know I would be  
3 there the next day, in China. I was in Hong Kong. I am going  
4 to be in China tomorrow, as a matter of fact. So, when I  
5 walked in the door, the first thing I saw was a fedora and then  
6 Eric Lundgren, and he introduced himself as Mr Wang's  
7 translator. It turned out the problem Mr. Wang had was his  
8 translator was on vacation, which was good for me to know.

9 So, I learned about three things that night; one, Mr.  
10 Wang actually spoke descent English despite what he thinks,  
11 Eric is a far more interesting person than a Chinese  
12 translator, and this is someone I really needed to know.

13 *THE COURT:* How far back is this?

14 *THE WITNESS:* This is China, so right before he came  
15 back to the U.S.

16 *THE COURT:* Okay.

17 *THE WITNESS:* We instantly connected and spent the  
18 entire evening until the sun came out again talking about God,  
19 the meaning of life, and actually, like so many other nights  
20 since, discussing how to make the U.S. electronics reuse and  
21 recycling industry more efficient and accountable. Those are  
22 large parts of my life.

23 So, I learned during that discussion Eric had been  
24 living in China for four years already which really has a very  
25 big way of distorting reality, good, bad, right, wrong.

1 Personally, for me, about a week after being there I needed to  
2 get home, it is a whole nother world that doesn't make any  
3 sense, and his best friend had just passed away during that  
4 time. He was at a turning point and ready for a life change.

5 I have enjoyed watching Eric grow and mature quite a  
6 bit after returning to the U.S. He has proven himself to be a  
7 reliable and trusted friend and someone's who handshake  
8 actually means something to me, which is saying a lot.

9 As a 26 year veteran of the reuse and recycling  
10 industry, I find his passion for creating new products from  
11 consumer waste very refreshing.

12 There are very few people in this world that actually  
13 get this. The industry is about grinding stuff up.

14 He is not your typical "green guy". When we talk  
15 about that, he is not a veggie crunchie tree hugger. He  
16 doesn't just talk about this stuff, he actually does it.

17 And so, an idea with him on Monday becomes a sleepless  
18 night on Tuesday. By Wednesday he is gathering people  
19 together, and Thursday they are working on something, Friday  
20 they are trying it out. The next Monday he has some new ideas  
21 on how to make it better.

22 So, just a couple of months ago, as an example, I  
23 received a call, I was digging a ditch at that time, but I  
24 received a call from a very excited Eric Lundgren. I get a lot  
25 of calls like this. This one started out with, buddy, I'm



1 going to break a world record and I want you to come down, and  
2 ended with me listing several warnings which ended with, you  
3 should really be wearing something fireproof for this, okay, in  
4 actual conversation.

5 His electric vehicle did indeed set a world record  
6 while wearing a NASCAR jumper, fireproof, and a fedora.

7 This electronic vehicle is made out of scrap parts  
8 from the EV industry, cars, I can't tell you the percentage of  
9 it, and out drove by mileage a Tesla.

10 It's drawing to the point I felt in my heart, and I  
11 know he does, too, stuff doesn't need to be disposed of, we  
12 need to be using this. Stuff like that is the perfect tool for  
13 the industry to go, change your heads and start looking at this  
14 from a real human perspective and a real world perspective.

15 We are not your veggie crunchies, we are practical  
16 business folks, but doing it is the key, showing it, because  
17 you don't change these battleships until they see it can be  
18 done.

19 In fact, just last week, before we arrived here for  
20 Sentencing, he beat his own world record in the same car, tuned  
21 it up, and next week, I hope, maybe two more weeks, we will go  
22 for another 20 more miles and get up to 400 miles, but all from  
23 scrap components from electric vehicles. We are talking about  
24 computers, scrap, vehicles, ten years from now are going to be  
25 the problem. Lithium batteries I won't touch with my own hand.

1 I won't let my employees touch them with their own hands  
2 without rubber gloves.

3 Your Honor, I do want to see this man continue and  
4 grow, do his work. He is an inspiration to me. I have been  
5 doing this a long time. He is an inspiration to me and we are  
6 able to talk and grow together as well. As long as I am doing  
7 this, I am finding new things, he is asking the questions.

8 Thank you for your consideration.

9 *THE COURT:* Thank you, Mr. Kelley, I appreciate it,  
10 and your testimony yesterday as well. Thank you so much.

11 *MR. REINHART:* I will ask Mr. Lundgren to say what he  
12 wants to say.

13 *THE COURT:* Yes. Mr. Lundgren, do you want to address  
14 the Court?

15 *THE DEFENDANT:* Yes, Your Honor.

16 Judge Hurley, I came here today knowing that I was  
17 going to be sentenced and there is a lot that I want to get  
18 out, but I am afraid I am going to jump around.

19 *THE COURT:* Take your time, I want to hear from you.

20 *THE DEFENDANT:* I might read it slowly so I get it all  
21 out and don't miss anything.

22 First I want to thank you for the opportunity to plead  
23 my case before you today. I certainly have made mistakes in  
24 this situation and I accept responsibility for what I have  
25 done. It is important to me, and hopefully to you, Judge, to

1 get to know the real me and not the one represented in this  
2 case.

3 I've spent the best part of my life trying to make  
4 things right in the world, both from a personal relationship  
5 standpoint and from a much larger problem, including the  
6 environment and humanitarian issues.

7 Your Honor, this case represents a moment in time, a  
8 moment in time of weakness for me. While living in China for  
9 four years I rationalized -- I rationalized my way into this  
10 situation. Never before have I done anything like this, never  
11 have I done anything like this before nor since. In hindsight,  
12 I really don't know what I was thinking.

13 I created a company called IT Asset Partners and  
14 devoted to changing the world into a cleaner more efficient  
15 environment. I am honored to lead 113 employees representing  
16 approximately 400 people including their families.

17 This is a responsibility that I take very seriously  
18 because my leadership provides their economic stability.  
19 Through this company, we strive to provide opportunity to those  
20 less fortunate while making a positive difference in the world.

21 Here are some of the ways how:

22 My passion is the environment. I care about the  
23 environment, so in Chatsworth, California in 2014, I founded  
24 the first electronic hybrid recycling company in the United  
25 States from scratch.

1 Today we serve Nintendo, Motorola, Fiat & Chrysler,  
2 Samsung, Lenovo and many others, successfully diverting over  
3 40 million pounds of eWaste from landfills a year by processing  
4 here in America.

5 This startup has since grown to employ 113 people now,  
6 today, and I feel responsible for them. My biggest fear is not  
7 going to jail, but letting them down, letting down people that  
8 rely on me.

9 I care about the future. I built the first electric  
10 car battery pack recycling facility that does all of the RMA's  
11 for Fiat and Chrysler trying to find the solution for electric  
12 batteries. It will be an enormous waste in the future, I am  
13 worried about that. We built the enormous RMA --

14 *THE COURT:* What is the word you are using?

15 *THE DEFENDANT:* Reverse logistics.

16 *THE COURT:* What did you call it, R what?

17 *THE DEFENDANT:* RMA.

18 *THE COURT:* What is the RMA?

19 *THE DEFENDANT:* A reverse solution for battery packs.

20 *THE COURT:* Okay.

21 *THE DEFENDANT:* This means \$40 million in savings,  
22 according to them, in the next ten years.

23 *THE COURT:* You are talking about getting batteries  
24 from cars and finding another use?

25 *THE DEFENDANT:* Every ten years the battery goes bad.

1 If you get in a wreck it may be weak. All battery packs go  
2 somewhere, they go to landfills and get smelted. So, we  
3 figured out a way to take out the working cells and build the  
4 power arrays that clean up the power ways in America. If you  
5 are in a rural area in the middle of the country, plug in your  
6 EV, and in 20 minutes have a full charge out of our old trash  
7 that is going to be thrown away. To me, it means a better  
8 world.

9 That is what I am about. That is what I live for.

10 I care about people. In 2015 -- in 2015, the  
11 Government of Ghana requested that we come over to help them  
12 solve the sixth most polluted environment in the world called  
13 Agbogbloshie.

14 I was busy trying to run a company, but they showed me  
15 pictures and we went.

16 *THE COURT:* How do you spell the name of that area you  
17 went to?

18 *THE DEFENDANT:* A-G-B-O-G-B-L-O-S-H-I-E.

19 *THE COURT:* Good, thank you.

20 You went over and what happened?

21 *THE DEFENDANT:* We were supposed to stay for a week,  
22 and we didn't go on behalf of any Government, we went on behalf  
23 of the company.

24 We wanted to film a documentary while we were there  
25 trying to figure out how to help the Government because they

1 didn't know what to do.

2 When we got there, it was a beautiful wetland 50 years  
3 ago, and today they pile up electronics and burn them.  
4 Everybody in the town that doesn't have a job goes to the  
5 location to burn this with gasoline every day. It is  
6 carcinogenic and next to Accra, which is a heavily populated  
7 city in Guyana.

8 The people doing the work are getting cancer from  
9 breathing in lead and everything being burned all day long.

10 We got there and we were supposed to stay a week. I  
11 remember meeting the vice-president, Arthur, and he took me to  
12 this fancy dinner and I said, let's try to fix this problem,  
13 and he laughed at me. He said you can't fix the problem, the  
14 problem is the problem. I said no, no, there are solutions,  
15 and I tried to explain it to him, and he said, have you ever  
16 been there? He said, you don't know what you are talking  
17 about.

18 That night he went home and I went to Agbogbloshie. I  
19 lived there, I lived there with my team, and I got to  
20 experience that first hand and see what happens to people when  
21 waste is -- when it is not handled properly. I saw orphans  
22 bleeding from their eyes, people getting cancer referred to as  
23 ghost children because they will not live past the age of 25.

24 Excuse me.

25 We were supposed to stay for a week, we ended up

1 staying for months, and we convinced the GIPC and the EPA to  
2 rewrite all of their policies. Now, today, there is no more  
3 burning in Africa, in Guyana, it is illegal today. And we got  
4 Home Depot in America to donate tools so they could separate  
5 this stuff and have a healthy solution to take this apart, and  
6 provided videos and the infrastructure to make sure people  
7 weren't hurting themselves, and helping the world, because why  
8 not? Because that is what I am about.

9 So they outlawed the toxic burning, and when we got to  
10 America, the EPA said you went there on behalf of the United  
11 States of America, and I said no. They said, well, we got word  
12 that the Ambassador here in the United States from Guyana said  
13 you came over to help them out on behalf of the United States  
14 of America, and I said no, we did it because we could do it.

15 I care about our troops. I grew up in a military  
16 family, my father is a Marine and so, I constantly look for  
17 ways where I can take this trash, this negative impact on our  
18 society, and turn it into a positive impact. Lemons to  
19 lemonade, how can I do it.

20 We found this great organization, Cellphones for  
21 Soldiers, we process all of their electronics and we refurbish  
22 and repackage 20,000 phones to soldiers every year, our troops,  
23 and ATT and Verizon, we said come on, guys, get involved, do  
24 something, and they did. They stood up and started donating  
25 minutes, and now every soldier that goes overseas can get

1 minutes and a cell phone.

2 We sit there as they are being deployed at the  
3 Cellphones for Soldiers desk, and I pass out minutes and cell  
4 phones because it matters.

5 Other programs that I'm working on today that are  
6 incomplete are in Nairobi. We are building with the charity  
7 Computers for Kids in Need, we are building an entire tech  
8 school using old electronics that we have. We got to refurbish  
9 the best of the best we could find, sending them over there and  
10 they use them as tools to bridge the gap.

11 In the Nairobi slums they are able to learn computer  
12 skills and get out of the slums. It gives them some sort of  
13 skill set that they can use to benefit themselves using what we  
14 were going to throw away.

15 And we broke ground on a project with Homes for Heros,  
16 we are building a home, and when I was asked what the budget  
17 was, I said, you know what, we can afford it, let's build the  
18 home. We are building Homes for Heros, breaking ground on it  
19 this month. I am supposed to be there to do the whole  
20 ceremony. I don't care if I am there, I care that it gets  
21 done.

22 That entire home is sponsored by my company which is  
23 made up of the people who work so hard in my company that I am  
24 supposed to lead.

25 *THE COURT:* Mr. Lundgren, you are telling me these



1 really remarkable things, projects and goals, which is truly  
2 admirable, but you understand the Court is obligated today to  
3 impose a sentence to serve as punishment for what you did.

4 *THE DEFENDANT:* I do, Your Honor.

5 *THE COURT:* What is your view of that? I need to ask  
6 you, why did you do it? You are a man of such talent and such  
7 creativity, what was going on here?

8 *THE DEFENDANT:* It was absolute stupidity. I  
9 justified it at the time, thinking I was doing it for the right  
10 cause, to keep laptops out of landfills. It was the dumbest  
11 thing in the world. I didn't have the right to print somebody  
12 else's brand, I didn't have the right to distribute.

13 *THE COURT:* Does your company have proprietary  
14 information?

15 *THE DEFENDANT:* I am ashamed today.

16 *THE COURT:* Does your company have proprietary  
17 information?

18 *THE DEFENDANT:* Yes, our process.

19 *THE COURT:* So you understand the importance of that.

20 *THE DEFENDANT:* I get it. I am not here to justify  
21 what I did. I pled guilty because I know what I did was wrong.

22 I am hoping you can find a way to let me pay for what  
23 I did rather than the people that rely on me.

24 *THE COURT:* I understand that.

25 I have to tell you, I wish you had sat down with the

1 Government and tried to work on a 5K1, because you could have  
2 given me flexibility to reduce your sentence.

3 I have to feel that your experience in China and the  
4 knowledge that you have would have been invaluable.

5 *THE DEFENDANT:* Your Honor --

6 *THE COURT:* Here is the point. I just wish they were  
7 in a position to file that motion today because it would have  
8 made my job a lot easier and would have had some societal  
9 benefit to it.

10 There is this Rule 35 I mentioned yesterday, I leave  
11 it out there. There are cases where people can't do it for all  
12 kinds of good reasons. I have drug cases where people live in  
13 Mexico, no way they can assist the Government.

14 But I would imagine, through your experience in China  
15 and so on, many wonderful things, but it is a hot bed of  
16 counterfeiting and so on. But we are where we are, and the  
17 Government has not filed that motion. I want you to think  
18 about it. You could really do some help.

19 *THE DEFENDANT:* Within three days of finding out,  
20 before any indictment, four and a half years ago, within three  
21 days of finding out about this, I was here for the first time  
22 ever in West Palm Beach, and I was meeting with the prosecutor  
23 in three days. I wanted to communicate, I came to figure this  
24 out and make sure that I could do whatever I could to make this  
25 right.

1           There is nothing to make right, and no pre-notice, it  
2       was a raid on my house, I wasn't there, I was in Dallas. The  
3       second I heard about it, I flew straight here and I tried to  
4       deal with it.

5           *THE COURT:* I know those are difficult decisions. I  
6       am not faulting you, I am telling you this is a difficult  
7       Sentencing because I credit everything you are telling me, you  
8       are a very remarkable person. I don't get people like that all  
9       the time in court. Look, somebody who committed crime after  
10      crime after crime, that is not you at all.

11           Unfortunately, you did commit a serious crime here.  
12      Anything else you want to say to me that you think I need to be  
13      aware of?

14           *THE DEFENDANT:* No. My every hope is you find a  
15      sentencing method that I pay for what I've done, and I hope it  
16      is me and not the people that rely on me.

17           *THE COURT:* Thank you very much.

18           Let me turn to the Government.

19           *MR. REINHART:* A few brief remarks.

20           *THE COURT:* Yes. You can sit down, Mr. Lundgren.

21           *MR. REINHART:* Thank you very much. I want to make a  
22      few remarks.

23           The Court is aware from having seen Mr. Lundgren in  
24      person, and you commented on this when he pled guilty, he told  
25      you when he was 16 years old he started his first business and

1 he has been hustling ever since. To try to get that into  
2 someone else's head is difficult. In conversation with Mr.  
3 Lundgren about why he did it was, I was 20 some years old, I  
4 was living in China, I was hustling and I just didn't think.  
5 It was quick money, trying to get my businesses up and running,  
6 and I made a stupid decision. I think that is the truth and  
7 that is what happened here.

8 Often times Your Honor imposes sentence and people  
9 stand here and say, judge, I am going to do better, judge, I  
10 learned my lesson. If you look into the future, you will see  
11 it is okay.

12 This is a rare case, this is not Mr. Lundgren saying I  
13 am going to be a better person and learn from my mistakes.  
14 There is concrete evidence that he has learned. That was a  
15 period of life with this and other things going on in China,  
16 and he is trying to move forward.

17 So, I recognize under the guidelines, Your Honor --  
18 not under the guidelines, under 3553, Your Honor has to balance  
19 a lot of different factors.

20 One of the things, when you talk about the guidelines,  
21 the guidelines try to quantify certain factors. One of the  
22 factors that doesn't do a lot of quantifying is the history and  
23 background of the Defendant. They don't let you factor in what  
24 you just heard and what you learned about Mr. Lundgren and all  
25 those things. You don't get points off for that.

1           The factor that talks about the history and  
2 characteristics of the Defendant is coequal with the one that  
3 talks about the guidelines, Your Honor. You could give  
4 whatever weight to those two that you want. You could look at  
5 the case and say I accept the guidelines, I must consider them.  
6 For purposes of this case, this defendant, I don't give a lot  
7 of weight to the guidelines.

8           Given the recommendation that the Government is going  
9 to make, the Government agrees the guidelines, driven by your  
10 findings yesterday, are not the right guidelines. As Mr.  
11 Lundgren said, it's not that he was unwilling, he was unable  
12 to. He had information on people in China, there is a factory  
13 on this street and this corner, and as time progressed, his  
14 information got old.

15           It wasn't that he was unwilling; it was he was unable.

16           I understand that what Section 5K does give you  
17 legally, and 3553, it is discretion you need. After the Booker  
18 case, you can evaluate 3553 factors any way you want to.

19           We urge the Court -- clearly you have to give weight  
20 to the need for deterrence. If I am looking at it from the  
21 Government's perspective, that is the factor that deserves the  
22 most weight.

23           When you look at the history and characteristics of  
24 the Defendant and respect for the law, respect for the law cuts  
25 both ways. If you impose a sentence too long, that doesn't

1 show respect for the law; if you impose a sentence too short,  
2 that doesn't show respect for the law. That factor should take  
3 into account it has been five years since this happened, he has  
4 moved on and become a positive person, and there is a sense  
5 that taking that all away for something that he did back then  
6 is something the Court might want to take into account and  
7 should take into account in balancing all of the factors that  
8 you have to balance in this case.

9 So, our recommendation -- I believe the Government is  
10 going to recommend 18 months in this case. I ask you to impose  
11 house arrest. That is punishment, liberty taken away, strict  
12 conditions on him, and sends a message. This is not a slap on  
13 the wrist. It allows him to continue on the arc he is on, to  
14 be the good person he has become, not pull the rug out from the  
15 progress he made, and let him be the person you read about and  
16 heard about this morning.

17 That would be our request, Your Honor.

18 *THE COURT:* Thank you very much.

19 Let me turn to the Government for the Government's  
20 assessment.

21 *MR. MORRIS:* First of all, this case reminds me, as  
22 many of these sentencings do, how hard your job is because what  
23 you are really doing is balancing two interests.

24 You are balancing the interest -- in arriving at a  
25 sentence, you are balancing the interest of Mr. Lundgren, but

1 also the interest of the community.

2 In this case, obviously, we are talking about a very  
3 large community, we are talking about people who use computers  
4 and all that entails, Government, military, education, personal  
5 use.

6 What they are asking for is not leniency, they are  
7 asking for a complete pass. Let's call it what it is.  
8 Probation, that is really not a punishment in this case.

9 What I would like to do, though, is focus a little bit  
10 on what Mr. Lundgren did after he was aware that the Government  
11 was investigating him.

12 We gave him the opportunity immediately when we met --  
13 I wasn't going to mention this because, frankly, it was a  
14 meeting that we had when he first came. We told him -- we had  
15 the exact same idea as you, we said, look, we think you could  
16 be helpful, you know China, you know people in China. We are  
17 very interested in knowing where this came from. You can come  
18 in and tell us, and that will help you, and we discussed that.

19 He said no, I am not going to do that. And, frankly,  
20 what he said was, I didn't do anything wrong. He didn't  
21 believe at that time, I am convinced he didn't believe. He  
22 knew what he was doing, but he rationalized it to a point where  
23 he was not -- he wasn't even close to accepting responsibility.  
24 In fact, he seemed very upset that we would even accuse him of  
25 this.

1           So, it evolved, but the theme I want to go with here  
2       is you almost are looking at two completely different people.

3           When you look at the case, you look at the fact that  
4       he really -- we had to drag him kicking and screaming into  
5       taking responsibility, and then he comes here and presents  
6       through his motions, you know, this -- I think it is -- again,  
7       technically he is accepting responsibility, but accepting  
8       responsibility and valuing the discs being at zero dollars,  
9       indicating that he is saying he never sold this for the reason  
10      we know he sold it, which was for refurbishers to use the  
11      software, we know that is what is going on here.

12          So, if you look at -- and one of the ways to analyze  
13      this is you look at the way Mr. Wolff reacted.

14          I think their conduct, even though they played  
15      different roles on this, was on par, they are equally culpable.  
16      Look at how Mr. Wolff approached this. When we told Mr. Wolff  
17      what we were investigating, he couldn't be more helpful.

18          It took awhile for him to say everything that he had  
19      done, but he gave us -- we took his computer and discussed it  
20      with him, we said we want you to cooperate. He helped us in an  
21      undercover investigation that helped to ultimately charge Mr.  
22      Lundgren, and afterwards, he helped us again by giving us his  
23      computer.

24          He did all these things, meanwhile Mr. Lundgren was  
25      denying, denying, denying any culpability at all, and the



1 bottom line is, in my view, there has to be some importance  
2 attached to that fact because when you are going forward,  
3 acceptance of responsibility and truly understanding what you  
4 did was wrong, no matter how many great things you have done --  
5 and I agree, he has done many great things, God bless him for  
6 it, and I think it is wonderful, and I hope and expect him to  
7 do more wonderful things.

8 He has to be sent the message. I am not asking for a  
9 long incarcerative sentence in this case. We came down already  
10 through the negotiated plea to a sentence of 18 months. You  
11 know what, Judge, I didn't know at the time all the things he  
12 had been doing when we agreed to that. I am impressed, but I  
13 still believe a sentence of some amount of incarceration is  
14 required, and here is why.

15 Piracy, computer piracy and, you know, ransom ware,  
16 viruses and all the things that come into it, is not just the  
17 loss of income to Microsoft, which is huge -- in fact, I have  
18 some statistics that show the economic loss in 2015 was likely  
19 1.3 billion dollars a year, not to Microsoft, but in the  
20 industry due to counterfeit. This is not a small problem.

21 We are not saying Mr. Lundgren is responsible for  
22 that, but he was playing his part in that. This is a serious  
23 business.

24 And then you asked the question, do you have  
25 proprietary information, do you have things that you would not

1 want other people to steal from you as a businessman? And of  
2 course, the answer is yes, we do, and we wouldn't want people  
3 to steal it from us.

4 So, a childhood indiscretion, I don't think that is  
5 what this was. This was not something you drop in and fall  
6 into this. You had to know where to go in China. First of  
7 all, travel to China, find the right factories. You saw all  
8 the emails going back and forth, a lot of effort was undertaken  
9 in this, and it wasn't for one month or two months, it was for  
10 two years.

11 The amount of money may seem small, but, you know,  
12 when you are starting off and trying to get your company off  
13 the ground, it is no small amount of money.

14 So I think that the bottom line is, the Court can  
15 fashion a remedy that will hold him responsible for what he  
16 did, and yet maintain the fact that he is an entrepreneur in  
17 America. We celebrate entrepreneurship when it is done the  
18 right way, not stealing others' ideas, taking shortcuts. That  
19 is the object of the entrepreneur and I believe there is an  
20 entrepreneur inside of him, but there is a thief inside of him.

21 None of us are perfect, we have different sides. This  
22 demonstrates it, you have almost complete polar opposites. On  
23 one side you see the entrepreneurial spirit, you want him to  
24 thrive, and on the other side you see a pirate, the opposite.  
25 And the Court is left with a record, which I think is a clean

1 and very powerful record of these two contrasting sides of Mr.  
2 Lundgren.

3 That is, of course, what the Court is here for, right,  
4 to develop a record, to see the whole of what Mr. Lundgren is,  
5 and then you are left with the very difficult task of  
6 fashioning a sentence that doesn't destroy Mr. Lundgren and his  
7 future, because we don't want to do that, but at the same time  
8 we have to punish this terrible problem that we have because so  
9 many people think that, you know, counterfeit Microsoft  
10 software, oh, Microsoft is a multi-billion dollar company, no  
11 big deal to them, it is not a crime.

12 And, you know, these cases are hard to do, and they  
13 don't come along every day. And it is unfortunate, you know  
14 that he is not just a total pirate with no redeeming qualities,  
15 it would be easier to sentence him, but you have to recognize  
16 that Microsoft isn't any better off because he is a wonderful  
17 guy. They are damaged and harmed and so is the country when we  
18 have -- you know, the bottom line is, I get why he felt in  
19 China that it is okay to be a pirate because in China everybody  
20 is a pirate. That is what they do.

21 They don't recognize the intellectual property rights  
22 of companies, at least certainly not American companies, maybe  
23 Chinese companies, but in America, we have to recognize those  
24 rights. Those are the entrepreneurial rights that make the  
25 dream he has in his mind come true.

1           We have to protect that. Bill Gates did not steal his  
2 software to create his company, he didn't. No, he did not. He  
3 did not. The bottom line is, we need to protect intellectual  
4 property rights in this country, it has to mean something, even  
5 with people who are doing good things.

6           What I am asking for, and I know it is a difficult  
7 request, is an incarcerative sentence that does not destroy Mr.  
8 Lundgren in his future, but also does justice to our  
9 intellectual property laws which need to be followed, and this  
10 is a case where people are going to hear about it in his  
11 community, which is a small community, these are the types of  
12 people that deal -- you heard it from one of the people  
13 speaking on his behalf.

14           So, the answer can't be, oh, Mr. Lundgren got charged  
15 for stealing counterfeit -- he got charged for stealing  
16 counterfeit software, there was no consequence. He got  
17 probation, he walked out of the courtroom, no problem. That  
18 sends the wrong message, and we can't send that message.

19           I know it is hard, I am not asking for a lengthy  
20 sentence, but he needs a sentence where when somebody asks him,  
21 when you got caught for that, did you go to prison -- I don't  
22 care if it is a day, a month, two months, doesn't matter -- the  
23 answer should be yes, I went to prison. It is a white collar  
24 case, but he needs to go to prison, and I know you are going to  
25 do the right thing, I know you are.

1           That is what I am asking for.

2           *THE COURT:* Mr. Morris, thank you.

3           *MR. REINHART:* Your Honor, there is one thing for the  
4 record. I think the fact that Mr. Lundgren took certain legal  
5 positions at Sentencing and during the litigation is not  
6 something the Court should hold against him. The fact that we  
7 filed a motion and argued valuation is not something that the  
8 Court should consider.

9           *THE COURT:* No. The parties have a right to assert  
10 positions and Mr. Morris said these are hard cases to  
11 prosecute, and I was sitting listening to it thinking these are  
12 hard cases to listen to, too. They are very complex, very  
13 tough. You folks are much more adept at this than I. I use a  
14 computer and yesterday was a revelation listening to the way  
15 this industry works.

16           Absolutely not, the parties have a right to argue  
17 their positions, people have a right to say I want to exercise  
18 my constitutional right and go to trial. That is what I get  
19 paid to do, I'm here and if someone wants to do it, that is  
20 their right. That is what we put in place, don't worry about  
21 that.

22           We began today by looking at the advisory guidelines.

23           I've talked several times about how important the  
24 guidelines are because they really make an effort to avoid  
25 these inexplicable highs or inexplicable lows, and if we have a

1 Criminal Justice System that goes across the country there  
2 ought not be different sentences in urban areas versus rural  
3 and East Coast and West Coast, and so on.

4 On the other hand, sentences need to be  
5 individualized, and this case illustrates the importance of  
6 that.

7 We began by looking at the advisory guidelines, but  
8 now the Court is obligated to turn to Title 18 United States  
9 Code, Section 3553(a), where Congress set out these factors.

10 The first is, appropriately, the nature and  
11 circumstances of the offense.

12 I must admit, I probably have only the most  
13 rudimentary concept of software, I know it exists, I see when I  
14 hit a button on the computer that something happens, but we all  
15 understand it is this combination of numbers and so on that  
16 allows operating systems to work.

17 It is a monument of creativity, and we have this  
18 concept, whether it be patents where we patent somebody's  
19 invention, a novel invention, we give them a monopoly on it for  
20 a period of time because we want to encourage creativity. We  
21 do the same thing with copyrighting written works or, in this  
22 instance, software.

23 And we all, in the course of our lives, I suspect,  
24 understand the extraordinary benefits that come to us.

25 When I went to law school, that is probably not true

1 of some young people here, but we spent the first six months in  
2 law school on how did you find the cases in the library. It  
3 was a big deal, they had the Centennial Digests, I don't know  
4 that I got the hang of it. Today they go on WestLaw and they  
5 find cases, and what they find are the most on point, specific  
6 cases that deal with something because of the brilliance of the  
7 internet and technology.

8 So, in that one area it has allowed for such strides.

9 And you folks who live in this area can see the  
10 applications in so many other things, whether it be in industry  
11 or in health care, things that we almost take for granted every  
12 day, the ability of someone going to a pharmacy and having your  
13 pharmacist say to you, wait a second, I have just done a check,  
14 you are getting this medication and that, and they may be  
15 contraindicated, you are not supposed to be taking them both at  
16 the same time, that sort of thing. It is second nature now in  
17 so many parts of our lives.

18 So, protecting these copyrights is very, very  
19 important. We understand. In the last six months there is  
20 this feeling that China is our friend and we work together  
21 because of mutual concerns, but we are watching, as in the last  
22 20 years, maybe longer, this extraordinary country emerging and  
23 pulling itself together and improving the lives of its people,  
24 obviously at certain cost to human rights, but we have also  
25 watched, unfortunately, that in the development of industry in

1 China, there has been a willingness to kind of look the other  
2 way when it came to a violation of intellectual property  
3 rights.

4 I am not suggesting that China is the sole malefactor  
5 here, but we do know there is a lot of it in China. It is  
6 probably because China has put so much effort into developing  
7 its manufacturing base.

8 I was talking the other day, the idea there is a  
9 factory over there that -- if there is such a thing -- the 8:00  
10 to 5:00 shift is literally making legitimate discs for Dell,  
11 which is a licensee of Microsoft, but somebody is slipping into  
12 that factory at night and clearly turning out the illegitimate  
13 discs, if that is what they do today, and they are clearly  
14 indistinguishable. This case has showed it, too, hasn't it?

15 The idea that you can look at these discs, the ones in  
16 evidence in this case, and there is no way to tell them apart.  
17 Certainly not by someone looking at it, reading the language  
18 and everything, and then as a marvel, you put them into the  
19 computer and look at the screen and they look exactly the same  
20 as what the legitimate Microsoft software would portray.

21 So, safeguarding Microsoft's or anybody's copyright is  
22 tremendously important.

23 We are talking about the quality of the software, we  
24 are talking about people's rights when you buy a brand name to  
25 rely on the reputation and the fact that you are getting what



1 you are paying for and so on.

2 And I know that Mr. Lundgren is someone who lives in  
3 this industry and understands all of that.

4 Now, I am also obligated to look at the history and  
5 characteristics of the Defendant. This morning's portrayal has  
6 been remarkable.

7 You know one of the things that I have noticed about  
8 the Federal Government and Federal law enforcement, I don't  
9 know that they would appreciate the analogy, but they reminded  
10 me of a large steamroller, they don't move fast, but they move  
11 inexorably what is there.

12 This has appeared every time since the initial  
13 investigation became obvious and us being here today. And in  
14 that time there is a whole other manifestation of Mr.  
15 Lundgren, and you talked about it eloquently this morning.

16 I agree with you, you know, we drive down I-95, or out  
17 on the Florida Turnpike, and at a certain point where you get  
18 into Broward County there is the emerging mountain in the  
19 southland of Florida, and it represents the trash and landfill  
20 we generate.

21 Every one of us is aware of that when we distribute  
22 our own rubbish. It is remarkable the quantity of things that  
23 a family generates in the course of a week.

24 So, understanding that we are a planet and we have to  
25 be concerned about this planet, and being aware of the abuses

1 that take place, whether they are young children in a lot with  
2 the water running through it pulling things apart with the  
3 chemicals and everything else, or people in Africa breathing in  
4 the acrid smoke and suffering potential damages, are very, very  
5 important. So, you are engaged in a wonderful thing and you  
6 are obviously bringing to it your talent and commitment. Let's  
7 hope there are more people like you and you are even more  
8 successful in the future.

9 The Court's obligation today is to impose a sentence  
10 that will promote respect for the law and provide just  
11 punishment. I have to be concerned about the concept of  
12 deterrence, and the need to protect the public.

13 Now, recently, I was involved in a lengthy sentencing  
14 and it involved a white collar crime that ultimately produced  
15 the loss of about \$170 million, and as I listened to each  
16 person who came to court, they are nice people, virtually every  
17 single one of them had never had any involvement in the past  
18 with the Criminal Justice System, and they came with 50 or so  
19 of their friends to tell me how marvelous this person was, and  
20 I know they were being truthful.

21 That is why these white collar crimes are difficult  
22 because we see people that by many, many indices in society  
23 they are successful, hard working, creative people, but they  
24 have done something that requires, frankly, punishment for what  
25 they have done.

1 With that group of people, I don't think there was a  
2 one that I would say I am really worried that you would go back  
3 and do this again.

4 I had a father sitting there who stood up with tears  
5 in his eyes confronting the fact and realizing that he had two  
6 young babies, and he is talking about not being a part of their  
7 lives for the next period of time, and I don't think that ever  
8 dawned on him when he made the judgment that he made.

9 Sometimes we don't have the ability to know the  
10 consequences that we have done.

11 I don't think deterrence, individual deterrence is an  
12 issue with you. I can't imagine anybody having the capacity to  
13 do what you have done, having developed this company and with  
14 the societal good it does, that you'd ever do anything, but I  
15 have to be concerned about the concept of general deterrence.

16 The reality is, there are people in all walks of life  
17 who make shortcuts, and we know that is true every day in the  
18 technology industry.

19 The Lenovo experience and dedication that Lenovo has  
20 to try to make sure this doesn't occur is truly admirable, but  
21 the concept of general deterrence is, frankly, what I have to  
22 be concerned about.

23 I am very sorry, because you do need to go to jail. I  
24 wish I could put you out with an ankle bracelet and you could  
25 be there at the groundbreaking for this Home for Heros, what a

1 wonderful thing, but what you did was wrong. It required  
2 skill, it required thought, it wasn't a quick thing.

3 The emails between yourself and Mr. Wolff really  
4 evidence that you folks knew what you were doing and you were  
5 moving carefully on that.

6 My hope is that you will put this behind you and get  
7 back to doing what you are good at and what you have a talent  
8 for.

9 It is hard, isn't it, to look back and try to pull  
10 apart now, in retrospect, the things that were either going on  
11 in your life or going on about you that allowed you to  
12 rationalize what you were doing, but it is pretty clear you  
13 understood that you were essentially highjacking legitimate  
14 software.

15 You may have said, well, it is okay, and other  
16 rationalizations, and we talked about that a lot yesterday, but  
17 it is pretty clear you were doing that.

18 This case is especially difficult, I will tell you,  
19 because of who you are today and in terms of who you have  
20 become. And so, balancing all of these things is not an easy  
21 thing to do.

22 I have looked at all of the factors in Title 18 United  
23 States Code, Section 3553(a), and I do think a sentence below  
24 the advisory guidelines is one that is sufficient, but not  
25 greater than that to achieve the goals that Congress set forth.

1           Accordingly, it is the judgment of the Court that the  
2 Defendant is to be committed to the United States Bureau of  
3 Prisons to be imprisoned for a term of 15 months as to Count 1,  
4 and 15 months as to Count 3, and those sentences are to be  
5 served concurrently, at the same time.

6           Upon your release from imprisonment, you are going to  
7 be placed on supervised release for a term of three years.  
8 This term consists of three years as to Counts 1 and 3, but  
9 they will run concurrently, at the same time.

10           Please remember, while you are on supervised release,  
11 number one, you must not commit another crime. You understand  
12 that you may not possess a firearm. That is a very serious  
13 limitation and you want to act responsibly in that regard. Of  
14 course, you must not possess or use any controlled substance,  
15 any illegal drug.

16           I am further ordering you pay a monetary fine to the  
17 United States in the sum of \$50,000 which shall be due and  
18 payable immediately.

19           I want you to comply with the standard conditions of  
20 supervised release and they will be explained to you in detail  
21 by the Probation Officer, but over and above the standard  
22 conditions, I will add the following special terms and  
23 conditions:

24           Number one, you must maintain full-time legitimate  
25 employment and not be unemployed more than 30 days without the

1 written permission of the Court. I want you to provide  
2 verification to the Probation Office to verify employment.

3 I do not preclude self employment or employment by a  
4 company in which Mr. Lundgren holds an ownership interest.

5 While on supervised release, you shall provide  
6 complete access to your financial information, including  
7 disclosure of all business and personal finances to the  
8 Probation Officer, but that requirement will cease upon the  
9 full payment of the monetary fine that was imposed.

10 Finally, while on supervised release, you shall submit  
11 to a search of your person, property and home, that to be  
12 conducted in a reasonable manner and done at a reasonable time  
13 by the Probation Officer.

14 It is further ordered that you pay to the United  
15 States a special assessment in the sum of \$100 as to each of  
16 the two counts of conviction for a total special assessment of  
17 \$200.

18 Mr. Lundgren, what is the major city near your home?

19 *THE DEFENDANT:* Los Angeles, California.

20 *THE COURT:* Chatsworth?

21 *THE DEFENDANT:* That is an hour away.

22 *THE COURT:* Los Angeles is the major city nearby?

23 *THE DEFENDANT:* Yes, sir.

24 *THE COURT:* I want you to go to the prison designated  
25 and self surrender. If they have not provided a facility on or

1 before Friday, July 14th, I want you to self surrender at the  
2 Office of the United States Marshal, United States Courthouse  
3 in Los Angeles.

4 Mr. Lundgren, I want you to know you have the absolute  
5 right to take an appeal from the judgment and sentence  
6 announced here today.

7 Your finances don't indicate you are in this  
8 situation, but if you do not have the ability to pay money for  
9 a lawyer to represent you on an appeal, upon application, I  
10 would look at that and make a decision about whether the Court  
11 would appoint counsel to represent you. Assuming you qualified  
12 for that, I would do that.

13 Now, in order to take an appeal, you need to file a  
14 piece of paper that is called a Notice of Appeal. That notice  
15 must be filed within 14 days of the day when the judgment and  
16 sentence are actually entered on the books of the Court.

17 Before I conclude this morning, or this afternoon, it  
18 is my obligation to elicit from each party their fully  
19 articulated objections to the Court's findings of fact and  
20 conclusions of law, and also to elicit any objections that  
21 either party has to the manner in which sentence has been  
22 imposed.

23 Let me turn first, if I might, to counsel for the  
24 Government.

25 MR. MORRIS: No objections, Your Honor.

1           THE COURT: Counsel for Defense.

2           MR. REINHART: We renew the previously made objections  
3 to the computation and the guidelines.

4           THE COURT: Yes.

5           MR. REINHART: We ask that he be designated to the  
6 camp in Sheridan, Oregon.

7           THE COURT: Mr. Lundgren, I don't have the legal  
8 authority to tell the Bureau of Prisons where somebody should  
9 be housed. The first is the level of security, that it be a  
10 camp.

11           I am more than happy to make a recommendation it be to  
12 the Federal camp in Sheridan, Oregon. I hope the Bureau of  
13 Prisons can accommodate that request.

14           I want to tell you again, I think it is reasonable to  
15 anticipate you will never be in a court in the future. I hope  
16 you continue doing the kinds of things you have done and I hope  
17 you will participate in the upcoming ceremony as one of the  
18 many things your company is doing for the community.

19           Anything else?

20           MR. MORRIS: No.

21           MR. REINHART: No.

22           THE COURT: Thank you. Court will be in recess.

23           *(Thereupon, the hearing was concluded.)*

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1 I certify that the foregoing is a correct transcript  
2 from the record of proceedings in the above matter.

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4 Date: June 3, 2017

5 /s/ Pauline A. Stipes, Official Federal Reporter

6 Signature of Court Reporter  
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Pauline A. Stipes, Official Federal Reporter

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# DOCUMENT 161

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

CASE NO. 16-CR-80090-HURLEY

**UNITED STATES OF AMERICA,** .  
Plaintiff, .  
vs. .  
**CLIFFORD E. LUNDGREN,** . West Palm Beach, FL  
February 28, 2017  
Defendant. .

CHANGE OF PLEA PROCEEDINGS  
BEFORE THE HONORABLE DANIEL T. K. HURLEY  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: **LOTHROP MORRIS**  
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COURT REPORTER: Pauline A. Stipes  
Official Federal Reporter  
HON. ROBIN L. ROSENBERG  
Fort Pierce/West Palm Beach  
772-467-2337

1           *THE COURT:* Good morning, everybody. This is Case  
2 Number 16-80090, United States versus Clifford Eric Lundgren.

3           Let me begin by allowing the lawyers to make  
4 appearances. I will start by recognizing counsel for the  
5 Government.

6           *MR. MORRIS:* Thank you, Lothrop Morris for the United  
7 States and Special Agent Daniel Longo.

8           *THE COURT:* And for the defense?

9           *MR. REINHART:* Good morning, Bruce Reinhart and Ms.  
10 Sanchez for the Defendant, Mr. Lundgren.

11           *THE COURT:* It is my understanding there have been  
12 discussions on behalf of Mr. Lundgren, and as a result, Mr.  
13 Lundgren has come to court desiring to change his plea from not  
14 guilty to guilty. Is that correct?

15           *MR. REINHART:* It is, Your Honor.

16           *THE COURT:* Mr. Lundgren, would you come up to the  
17 lectern. I will ask Ms. Guerrero to administer the oath.

18           (Thereupon, the Defendant was duly sworn.)

19           *BY THE COURT:*

20           *Q.* Mr. Lundgren, would you introduce yourself?

21           *A.* Clifford Eric Lundgren.

22           *Q.* Mr. Lundgren, do you understand that by taking the oath you  
23 have taken, if you were not truthful, you would be put at risk  
24 with another crime, the crime of perjury and giving a false  
25 statement under oath?

1 Do you understand that, too?

2 A. Yes, I do.

3 Q. Let me first suggest you relax, listen to the questions and  
4 go ahead and answer them as accurately and completely as you  
5 can.

6 I hope you understand that nobody, nobody wants you to  
7 plead guilty unless, number one, you really did whatever it is  
8 the Government is claiming. You have some idea of the  
9 allegations. And also, this is equally important, you should  
10 not plead guilty unless you come to the firm conclusion in your  
11 own mind that it is in your best interest to resolve the case  
12 this way.

13 If there is anything at all that I say and you don't  
14 understand and you want to talk about it in greater detail,  
15 please, stop me and let me know and we can have that  
16 discussion.

17 By the way, if in the course of our discussion you need to  
18 talk to counsel privately, let me know and I will give you that  
19 opportunity as well.

20 Okay?

21 A. Okay.

22 Q. I would like to start by asking you about your  
23 representation by counsel, and I suspect I know the answer to  
24 this already. Is it fair to say you or your family retained  
25 counsel, they are not court appointed?

1 A. Yes, I retained counsel myself.

2 Q. Now, have you had an opportunity to discuss with your  
3 lawyers in detail all of the charges that have been brought  
4 against you in this case?

5 A. Yes, I have.

6 Q. And when you were having those discussions, did you also  
7 talk about, if there had to be a trial in this case, what the  
8 Government's evidence might consist of, and what you could do  
9 to defend yourself in light of that evidence?

10 Did you have those kinds of discussions?

11 A. Yes, yes, we did.

12 THE COURT: Hold on for a second.

13 Mr. Marshal, anything we needed to talk about?

14 THE MARSHAL: No, sir.

15 THE COURT: Okay, thank you.

16 BY THE COURT:

17 Q. Now, I have a couple of documents here, it is a Plea  
18 Agreement, and your name is typewritten on the first page, and  
19 if we go to the last page, your name is typewritten and there  
20 is a signature above that.

21 Mr. Lundgren, is that your signature?

22 A. Yes, it is.

23 Q. Now, before you signed this document, did you go over every  
24 single provision in this document with your lawyers?

25 A. Yes, we did.



1 Q. Okay.

2 There is a second document here and it is called a  
3 statement of facts, and, of course, once again your name is  
4 typewritten on the very first page, and if you go to the last  
5 page, you see your name is typewritten again, and there is a  
6 signature above that.

7 Mr. Lundgren, is that your signature?

8 A. Yes, that is.

9 Q. Okay.

10 Now, before you signed this document, did you go over every  
11 single sentence in this document with your lawyers?

12 A. Yes, we did.

13 Q. And this document suggests that you said things or did  
14 things, when it talks about you, and it ascribes either words  
15 or actions to you. Are those statements factually correct, are  
16 they true?

17 A. Sorry, I am ready, sorry. Yes.

18 Q. In other words, did you say and do what it says you did?

19 A. Yes.

20 Q. Okay.

21 Now, may I ask you, are you satisfied with the advice and  
22 services that your lawyers have been providing to you while  
23 they have been acting for you in this case?

24 A. Yes.

25 Q. You seem to be hesitant about that. Are you okay on that?

1 A. Yep.

2 Q. Okay.

3 Now, I wonder if you would tell me about yourself. How old  
4 are you today?

5 A. I am 32 years old.

6 Q. Today are you a citizen of the United States?

7 A. Yes, I am.

8 Q. Where are you from?

9 A. Washington state, I lived most of my life in Washington  
10 state and China.

11 Q. Where did you live in Washington?

12 A. Lynden, a Dutch town in the middle of nowhere.

13 Q. Tell me about your education background.

14 A. I went to Lynden --

15 Q. Is that L-I-N --

16 A. L-Y-N-D-E-N, a Dutch town right on the border.

17 Q. Right.

18 A. After high school, I went to Los Angeles and started my  
19 first company called ECA Company.

20 Q. You did that right after high school?

21 A. Right after high school.

22 Q. Did your family go with you?

23 A. We were pretty poor, I went to live with my brother who was  
24 going to UC.

25 Q. What kind of company?

1 A. Environmental life.

2 Q. You had your life in the environmental area?

3 A. Yes.

4 Q. Did you have any academic schooling after high school?

5 A. Recently, yes, but most overseas and the United States, a  
6 lot of mentors.

7 Q. I missed what you said.

8 A. With mentors, more mentorship.

9 Q. You went down to Los Angeles, started your own company.

10 How long were you in the Los Angeles area?

11 A. About four years.

12 Q. What did you do after that?

13 A. I went to Springfield, Illinois.

14 Q. What was the name of the company?

15 A. Environmental Computer Associates, ECA.

16 Q. That is you and your brother or yourself?

17 A. Just myself, it was an LLC.

18 Q. What did you do?

19 A. Recycling -- electronic recycling for Fortune companies,  
20 all of American Airlines, at 19 years old I was doing American  
21 Airlines, at 20, Sisco, Coca-Cola.

22 Q. When you say recycling, taking the computers, no longer  
23 using them and recycling them?

24 A. At that time, taking the computers out of the corporate  
25 sector, refurbishing them and putting them in the lower sector,

1 \$99.

2 Q. The demand was there?

3 A. It was at that time. Nowadays we are extracting all the  
4 parts and components and building new components, like a chop  
5 shop but for computers.

6 Q. Where did you go after Illinois?

7 A. I went to China.

8 Q. Where?

9 A. Xiamen.

10 Q. Xiamen in Fujian Province?

11 A. Actually, yes.

12 Q. What did you do?

13 A. I started a company, Source Captain, sourcing parts to  
14 people that want to refurbish parts.

15 Q. Tell me time wise, to the best of your recollection.

16 A. I would say 2000 -- probably 2000 -- I was 24 -- I was 19  
17 the first time I went to China, and 24 the second.

18 Q. Do you speak Mandarin?

19 A. (Speaking Chinese.)

20 Q. How long were you there?

21 A. Approximately five years. I went to India, we were trying  
22 to expand to India. That didn't work out so well.

23 Q. Here you are right in the forefront of the technological  
24 change, and you did that. What happened next?

25 A. After India didn't work out, I was in India for a year,

1 year and a half, I went back to China.

2 Q. Where were you in India?

3 A. Calcutta, I had an office in Sector Two Salt Lake in  
4 Calcutta and Mumbai, India, next to the airport, and we were  
5 doing programming there and trying to source all of the  
6 factories in mainland China and the United States, but we lost  
7 and Alibaba won.

8 Q. That is the Chinese equivalent to Google?

9 A. Yes, it is owned by Jack Ma, who is a multi billionaire,  
10 and I am not.

11 Q. A friend of President Trump, apparently.

12 A. Yes.

13 Q. You did that, and what happened after that? Did you come  
14 back to the United States?

15 A. Yes, I was flat broke and took a job in the United States  
16 as a vice-president of a company called Allied Trading, and I  
17 was fired after three weeks for not understanding the company  
18 culture. I asked what the company culture was, and it was to  
19 take advantage of companies.

20 So I left, went up across the street and opened up a one  
21 thousand square foot facility and bought that company that  
22 fired me, retained all of their employees, and now myself and  
23 my partner own that company.

24 Q. You sound like the epitome of an entrepreneur. Are you  
25 married today?

1 A. No. To my company.

2 Q. It sounds like it is enormously engaging and time  
3 consuming, you have to be very dedicated to what you are doing,  
4 I understand that.

5 Let me ask you this, a couple of personal questions, and I  
6 am asking you this only so I can make an evaluation of your  
7 ability to make the judgment you are thinking of making this  
8 morning.

9 The first question is whether you have gone to see somebody  
10 we describe as a medical health professional, psychologist,  
11 anybody like that, because of mental illness.

12 Have you ever done that?

13 A. No. Never.

14 Q. How about illegal drugs, have you ever used illegal drugs  
15 yourself?

16 A. No.

17 Q. It is so important today here in the courtroom you are  
18 completely clear headed so you, yourself, can listen to  
19 everything that is said, so you can evaluate this information  
20 and make whatever judgments you think are the right judgments  
21 for yourself.

22 Do you feel you can do that?

23 A. Yes.

24 Q. Can I ask you about your physical health; how would you  
25 describe your physical health today?

1 A. It was perfect, now I have ulcers, but it is from five  
2 years of this.

3 Q. Of this case?

4 A. Yes.

5 Q. A lot of worry, anxiety and tension?

6 A. Yep.

7 Q. Tell me the kinds of medicines you take. Do you take any  
8 prescription medicines?

9 A. I was prescribed one by a doctor that I take every night.

10 Q. Do you know what that is?

11 A. I don't know what it is called. I had over the counter  
12 stuff, it wasn't strong enough.

13 Q. How long have you been taking this medicine?

14 A. About a year now, year and a half.

15 Q. In the course of taking it, have you found that it distorts  
16 your ability to understand what is going on around you?

17 A. No.

18 Q. Okay, all right. Fine.

19 I want to take a second and review with you your rights  
20 under the United States Constitution. You want to think of  
21 these as protections built into the law so they will be  
22 available to you in a situation like this.

23 Number one, I want you to know what they are, and second, I  
24 want to make sure you thought about, if you do decide to plead  
25 guilty, one of the things you will be doing is giving up these

1 rights, these protections.

2 When you think about it, that is what makes this such an  
3 important decision this morning.

4 The most important right is this: When somebody is alleged  
5 to have violated the law, there is no obligation they come to  
6 court and say they are going to plead guilty. Under the  
7 Constitution, you have the right to say my plea is going to be  
8 not guilty, I want to have a trial. As a matter of fact, I  
9 want 12 people to come in and sit as a jury.

10 It would be the jury that listens to all the information,  
11 all the evidence, and it is the jury that decides the result of  
12 the trial, the verdict in the trial.

13 So, do you understand you have the right to plead not  
14 guilty and have a trial by jury?

15 A. Yes.

16 Q. Okay.

17 Now, you told me -- and you have two very fine lawyers you  
18 retained to assist you in all of this.

19 I want you to understand that if we have a trial, they  
20 would be by your side from the beginning to the end of the  
21 process.

22 Do you understand that?

23 A. Yes.

24 Q. Do you understand that it is so important you be  
25 represented by counsel and if for some reason you could not



1 afford your lawyers' services, do you understand the Court  
2 could appoint a lawyer to represent you through this entire  
3 process?

4 A. Yes, yes, I do.

5 Q. I want to make sure you understand the way a trial works  
6 because we say that the obligation to bring the evidence into  
7 the courtroom, that is something we put one hundred percent on  
8 the shoulders of the prosecutor, the Government. So, what that  
9 means is, the person who is alleged to have violated the law,  
10 they don't need to prove anything in a trial. You won't have  
11 to disprove anything, you wouldn't even have to speak in the  
12 trial.

13 Do you understand that?

14 A. Yes, I do.

15 Q. Now, of course, the way the Government normally tries to  
16 prove its charges, they call witnesses, and you understand in a  
17 trial, people come into the courtroom one by one, come over to  
18 the witness stand, take the oath and they are questioned by the  
19 prosecutor.

20 Now, if we had a trial in your case, you could sit over  
21 there at defense table and you would be able to look these  
22 witnesses right in the eye, hear whatever they have to say and  
23 you could talk to your lawyers about their testimony.

24 Do you understand that?

25 A. Yes, I do.

1 Q. Do you understand that when the prosecutor finished asking  
2 his questions of a particular witness, that your lawyer would  
3 stand up in front of the jury and question that witness so he  
4 or she could show the jury whether there were any holes or  
5 weaknesses or inconsistencies in what that witness might be  
6 saying?

7 Do you understand your lawyer would do that?

8 A. Yes.

9 Q. Do you also understand that your lawyers have the ability,  
10 the authority to have court orders sent out, subpoenas that  
11 would force other people to come to the trial to testify on  
12 your behalf, or to have other evidence brought to the trial  
13 that would assist you?

14 Do you understand they would do that for you?

15 A. Yes.

16 Q. Now, remember I said at a trial the Government gets to call  
17 witnesses, and certainly you could call witnesses as well.

18 I want to make sure you have thought about this.

19 If we had a trial in your case, you, yourself, would have  
20 the absolute right to come up to the witness stand to take the  
21 oath, and then to explain to the jury from your point of view  
22 either what happened or what didn't happen in the case.

23 Do you understand you would be able to do that?

24 A. Yes, I do.

25 Q. Now, in this one area, the Constitution guarantees you an

1 all important choice, because while you certainly could testify  
2 if that is what you wanted to do, the Constitution goes on and  
3 says you have the absolute right not to testify, the right to  
4 remain silent.

5 If for whatever reason you decided that you were not going  
6 to testify, well, first, I would explain to the jury that was a  
7 right guaranteed to you by the Constitution, and I would  
8 actually go a step further because when the jury got ready to  
9 leave at the end of the case, to go out and deliberate, I would  
10 instruct them and tell them they absolutely could not consider  
11 the fact that you had not testified.

12 So, do you understand you have that right to remain silent  
13 and not testify in the trial?

14 A. Yes, I do.

15 Q. Now, this is probably obvious to you, but let's talk about  
16 it for a minute.

17 Do you understand that if you do decide to plead guilty  
18 today, one of the things you are doing then is giving up all  
19 these rights, because we won't have a trial, no jury, no  
20 witnesses, in all likelihood the next time you would be present  
21 in court would be at the sentencing proceeding?

22 Do you understand that, too?

23 A. Yes, I do.

24 Q. Okay.

25 Mr. Lundgren, do you have a copy of the Plea Agreement in

1 front of you?

2 A. Yes.

3 Q. Let's take a look at this.

4 I am looking at the first paragraph. It says you are  
5 agreeing to plead guilty to the crime that is charged in Count  
6 1, which is called the crime of conspiracy to traffic in  
7 counterfeit goods, and then also you are going to plead guilty  
8 to the crime that is set forth in Count 3 which charges you  
9 with criminal copyright infringement.

10 Are those the charges you agree to plead guilty to?

11 A. Yes.

12 Q. Okay.

13 We say that every single crime is made up of what are  
14 called elements or parts. In other words, these are specific  
15 facts that we say the Government has got to be able to prove,  
16 and we say they have to be able to prove them beyond a  
17 reasonable doubt before anybody could be found guilty of that  
18 crime.

19 So, let's pull these two apart, take a look at them and see  
20 what it is the Government would have to prove.

21 I am going to ask the lawyers to double check me, these are  
22 kind of unusual charges.

23 It is interesting, in federal law sometimes the planning to  
24 commit a crime can be a separate crime all by itself, and let  
25 me give you an example that really has nothing to do with this

1 case, but I want to make sure you understand it.

2 We all would acknowledge that bank robbery is a crime.  
3 Well, if you had a group of people -- and for a conspiracy, the  
4 minimum is two, you can't have a conspiracy with one person.  
5 So you have a lot more than that.

6 If there were a group of people who said we ought to rob a  
7 bank, and so they talk about it, and one of the persons goes to  
8 a store to buy ski masks, another fellow goes to find a car  
9 they would use that is a get-away car, another person goes  
10 driving around trying to spot a likely target bank, if they did  
11 that, they would have committed the crime of conspiring,  
12 planning to commit a bank robbery, even though no bank robbery  
13 was ever committed.

14 Do you understand the difference there?

15 A. Yes, I do.

16 Q. The planning to commit a crime can be a separate crime all  
17 by itself.

18 Now, let's talk for a minute about the alleged goal of the  
19 conspiracy because it sounds like the goal of the conspiracy is  
20 to traffic, and I would imagine traffic means selling, buying,  
21 distributing counterfeit goods, goods that I suppose are meant  
22 to look like one thing, and here, I guess it is either  
23 Microsoft or something, but in fact they are really not.

24 *THE COURT:* What is the definition of counterfeit in  
25 this instance, does somebody have the elements of that crime?

1 MR. REINHART: I do, Your Honor.

2 THE COURT: Could I see them?

3 MR. REINHART: Sure. Let me show it to Mr. Morris.

4 I have one for Count 3 as well.

5 THE COURT: I appreciate that.

6 MR. REINHART: As to Count 1, the crime is trafficking  
7 in goods that contain a counterfeit mark, meaning the  
8 representation on the outside of the product is meant to  
9 misrepresent the origin of the product.

10 THE COURT: So the product itself does not have to be  
11 counterfeit, the --

12 MR. REINHART: The elements of the offense states  
13 goods containing a counterfeit mark.

14 THE COURT: All right. I got you.

15 Let's look at the crime itself, trafficking,  
16 trafficking means buying, selling, distributing, it is a  
17 commercial transaction usually.

18 As you just heard, the goods contain a counterfeit  
19 mark.

20 Does the crime require that the person knew that it  
21 contained a counterfeit mark?

22 MR. REINHART: Yes, it has to be willful, it has to be  
23 a mark that they know cannot be used.

24 THE COURT: You have knowing the goods have a --

25 MR. REINHART: You have to know you are doing

1 something against the law, and know the mark is not a mark you  
2 can use.

3 *MR. MORRIS:* Because it is conspiracy, that adds the  
4 willfulness.

5 *THE COURT:* Yes, we are looking at the goal.

6 You are not charged with the goal, but in order to  
7 understand the charge, you have to understand the goal.

8 Trafficking in counterfeit goods, trafficking, buying  
9 and selling or distribution of them. Counterfeit means that it  
10 contains a counterfeit mark, a mark that simulates something  
11 else, but it is not authorized, and you knew it was a  
12 counterfeit mark, and there is an intentional element here, you  
13 knew the law forbade this, but you were still doing it.

14 *BY THE COURT:*

15 *Q.* Do you know what the goal would be?

16 *A.* Yes.

17 *Q.* The counterfeit mark, I suppose, when you think about it, I  
18 think in this case is the designation that it is Microsoft. I  
19 may be wrong about that.

20 *THE COURT:* What is the counterfeit mark they have  
21 alleged?

22 *MR. REINHART:* What I think the evidence would be,  
23 Your Honor, and what is admitted in the statement of facts is  
24 these are what are called reinstallation discs, which are  
25 actually distributed by Dell.

1           *THE COURT:* Under a license from Microsoft?

2           *MR. REINHART:* Some of the software is Dell and some  
3 Microsoft. The counterfeit mark was when they were produced a  
4 label that was placed on them which purported them to be  
5 authentic discs containing Dell and Microsoft.

6           *THE COURT:* And manufactured by somebody else?

7           *MR. REINHART:* Correct, without permission from Dell  
8 to do that.

9           *THE COURT:* Okay.

10       *BY THE COURT:*

11       *Q.* So, do you understand the elements of that crime, the goal  
12 of the conspiracy?

13       *A.* Yes, I understand the Dell label itself is the issue, the  
14 software is not an issue, you can download it for free.

15       *Q.* I don't know that. The bottom line is, it has a  
16 counterfeit mark.

17       *A.* Yes.

18       *Q.* I want to make sure you understand the elements of the  
19 crime, the goal here. Remember, they didn't charge you with  
20 that.

21       The crime in Count 1 is called the crime of conspiracy, the  
22 planning to commit it.

23       *A.* Yes.

24       *Q.* Here is what they have to prove beyond a reasonable doubt  
25 before you could be found guilty of that crime.



1       Number one, they have to prove there really was a group of  
2 people who were planning to commit this crime, they were going  
3 to market and distribute this counterfeit mark. They have to  
4 prove that you understood what the group was really up to,  
5 maybe not all the minor details, but you understood it was an  
6 effort to market the counterfeit product. And third, they have  
7 to prove, with that knowledge, you knowingly and intentionally  
8 joined the conspiracy. You did something to achieve the goals  
9 of the conspiracy.

10       Now, sometimes there is a fourth element, I want to double  
11 check it.

12       *THE COURT:* Is there a requirement of an overt act in  
13 this case?

14       *MR. MORRIS:* There is, Your Honor.

15       *THE COURT:* Okay.

16       *BY THE COURT:*

17       *Q.* Remember my example of the bank robbery? You go skiing,  
18 you by a ski mask, nothing wrong with that.

19       There are some conspiracy crimes where it is proved beyond  
20 the talking stage, they require proof of what is called an  
21 overt act.

22       It can be completely innocent, but something aimed at  
23 achieving the goal.

24       This particular conspiracy crime also would require proof  
25 that while you were a member of the conspiracy, either you or

1 some other coconspirator engaged in an overt act to achieve the  
2 goal of the conspiracy.

3 Do you think you understand what the Government would have  
4 to prove before you could be found guilty of this crime?

5 A. Yes, yes, I do.

6 Q. Okay. Now let's move on to the crime charged in Count 3.

7 MR. REINHART: As part of this, the colloquy, at some  
8 point, if the Court could discuss with Mr. Lundgren the  
9 liability for the acts of a co-conspirator and aiding and  
10 abetting under Count 3. Some of the conduct in the proffer Mr.  
11 Lundgren did not do, but caused other people to do. He can be  
12 liable for the acts of others, either under the conspiracy or  
13 aiding and abetting the conspiracy.

14 BY THE COURT:

15 Q. Have you talked with your lawyers about the liability of a  
16 co-conspirator?

17 A. Yes.

18 Q. Let me tell you something, from what I have seen in my  
19 experience, this conspiracy crime is an incredibly dangerous  
20 crime because the law views the members of the conspiracy as  
21 agents of each other, as partners of each other, and so, the  
22 theory is that if a co-conspirator does something in  
23 furtherance of the conspiracy that was foreseeable, you  
24 understood it would be done, and it advances a goal of the  
25 conspiracy, you can be held liable for what the other person

1 did.

2 Let me give you an example going back to the bank robbery  
3 example.

4 People commit a bank robbery and in the course of it  
5 somebody gets nervous, and one of the conspirators shoots  
6 somebody. Everyone in the conspiracy can become liable for  
7 that, it is foreseeable, something they would have known, and  
8 it happened, so they are all responsible.

9 Do you understand that concept?

10 A. Yes, yes, I do.

11 Q. Aiding and abetting is a slightly different legal concept.  
12 The theory of aiding and abetting is that the law recognizes  
13 anything you can do for yourself, usually it can be done  
14 through another person.

15 So, if somebody directs somebody to do something, they  
16 could be held liable for what the other person did under the  
17 concept of aiding and abetting.

18 Do you think you understand that?

19 A. Yeah.

20 Q. Okay. Now let's move on to the crime that is set out in  
21 Count 3.

22 This is the crime of criminal copyright infringement. The  
23 Government would have to prove that there was a valid  
24 copyright.

25 You understand, the copyright is when somebody has a mark

1 or a product and they copyright it, so it is a valid copyright,  
2 and that it was infringed, it was used without the  
3 authorization of the owner of the copyright. It was done  
4 willfully, you knew what you were doing, you knew the law  
5 prohibited this, but you did it, and done for the purpose of  
6 commercial advantage or private financial gain by reproducing  
7 or distributing the valid copyright.

8 They have to prove there were ten or more copies with a  
9 retail value of \$2,500 or more, and they have to prove that  
10 this was done during a 180 day period.

11 *THE COURT:* Have I covered all of the elements of that  
12 offense?

13 *MR. REINHART:* Yes, Your Honor.

14 *MR. MORRIS:* You have, Your Honor.

15 *BY THE COURT:*

16 *Q.* Do you think you understand what the Government would have  
17 to prove before you could be found guilty of that offense?

18 *A.* Yes, Your Honor.

19 *Q.* Now, one of the things you absolutely need to know is, if  
20 you plead guilty for these crimes what is the worst possible  
21 punishment that could be imposed, because only by knowing that  
22 can you evaluate the risk you would be subjecting yourself to.

23 Come over to page two and look at paragraph three.

24 Let's talk first about the conspiracy charge. That is a  
25 pretty serious charge because the sentence, it could be a

1 sentence of up to ten years in federal prison, and then after  
2 any prison sentence, there is a period of time called  
3 supervised release. That is a period of time after any  
4 imprisonment where somebody would be checking up on you, and  
5 there are usually other terms and conditions. That could be an  
6 additional three years.

7 And on top of all of this, there could be a monetary fine  
8 of as much as \$2,000,000, and this is the kind of case where  
9 there must be an order of restitution. If someone has been  
10 defrauded or lost money in this process, there would have to be  
11 an order of restitution.

12 So, do you understand that is the worst possible sentence  
13 for Count 1?

14 A. Yes, Your Honor.

15 Q. I am not saying that is going to be the sentence, but you  
16 have to understand the worst possible, the most serious  
17 configuration of that sentence.

18 Now let's turn to Count 3. That is slightly less serious,  
19 because it could be five years in federal prison, supervised  
20 release of three years, a monetary fine up to \$250,000, and  
21 restitution.

22 Do you understand that is the worst possible sentence for  
23 Count 3?

24 A. Yes, Your Honor.

25 Q. When somebody comes to court and even if there were a

1 trial, and the jury returned a verdict, or somebody comes to  
2 court and they plead guilty, when you have more than one  
3 sentence, the sentences could be imposed in more than one way.  
4 They could be concurrently, if somebody serves a day for one  
5 sentence, they get credit for the other.

6 The other legal possibility is consecutively, one after the  
7 other.

8 In this case, the worst possible configuration of the  
9 sentence would be 15 years in federal prison, \$2,250,000 in  
10 monetary fines, three years supervised release and restitution.

11 Do you understand that is the most serious configuration of  
12 the sentences?

13 A. Yes, I do, Your Honor.

14 Q. Now, this next thing I know sounds so insignificant it is  
15 almost foolish, but there is a requirement that the Court  
16 impose a \$100 special assessment for each of these two crimes.

17 Do you understand that?

18 A. Yes, I do, Your Honor.

19 Q. Now, take a look on page three, paragraph six, because in  
20 that paragraph the Government is promising you that it would  
21 make a recommendation you get a reduction in what is called the  
22 guideline offense level because you have come to court today  
23 and you have admitted what you did, and you are accepting  
24 responsibility, and when you think about it, you are saving the  
25 Government the time and expense of a trial.

1 Now, I need to make sure you understand that to be eligible  
2 for this reduction, there are things that you need to be  
3 willing to do.

4 The first is, number one, you would be willing to sit down  
5 with a Probation Officer face-to-face and tell them everything  
6 about your involvement in this offense.

7 Are you willing to do that?

8 A. Yes, Your Honor.

9 Q. The second thing, of course, would be you have not told any  
10 lies or made any misrepresentations to the Government to get  
11 them to go along with this disposition. And the third thing  
12 is, at least today looking forward, you really do intend to  
13 obey the law in the future, and today, you have the present  
14 intention of honoring that commitment.

15 Are you willing to do that, too?

16 A. Before and after this, yes. This is the only offense I  
17 ever had.

18 Q. I understand that. You may have made a mistake and didn't  
19 understand where you were going on this, but it sounds to me  
20 you are someone who has enormous drive in your field and so on.  
21 You know, we make mistakes in life and we pick up the pieces  
22 and move on. I am certainly hopeful you can do that, too.

23 A. Me, too.

24 Q. All right. Now, page five, I notice there is a whole list  
25 of things you agree to forfeit to the Government. Is that

1 true, you have agreed to do that?

2 A. Yes, Your Honor.

3 Q. Okay. I want to take a second and I would like to talk  
4 with you about how a sentence is decided.

5 In all the federal courts all across the United States, any  
6 discussion about sentencing has to start with what are called  
7 the Federal Sentencing Guidelines. They were developed, and it  
8 was a serious effort, but an effort to achieve uniformity  
9 across the United States.

10 The theory is that people who have committed the same  
11 crime, and who have pretty much the same background, the hope  
12 is they would be treated as much alike as possible, and the  
13 co-existing hope is that if that happens, the whole system  
14 would be more fair.

15 Here is how they try to achieve this.

16 There is a committee in Washington that has gone through  
17 the law books. Next to every crime they place a range of  
18 points.

19 Now, let me tell you something, I have not seen -- other  
20 than this case, I have not seen anything quite like this  
21 before, but this case sounds to me like it is essentially a  
22 fraud case.

23 So, I suspect what drives the Guidelines here is the loss  
24 to the victim or the gain to the person who has committed it.  
25 The greater the financial loss, probably the more points you



1 put next to that crime.

2 When you have a multi-person crime, and conspiracy is a  
3 multi-person crime, you need to look at the individual and say  
4 if Mr. Lundgren was involved in this, what was his  
5 responsibility?

6 The theory is, the leader would get more points than  
7 someone involved but further down.

8 Another thing you look at, and I suspect I know the answer  
9 to this, too, but you say, has Eric Lundgren ever been  
10 convicted of any other crime? I suspect the answer is no.

11 I have to tell you, sometimes that is not the case, but you  
12 say, all right, how many times, and the theory is you add  
13 points for every prior conviction.

14 Now, I have to tell you there are some other things you  
15 look at, but when you are done, you add up all these  
16 subcategories, you figure out the total number of points in  
17 your case, and then you need to go to the sentencing book.

18 There is a chart in the sentencing book.

19 Did your lawyers have a chance to show you that chart?

20 A. Yes, yes, they did.

21 Q. Is it fair to say you understand, at least in a rough  
22 sense, that when you know the total number of points in your  
23 case, and when you look at that chart, you understand that the  
24 chart ultimately is going to recommend what is called a  
25 recommended guideline imprisonment range?

1 Do you understand that in a rough sense?

2 A. Yes. Yes, I do, Your Honor.

3 Q. Okay.

4 Now, and this is very, very important, as important as  
5 these guidelines are, what they do is generate a nonbinding  
6 recommendation, see, and because it is nonbinding, after  
7 looking at the guidelines, after consulting the guidelines, the  
8 judge has to turn to another statute where Congress set out a  
9 whole list of factors that need to be considered.

10 What that means is, ultimately, the sentence that is  
11 actually pronounced could end up being above the Guidelines,  
12 you see, more serious, or inside the Guidelines, and frankly,  
13 even below the guidelines.

14 Do you understand that?

15 A. Yes, yes, I do.

16 Q. The law says if you came to court and you listened to the  
17 sentence that was actually announced, if you felt that sentence  
18 was not a fair and reasonable sentence, the law says you would  
19 be entitled to take an appeal, to ask three judges on the  
20 Appellate Court to take a look at your case and decide whether  
21 the sentence was or was not a reasonable sentence.

22 Do you understand you would be able to take that kind of  
23 appeal?

24 A. Yes, Your Honor.

25 Q. Now, certainly it is reasonable to expect on the day of

1 sentencing, Mr. Morris, whoever is representing the  
2 Government, is probably going to come to court and stand up and  
3 speak about the case from the Government's point of view and  
4 probably make some recommendations, and certainly it is  
5 reasonable to anticipate your lawyers will stand up and speak  
6 on your behalf and probably make some recommendations, too.

7 I need to make sure you understand, while I certainly will  
8 listen to what everybody has to say, the recommendations made  
9 by the lawyers are not binding on the Court.

10 Do you understand that?

11 A. Yes, I do, Your Honor.

12 Q. Do you understand that if for some reason I do not accept  
13 one or more of the lawyer's recommendations, that you would not  
14 be able to withdraw your plea?

15 Do you understand that, too?

16 A. Yes, I do.

17 Q. Now, the very last provision in this Plea Agreement, come  
18 over to page seven and take a look at what is listed as  
19 paragraph ten. What that says is, everything you are relying  
20 on to make this important decision is down here in writing.

21 In other words, there is nobody off on the side promising  
22 you something else or telling you something I have not been  
23 made aware of.

24 Mr. Lundgren, may I ask you, is your entire agreement with  
25 the Government contained in this document?

1           MR. REINHART: Your Honor, there is one other  
2 provision, we missed it when we wrote this up.

3           The Government is agreeing that if the Court imposes a  
4 term of incarceration, they would not oppose a request that Mr.  
5 Lundgren self surrender. That is not contained in the  
6 agreement.

7       BY THE COURT:

8       Q. That is important, because a Plea Agreement, sometimes  
9 cases talk about it like a contract. The contract would bind  
10 you and bind the Government.

11       So, if they made that representation to you they can't come  
12 in on the day of sentencing and say, oh, no, we want him sent  
13 away this afternoon, they are bound by it.

14       Do you understand that is not binding on the Court?

15       A. Yes, I do.

16       Q. Okay, all right.

17       MR. REINHART: Other than that, we are not aware of  
18 any other agreement not contained in the Plea Agreement.

19       BY THE COURT:

20       Q. Mr. Lundgren, has anybody put any pressure on you or  
21 threatened you or induced you with money or anything else to  
22 get you to come to court today to plead guilty?

23       A. No, Your Honor.

24       Q. Are you doing this freely and voluntarily?

25       A. Yes, Your Honor.

1 Q. Are you doing this because you really did, in fact,  
2 knowingly and willfully join a conspiracy, the aim of which was  
3 to traffic in counterfeit goods as I have previously defined  
4 that crime to you this morning, counterfeit mark?

5 A. Yes, Your Honor.

6 Q. Are you doing this because you really did knowingly and  
7 intentionally and willfully infringe on a valid copyright as I  
8 previously defined that crime for you this morning?

9 A. I know that now, Your Honor. Now, as I stand before you, I  
10 know that now. So I am fully aware of that now.

11 Q. Did you know it at the time, did you understand you were  
12 violating the law?

13 A. At the time, I thought it was free ware, I thought I was  
14 helping people.

15 Q. I understand that in terms of the contents, but what we are  
16 talking about is infringing the valid copyright. Did you  
17 understand you were doing that?

18 A. Yes, now, I understand exactly what I did wrong now.

19 Q. Well, there is one problem that I want to make sure you are  
20 aware of.

21 The crime means at the time you did it, you knew you were  
22 violating the law. That is one of the elements of willfulness,  
23 you knew you were violating the law and you did it, you  
24 understood there was a valid copyright and you were infringing  
25 it.

1 Did you do that knowingly and willfully?

2 A. Sorry, Your Honor.

3 *THE COURT:* Take a minute, yes.

4 (Pause.)

5 *THE DEFENDANT:* Your Honor, I knew I didn't have  
6 permission from Dell to reproduce their Dell logo.

7 *BY THE COURT:*

8 Q. That is really what makes this case confusing, because the  
9 software apparently you, yourself, told me a couple of times is  
10 free.

11 But it is, I suppose, the misuse of the copyrighted mark  
12 that suddenly turns it from being -- just the transmission of  
13 free software into criminal copyright infringement?

14 A. Yes.

15 Q. I know we have -- so you admit you willfully and  
16 intentionally did those things?

17 A. Yes, yes.

18 *THE COURT:* I know we have stipulated facts.

19 I would ask Mr. Morris if he would come up and set in  
20 the record, if we had a trial on the two charges, what the  
21 Government's evidence would have been.

22 I ask you to listen and I'll come back to see if you  
23 think this is an accurate statement of what happened.

24 *MR. MORRIS:* Your Honor, if this case had proceeded to  
25 trial, the United States would have proved the following facts

1 beyond a reasonable doubt:

2 In or on about 2011, the Defendant was contacted by  
3 Robert Wolff about producing multiple copies of Dell  
4 reinstallation CD-ROMs for Microsoft Windows, these are  
5 reinstallation discs, that could be resold to refurbishers of  
6 Dell computers. At the time he was living in China. Wolff  
7 represented that he had purchased an authorized retail copy of  
8 a reinstallation disc from Dell for \$5. Wolff provided the  
9 reinstallation disc to Mr. Lundgren.

10 Lundgren arranged for the reinstallation disc to be  
11 reproduced by a Chinese manufacturer. He wasn't authorized by  
12 Dell or Microsoft to reproduce these discs. Mr. Lundgren knew  
13 that he was not authorized to reproduce these discs.

14 As part of the manufacturing process, labels were  
15 affixed by the factory to the CD-ROMs that purported to be  
16 labels authorized by Dell and Microsoft and that falsely  
17 represented that the discs contained copyrighted software that  
18 Dell and Microsoft had authorized to be included on the disc.  
19 The labels were substantially indistinguishable from the labels  
20 that were affixed to authorized reinstallation discs.

21 Mr. Lundgren was aware that the labels were misleading  
22 and had not been authorized to be used.

23 On September 3rd, 2012, U.S. Customs and Border  
24 Protection (CBP) officers at San Francisco International  
25 Airport detained a shipment of 2,246 reinstallation discs that

1 Lundgren had caused to be shipped from China to Wolff's address  
2 in Boca Raton, Florida. They detained two different shipments,  
3 one of those shipments was bound for New York.

4 When they found that shipment, they sent a notice that  
5 the shipments were piracy to Mr. Wolff. Mr. Wolff forwarded  
6 that to Mr. Lundgren. As a result of that, he knew, and he  
7 went ahead and did another shipment to Mr. Wolff and he was  
8 paid for it.

9 *THE COURT:* Mr. Lundgren, would you be good enough to  
10 come back up to the lectern.

11 *BY THE COURT:*

12 *Q.* Mr. Lundgren, you listened as counsel for the Government  
13 outlined what the Government's proof would have been if we had  
14 a trial on the two charges. Do you admit you said and did the  
15 various things Mr. Morris suggested?

16 *A.* Yes, Your Honor.

17 *Q.* Now, as you probably know, we divide crimes into two  
18 categories. The less serious category is where a sentence  
19 could be up to a year in jail, could be a misdemeanor.  
20 Anything above that is classified as a felony.

21 Obviously, both of these crimes are classified as felonies.

22 Now, if I conclude you really know what you are doing, you  
23 are making a voluntary and informed decision, what I would do  
24 is, I would accept your pleas and in a sense put the Court's  
25 seal of approval on it. The technical term for that is called



1 adjudicating you to be guilty.

2 The moment that happens, though, you would be characterized  
3 as a convicted felon, and you automatically lose valuable civil  
4 rights, the right to vote, you would not be able to possess a  
5 firearm, or you couldn't serve on a jury or run for public  
6 office.

7 Do you understand you will lose those valuable civil  
8 rights?

9 A. Yes, Your Honor. I don't think I have a choice in that  
10 matter, I do -- but yes, I do.

11 Q. I think you can petition for the restoration of some of  
12 them, but I want to make sure you know it is one of the  
13 consequences of what follows through here.

14 Do you understand that?

15 A. Yes, I have been researching all the ways in the future,  
16 not being able to go to Canada and do my business, and my  
17 colleagues, yes, I am aware of it.

18 Q. Somebody like yourself involved in international business,  
19 these are things you need to think about very carefully, and we  
20 are all reading every day about border security and tightened  
21 travel arrangements and so on.

22 I want to make sure you understand what you are doing and  
23 you can see the consequences of that. Do you understand that?

24 A. In comparison to the alternatives, yes, I think this is my  
25 best option.

1 Q. All right. We've talked about the right to trial by jury  
2 and all those intendant rights, and I am satisfied you  
3 understand those. And we have gone through the provisions of  
4 your plea agreement, and I am satisfied you understand the  
5 terms and conditions. And we've discussed the sentencing  
6 process, and again, I am satisfied you understand that.

7 But, is there anything I haven't touched on, any questions  
8 or concerns you have that you wanted to mention this morning?

9 A. Just that -- I, I want the Court to know I didn't think I  
10 was doing anything --

11 MR. REINHART: That is for another day.

12 THE DEFENDANT: Yes.

13 BY THE COURT:

14 Q. Is it still your desire to go forward and enter the two  
15 pleas we are discussing?

16 A. Yes, Your Honor.

17 THE COURT: Let me turn to Mr. Reinhart.

18 MR. REINHART: At this time, we change our previously  
19 entered plea of not guilty to Count 1 to a plea of guilty and  
20 previously entered plea of not guilty to Count 3 and plead  
21 guilty.

22 THE COURT: Mr. Lundgren, is that what you want to do?

23 THE DEFENDANT: Yes.

24 THE COURT: In Case Number 16-80090, the case of  
25 United States of America versus Clifford Eric Lundgren, it is

1 the finding of the Court that Mr. Lundgren is competent and  
2 capable of entering informed pleas. I find both of the pleas  
3 are knowing and voluntary pleas, each one of which is supported  
4 by an independent basis in fact containing all of the essential  
5 elements of these two offenses.

6 Therefore, I accept Mr. Lundgren's pleas of guilty,  
7 and I adjudge him to be guilty first of the crime of having  
8 conspired to traffic in counterfeit goods, in violation of  
9 Title 18 United States Code, Section 2320, subsection (a)(1),  
10 and engaging in the crime of criminal copyright infringement,  
11 in violation of Title 17 United States Code, Section 506,  
12 subsection (a)(1)(A), and Title 18 United States Code, Section  
13 2319(a), and (b)(1)(B).

14 So I adjudge you to be guilty of those two offenses.

15 Now, Mr. Lundgren, I will ask a Probation Officer to  
16 get started right away on the Pre-Sentence Investigation  
17 Report. You will get a copy and I want you to sit down with  
18 your lawyers and go over it very, very carefully, and we will  
19 go ahead and have the sentencing.

20 I suspect one of the critical issues in this case,  
21 because I know Ms. Sanchez raised this in the beginning, is  
22 trying to figure out what is the loss.

23 Remember I said before, it is the loss that I think  
24 probably drives some of these Guidelines, and we will have to  
25 sit down and we will take as much time as we need to on that.

1           If it looks like this will take longer than the normal  
2     sentencing, I would appreciate a little advance warning. I  
3     will give you whatever time you need on that.

4           I wonder if I could ask Mr. Morris if the Government  
5     would be willing to concede and stipulate -- if the Court held  
6     an evidentiary hearing this morning, is the Government willing  
7     to stipulate there would be clear and convincing evidence that  
8     Mr. Lundgren does not pose a danger to the community nor a risk  
9     of flight, and therefore may remain at liberty on the same  
10    terms and conditions as were previously set?

11           *MR. MORRIS:* Yes, Your Honor, the Government would so  
12    stipulate.

13           *THE COURT:* Based upon that, Mr. Lundgren, I will  
14    allow you to remain on the same terms set in the case.

15           This has been a bad experience for you, and we will  
16    deal with it, hopefully, and put this behind you.

17           *THE DEFENDANT:* Thank you, Your Honor.

18           *MR. REINHART:* Your Honor will set the sentencing by  
19    separate order?

20           *THE COURT:* I will do it by separate order.

21           We need enough time to get the Pre-Sentence Report  
22    completed.

23           *MR. REINHART:* I think we are going to need probably  
24    half a day for the sentencing. There will be testimony on both  
25    sides on the valuation.

1           THE COURT: If you let Ms. Guerro know, I will put  
2 that aside for you. If it changes, let me know on that, too.  
3 Thank you very much.

4           *(Thereupon, the hearing was concluded.)*

5                           \* \* \*

6           (End of requested transcript)

7                           -oOo-

8           I certify that the foregoing is a correct transcript  
9 from the record of proceedings in the above matter.

10  
11           Date: July 16, 2016

12                           /s/ Pauline A. Stipes, Official Federal Reporter

13   Signature of Court Reporter  
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Pauline A. Stipes, Official Federal Reporter

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TAB B



IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

No. 17-12466-H

---

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

CLIFFORD ERIC LUNDGREN,

Defendant - Appellant.

---


Appeal from the United States District Court  
for the Southern District of Florida

---

ORDER:

Appellant's "Emergency Motion for Continued Release Pending Appeal" is GRANTED,  
as he has made the requisite showing. *See* 18 U.S.C. § 3143(b)(1)(B).

The Clerk is directed to treat any motion for reconsideration of this order as a  
non-emergency matter.

  
UNITED STATES CIRCUIT JUDGE

TAB C

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of September 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent five copies to the Clerk of the Court via third party commercial carrier for delivery within three days. I also certify that the foregoing is being served this day via CM/ECF on all Counsel of record.

s/ Randall S. Newman  
Randall S. Newman  
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New York, NY 10016  
(212) 545-4600  
newman@whafh.com

*Attorney for Defendant/Appellant,  
Clifford Eric Lundgren*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NO. **17-12466-HH**

United States of America,

Appellee,

- versus -

Clifford Eric Lundgren,

Appellant.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

---

SUPPLEMENTAL APPENDIX FOR THE UNITED STATES

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Emily M. Smachetti  
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Aileen M. Cannon  
Assistant United States Attorney

Of Counsel

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Certificate of Service	

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<sup>1</sup> The Presentence Investigation Report and Government Exhibit 18 were sent to the Court in a sealed envelope along with the supplemental appendix filed by the government.

**TAB A**

## US District Court Criminal Docket

U.S. District - Florida Southern  
(West Palm Beach)

9:16cr80090

**USA v. Wolff et al**

This case was retrieved from the court on Monday, October 30, 2017

Date Filed: 06/07/2016 Class Code: CLOSED  
Other Docket: None Closed: yes

### Defendants

#### Name

Robert J. Wolff(1)  
[Term: 05/24/2017]  
13444-104 1963 ENGLISH

#### Attorneys

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Fax: 561-431-3232  
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#### Charges

Complaints: none

**Pending:** 18:2320.F CONSPIRACY TO TRAFFIC CNTRFEIT  
GOODS/SERVICES(1s) PROBATION: 4 Years total to run concurrent.

17:506A.F CRIMINAL INFRINGEMENT OF A  
COPYRIGHT(3s) PROBATION: 4 Years total to run concurrent.

**Offense Level (Opening): Felony**

**Terminated:** TRAFFICKING CNTRFEIT GOODS/SERVICES(1-2) DISMISSED.

18:2320.F TRAFFICKING CNTRFEIT  
GOODS/SERVICES(2s) DISMISSED.

CRIMINAL INFRINGEMENT OF A COPYRIGHT(3) DISMISSED.

COUNTERFEIT LABELS FOR PHONOGRAPH  
RECORDS(4) DISMISSED.

18:2318.F COUNTERFEIT LABELS FOR  
PHONOGRAPH RECORDS(4s) DISMISSED.

FRAUD BY WIRE, RADIO, OR TELEVISION(5-15) DISMISSED.

18:1343.F FRAUD BY WIRE, RADIO, OR  
TELEVISION(5s-15s) DISMISSED.

#### Disposition

18:1341.F FRAUDS AND SWINDLES(16s-19s) DISMISSED.

**Offense Level (Terminated): Felony**

Case Assigned to: Senior Judge Daniel T. K. Hurley

**Name**

Clifford Eric Lundgren(2)  
[Term: 05/24/2017]  
Appeals court case number: 17-12466-H USCA 13623-104  
ENGLISH

**Attorneys**

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**Charges**

**Complaints:** none

**Pending:** 18:2320.F CONSPIRACY TO TRAFFIC CNTRFEIT  
GOODS/SERVICES(1s)

17:506A.F CRIMINAL INFRINGEMENT OF A  
COPYRIGHT(3s)

**Offense Level (Opening): Felony**

**Terminated:** TRAFFICKING CNTRFEIT GOODS/SERVICES(1-2)

18:2320.F TRAFFICKING CNTRFEIT  
GOODS/SERVICES(2s)

CRIMINAL INFRINGEMENT OF A COPYRIGHT(3)  
COUNTERFEIT LABELS FOR PHONOGRAPH  
RECORDS(4)

18:2318.F COUNTERFEIT LABELS FOR  
PHONOGRAPH RECORDS(4s)

FRAUD BY WIRE, RADIO, OR TELEVISION(5-15)

18:1343.F FRAUD BY WIRE, RADIO, OR  
TELEVISION(5s-15s)

FRAUDS AND SWINDLES(16-21)

**Disposition**

IMPRISONMENT: 15 Months. This term consists of 15 as to  
each of the counts 1s and 3s to be served concurrently.  
SUPERVISED RELEASE: 3 Years. This term consists of 3  
years as to count 1s and 3 years as to count 3s to run  
concurrent with each other.

IMPRISONMENT: 15 Months. This term consists of 15 as to  
each of the counts 1s and 3s to be served concurrently.  
SUPERVISED RELEASE: 3 Years. This term consists of 3  
years as to count 1s and 3 years as to count 3s to run  
concurrent with each other.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.

DISMISSED.



Case Assigned to: Senior Judge Daniel T. K. Hurley

**U. S. Attorneys**

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Date	#	Proceeding Text
06/07/2016	1	INDICTMENT as to Robert J. Wolff (1) count(s) 1-2, 3, 4, 5-15, 16-19, Clifford Eric Lundgren (2) count(s) 1-2, 3, 4, 5-15, 16-21; FORFEITURE. (tmn) (Additional attachment(s) added on 6/7/2016: # 1 Restricted Unredacted Indictment) (tmn). (Entered: 06/07/2016)
06/07/2016		SYSTEM ENTRY - Docket Entry 2 restricted/sealed until further notice. (tmn) (Entered: 06/07/2016)
06/07/2016		SYSTEM ENTRY - Docket Entry 3 restricted/sealed until further notice. (tmn) (Entered: 06/07/2016)
06/14/2016	4	NOTICE OF TEMPORARY ATTORNEY APPEARANCE: Jacob Alain Cohen appearing for Robert J. Wolff (sa) (Entered: 06/14/2016)
06/14/2016	5	PAPERLESS Minute Order for proceedings held before Magistrate Judge Dave Lee Brannon: AUSA-Lothrop Morris, Temporary Defense Counsel-Jacob A. Cohen and Defendant all present. Defendant sworn/testified and advised of rights. Defendant request Court to appoint permanent counsel. Court questions Defendant, finds him partially indigent and appoints CJA Counsel-Randee Golder. Court orders Defendant to pay \$2000.00 into the Court's Treasury to defray the costs of attorney's fees in 180 days. Initial Appearance as to Robert J. Wolff held on 6/14/2016. Date of Arrest or Surrender: 6/14/16. ( Arraignment and Status Conference Re: Waiver of Speedy Trial set for 6/16/2016 at 10:00 AM in West Palm Beach Division before WPB Duty Magistrate.), Bond Hearing as to Robert J. Wolff held on 6/14/2016. Bond set: Robert J. Wolff (1) \$50,000 PSB. Attorney added: Randee J. Golder for Robert J. Wolff for Criminal Case CJA representation. Date attorney was appointed CJA: 6/14/16. (Digital 10:18:50) Signed by Magistrate Judge Dave Lee Brannon on 6/14/2016. (sa) (Entered: 06/14/2016)
06/14/2016	6	\$50,000 PSB Entered as to Robert J. Wolff. Approved by Magistrate Judge Dave Lee Brannon. Please see bond image for conditions of release. (sa) (Additional attachment(s) added on 6/14/2016: # 1 Restricted Bond with 5th Page) (sa). (Entered: 06/14/2016)
06/14/2016	7	Report Commencing Criminal Action as to Robert J. Wolff - YOB: **/**/1963 Prisoner #: 13444-104 (ar2) (Entered: 06/14/2016)
06/14/2016		Arrest of Robert J. Wolff (ar2) (Entered: 06/14/2016)
06/14/2016	8	Order on Partial Indigency for Appointment of Counsel and Distribution of Available Funds as to Robert J. Wolff. Directing Funds in the amount of \$2000.00 be deposited with the Clerk of Court by 12/14/16. Status Conference Re: Partial Indigency/CJA Payment set for 12/14/2016 at 10:00 AM in

- 06/16/2016 9 PAPERLESS Minute Order for proceedings held before Magistrate Judge Dave Lee Brannon: AUSA-William Zloch, Defense Counsel-Randee Golder and Defendant all present.ARRAIGNMENT as to Robert J. Wolff (1) Count 1-2,3,4,5-15,16-19 held on 6/16/2016, Status Conference Re: Waiver of Speedy Trial as to Robert J. Wolff held on 6/16/2016. Defendant WAIVES speedy trial. (Digital 10:15:57) PAPERLESS STANDING DISCOVERY ORDER: The defendant(s) having been arraigned this date in open Court, it is Ordered that within 14 days of the date of this order that all parties to this action shall review and comply with Southern District of Florida Local Rules 88.10 (Criminal Discovery), and 88.9(c) (Motions in Criminal Cases). Upon a sufficient showing, the Court may at any time, upon a properly filed motion, order that the discovery or inspection provided for by this Standing Order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make a good faith effort to comply with the letter and spirit of this Standing Order. It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of Local Rule 88.10. Signed by Magistrate Judge Dave Lee Brannon on 6/16/2016. (sa) (Entered: 06/16/2016)
- 06/16/2016 10 ORDER RE: STATUS REPORT, SPEEDY TRIAL AND PRETRIAL MATTERS as to Robert J. Wolff. Signed by Magistrate Judge Dave Lee Brannon on 6/16/2016. (sa) (Entered: 06/16/2016)
- 06/16/2016 11 ENDORSED ORDER as to Robert J. Wolff: Consistent with the oral waiver made on the record in open court on this date, the Defendant shall file a written speedy trial waiver in 5 working days. Signed by U.S. Magistrate Judge Dave Lee Brannon on 6/16/2016. (js00) (Entered: 06/16/2016)
- 06/17/2016 12 WAIVER of Speedy Trial by Robert J. Wolff (Golder, Randee) (Entered: 06/17/2016)
- 06/20/2016 13 Arrest Warrant returned executed on 6/14/2016 as to Robert J. Wolff (ar2) (Entered: 06/20/2016)
- 06/21/2016 14 NOTICE OF ATTORNEY APPEARANCE: Lilly Ann Sanchez appearing for Clifford Eric Lundgren . Attorney Lilly Ann Sanchez added to party Clifford Eric Lundgren(pty: dft). (Sanchez, Lilly Ann) (Entered: 06/21/2016)
- 06/22/2016 15 PAPERLESS Minute Order for proceedings held before Magistrate Judge Dave Lee Brannon: AUSA-Lothrop Morris, Defense Counsel-Lilly Ann Sanchez and Defendant all present. Defendant sworn/testified and advised of rights. Initial Appearance and ARRAIGNMENT as to Clifford Eric Lundgren held on 6/22/2016. Date of Arrest or Surrender: 6/22/16., Bond Hearing as to Clifford Eric Lundgren held on 6/22/2016. Bond set: Clifford Eric Lundgren (2) \$50,000 PSB. Defendant waives Speedy Trial. Defense Counsel will file written waiver in 5 business days. (Digital 10:09:46) PAPERLESS STANDING DISCOVERY ORDER: The defendant(s) having been arraigned this date in open Court, it is Ordered that within 14 days of the date of this order that all parties to this action shall review and comply with Southern District of Florida Local Rules 88.10 (Criminal Discovery), and 88.9(c) (Motions in Criminal Cases). Upon a sufficient showing, the Court may at any time, upon a properly filed motion, order that the discovery or inspection provided for by this Standing Order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both sides shall make a good faith effort to comply with the letter and spirit of this Standing Order. It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of Local Rule 88.10. Signed by Magistrate Judge Dave Lee Brannon on 6/22/2016. (sa) (Entered: 06/22/2016)
- 06/22/2016 16 ORDER RE: STATUS REPORT, SPEEDY TRIAL AND PRETRIAL MATTERS as to Clifford Eric Lundgren. Signed by Magistrate Judge Dave Lee Brannon on 6/22/2016. (sa) (Entered: 06/22/2016)
- 06/22/2016 17 \$50,000 PSB Entered as to Clifford Eric Lundgren. Approved by Magistrate Judge Dave Lee Brannon. Please see bond image for conditions of release. (sa) (Additional attachment(s) added on 6/22/2016: # 1 Restricted Bond with 5th Page) (sa). (Entered: 06/22/2016)
- 06/24/2016 18 Arrest Warrant returned executed on 6/22/2016 as to Clifford Eric Lundgren (ar2) (Entered: 06/24/2016)
- 06/27/2016 19 WAIVER of Speedy Trial by Robert J. Wolff, Clifford Eric Lundgren (Sanchez, Lilly Ann) (Entered: 06/27/2016)
- 06/30/2016 20 STATUS REPORT - Joint by Robert J. Wolff (Golder, Randee) (Entered: 06/30/2016)
- 07/07/2016 21 STATUS REPORT Joint by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 07/07/2016)
- 07/08/2016 22 RESPONSE to Standing Discovery Order by USA as to Robert J. Wolff (Morris, Lothrop) (Entered: 07/08/2016)
- 07/08/2016 23 RESPONSE to Standing Discovery Order by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 07/08/2016)
- 07/11/2016 24 ORDER SETTING TRIAL as to Robert J. Wolff and Clifford Eric Lundgren. Calendar Call set for 10/6/2016 at 8:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. Jury Trial set for 10/11/2016 before Judge Daniel T. K. Hurley. Signed by Judge Daniel T. K. Hurley on 7/11/2016. (ar2) Pattern Jury Instruction Builder - To access the latest, up to date changes to the 11th Circuit Pattern Jury Instructions go to <https://pji.ca11.uscourts.gov> or click here. (Entered: 07/11/2016)

07/13/2016	25	NOTICE OF UNAVAILABILITY by Clifford Eric Lundgren for dates of October 3, 2016 through November 1, 2016 (Sanchez, Lilly Ann) (Entered: 07/13/2016)
09/07/2016	26	Unopposed MOTION to Continue Trial by Clifford Eric Lundgren. Responses due by 9/26/2016 (Sanchez, Lilly Ann) (Entered: 09/07/2016)
09/09/2016	27	ORDER denying without prejudice to renewal at the calendar call Defendant (2) Clifford Lundgren's 26 motion to continue the trial. Defense counsel may ask counsel for the co-defendant to speak for her at the calendar call. Signed by Judge Daniel T. K. Hurley on 9/9/2016. (DTKH) (Entered: 09/09/2016)
10/11/2016	28	PAPERLESS ORDER RESETTING CALENDAR CALL as to Robert J. Wolff, Clifford Eric Lundgren, Due to the court's closure for Hurricane Matthew, the calendar call previously set for 10/7/16 has been reset. ( Calendar Call set for 10/14/2016 09:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley.) Signed by Judge Daniel T. K. Hurley on 10/11/2016. (mg) (Entered: 10/11/2016)
10/20/2016	29	ORDER GRANTING MOTION TO CONTINUE - Ends of Justice as to Robert J. Wolff, Clifford Eric Lundgren Time excluded from 10/14/16 until 11/7/16. Calendar Call set for 10/27/2016 08:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. Jury Trial set for 11/7/2016 in West Palm Beach Division before Judge Daniel T. K. Hurley. Signed by Judge Daniel T. K. Hurley on 10/20/2016. (mg) (Entered: 10/20/2016)
10/24/2016	30	Unopposed MOTION to Travel by Robert J. Wolff. (Attachments: # 1 Text of Proposed Order Proposed Order Allowing Travel)(Golder, Randee) (Entered: 10/24/2016)
10/25/2016	31	PAPERLESS ORDER granting 30 Unopposed Motion to Allow Travel as to Robert J. Wolff (1). Mr. Wolff may travel by car to Gainesville, Florida from November 4-6, 2016, so long as he provides his complete itinerary and all pertinent contact information to Pretrial Services before he leaves. Signed by U.S. Magistrate Judge Dave Lee Brannon on 10/25/2016. (jrz) (Entered: 10/25/2016)
11/03/2016	32	NOTICE OF HEARING as to Robert J. Wolff, Clifford Eric Lundgren Miscellaneous Hearing set for 11/14/2016 09:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. (mg) (Entered: 11/03/2016)
11/04/2016	33	First RESPONSE to Standing Discovery Order by USA as to Robert J. Wolff Supplemental (Morris, Lothrop) (Entered: 11/04/2016)
11/04/2016	34	First RESPONSE to Standing Discovery Order by USA as to Clifford Eric Lundgren Supplemental (Morris, Lothrop) (Entered: 11/04/2016)
11/14/2016	35	PAPERLESS Minute Entry for proceedings held before Judge Daniel T. K. Hurley: Miscellaneous Hearing as to Robert J. Wolff, Clifford Eric Lundgren held on 11/14/2016. Court to put the case on the February trial calendar which begins February 6, 2017 with Calendar call being January 26, 2017. Total time in court: 2 hour(s). Attorney Appearance(s): Lothrop Morris, Randee J. Golder, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (mg) (Entered: 11/14/2016)
11/14/2016		Set/Reset Hearings as to Robert J. Wolff, Clifford Eric Lundgren: Calendar Call set for 1/26/2017 08:30 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. Jury Trial set for 2/6/2017 in West Palm Beach Division before Judge Daniel T. K. Hurley. (mg) (Entered: 11/14/2016)
11/14/2016	36	ORDER granting Defendants oral motion to continue the trial from its present setting on the November/December 2016 trial calendar. The case will be reset to the February 2017 trial calendar by separate order. All pretrial motions shall be filed on or before December 31, 2016. In granting this motion the court finds that the ends of justice served by taking this action outweigh the best interest of the public and the Defendants' in strict speedy trial compliance. The necessity for this action is the Defendants' right to effective assistance of counsel in investigating and, if necessary, filing appropriate pretrial motions concerning newly-discovered evidentiary issues. Signed by Judge Daniel T. K. Hurley on 11/14/2016. (DTKH) (Entered: 11/14/2016)
11/14/2016	37	Case No Longer Referred to Magistrate Judge James M. Hopkins as to Robert J. Wolff, Clifford Eric Lundgren Signed by Judge Daniel T. K. Hurley on 11/14/2016. (DTKH) (Entered: 11/14/2016)
11/25/2016	38	NOTICE of Intent to Use 902(11) Evidence by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 11/25/2016)
12/14/2016	39	PAPERLESS Minute Order for proceedings held before Magistrate Judge William Matthewman: Status Conference Re: Partial Indigency as to Robert J. Wolff held on 12/14/2016. Defendant and Defense counsel did not appear. Status Re: Partial Indigency reset to 12/15/2016 at 10:00 a.m. in the West Palm Beach division before the WPB Duty Magistrate Judge. Total time in court: 6 minutes. Attorney Appearance(s): AUSA Lothrop Morris. (Digital 10:10:29) Signed by Magistrate Judge William Matthewman on 12/14/2016. (kza) (Entered: 12/14/2016)
12/14/2016	40	ORDER SETTING HEARING AND DIRECTING DEFENDANT AND DEFENSE COUNSEL TO APPEAR as to Robert J. Wolff, ( Status Conference Re: Partial Indigency/CJA Payment set for 12/15/2016 at 10:00 AM in West Palm Beach Division before WPB Duty Magistrate.) Signed by Magistrate Judge William Matthewman on 12/14/2016. (kza) (Entered: 12/14/2016)
12/15/2016	41	Clerks Receipt for CJA Repayment received on 12/15/2016 in the amount of \$2,000.00 Per the Order of the Court DE 40 , receipt FLS900004825. (fbn) (Entered: 12/15/2016)
12/15/2016	42	PAPERLESS Minute Order for proceedings held before Magistrate Judge William Matthewman: Status

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Conference Re: Partial Indigency as to Robert J. Wolff held on 12/15/2016. Defense counsel informs the Court that defendant will make the payment. The Court will allow the defendant to make the payment by 2:00 p.m. on Monday, December 19, 2016. ( Status Conference Re: Partial Indigency/CJA Payment set for 12/29/2016 at 10:00 AM in West Palm Beach Division before WPB Duty Magistrate.) Total time in court: 3 minutes. Attorney Appearance(s): AUSA Lothrop Morris and Randee J. Golder, present. (Digital 10:05:06) Signed by Magistrate Judge William Matthewman on 12/15/2016. (kza) (Entered: 12/15/2016)

12/23/2016 Terminate Hearings - Status Re Partial Indigency cancelled - See DE 41 Clerks Receipt for CJA Repayment received on 12/15/2016 in the amount of \$2,000.00 Per the Order of the Court DE 40, receipt FLS900004825 as to Robert J. Wolff. (kza) (Entered: 12/23/2016)

01/03/2017 43 MOTION to Dismiss 1 Indictment, and Memorandum of Law by Clifford Eric Lundgren. Responses due by 1/17/2017 (Attachments: # 1 Exhibit Exhibit A, # 2 Exhibit Exhibit B, # 3 Exhibit Exhibit C, # 4 Exhibit Exhibit D, # 5 Exhibit Exhibit E, # 6 Exhibit Exhibit F, # 7 Exhibit Exhibit G)(Sanchez, Lilly Ann) Modified title text on 1/4/2017 (asl). (Entered: 01/03/2017)

01/03/2017 44 MOTION to Exclude Proposed Expert Evidence and Testimony of Microsoft Corporation by Clifford Eric Lundgren. Responses due by 1/17/2017 (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Sanchez, Lilly Ann) (Entered: 01/03/2017)

01/03/2017 46 MOTION to Suppress Evidence by Clifford Eric Lundgren. See 43 for image (asl) (Entered: 01/04/2017)

01/04/2017 45 Clerks Notice to Filer re 43 MOTION to Dismiss 1 Indictment, . Motion with Multiple Reliefs Filed as One Relief; ERROR - The Filer selected only one relief event and failed to select the additional corresponding events for each relief requested in the motion. The docket entry was corrected by the Clerk. It is not necessary to refile this document but future filings must comply with the instructions in the CM/ECF Attorney User's Manual. (asl) (Entered: 01/04/2017)

01/10/2017 47 RESPONSE to Motion by USA as to Robert J. Wolff, Clifford Eric Lundgren re 44 MOTION to Exclude Proposed Expert Evidence and Testimony of Microsoft Corporation Request for Expert Summary Replies due by 1/17/2017. (Attachments: # 1 Appendix CV of Katie Hasbrouck) (Morris, Lothrop) (Entered: 01/10/2017)

01/10/2017 48 RESPONSE in Opposition by USA as to Clifford Eric Lundgren re 44 MOTION to Exclude Proposed Expert Evidence and Testimony of Microsoft Corporation Replies due by 1/17/2017. (Morris, Lothrop) (Entered: 01/10/2017)

01/10/2017 49 RESPONSE in Opposition by USA as to Clifford Eric Lundgren re 43 MOTION to Dismiss 1 Indictment, Replies due by 1/17/2017. (Morris, Lothrop) (Entered: 01/10/2017)

01/17/2017 50 REPLY in Support by Clifford Eric Lundgren as to Robert J. Wolff, Clifford Eric Lundgren re 44 MOTION to Exclude Proposed Expert Evidence and Testimony of Microsoft Corporation (Attachments: # 1 Exhibit A) (Sanchez, Lilly Ann) Modified title text on 1/17/2017 (asl). (Entered: 01/17/2017)

01/17/2017 51 Clerks Notice to Filer re 50 Response in Support, . Master Case Selected; ERROR - The filer selected the Master Case, instead of the applicable defendant. The correction was made by the Clerk. It is not necessary to refile this document. (asl) (Entered: 01/17/2017)

01/17/2017 52 RESPONSE to Motion by USA as to Clifford Eric Lundgren re 43 MOTION to Dismiss 1 Indictment, Second Rule 16 Response Replies due by 1/24/2017. (Attachments: # 1 Appendix A) (Morris, Lothrop) (Entered: 01/17/2017)

01/17/2017 53 Memorandum in Support by Clifford Eric Lundgren re 43 MOTION to Dismiss 1 Indictment, or in the Alternative, to Suppress Evidence (Attachments: # 1 Exhibit A) (Sanchez, Lilly Ann) (Entered: 01/17/2017)

01/18/2017 54 TRANSCRIPT of status conference as to Robert J. Wolff, Clifford Eric Lundgren held on 10-14-2016 before Judge Daniel T. K. Hurley, 1-7 pages, Court Reporter: Dawn Savino, 305-523-5598 / Dawn\_Savino@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/8/2017. Redacted Transcript Deadline set for 2/21/2017. Release of Transcript Restriction set for 4/18/2017. (dwh) (Entered: 01/18/2017)

01/23/2017 55 RESPONSE to Motion by USA as to Clifford Eric Lundgren re 43 MOTION to Dismiss 1 Indictment, Replies due by 1/30/2017. (Attachments: # 1 Appendix A) (Morris, Lothrop) (Entered: 01/23/2017)

01/24/2017 56 NOTICE OF ATTORNEY APPEARANCE: Bruce Reinhart appearing for Clifford Eric Lundgren as Co-Counsel for trial purposes. Attorney Bruce Reinhart added to party Clifford Eric Lundgren(pty:dft). (Reinhart, Bruce) (Entered: 01/24/2017)

01/26/2017 57 NOTICE OF ATTORNEY APPEARANCE Rolando Garcia appearing for USA. . Attorney Rolando Garcia added to party USA(pty:pla). (Garcia, Rolando) (Entered: 01/26/2017)

01/26/2017 58 ORDER SETTING EVIDENTIARY HEARING as to Robert J. Wolff, Clifford Eric Lundgren, as to 43 MOTION to Dismiss 1 Indictment, , 44 MOTION to Exclude Proposed Expert Evidence and Testimony of Microsoft Corporation . ( Evidentiary Hearing set for 2/6/2017 09:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley.), Signed by Judge Daniel T. K. Hurley on 1/26/2017. (mg) (Entered: 01/26/2017)



01/26/2017 59 NOTICE OF CHANGE OF PLEA HEARING as to Robert J. Wolff. Change of Plea Hearing set for 2/2/2017 03:30 PM in West Palm Beach Division before Judge Daniel T. K. Hurley. (mg) (Entered: 01/26/2017)

01/31/2017 60 MOTION in Limine Regarding Evidence of Copyright and/or Suggestion that this Matter is a Civil Rather Than Criminal Matter by USA as to Clifford Eric Lundgren. Responses due by 2/14/2017 (Morris, Lothrop) (Entered: 01/31/2017)

01/31/2017 61 NOTICE of Intent to Use FRE 806 Evidence by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 01/31/2017)

02/02/2017 62 SUPERSEDING INDICTMENT as to Robert J. Wolff (1) count(s) 1s, 2s, 3s, 4s, 5s-15s, 16s-19s, Clifford Eric Lundgren (2) count(s) 1s, 2s, 3s, 4s, 5s-15s, 16s-21s and Forfeiture. (kza) (Additional attachment(s) added on 2/2/2017: # 1 Restricted Unredacted Indictment) (kza). (Entered: 02/02/2017)

02/03/2017 63 Notice of Presentence Investigation Assignment of Robert J. Wolff to US Probation Officer Edward Cooley in the Fort Pierce Alto Lee Adams, Sr. U.S. Courthouse and he/she can be contacted at 772-467-2367 or Edward\_Cooley@flsp.uscourts.gov. (mhz2) (Entered: 02/03/2017)

02/03/2017 64 MOTION in Limine Admissibility of Email Evidence by USA as to Clifford Eric Lundgren. Responses due by 2/17/2017 (Attachments: # 1 Appendix 1 to 5)(Morris, Lothrop) (Entered: 02/03/2017)

02/03/2017 65 PAPERLESS Minute Entry for proceedings held before Judge Daniel T. K. Hurley: Change of Plea Hearing as to Robert J. Wolff held on 2/3/2017. Robert J. Wolff (1)pleaded Guilty to Count 1s,3s. Total time in court: 45 minutes. Attorney Appearance(s): Lothrop Morris, Randee J. Golder, Court Reporter: Tammy Nestor, 954-769-5488 / Tammy\_Nestor@flsd.uscourts.gov. (mg) (Entered: 02/03/2017)

02/03/2017 66 Third Response Request for Summary of Expert Testimony by USA as to Clifford Eric Lundgren (Attachments: # 1 Supplement Mazzone expert report)(Morris, Lothrop) (Entered: 02/03/2017)

02/03/2017 67 PLEA AGREEMENT as to Robert J. Wolff (ail) (Entered: 02/03/2017)

02/03/2017 68 STATEMENT OF FACTS as to Robert J. Wolff (ail) (Entered: 02/03/2017)

02/05/2017 69 RESPONSE to Motion by USA as to Clifford Eric Lundgren re 43 MOTION to Dismiss 1 Indictment, McGloin Expert Witness Summary FRCP 16 Replies due by 2/13/2017. (Morris, Lothrop) (Entered: 02/05/2017)

02/06/2017 71 PAPERLESS Minute Entry for proceedings held before Judge Daniel T. K. Hurley: Motion Hearing as to Clifford Eric Lundgren held on 2/6/2017 re 46 MOTION to Suppress Evidence filed by Clifford Eric Lundgren, 43 MOTION to Dismiss 1 Indictment, filed by Clifford Eric Lundgren Total time in court: 8 hour(s). Attorney Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (mg) (Entered: 02/07/2017)

02/07/2017 70 Minute Entry for proceedings held before Judge Daniel T. K. Hurley: ARRAIGNMENT on Superseding Indictment DE 62 as to Clifford Eric Lundgren (2) Count 1-2,1s,2s,3,3s,4,4s,5-15,5s-15s,16-21,16s-21s held on 2/7/2017. Waived formal reading of indictment. Entered a plea of not guilty. Requests trial by jury. Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (lbc) (Entered: 02/07/2017)

02/07/2017 72 ORDER denying Defendant (2) Clifford Eric Lundgren's 43 motion to dismiss the indictment. The court conducted an evidentiary hearing and made findings of fact and reached conclusions of law which are incorporated by reference into this order. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)

02/07/2017 73 ORDER denying Defendant (2) Clifford E. Lundgren's 46 motion to suppress without prejudice to object to the admissibility of evidence at trial. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)

02/07/2017 74 ORDER denying, without prejudice to renewal at trial, the Government 60 64 motions win limine. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)

02/07/2017 75 ORDER denying, without prejudice to raise the issue via a motion pursuant to Rule 29, Fed.R.Crim.P., Defendant (2) Clifford E. Lundgren's 44 motion to exclude a proposed government expert witness. Signed by Judge Daniel T. K. Hurley on 2/7/2017. (DTKH) (Entered: 02/07/2017)

02/07/2017 76 PAPERLESS Minute Entry for proceedings held before Judge Daniel T. K. Hurley: Motion Hearing as to Clifford Eric Lundgren held on 2/7/2017 re 43 MOTION to Dismiss 1 Indictment, filed by Clifford Eric Lundgren Total time in court: 5 hour(s). Attorney Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (mg) (Entered: 02/08/2017)

02/10/2017 77 RESPONSE to Motion by USA as to Clifford Eric Lundgren re 43 MOTION to Dismiss 1 Indictment, Rule 16 Expert Summary Lozano Replies due by 2/17/2017. (Attachments: # 1 Appendix Curriculum Vitae) (Morris, Lothrop) (Entered: 02/10/2017)

02/13/2017 78 MOTION for Forfeiture of Property preliminary order of forfeiture by USA as to Robert J. Wolff. Attorney Antonia J. Barnes added to party USA(pty:pla). Responses due by 2/27/2017 (Attachments: # 1 Text of Proposed Order preliminary order of forfeiture)(Barnes, Antonia) (Entered: 02/13/2017)

02/16/2017	79	NOTICE OF CHANGE OF PLEA HEARING as to Clifford Eric Lundgren. Change of Plea Hearing set for 2/28/2017 08:00 AM in West Palm Beach Division before Judge Daniel T. K. Hurley. (mg) (Entered: 02/16/2017)
02/19/2017	80	TRANSCRIPT of Motion to Dismiss as to Clifford Eric Lundgren held on 2.6.17 before Judge Daniel T. K. Hurley, Volume Number 1 of 2, 1-255 pages, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 3/13/2017. Redacted Transcript Deadline set for 3/22/2017. Release of Transcript Restriction set for 5/22/2017. (ps) (Entered: 02/19/2017)
02/19/2017	81	TRANSCRIPT of Motion to Dismiss as to Clifford Eric Lundgren held on 2.7.17 before Judge Daniel T. K. Hurley, Volume Number 2 of 2, 1-148 pages, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 3/13/2017. Redacted Transcript Deadline set for 3/22/2017. Release of Transcript Restriction set for 5/22/2017. (ps) (Entered: 02/19/2017)
02/22/2017	82	PRELIMINARY ORDER OF FORFEITURE granting 78 Motion for Forfeiture of Property as to Robert J. Wolff (1). Signed by Judge Daniel T. K. Hurley on 2/22/2017. (ail) (Entered: 02/22/2017)
02/28/2017	83	PAPERLESS Minute Entry for proceedings held before Senior Judge Daniel T. K. Hurley. Change of Plea Hearing as to Clifford Eric Lundgren held on 2/28/2017. Clifford Eric Lundgren (2) Plead Guilty to Count 1s,3s. Total time in court: 1 hour(s). Attorney Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline_Stipes@flsd.uscourts.gov. (lbc) (Entered: 02/28/2017)
02/28/2017	84	Notice of Presentence Investigation Assignment of Clifford Eric Lundgren to US Probation Officer Nathan Vreeland in the West Palm Beach U.S. Probation Office and he/she can be contacted at 561 804-6844 or Nathan_Vreeland@flsp.uscourts.gov. (mhz2) (Entered: 02/28/2017)
03/01/2017	85	PLEA AGREEMENT as to Clifford Eric Lundgren (ail) (Entered: 03/01/2017)
03/01/2017	86	STATEMENT OF FACTS as to Clifford Eric Lundgren (ail) (Entered: 03/01/2017)
03/03/2017	87	MOTION for Forfeiture of Property preliminary order of forfeiture by USA as to Clifford Eric Lundgren. Responses due by 3/17/2017 (Attachments: # 1 Text of Proposed Order preliminary order of forfeiture)(Barnes, Antonia) (Entered: 03/03/2017)
03/07/2017	88	PRELIMINARY ORDER OF FORFEITURE granting 87 Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 3/6/2017. (ail) (Entered: 03/07/2017)
03/16/2017	89	Unopposed MOTION to Travel by Robert J. Wolff. (Golder, Randee) (Entered: 03/16/2017)
03/17/2017	90	PAPERLESS NOTICE OF HEARING as to Robert J. Wolff. Sentencing set for 5/15/2017 09:00 AM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. (lbc) (Entered: 03/17/2017)
03/17/2017	91	PAPERLESS NOTICE OF HEARING as to Clifford Eric Lundgren. Sentencing set for 5/15/2017 01:30 PM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. (lbc) (Entered: 03/17/2017)
03/17/2017	92	PAPERLESS NOTICE OF HEARING as to Robert J. Wolff. Sentencing RESET for 5/22/2017 09:00 AM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. Reset from 5/15/17. (lbc) (Entered: 03/17/2017)
03/17/2017	93	PAPERLESS NOTICE OF HEARING as to Clifford Eric Lundgren Sentencing RESET for 5/22/2017 01:30 PM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. Reset from 5/15/17. (lbc) (Entered: 03/17/2017)
03/20/2017	94	ORDER granting Defendant (1) Robert J. Wolff's 89 motion for permission to travel to Flushing, N.Y., leaving on April 11th and returning on April 15th, 2017. Signed by Judge Daniel T. K. Hurley on 3/20/2017. (DTKH) (Entered: 03/20/2017)
03/29/2017	95	Acknowledgment of Service on 03/13/2017 by USA as to Robert J. Wolff re 82 PRELIMINARY ORDER OF FORFEITURE granting 78 Motion for Forfeiture of Property as to Robert J. Wolff (1). Signed by Judge Daniel T. K. Hurley on 2/22/2017. (ail) Miscellaneous Microsoft Windows CDs and DVDs (Barnes, Antonia) (Entered: 03/29/2017)
03/29/2017	96	Acknowledgment of Service on 03/13/2017 by USA as to Clifford Eric Lundgren re 88 PRELIMINARY ORDER OF FORFEITURE granting 87 Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 3/6/2017. (ail) Miscellaneous Microsoft Windows CDs and DVDs (Barnes, Antonia) (Entered: 03/29/2017)
04/10/2017	97	SERVICE (Proof) by Publication by USA as to Robert J. Wolff Last Publication date 4/2/2017. Claims/Positions/Written Defenses/Answers/etc., due by 5/2/2017. (Attachments: # 1 Publication and Certification Report) (Barnes, Antonia) (Entered: 04/10/2017)
04/11/2017	98	SERVICE (Proof) by Publication by USA as to Clifford Eric Lundgren Last Publication date 4/7/2017. Claims/Positions/Written Defenses/Answers/etc., due by 5/8/2017. (Attachments: # 1 Advertisement and Certification Report) (Barnes, Antonia) (Entered: 04/11/2017)

04/17/2017	99	DRAFT Disclosure of Presentence Investigation Report of Robert J. Wolff. This is a limited access document. Report access provided to attorneys Lothrop Morris, Randee J. Golder by USPO (Attachments: # 1 Position of Parties)(bma) (Entered: 04/17/2017)
04/17/2017	100	DRAFT Disclosure of Presentence Investigation Report of Clifford Eric Lundgren. This is a limited access document. Report access provided to attorneys Lothrop Morris, Bruce Reinhart by USPO (Attachments: # 1 Position of Parties)(mh2) (Entered: 04/17/2017)
04/18/2017	101	Unopposed MOTION Partially CONSolidated Sentencing Hearing re 93 Notice of Hearing by Clifford Eric Lundgren. Responses due by 5/2/2017 (Reinhart, Bruce) (Entered: 04/18/2017)
04/25/2017	102	ORDER granting Defendant (2) Clifford Eric Lundgren's 101 motion for the Court to conduct a common hearing on loss valuation. The matter shall be heard for both defendants at 9:00 a.m. on May 22, 2017. Signed by Senior Judge Daniel T. K. Hurley on 4/25/2017. (DTKH) (Entered: 04/25/2017)
04/30/2017	103	OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT by Robert J. Wolff (Golder, Randee) (Entered: 04/30/2017)
05/01/2017	104	STIPULATED MOTION for Substitution of Counsel. Substituting Bruce E. Reinhart, P.A. for McDonald Hopkins LLC by Clifford Eric Lundgren. Responses due by 5/15/2017 (Reinhart, Bruce) (Entered: 05/01/2017)
05/02/2017	105	ORDER granting Defendant (2) Clifford E. Lundgren's 104 motion to permit Bruce E. Reinhart, Esq. to substitute for McDonald Hopkins, Esq. Mr. Hopkins shall have no further responsibility in this matter. Signed by Senior Judge Daniel T. K. Hurley on 5/2/2017. (DTKH) (Entered: 05/02/2017)
05/12/2017	106	SENTENCING MEMORANDUM by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/12/2017)
05/12/2017	107	Response Expert Witness Summary by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/12/2017)
05/14/2017	108	OBJECTIONS TO PRESENTENCE INVESTIGATION REPORT by Clifford Eric Lundgren (Reinhart, Bruce) (Entered: 05/14/2017)
05/15/2017	109	FINAL Addendum 1 Disclosure of Presentence Investigation Report of Robert J. Wolff. This is a limited access document. Report access provided to attorneys Lothrop Morris, Randee J. Golder by USPO (Attachments: # 1 Addendum, # 2 Objections by Defendant, # 3 Government's Sentencing Memorandum)(bma) (Entered: 05/15/2017)
05/15/2017	110	RESPONSE to 103 Objections to Presentence Investigation Report by USA as to Robert J. Wolff (Morris, Lothrop) (Entered: 05/15/2017)
05/15/2017	111	FINAL Addendum 1 Disclosure of Presentence Investigation Report of Clifford Eric Lundgren. This is a limited access document. Report access provided to attorneys Lothrop Morris, Bruce Reinhart by USPO (Attachments: # 1 Addendum)(mh2) (Entered: 05/15/2017)
05/16/2017	112	RESPONSE to 108 Objections to Presentence Investigation Report by USA as to Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/16/2017)
05/16/2017	113	NOTICE of Filing Character and Reference Letters by Clifford Eric Lundgren (Sanchez, Lilly Ann) (Entered: 05/16/2017)
05/16/2017	114	Response Second Ray Expert Witness Summary for Sentencing by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/16/2017)
05/17/2017	115	NOTICE of Filing Character and Reference Letters by Clifford Eric Lundgren (Sanchez, Lilly Ann) (Entered: 05/17/2017)
05/17/2017	116	Amended Response McGloin Expert Witness for Sentencing by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/17/2017)
05/17/2017	117	SENTENCING MEMORANDUM by Clifford Eric Lundgren (Attachments: # 1 Exhibit List of Websites, # 2 Exhibit ITAP description, # 3 Exhibit Charitable works)(Reinhart, Bruce) (Entered: 05/17/2017)
05/19/2017	118	SENTENCING MEMORANDUM by Robert J. Wolff (Golder, Randee) (Entered: 05/19/2017)
05/19/2017	119	Amended Response Second McGloin Expert Witness Summary by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/19/2017)
05/21/2017	120	MOTION to Reduce Sentence Pursuant to 5K1.1 by USA as to Robert J. Wolff. Responses due by 6/5/2017 (Morris, Lothrop) (Entered: 05/21/2017)
05/22/2017	121	PAPERLESS NOTICE OF HEARING as to Clifford Eric Lundgren. Sentencing reset for 5/23/2017 10:30 AM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. (lbc) (Entered: 05/22/2017)
05/22/2017	122	PAPERLESS NOTICE OF HEARING as to Robert J. Wolff. Sentencing reset for 5/23/2017 11:15 PM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. (lbc) (Entered: 05/22/2017)
05/22/2017	123	PAPERLESS NOTICE OF HEARING as to Robert J. Wolff. Sentencing set for 5/23/2017 11:15 AM in West Palm Beach Division before Senior Judge Daniel T. K. Hurley. (lbc) (Entered: 05/22/2017)
05/22/2017	124	PAPERLESS Minute Entry for proceedings held before Senior Judge Daniel T. K. Hurley: Hearing as to Robert J. Wolff, Clifford Eric Lundgren held on 5/22/2017. Defendants present with counsel. Total time in court: 7 hour(s) : 00 minutes. Attorney Appearance(s): Lothrop Morris, Randee J. Golder,

- 05/23/2017 125 PAPERLESS Minute Entry for proceedings held before Senior Judge Daniel T. K. Hurley: Sentencing held on 5/23/2017 as to Clifford Eric Lundgren. Defendant present with counsel.. Imprisonment for a term of 15 months. 3 years supervised release. \$200.00 assessment. \$50,000.00 fine. Total time in court: 1 hour(s) : 30 minutes. Attorney Appearance(s): Lothrop Morris, Bruce Reinhart, Lilly Ann Sanchez, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (lbc) (Entered: 05/23/2017)
- 05/23/2017 126 PAPERLESS Minute Entry for proceedings held before Senior Judge Daniel T. K. Hurley: Sentencing held on 5/23/2017 as to Robert J. Wolff. Defendant present with counsel.. Probation 4 years total. \$200.00 assessment. Total time in court: 45 minutes. Attorney Appearance(s): Lothrop Morris, Rande J. Golder, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (lbc) (Entered: 05/23/2017)
- 05/23/2017 127 NOTICE of Compliance With Administrative Order 2016-70 by Clifford Eric Lundgren (Attachments: # 1 Exhibit)(Reinhart, Bruce) (Entered: 05/23/2017)
- 05/24/2017 128 JUDGMENT as to Robert J. Wolff (1), Count(s) 1-2, 16-19, 16s-19s, 2s, 3, 4, 4s, 5-15, 5s-15s, DISMISSED.; Count(s) 1s, 3s, PROBATION: 4 Years total. 4 years as to count 1s and 4 years as to count 3s, to run concurrent. Assessment: \$200.00. Closing Case for Defendant. Signed by Senior Judge Daniel T. K. Hurley on 5/23/2017. (jas) NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69. (Entered: 05/24/2017)
- 05/24/2017 129 JUDGMENT as to Clifford Eric Lundgren (2), Count(s) 1-2, 16-21, 16s-21s, 2s, 3, 4, 4s, 5-15, 5s-15s, DISMISSED.; Count(s) 1s, IMPRISONMENT: 15 Months. This term consists of 15 months as to each of the counts 1s and 3s to be served concurrently. SUPERVISED RELEASE: 3 Years. This term consists of 3 years as to count 1s and 3 years as to count 3s to run concurrent with each other. Assessment: \$200.00. Fine: \$50,000.00. Closing Case for Defendant. Signed by Senior Judge Daniel T. K. Hurley on 5/23/2017. (jas) NOTICE: If there are sealed documents in this case, they may be unsealed after 1 year or as directed by Court Order, unless they have been designated to be permanently sealed. See Local Rule 5.4 and Administrative Order 2014-69. (Entered: 05/24/2017)
- 05/24/2017 130 EXHIBIT and WITNESS LIST by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/24/2017)
- 05/25/2017 131 MOTION for Forfeiture of Property FINAL ORDER OF FORFEITURE by USA as to Robert J. Wolff. Responses due by 6/8/2017 (Attachments: # 1 Text of Proposed Order (Final Order of Forfeiture)) (Barnes, Antonia) (Entered: 05/25/2017)
- 05/25/2017 132 MOTION for Forfeiture of Property FINAL ORDER OF FORFEITURE by USA as to Clifford Eric Lundgren. Responses due by 6/8/2017 (Attachments: # 1 Text of Proposed Order (Final Order of Forfeiture))(Barnes, Antonia) (Entered: 05/25/2017)
- 05/26/2017 133 EXHIBIT and WITNESS LIST by USA as to Robert J. Wolff, Clifford Eric Lundgren (Morris, Lothrop) (Entered: 05/26/2017)
- 05/26/2017 134 HEARING EXHIBITS from Sentencing 1-22 by USA as to Robert J. Wolff, Clifford Eric Lundgren (Attachments: # 1 Exhibit Index of Exhibits, # 2 Exhibit Batch of exhibits 1-22)(Morris, Lothrop) (Entered: 05/26/2017)
- 05/26/2017 135 MOTION Requesting Permission to File Substitute Exhibit by USA as to Robert J. Wolff, Clifford Eric Lundgren. Responses due by 6/9/2017 (Attachments: # 1 Affidavit)(Morris, Lothrop) (Entered: 05/26/2017)
- 05/26/2017 SYSTEM ENTRY - Docket Entry 136 restricted/sealed until further notice. (jmd) (Entered: 05/26/2017)
- 05/30/2017 137 ORDER granting the Government's 135 motion for leave to file a substitute sentencing exhibit as to Defendants Robert J. Wolff (1), and Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (DTKH) (Entered: 05/30/2017)
- 05/30/2017 138 FINAL ORDER OF FORFEITURE granting 132 Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (lan) (Entered: 05/30/2017)
- 05/30/2017 139 FINAL ORDER OF FORFEITURE granting 131 Motion for Forfeiture of Property as to Robert J. Wolff (1). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (lan) (Entered: 05/30/2017)
- 05/30/2017 140 NOTICE OF APPEAL by Clifford Eric Lundgren Re: 129 Judgment,,,. Filing fee \$ 505.00 receipt number 113C-9771569. Within fourteen days of the filing date of a Notice of Appeal, the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Reinhart, Bruce) (Entered: 05/30/2017)
- 05/30/2017 Transmission of Notice of Appeal, Judgment under appeal and Docket Sheet as to Clifford Eric Lundgren to US Court of Appeals re 140 Notice of Appeal - Final Judgment, Notice has been electronically mailed. (apz) (Entered: 05/30/2017)



06/01/2017 141 Acknowledgment of Receipt of NOA from USCA as to Clifford Eric Lundgren re 140 Notice of Appeal - Final Judgment, date received by USCA: 5/30/2017. USCA Case Number: 17-12466-H. (amb) (Entered: 06/01/2017)

06/09/2017 142 AMENDED JUDGMENT as to Robert J. Wolff (1), Count(s) 1-2, 16-19, 16s-19s, 2s, 3, 4, 4s, 5-15, 5s-15s, DISMISSED.; Count(s) 1s, 3s, PROBATION: 4 Years total to run concurrent (amending date of Imposition of Sentence only). PRIOR JUDGMENT: as to Robert J. Wolff (1), Count(s) 1-2, 16-19, 16s-19s, 2s, 3, 4, 4s, 5-15, 5s-15s, DISMISSED.; Count(s) 1s, 3s, PROBATION: 4 Years total to run concurrent. Signed by Senior Judge Daniel T. K. Hurley on 6/9/2017. (lbc) (Entered: 06/09/2017)

06/12/2017 143 TRANSCRIPT INFORMATION FORM as to Clifford Eric Lundgren re 140 Notice of Appeal - Final Judgment, filed by Clifford Eric Lundgren. Hearings, sentencing transcript(s) ordered. Order placed by Bruce Reinhart. Email sent to Court Reporter Coordinator. (Reinhart, Bruce) (Entered: 06/12/2017)

06/16/2017 144 COURT REPORTER ACKNOWLEDGMENT as to Clifford Eric Lundgren re 140 Notice of Appeal - Final Judgment, 143 Transcript Information Form, Transcripts for 5.22.17 and 5.23.17 to be filed on or before 7.16.17. Transcripts for dates 2.6.17 and 2.7.17 previously filed. Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (ps) (Entered: 06/16/2017)

06/22/2017 145 TRANSCRIPT of Sentence as to Robert J. Wolff, Clifford Eric Lundgren held on 5.22.17 before Senior Judge Daniel T. K. Hurley, Volume Number 1 of 3, 1-261 pages, re: 140 Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/13/2017. Redacted Transcript Deadline set for 7/24/2017. Release of Transcript Restriction set for 9/20/2017. (ps) (Entered: 06/22/2017)

06/22/2017 146 TRANSCRIPT of Sentence as to Robert J. Wolff, Clifford Eric Lundgren held on 5.23.17 before Senior Judge Daniel T. K. Hurley, Volume Number 2 of 3, 1-88 pages, re: 140 Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/13/2017. Redacted Transcript Deadline set for 7/24/2017. Release of Transcript Restriction set for 9/20/2017. (ps) (Entered: 06/22/2017)

06/22/2017 147 TRANSCRIPT of Sentence as to Robert J. Wolff, Clifford Eric Lundgren held on 5.23.17 before Senior Judge Daniel T. K. Hurley, Volume Number 3 of 3, 1-32 pages, re: 140 Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 7/13/2017. Redacted Transcript Deadline set for 7/24/2017. Release of Transcript Restriction set for 9/20/2017. (ps) (Entered: 06/22/2017)

06/26/2017 148 TRANSCRIPT NOTIFICATION as to Robert J. Wolff, Clifford Eric Lundgren - Transcript(s) ordered on: 6.8.17 by Bruce E. Reinhart, Esq. have been filed by Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov re 144 Court Reporter Acknowledgment, 140 Notice of Appeal - Final Judgment, 143 Transcript Information Form,. (ps) (Entered: 06/26/2017)

06/28/2017 149 Unopposed MOTION for Extension of Time Surrender Date by Clifford Eric Lundgren. Responses due by 7/12/2017 (Reinhart, Bruce) (Entered: 06/28/2017)

06/29/2017 150 ORDER denying Defendant (2) Clifford E. Lundgren's 149 motion for an extension of time to self-surrender. Signed by Senior Judge Daniel T. K. Hurley on 6/29/2017. (DTKH) (Entered: 06/29/2017)

07/07/2017 151 Defendant's MOTION Motion Continue of Bond Pending Appeal by Clifford Eric Lundgren. Attorney Hugo A. Rodriguez added to party Clifford Eric Lundgren(pty:dft). Responses due by 7/21/2017 (Rodriguez, Hugo) (Entered: 07/07/2017)

07/07/2017 152 NOTICE OF ATTORNEY APPEARANCE: Hugo A. Rodriguez appearing for Clifford Eric Lundgren (Rodriguez, Hugo) (Entered: 07/07/2017)

07/10/2017 153 ORDER denying Defendant (2) Clifford E. Lundgren's 151 motion for bond pending appeal. Signed by Senior Judge Daniel T. K. Hurley on 7/10/2017. (DTKH) (Entered: 07/10/2017)

07/11/2017 154 MEMORANDUM OPINION and Order Denying Defendant Clifford Eric Lundgren's Motion for Release Pending Appeal. Signed by Senior Judge Daniel T. K. Hurley on 7/11/2017. (tda) (Entered: 07/11/2017)

07/15/2017 155 MOTION to Withdraw as Attorney by Bruce E. Reinhart, P.A.. by Clifford Eric Lundgren. (Reinhart, Bruce) (Entered: 07/15/2017)

07/17/2017 156 ORDER granting Bruce E. Reinhart, Esq.'s 155 motion for leave to withdraw a counsel for Defendant (2) Clifford Eric Lundgren. Effective today, Mr. Reinhart shall have no further responsibility in this matter. Signed by Senior Judge Daniel T. K. Hurley on 7/17/2017. (DTKH) (Entered: 07/17/2017)

07/17/2017 157 MOTION to Withdraw as Attorney by Lilly Ann Sanchez. by Clifford Eric Lundgren as to Robert J. Wolff, Clifford Eric Lundgren. (Sanchez, Lilly Ann) (Entered: 07/17/2017)

07/18/2017 158 TRANSCRIPT INFORMATION FORM as to Clifford Eric Lundgren re 140 Notice of Appeal - Final

07/19/2017 159 TRANSCRIPT of Plea Hearing as to Clifford Eric Lundgren held on 2.28.17 before Senior Judge Daniel T. K. Hurley, 1-51 pages, re: 140 Notice of Appeal - Final Judgment, Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 8/9/2017. Redacted Transcript Deadline set for 8/21/2017. Release of Transcript Restriction set for 10/17/2017. (ps) (Entered: 07/19/2017)

07/19/2017 160 COURT REPORTER ACKNOWLEDGMENT as to Clifford Eric Lundgren re 158 Transcript Information Form, 140 Notice of Appeal - Final Judgment,. Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov. (ps) (Entered: 07/19/2017)

07/19/2017 161 TRANSCRIPT NOTIFICATION as to Clifford Eric Lundgren - Transcript(s) ordered on: 7.17.17 by Randall S. Newman, Esq., Esq. has been filed by Court Reporter: Pauline Stipes, 561-803-3434 / Pauline\_Stipes@flsd.uscourts.gov re 158 Transcript Information Form, 140 Notice of Appeal - Final Judgment,. (ps) (Entered: 07/19/2017)

07/20/2017 162 ORDER granting Lilly Ann Sanchez's 157 motion to withdraw as counsel for Defendant (2) Clifford Eric Lundgren. Effective today, Ms. Sanchez shall have no further responsibility in this matter. Signed by Senior Judge Daniel T. K. Hurley on 7/20/2017. (DTKH) (Entered: 07/20/2017)

08/08/2017 163 Acknowledgment of Service on 07/07/17 by USA as to Clifford Eric Lundgren re 138 FINAL ORDER OF FORFEITURE granting 132 Motion for Forfeiture of Property as to Clifford Eric Lundgren (2). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (lan) Miscellaneous Microsoft Windows CDs and DVDs (Barnes, Antonia) (Entered: 08/08/2017)

08/08/2017 164 Acknowledgment of Service on 07/07/17 by USA as to Robert J. Wolff re 139 FINAL ORDER OF FORFEITURE granting 131 Motion for Forfeiture of Property as to Robert J. Wolff (1). Signed by Senior Judge Daniel T. K. Hurley on 5/30/2017. (lan) Miscellaneous Microsoft Windows CDs and DVDs (Barnes, Antonia) (Entered: 08/08/2017)

10/03/2017 165 Pursuant to F.R.A.P. 11(c), the Clerk of the District Court for the Southern District of Florida certifies that the record is complete for purposes of this appeal re: 140 Notice of Appeal - Final Judgment, Appeal No. 17-12466-JJ. The entire record on appeal is available electronically. (apz) (Entered: 10/03/2017)

DE 86

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-80090-CR-Hurley/Hopkins

UNITED STATES OF AMERICA,

vs.

CLIFFORD ERIC LUNDGREN,

Defendant,

/

**STATEMENT OF FACTS**

COMES NOW, the United States of America, by and through the undersigned counsel, hereby files this statement of facts as follows:

If this case had proceeded to trial, the United States would have proved the following facts beyond a reasonable doubt:

In or about 2011, Clifford Eric Lundgren was contacted by Robert Wolff about producing multiple copies of Dell Reinstallation CD-ROMs for Microsoft Windows. ("Reinstallation Disk") that could be resold to refurbishers of Dell computers. At that time, Lundgren was living in China. Wolff represented that he had purchased an authorized retail copy of a Reinstallation Disk from Dell for \$5.00. Wolff provided the Reinstallation Disk to Lundgren.

Lundgren arranged for the Reinstallation Disk to be reproduced by a Chinese manufacturer. Lundgren was not authorized by Dell or Microsoft to reproduce these disks. Lundgren knew that he was not authorized to reproduce these disks. As

part of the manufacturing process, labels were affixed by the factory to the CD-ROMs that purported to be labels authorized by Dell and Microsoft and that falsely represented that the disks contained copyrighted software that Dell and Microsoft had authorized to be included on the disk. The labels were substantially indistinguishable from the labels that were affixed to authorized Reinstallation Disks. Lundgren was aware that the labels were misleading and had not been authorized to be used.

On September 3, 2012, U.S. Customs and Border Protection (CBP) officers at San Francisco International Airport detained a shipment of 2,246 Reinstallation Disks that Lundgren had caused to be shipped from China to Wolff's address in Boca Raton, Florida.

The same day, CBP Officers at San Francisco International Airport detained a shipment of 1,444 Reinstallation Disks that Lundgren had caused to be shipped from China to Wolff's father's address in Flushing, New York. On or about September 26, 2012, CBP issued a notice of seizure to Wolff's father relating to the 1,444 disks. The notice stated that CBP believed the disks were subject to forfeiture based on copyright violations. On or about October 5, 2012, Wolff forwarded a copy of the seizure notice to Lundgren by email.

On or about February 28, 2013, Lundgren shipped a package from Chatsworth, California, to Wolff's home address in Boca Raton, Florida. The package contained 1,598 unauthorized Reinstallation Disks that contained

copyrighted Dell and Microsoft software. In return, \$3,400 was deposited into a Wells Fargo Checking Account controlled by Lundgren.

In all, between in or about June 2011 and in or about November 2013, Lundgren caused approximately 28,000 CD-ROMs to be shipped, directly or indirectly, to Wolff.

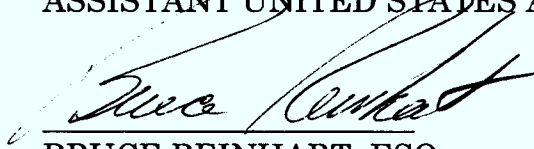
WIFREDO A. FERRER  
UNITED STATES ATTORNEY

Date: 2/28/17

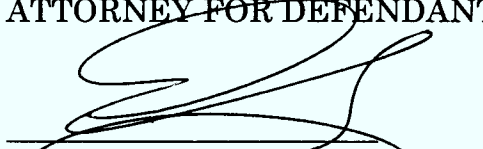
By: 

LOTHROP MORRIS  
ASSISTANT UNITED STATES ATTORNEY

Date: 2/28/17

  
BRUCE REINHART, ESQ  
LILLY ANN SANCHEZ, ESQ.  
ATTORNEY FOR DEFENDANT

Date: 2/28/17

  
CLIFFORD ERIC LUNDGREN  
DEFENDANT

DE 106

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-80090-CR-Hurley/Hopkins

UNITED STATES OF AMERICA,

vs.

**ROBERT J. WOLFF, and  
CLIFFORD ERIC LUNDGREN,**

Defendants,

\_\_\_\_\_ /

**GOVERNMENT'S SENTENCING MEMORANDUM**

**COMES NOW**, the United States of America, by and through the undersigned counsel, hereby files its Sentencing Memorandum and states as follows:

Protecting Intellectual Property (IP) rights is essential to fostering the innovation and creativity that fuels the economy in the United States. IP rights create incentives for entrepreneurs, artists, firms, and investors to commit the necessary resources to research, develop, and market new technologies and creative works. As one court observed, “[t]he future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the protection of intellectual property.” *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991).



The defendants were convicted for criminal copyright infringement, in violation of Title 17, United States Code, Section 506(a)(1)(A) and Title 18, United States Code, Section 2319(a ) and (b)(1). The defendants in this matter were also convicted for conspiracy to traffic in counterfeit goods, in violation of Title 18, United States Code, Section 2320( a)(1). These convictions carry maximum statutory sentences of five and ten years respectively. The corresponding advisory sentencing guidelines section is U.S.S.G. § 2B5.3.

### **MEMORANDUM OF LAW**

The base offense level for these convictions is 8. U.S.S.G. § 2B5.3(a). Based on the facts of this case, the specific offense characteristic directs this Court to consider increasing the base offense level by a number of levels corresponding to the infringement amount. [U.S.S.G. § 2B5.3(b)(1)(B), directing a cross-reference to U.S.S.G. § 2B1.1.] The special offense characteristics in U.S.S.G. § 2B5.3(b)(3)(A) applies because the items involved the manufacture or importation of the infringing items and increases the base offense level by two levels.

### **INFRINGEMENT AMOUNT**

With respect to the infringement amount used to calculate the total offense level, the infringement amount should be the retail value of the infringed items. U.S.S.G. § 2B5.3, n. 2. “The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items.” U.S.S.G. § 2B5.3, n. 2(A) (emphasis added). The guidelines direct that amount to be used in the guidelines

calculations if one of any eight enumerated situations exist. *Id.* Three of the circumstances exist in the instant case.

a. “The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item. The United States expects the testimony of Jonathan McGloin, who represents Microsoft Corporation the trademark holder in the instant case, will demonstrate that the infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item. In an email correspondence between WOLFF and LUNDGREN discussing the quality of the infringing item, LUNDGREN said, “[t]hese issues are VERY VERY minor... You would have to be an expert with a magnifying glass to know and/or see such tiny differences... ) You must have been trying to supply these units to Amazon directly or someone whom is an expert in this field... Anyone whom buys these would not notice a O or 0 when it comes to a font this size "U.S.A. (or) U.S.A" C'mon Bob, you should be able to sell these units to anyone whom is not trying to sell them directly back to Bill Gates. If they are not perfect, it is because the unit that we recieved from the USA retail on Ebay was not perfect... We made an identical copy of said unit from the same factories that manufacture for Dell.” Thus, LUNDGREN himself describes the infringing items as “identical” See attachment A.

b. “The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value

of the infringing item.” U.S.S.G. § 2B5.3, n.2(A)(v). The United States intends to present evidence at the sentencing hearing that the more accurate assessment of harm to the victims in this case is the retail value of the infringed item. Mr. McGloin is expected to testify that the pecuniary loss to Microsoft is vastly greater than the much lower prices for which the defendants sold the counterfeit goods.

c. “A case under 18 U.S.C....§ 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good...; and (II) which had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good.” U.S.S.G. § 2B5.3, n.2(A)(vii).

In This case, the Court should use the retail value of the infringed item to calculate the loss because it is covered by the enumerated provisions. In *United States v. Lozano*, 490 F.3d 1317, 1321-22 (11<sup>th</sup> Cir. 2007), the Eleventh Circuit held that ‘the language provided that the infringing item “is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item” is critical.’ *Lozano*, 490 F.3d at 1321-22. The *Lozano* court affirmed the district court finding that the infringing and infringed items were essentially indistinguishable and thus concluded that use of the retail value of the infringed item was appropriate.

Defendants’ cannot claim that use of the infringed item’s retail value over-represents their culpability and ignores the “nature and magnitude of the pecuniary

harm.” U.S.S.G. § 2B5.3, at comment. backg’d. They cannot claim that Microsoft suffered minimal pecuniary injury. Microsoft lost the sale of its software as a direct consequence of the defendants’ actions. In *Lozano*, the Eleventh Circuit discussed the case of *United States v. Yi*, 460 F.3d 623 (5th Cir.2006), in which the Fifth Circuit reversed the district court’s use of the retail value of the infringed items because “[t]he lack of record evidence on pecuniary harm to the victim companies weighs against the district court’s decision to use the infringed item value.” The Eleventh Circuit found that “crucial to the Fifth Circuit’s reversal of the lower court was the fact that the infringing and infringed items were distinguishable to a reasonably informed purchaser.” The *Lozano* court concluded that it would be inappropriate to follow *Yi* because the enumerated provisions regarding retail value of the infringed item apply and therefore the “catch-all” provision did not apply. Thus it was not appropriate to use the retail value of the infringing item to calculate the loss. The Court should reach the same result here and apply the enumerated provisions regarding retail value and find that the loss per item is \$25.

#### **GOVERNMENT’S RECOMMENDED GUIDELINES RANGES**

The most accurate method of calculating the applicable guidelines range is through the use of the infringed items retail cost. The United States contends that the loss value of \$700,000 does not over-represent the total figure for which the defendants should be held liable. This figure-\$700,000-corresponds to an increase in the base offense level of 14. U.S.S.G. § 2B1.1(b)(1)(J).

Accordingly, the United States urges this Court to find the applicable guidelines ranges as follows:

a. Defendant Wolff: base offense level of 8, pursuant to U.S.S.G. § 2B5.3(a), plus special offense characteristic of 14, pursuant to U.S.S.G. § 2B1.1(J), plus special offense characteristic of 2, pursuant to U.S.S.G. § 2B5.3(b)(3)(A), minus three levels for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, resulting in a total offense level of 21. The resulting guidelines range is 37-46 months.

a. Defendant Lundgren: base offense level of 8, pursuant to U.S.S.G. § 2B5.3(a), plus special offense characteristic of 14, pursuant to U.S.S.G. § 2B1.1(J), plus special offense characteristic of 2, pursuant to U.S.S.G. § 2B5.3(b)(3)(A), minus three levels for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, resulting in a total offense level of 21. The resulting guidelines range is 37-46 months.

Pursuant to the Plea agreements and subsequent agreements with Wolff and Lundgren, the United States agrees that although not binding on the probation office or the Court, the United States agrees that if the Court determines that the applicable Sentencing Guidelines total offense level is greater than 15, the United States agrees to recommend a downward variance to total offense level 15. Under any circumstances, the Government agrees to recommend a sentence of no greater than 18 months' incarceration for both Wolff and Lundgren.

### **REASONABLE SENTENCE**

The United States suggests that a sentence of 18 months' incarceration for Wolff and Lundgren is appropriate in this matter. The United States may file a 5K1.1 motion on behalf of Wolff for substantial assistance in this case. If the United States does file such a motion, it would recommend a sentence below 18 months' incarceration. This sentence is commensurate with that amount of loss to Microsoft and is reasonable. The evidence in this case demonstrates that this was a conspiracy that was long term and extensive. It involved the manufacture of at least 29,000 discs containing Microsoft's intellectual property in China and the importation of those discs into the United States. This is an important case for many reasons.

U.S. companies suffer substantial losses from international trade in counterfeit and pirated goods, which the OECD has estimated to amount to hundreds of billions of dollars each year. See *Organization for Economic Cooperation and Development, Magnitude of Counterfeiting and Piracy of Tangible Products: An Update* (November 2009); *Frontier Economics, Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy* (February 2011) (suggesting the value of counterfeit and pirated products for G20 nations was \$650 billion in 2008 and likely to more than double by 2015).

Although quantifying the economic effects of counterfeit and pirated goods with precision is difficult, the problem is enormous with substantial consequences: to industry in the form of lost sales, lost brand value, and reduced incentives to innovate;

to consumers who purchase counterfeit goods; to governments which may lose tax revenue and face risks of counterfeits entering national security or critical infrastructure supply chains; and to economic growth slowed by reduced innovation and lost trade revenue. *See U.S. Government Accountability Office, Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods* (Publication Number GAO-10-423) (April 2010).

### **Conclusion**

Wherefore, the government respectfully requests that the court find that the total value of the infringed items is \$700,000 resulting in a total offense level of 21.

Respectfully submitted,

BENJAMIN GREENBERG  
ACTING UNITED STATES ATTORNEY

s/LOTHROP MORRIS  
By: LOTHROP MORRIS  
ASSISTANT U.S. ATTORNEY  
Florida Bar # 0095044  
500 Australian Avenue, Suite 400  
West Palm Beach, FL 33401  
(561) 820-8711  
(561) 820-8777 (FAX)  
[LOTHROP.MORRIS@USDOJ.GOV](mailto:LOTHROP.MORRIS@USDOJ.GOV)

**Certificate of Service**

I HEREBY CERTIFY that on May 12, 2017, I electronically filed the foregoing with the Clerk of the Court using CM/ECF.

S/ LOTHROP MORRIS

LOTHROP MORRIS

ASSISTANT UNITED STATES ATTORNEY



DE 134

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-80090-CR-Hurley/Hopkins

UNITED STATES OF AMERICA,

vs.

**ROBERT J. WOLFF, and  
CLIFFORD ERIC LUNDGREN,**

Defendants,

**CERTIFICATE OF COMPLIANCE RE ADMITTED EVIDENCE**

I, Lothrop Morris, as counsel for the plaintiff, United States, hereby certify the following:

Check the applicable sections:

☐ ALL EXHIBITS E-FILED: All documentary exhibits and photographs of non-documentary physical exhibits admitted into evidence have been electronically filed in CM/ECF.

☒ EXHIBITS NOT E-FILED: Some documentary exhibits and/or other physical exhibits admitted into evidence cannot be electronically filed in CM/ECF. This includes sealed criminal exhibits and contraband. The following identifies those exhibit numbers that have been retained by the Clerk, and separately identifies those exhibit numbers retained by this filing party. (Itemize or attach a list). Retained by the Clerk: \_\_\_\_\_

Retained by filing party: \_\_\_\_\_

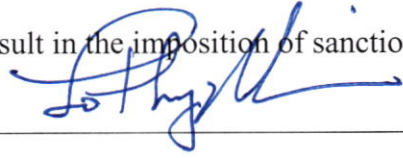
☐ AUDIO/VIDEO EXHIBITS: The following audio and/or video exhibits were entered into evidence during these proceedings. The filing party has conventionally filed with the Clerk of Court a CD or DVD containing the audio or video recording. (Itemize or attach a list.) \_\_\_\_\_

Any original exhibits that have been returned to or retained by the filing party after electronic filing shall be kept for safe keeping until the conclusion of any appeals. Upon order of court, the filing party agrees to return the original exhibits to the Clerk of Court.

This Certificate shall be filed within three (3) days of the conclusion of trial or relevant proceedings. Failure to timely comply with the requirements of Administrative Order 2016-70 governing the Electronic Filing

of Exhibits may result in the imposition of sanctions.

Signature: \_\_\_\_\_

A handwritten signature in blue ink, appearing to be "L. H. [unclear]", written over a horizontal line.

Date: \_\_\_\_\_

May 24, 2017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-80090-CR-Hurley/Hopkins

UNITED STATES OF AMERICA,

vs.

**ROBERT J. WOLFF, and  
CLIFFORD ERIC LUNDGREN,**

Defendants,

**CERTIFICATE OF COMPLIANCE RE ADMITTED EVIDENCE**

I, Lothrop Morris, as counsel for the plaintiff, United States, hereby certify the following:

Check the applicable sections:

☐ ALL EXHIBITS E-FILED: All documentary exhibits and photographs of non-documentary physical exhibits admitted into evidence have been electronically filed in CM/ECF.

☒ EXHIBITS NOT E-FILED: Some documentary exhibits and/or other physical exhibits admitted into evidence cannot be electronically filed in CM/ECF. This includes sealed criminal exhibits and contraband. The following identifies those exhibit numbers that have been retained by the Clerk, and separately identifies those exhibit numbers retained by this filing party. (Itemize or attach a list). Retained by the Clerk: \_\_\_\_\_

Retained by filing party: \_\_\_\_\_

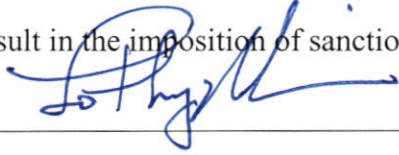
☐ AUDIO/VIDEO EXHIBITS: The following audio and/or video exhibits were entered into evidence during these proceedings. The filing party has conventionally filed with the Clerk of Court a CD or DVD containing the audio or video recording. (Itemize or attach a list.) \_\_\_\_\_

Any original exhibits that have been returned to or retained by the filing party after electronic filing shall be kept for safe keeping until the conclusion of any appeals. Upon order of court, the filing party agrees to return the original exhibits to the Clerk of Court.

This Certificate shall be filed within three (3) days of the conclusion of trial or relevant proceedings. Failure to timely comply with the requirements of Administrative Order 2016-70 governing the Electronic Filing

of Exhibits may result in the imposition of sanctions.

Signature: \_\_\_\_\_

A handwritten signature in blue ink, appearing to be "D. H. [unclear]", written over a horizontal line.

Date: \_\_\_\_\_

May 24, 2017

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-80090-CR-Hurley/Hopkins

UNITED STATES OF AMERICA,

vs.

**ROBERT J. WOLFF, and  
CLIFFORD ERIC LUNDGREN,**

Defendants,

\_\_\_\_\_ /

GOVERNMENT'S INDEX TO SENTENCING EXHIBITS 1-22

The United States respectfully files the following sentencing exhibits:

Exhibit Number	Description
1	Certificate of Authenticity
2	SP2 disc
3*	SP3 disc
4	Win 7 disc
5	email 269
6	email 152
7	email 249
8	email 245
9	email 120
10	email 128
11	Intentionally left blank
12	Chart of disc
13	Screen Shot SP3 Installation
14	Screen Shot Win 7 Installation
15.1	Seizure Pictures
15.2	Seizure Pictures
15.3	Seizure Pictures
15.4	Seizure Pictures
15.5	Seizure Pictures
16.1	Gov't Spreadsheet Seizures
16.2	Gov't Spreadsheet Importations

Exhibit Number	Description
16.3	Gov't Spreadsheet Wire Transfers
16.4	Gov't Spreadsheet Pay Pal
17	Victim Impact Letter
18	Microsoft Royalty Rates <sup>1</sup>
19	Email 9 (cameras)
20	Email 10 (cameras)
21	Purchase order Cisneros
22	Genuine Microsoft SP3 disc

\*This disc is filed as a substitute for the disc admitted as Government's Exhibit 3 at the Sentencing hearing.

Respectfully submitted,

BENJAMIN G. GREENBERG  
ACTING UNITED STATES ATTORNEY

By: s/ Lothrop Morris  
Assistant United States Attorney  
FL Bar No.: 095044  
500 S. Australian Avenue, Suite 400  
West Palm Beach, Florida 33401  
Tel: (561) 820-8711  
Lothrop.Morris@usdoj.gov

---

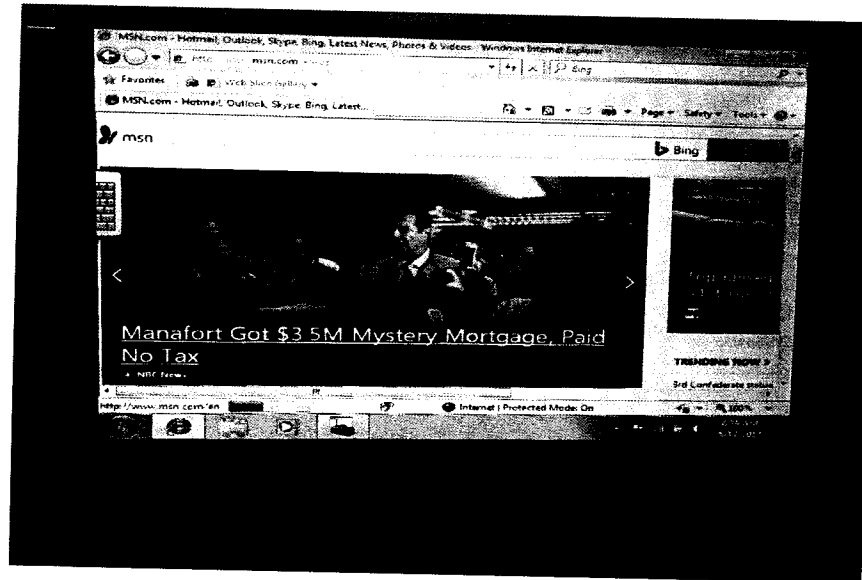
<sup>1</sup> Exhibit 18 is sealed by court and retained by clerk.

**CERTIFICATE OF SERVICE**

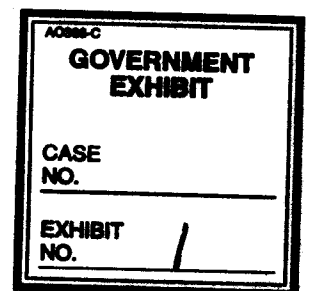
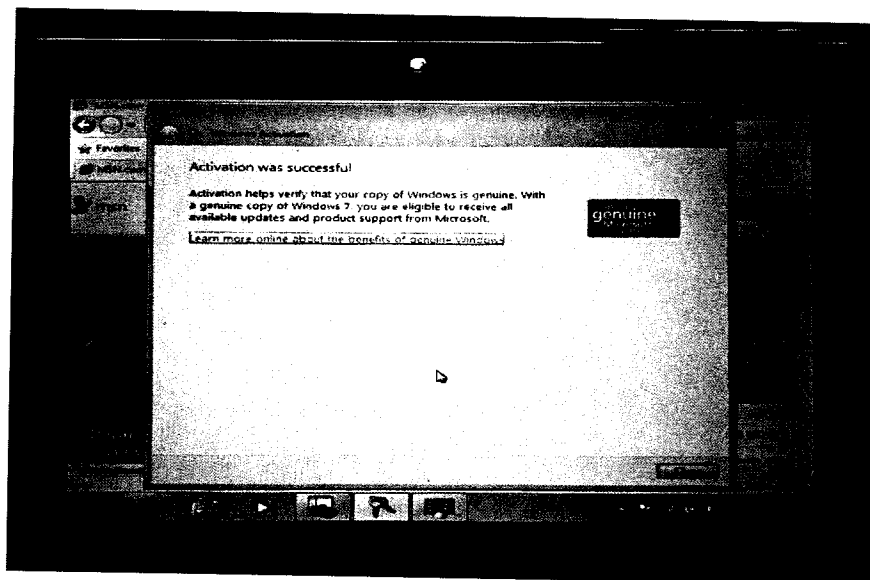
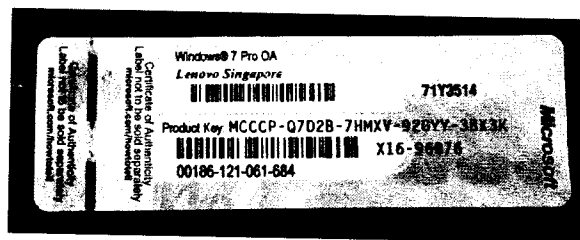
I hereby certify that on May 26, 2017, I electronically filed the foregoing with the Clerk of the Court.

s/ Lothrop Morris  
Assistant United States Attorney





**Step 6:** I used the Windows 7 COA/product key supplied on the Lenovo X220 device to successfully activate the software over the internet.



Note: at time of writing, the key is not showing an activation event in the Microsoft Key Information tool.

Dr

Sample 1



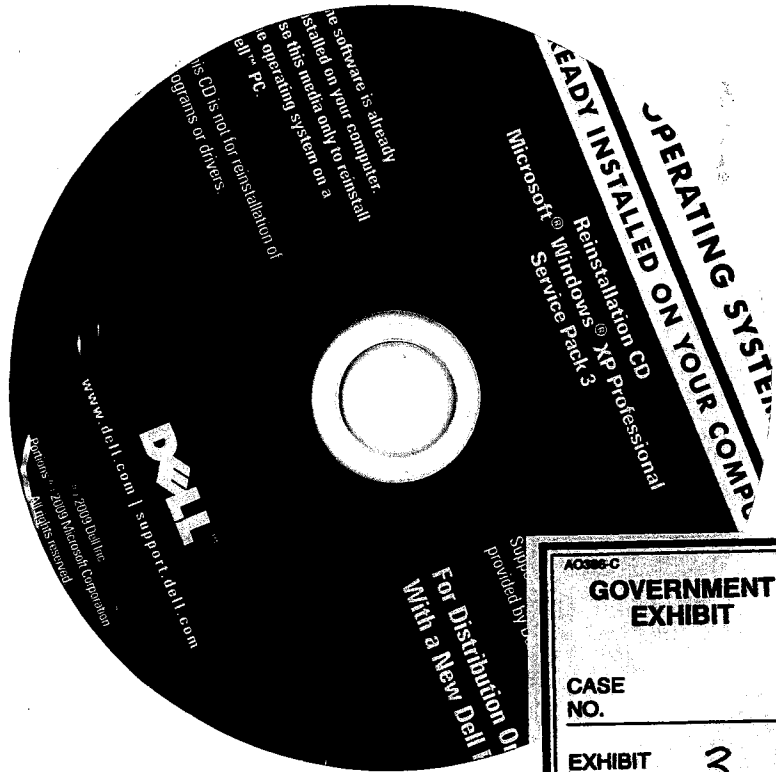
AD595-C

**GOVERNMENT  
EXHIBIT**

CASE  
NO.

---

EXHIBIT  
NO. 2

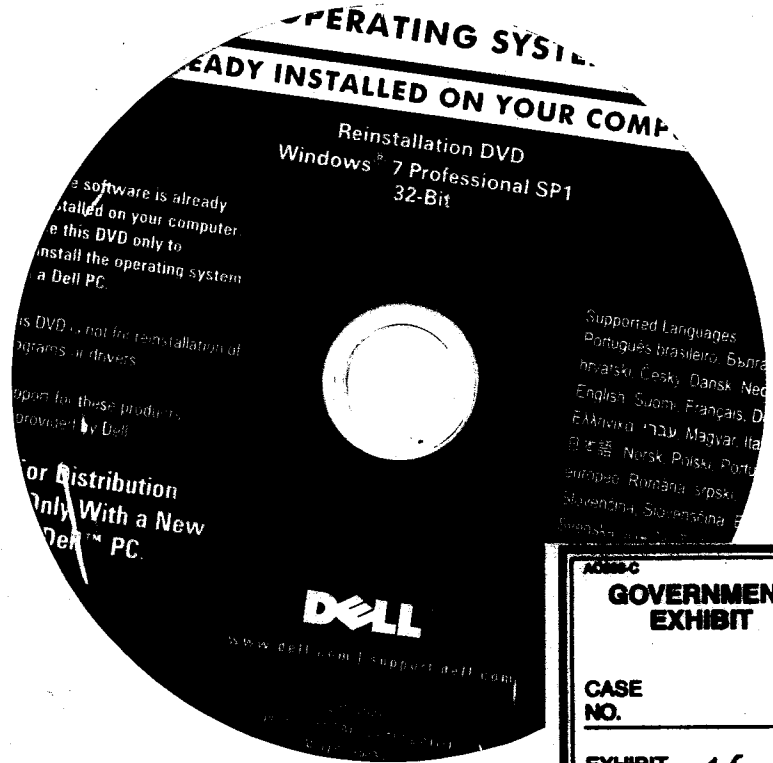


AC988-C	
<b>GOVERNMENT EXHIBIT</b>	
CASE NO.	
EXHIBIT NO.	3

2013 5801 0000 6201

AR

Sample 5



<b>GOVERNMENT EXHIBIT</b>	
CASE NO.	
EXHIBIT NO.	4

269)

Path Dell\C:\Documents and Settings\ADMIN\Local Settings\Application Data\Identities\{FEE946EB-15AC-493E-AB99-7DF556000261}\Microsoft\Outlook Express\Inbox.dbx\Inbox.dbx\Fwd: Disk

From ECA

Network <ecanetwork@gmail.com>

To bob Wolff <rjw@mindspring.com>

Sent 04/10/13 12:57:35 PM

Subject Fwd: Disk

Hey Bob,

Look what my client is asking for below..

Can our picture pass this test? If not - we should not sell to him.

Thanks.

--

See how you can see the ifpi info and the hologram around the ring... the pictures you sent look good just I can only see I side. ..

Thank youRichard

--

Best Regards,

IMG [<https://lh6.googleusercontent.com/zV--IVUjVG51JL3I3IcUb-vxKc...>]

C. Eric Lundgren

CEO

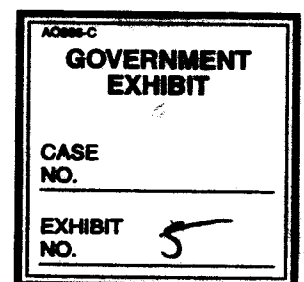
I.T. Asset Partners, Inc.

R2 &ISO 14001:2004 Certified

Office (323) 685-ITAP (4827) ext.151

Mobile: (562) 537-7753

IMG [[https://lh3.googleusercontent.com/IdPt5K3ZKAqpbkCZgCqbw3\\_A9j...](https://lh3.googleusercontent.com/IdPt5K3ZKAqpbkCZgCqbw3_A9j...)]



www.GoITAP.com [http://www.itassetpartners.com/] / www.ITAssetPartners.com [http://www.ITAssetPartners.com]

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Attachments

Name (Alternate  
Body)

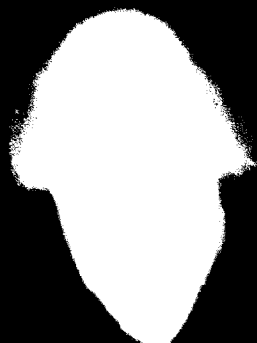
Logical Size 1,328

(Alternate Body)

Name Screenshot\_2013-04-10-11-47-  
13.png

Logical Size 1,077,545

Screenshot\_2013-04-10-11-47-13.png



40x



Copied to clipboard



152)

Path Dell\RECYCLER\S-1-5-21-2592123262-834108671-869673374-1003\Inbox.bak\Dc18.bak\Re: Hello Bob, Update Please? WHAT IS GOING ON?

From Eric Lundgren <Eric@SourceCaptain.com>

To bob wolff <rjw@mindspring.com>

Sent 12/06/11 09:01:03 AM

Subject Re: Hello Bob, Update Please? WHAT IS GOING ON?

MY REPLIES ARE IN "HIGHLIGHT" BELOW...

On Tue, Dec 6, 2011 at 9:55 AM, bob wolff <rjw@mindspring.com [mailto:rjw@mindspring.com]> wrote:  
Eric,

Tried reaching you by phone.

Eric,

The large order that I have has fallen through. Below are the reasons from the customer:

I received the samples on Friday and I am afraid there are several indications that they are in fact counterfeit.

First of all, the service pack 2 CD sets say on the label "Made in USA", but the disk inside the sleeve says "Made in Canada". We have never seen any genuine software be mismatched like that, ever. But a mismatch like that is very common in counterfeit software. The retail boxes of counterfeit Adobe software that are circulating have a similar type of problem.

(We purchased the units from Ebay - had them shipped to China, and produced from here. The OEM units being sold all over e-bay have the same "Made in USA, and "Made in Canada" issue... I believe it is because the CD's are made in Canada and Selves or stickers in USA or vice/versa.)

Secondly, the SP3 discs have a labeling/printing error on the inner ring of the disc. The genuine discs we have seen all say made in U.S.A. and have an IFPI Number of L028. The discs we received from you say Made in U.S.A (no period after the A) and have an IFPI number of LO28 (they used the letter "o" instead of a zero). You may think these are small issues, but you must understand that the Chinese counterfeiters have become extremely adept at make counterfeit software and it is getting harder to spot it. Fortunately for us, they are very prone to making grammatical and punctuation errors like this and that is how can catch them. Do the discs look good? sure they do-do they work? they probably work fine - but bear in mind that if they didn't look good or work properly, then no one would buy them. (These issues are VERY VERY minor... You would have to be an expert with a magnifying glass to know and/or see such tiny differences... ) You must have been trying to supply these units to Amazon directly or someone whom is an expert in this field... Anyone whom buys these would not notice a O or 0 when it comes to a font this size "U.S.A. (or) U.S.A" C'mon Bob, you should be able to sell these units to anyone whom is not trying to sell them directly back to Bill Gates. If they are not perfect, it is because the unit that we recieved from the USA retail on Ebay was not perfect... We made an identical copy of said unit from the same factories that manufacture for Dell..

If you can retain this buyer - I am sure that I can get him another batch with a "." after the A and 0 inseed of 0. hehe

But for now - Please sell some of these units... You MUST have some other buyer's for this product - and if you do not, then find some. It has been months and I have not seen the return that I was expecting to use for my India project buddy...

Don't leave me hanging on this one.. Work hard and get these moved to any other buyer. No normal company or buyer will notice such issues and every month that you spend sitting on this product is another month XP get's older

G #6

and my assets become worth less... Come thorough on this one Bob.. Get it done... Make it happen... Make me proud so that our business can grow and we can keep WINNING!

The choice is yours but no matter what you choose. Keep in touch!

Thanks,

E

I have attached pictures showing everything that I mentioned. I regret that will be cancelling our PO with you and returning these sample discs - please let me know where you would like them sent.

Although this is a setback this was a new customer and clearly is not the type of customer we are going after. I am still working very hard at moving the product and although it is taking a bit longer I am still bullish on the project. My main customer still has some inventory and as soon as some of the inventory in the market diminishes he will be purchasing more from us.

I am willing to make this commitment to you. If by year's end the inventory doesn't move to our satisfaction I will become a full financial partner so that you don't wait longer to get whole on, at least, your investment.

Bob

----- Original Message -----

From: Eric Lundgren

To: bob Wolff

Sent: Sunday, December 04, 2011 4:04 PM

Subject: Hello Bob, Update Please? WHAT IS GOING ON?

Bob,

What is going on?

Why have you not moved any units yet?

I trusted that you would take care of your side and now this is getting ridiculous..

We must wrap this up ASAP!

--

Best Regards,

Eric Lundgren

CEO

Source Captain Inc.

Eric@SourceCaptain.com [mailto:Eric@SourceCaptain.com]

Office US: 360-746-2449

Office CN: (86) 755 15817433433

Fax: (888) 408-2010

SKYPE: ECAcompany

IMG [<http://sourcecaptain.com/files/3812/8569/9912/Source%20Capta...>]

--

Best Regards,

Eric Lundgren

CEO

Source Captain Inc.

Eric@SourceCaptain.com

Office US: 360-746-2449

Office CN: (86) 755 15817433433

Fax: (888) 408-2010

SKYPE: ECAcompany

IMG [<http://sourcecaptain.com/files/3812/8569/9912/Source%20Capta...>]

#### Attachments

Name (Alternate  
Body)

Logical Size 5,262

(Alternate Body)

A0880-C	
<b>GOVERNMENT EXHIBIT</b>	
CASE NO.	
EXHIBIT NO.	6

249)

Path Dell\CYCLER\S-1-5-21-2592123262-834108671-869673374-1003\Inbox.bak\Dc18.bak\Re: SP3

From Eric  
Lundgren <Eric@SourceCaptain.com>  
To bob wolff <rjw@mindspring.com>  
Sent 04/16/12 05:29:05 PM  
Subject Re: SP3  
Bob,

I'm sorry. We cannot produce sub grade SP3. I do not want to risk the funds making product that does not work and expecting you to sell such product..

Maybe send me a few of the last CD's made with the batch of OEM so that I may show the factory where they messed up last time..

I have already started making the W7 32&64 Molds.

Please advise;

1. What do you think W7 Will sell for?
2. How many W7 64 Can you move?
3. How many W7 32 Can you move?
4. How many SP3 XP Can you move?
5. What other Model/Brand besides Dell - Can you sell in bulk?
6. What kind of bulk of said model in ? # 5 Can you sell?

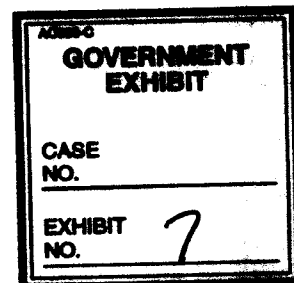
Thank You,

E

On Mon, Apr 16, 2012 at 9:04 AM, bob wolff <rjw@mindspring.com [mailto:rjw@mindspring.com]> wrote:  
Eric,

I'm ordering today SP3 from Dell. By the time they send to me and I send to you, you will have them in your possession probably some time next week. I will expedite on my end as best I can.

I have requirements right now. Just a thought, to make one more load with the copies you currently have to speed up the delivery process. If the software will be 98% accurate, I believe I can get away with that.



Your thoughts.  
Bob Wolff  
561-289-5465 [tel:561-289-5465]

--  
Best Regards,

Eric Lundgren  
CEO  
Source Captain Inc.  
Eric@SourceCaptain.com

Office US: 360-746-2449  
Office CN: (86) 755 15817433433  
Fax: (888) 408-2010  
SKYPE: ECAcompany  
IMG [<https://encrypted-tbn3.google.com/images?q=tbn:ANd9GcQ5Mgn0l...>]

Attachments

Name	(Alternate Body)
------	---------------------

Logical Size 1,436

(Alternate Body)

245)

Path Dell\C\RECYCLER\S-1-5-21-2592123262-834108671-869673374-1003\Inbox.bak\Dc18.bak\Re: Bob: Update.. Thanks.

From Eric  
Lundgren <ecanetwork@gmail.com>

To bob wolff <rjw@mindspring.com>

Sent 04/10/12 06:54:39 PM

Subject Re: Bob: Update.. Thanks.

Bob,

Thank you for for filling your promise and getting these liquidated.

We will not have to sell anymore at 1.75 Ea because we are making the newer versions right? The market is still plenty high for SP3 and W7 Correct?

What is the best breakdown for such product?

% will want W7 32?

% will want w7 64?

% will want wxp sp3.?

As for CDs shipped, I'll pay for local shipping on my 1% to friends. However, since it is less than 1% of what is shipped to you to sell, you are packing as a favor to me and I thank you sir..

Now moving on; I just traveled 6 hours by train to visit the molding factory for our product.. I had to sit next to a fat woman which smelt like rotten rice and get drunk with a bunch of country bumpkin factory owners just to get our mission done over here.. I think I spent about 214 USD on this side for the molds etc and a down payment of 2,500 USD 30%) which is for soley supporting our business.. And product to come...

In 10 days I will receive the mold for SP3 from the northern city of Guanxi and then I will have to go back up with your newest sample when it arrives hence another 2 days in travel.. : )

But once we have these two molds made, we will be only ones capable of factory grade production! : )

This will ensure a steady income for the next year to come! : )

I solute you Bob! : ) Good work!

--

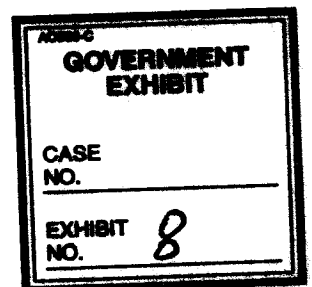
Best Regards,

Eric Lundgren  
CEO  
Source Captain Inc.  
Eric@SourceCaptain.com

Office US: 360-746-2449 /  
Fax US: (888) 408-2010  
Office CN: (86) 755 15817433433

\*\* Message sent via "Source Captain" encrypted mobile network \*\*

On Apr 10, 2012, at 10:03 PM, "bob wolff" <rjw@mindspring.com> wrote:



120)

: Path Dell\CYCLER\S-1-5-21-2592123262-834108671-869673374-1003\Inbox.bak\De18.bak\Re: 7th to 9th Tracking Numbers & 1,000 PCS comming from California. 16,000 PCS total.

From Eric Lundgren <Eric@SourceCaptain.com>

To bob wolff <rjw@mindspring.com>

Sent 09/21/11 05:25:01 PM

Subject Re: 7th to 9th Tracking Numbers & 1,000 PCS comming from California. 16,000 PCS total.

I was told from my source over here that all were delivered...

I will talk to him today. Let me knwo when the other two boxes land.

I can look into the missing boxes - Usually in my history - Customs just ships them to you 3 weeks later.

If they call you - play stupid and just tell them that you ordered from an asset management broker overseas.

Tell him that the product was guaranteed to be real and that you paid a very high price for it. Act upset as to why you had not recieved your product yet...

Then give me an update for the boxes recieved... You said you had 6K sold already right?

You have 16,000 There...

I'll await your update in the future. Thank you for your reply.Thanks,

E

On Thu, Sep 22, 2011 at 5:19 AM, bob wolff <rjw@mindspring.com [mailto:rjw@mindspring.com]> wrote:

Eric,

1. I should have a PO today for 3K pieces SP2

2. most boxes have arrived, there is an issue with two of the boxes:

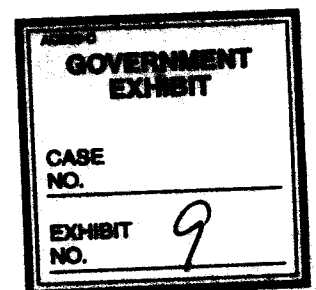
7992271582, 7992271501

According to DHL customs has pulled these boxes back and the next contact I will receive is from Customs not DHL..DHL is out of it

two more boxes are still in transit

Bob

----- Original Message -----





From: Eric Lundgren

To: bob wolff

Sent: Wednesday, September 21, 2011 1:58 PM

Subject: Re: 7th to 9th Tracking Numbers & 1,000 PCS coming from California. 16,000 PCS total.

Bob,

Any update sir?

Thank You.

--

Best Regards,

Eric Lundgren

CEO

Source Captain Inc.

Eric@SourceCaptain.com [mailto:Eric@SourceCaptain.com]

Office US: 360-746-2449

Office CN: (86) 755 15817433433

Fax: (888) 408-2010

SKYPE: ECACompany

IMG [<http://sourcecaptain.com/files/3812/8569/9912/Source%20Capta...>]

--

Best Regards,

Eric Lundgren

CEO

Source Captain Inc.

Eric@SourceCaptain.com

Office US: 360-746-2449  
Office CN: (86) 755 15817433433  
Fax: (888) 408-2010  
SKYPE: ECAcompany

IMG [<http://sourcecaptain.com/files/3812/8569/9912/Source%20Capta...>]

Attachments

Name (Alternate  
Body)

Logical Size 1,934  
(Alternate Body)

128)

: Path Dell\C\RECYCLER\S-1-5-21-2592123262-834108671-869673374-1003\Inbox.bak\De18.bak\Re: BOB, PLEASE SHIP THESE UNITS. THANK YOU.

From Eric Lundgren <Eric@SourceCaptain.com>

To rjw@mindspring.com

Sent 10/13/11 01:06:30 AM

Subject Re: BOB, PLEASE SHIP THESE UNITS. THANK YOU.  
THAT IS GREAT NEWS!

I knew that they would eventually come in... Customs can't tell the difference and therefore is not legally allowed to hold them. hehe

I'm in India now setting up my office here... I look forward to having you move this product so that we may continue our business relationship... I have many more products that I would like to send to you from India & China. Just focus on moving these first then I will shoot you over samples of the other products and we can talk.

Best Regards,

Eric Lundgren  
Source Captain Inc.

On Thu, Oct 13, 2011 at 5:01 AM, <rjw@mindspring.com [mailto:rjw@mindspring.com]> wrote:

Good news received the 4 boxes from dhl..working on a few big orders...will keep u informed

Sent from my Verizon Wireless BlackBerry

From: Eric Lundgren <Eric@SourceCaptain.com>

Sender: ecanetwork@gmail.com [mailto:ecanetwork@gmail.com]

Date: Wed, 12 Oct 2011 15:46:29 +0800

To: bob Wolff<rjw@mindspring.com [mailto:rjw@mindspring.com]>

Subject: BOB, PLEASE SHIP THESE UNITS. THANK YOU.

Bob,

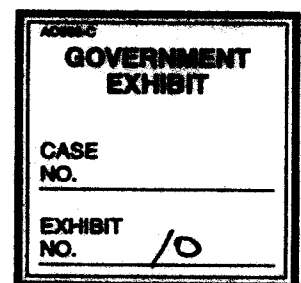
I need to move this product quickly. I need you to ship (450 Units) today to my buyer below (Today):

Neil Rodrigues Coretek Enterprises LLC, 290-B International Dr. Concord, NC, 280271-704-792-2221

Call me when you read this e-mail... It is very important that I send these today, I was supposed to send them a week ago and forgot so the buyer is pretty pissed at me.

Please assist.

Please send me tracking information when this has been completed.



Thank You.

--

Best Regards,

Eric Lundgren  
CEO  
Source Captain Inc.  
Eric@SourceCaptain.com

Office US: 360-746-2449  
Office CN: (86) 755 15817433433  
Fax: (888) 408-2010  
SKYPE: ECAcompany

--

Best Regards,

Eric Lundgren  
CEO  
Source Captain Inc.  
Eric@SourceCaptain.com

Office US: 360-746-2449  
Office CN: (86) 755 15817433433  
Fax: (888) 408-2010  
SKYPE: ECAcompany

IMG [<http://sourcecaptain.com/files/3812/8569/9912/Source%20Capta...>]

Attachments

Name (Alternate  
Body)

Logical Size 2,006

(Alternate Body)

**US V. WOLFF et al**

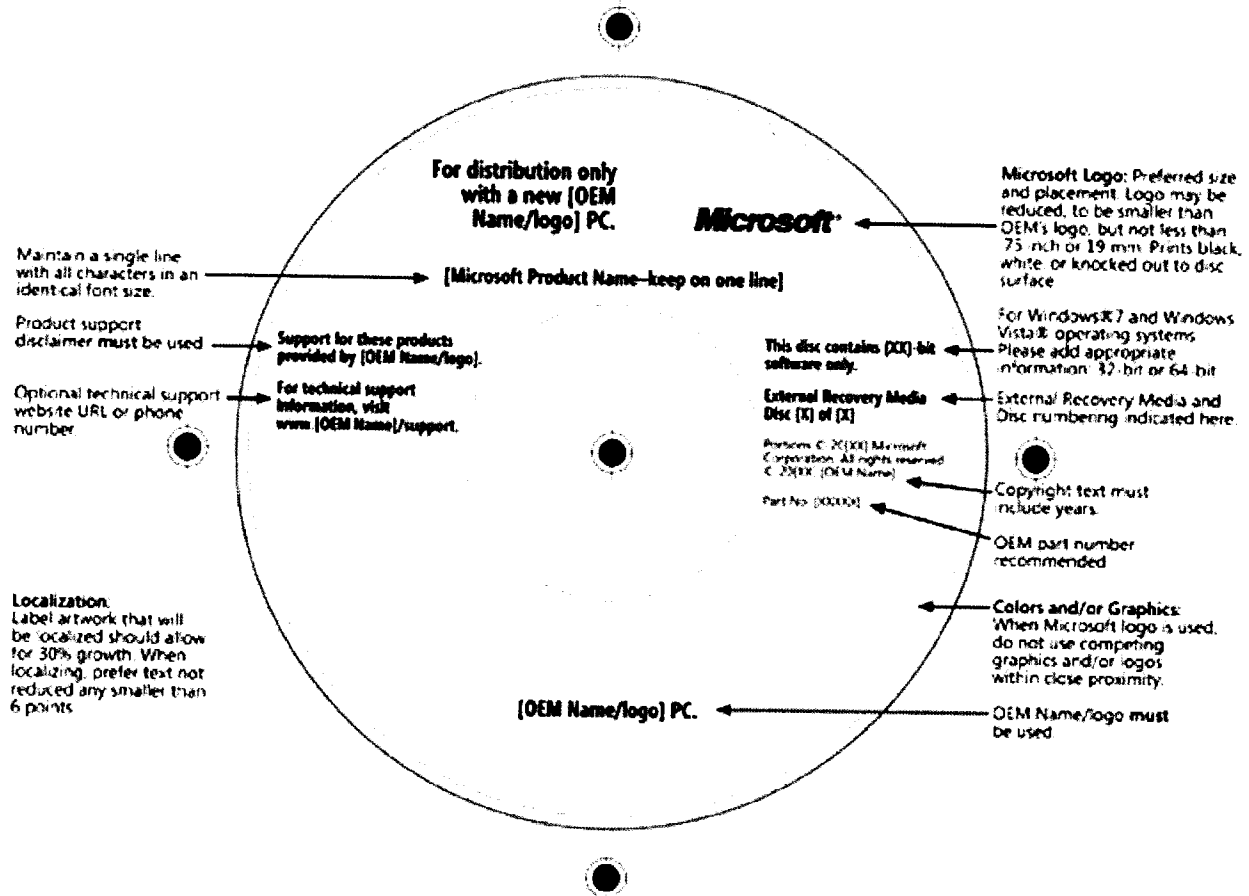
**15-80090-DTKH**

**EXHIBIT 11**

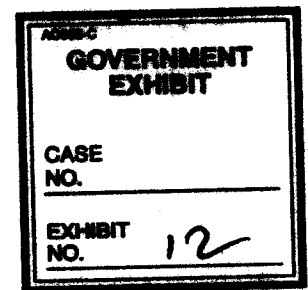
**INTENTIONALLY LEFT BLANK**

## Appendix IV - DTOS Product Guide

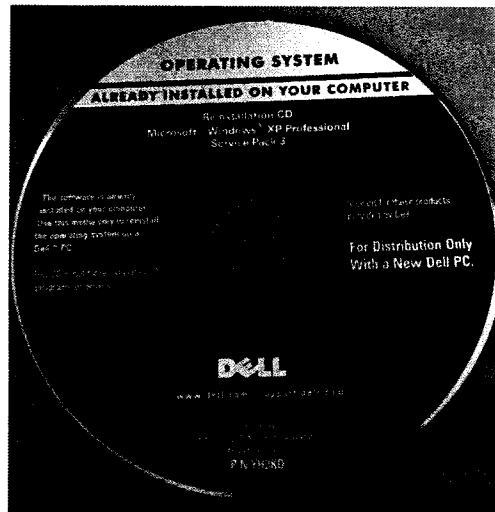
### Exhibit III - Recovery Media Template for Windows 7 Product



[Back to Table of Contents](#)

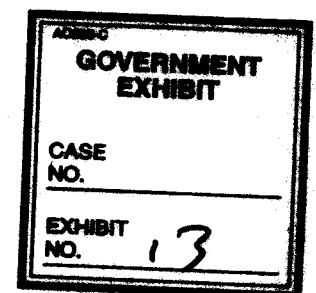
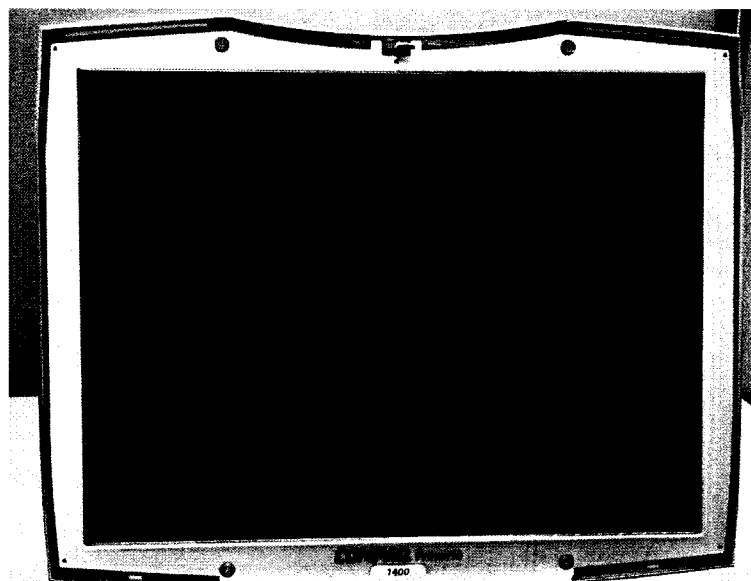


**TEST INSTALLATION ON A COMPAQ PRESARIO LAPTOP DEVICE USING A DELL  
WINDOWS XP PROFESSIONAL SP3 REINSTALLATION CD**

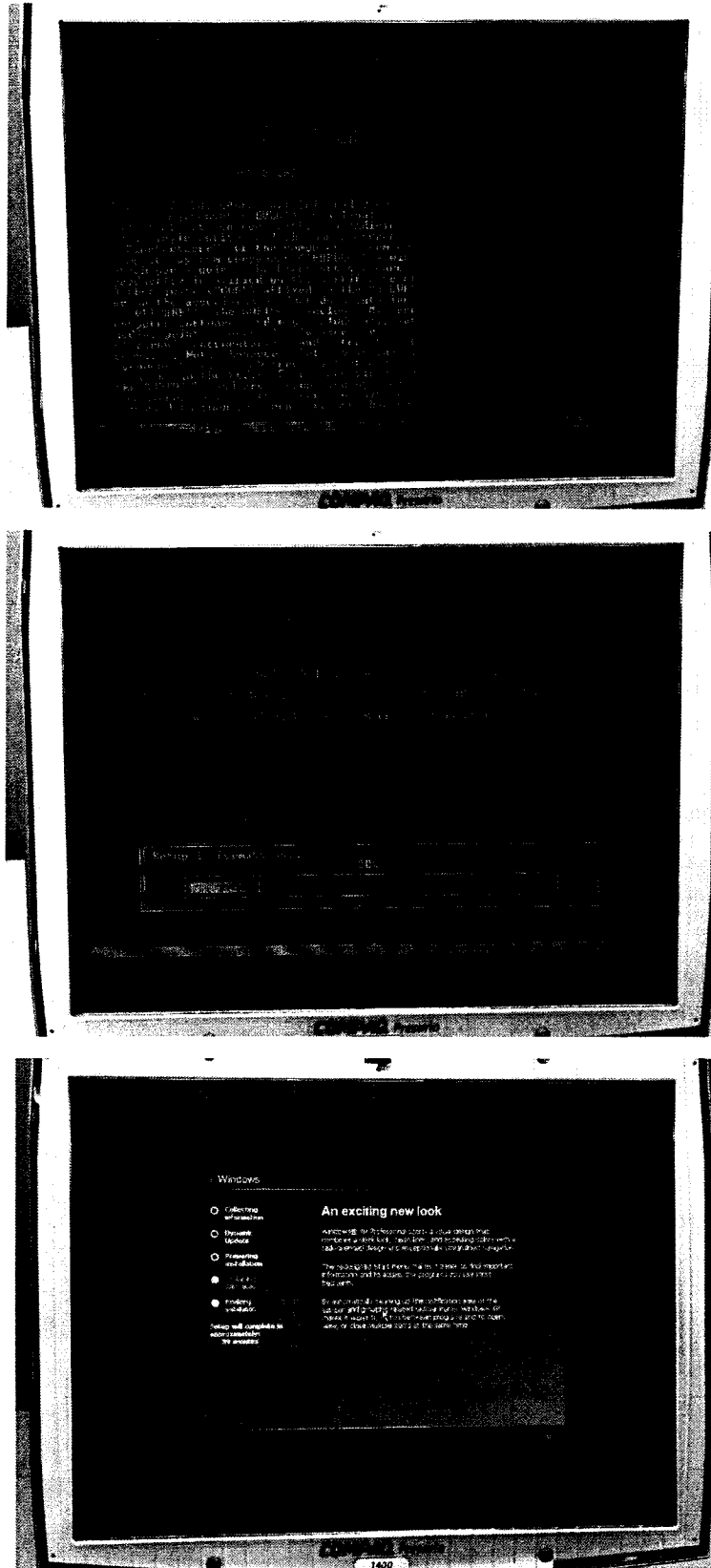


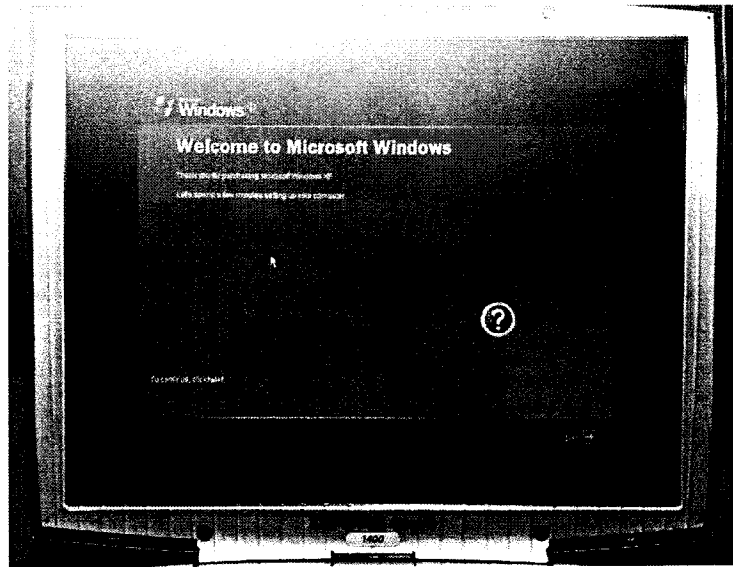
The device used was a Compaq Presario laptop that was originally built as a Windows ME (millennium edition) device. The device was not connected to any network during the installation process itself.

**Step 1.** CD inserted into the drive. Device restarted and booted from the CD. Windows setup starts the installation process.





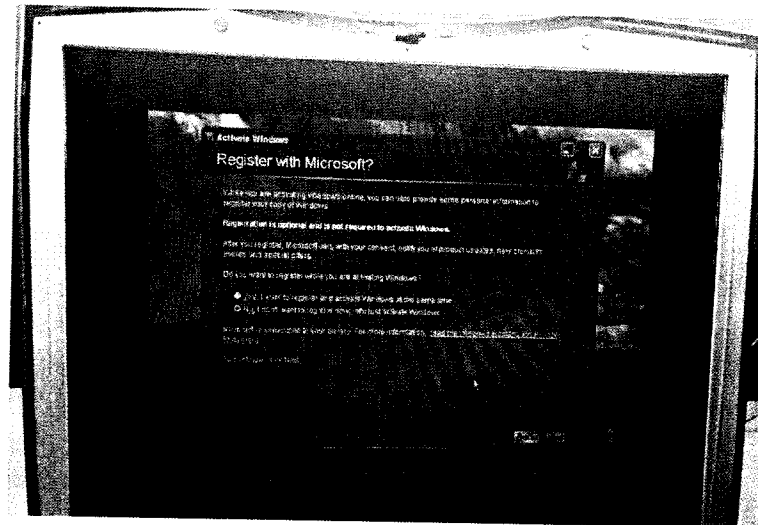




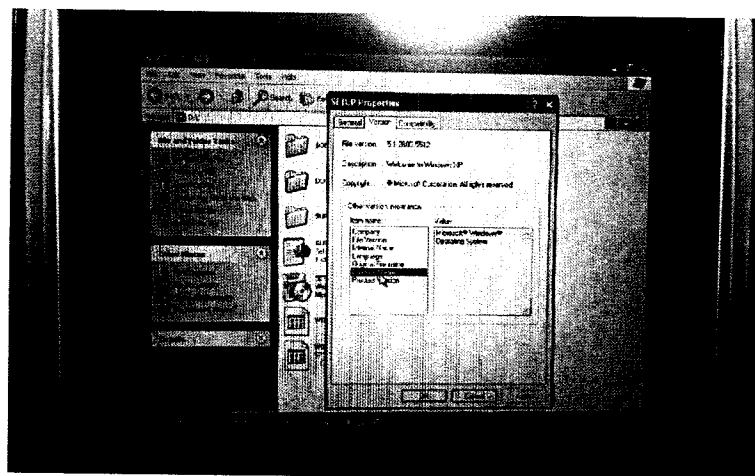
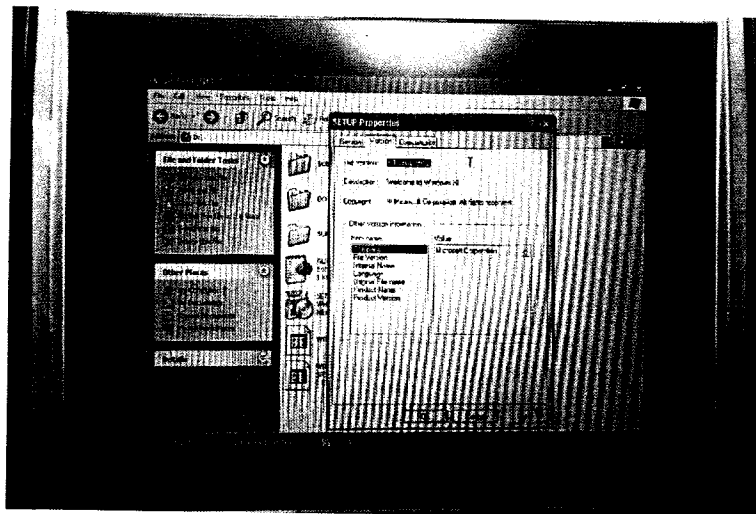
**Step 2.** Windows installation process completed 100%. At no time was I prompted to enter a 5 x 5 product key. The device started up as normal but did display an activation message.



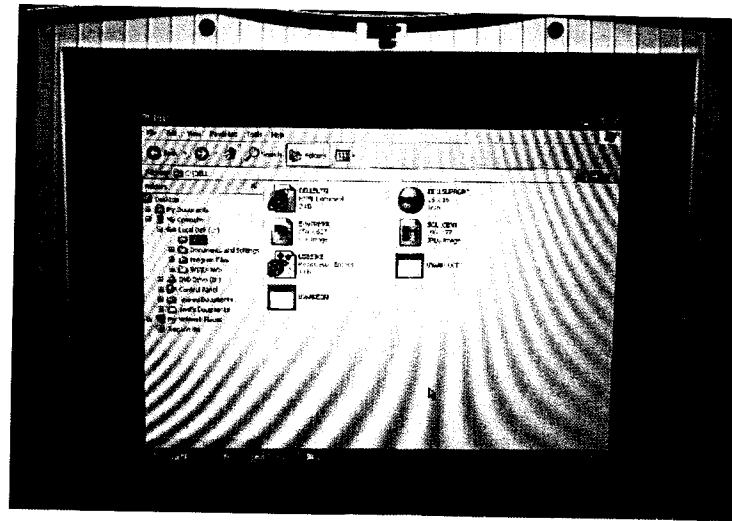
**Step 3:** Activation status checked by clicking on the activation pop up message. This prompted the 'register with Microsoft' step. At time of writing, the laptop could not be connected to the internet, so this step was not completed.



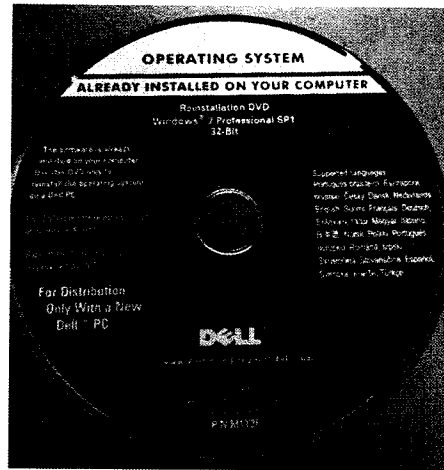
**Step 4:** Verified the digital signature and copyright information on the CD setup.exe file.



Because the disc was a Dell reinstallation disc, a Dell folder was created on device with some support information.

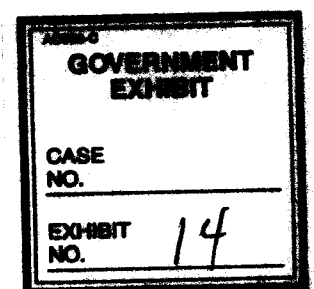
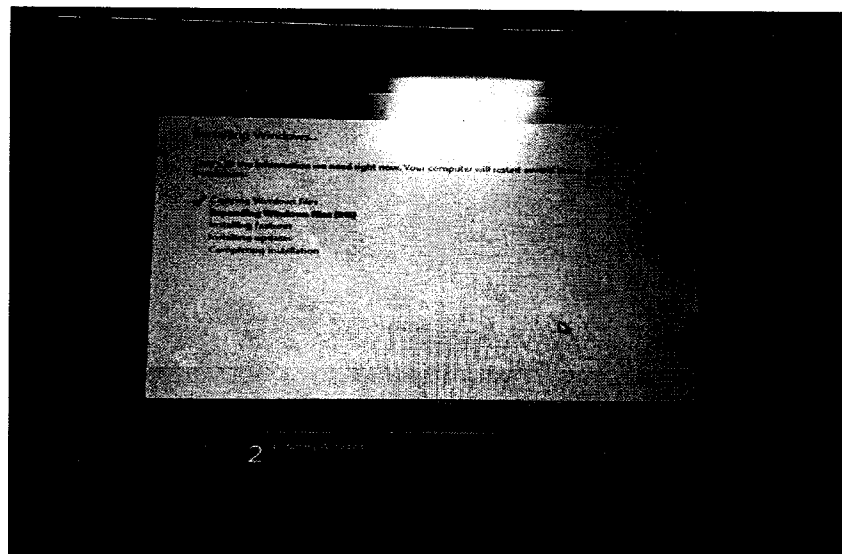


## TEST INSTALLATION ON A LENOVO X220 TABLET DEVICE USING A DELL WINDOWS 7 PROFESSIONAL SP1 REINSTALLATION DVD



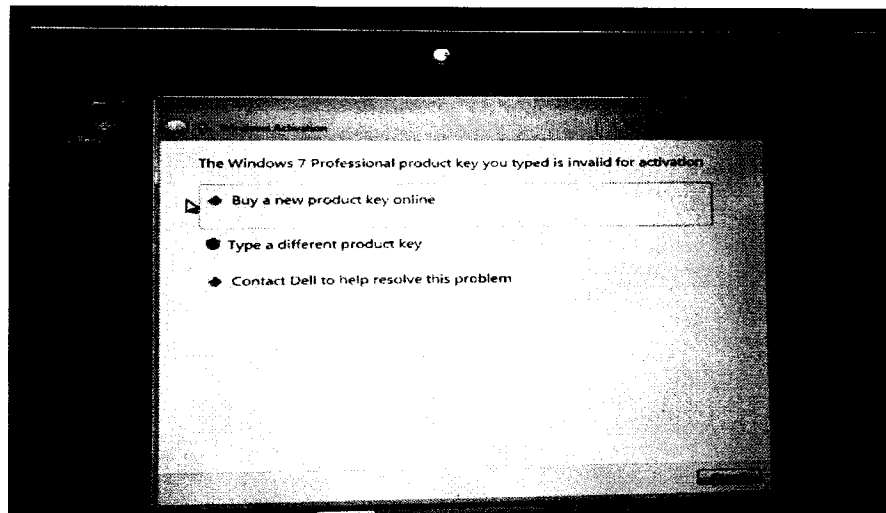
The device used was a Lenovo X220 tablet PC that was originally built as a Windows 7 device but was upgraded and running Windows 8.1 at the time of the test (Wed 17<sup>th</sup> May 2017). The device was not connected to any network during the installation process itself.

**Step 1.** DVD inserted into the drive. Device restarted and booted from the DVD. Windows setup starts the installation process.

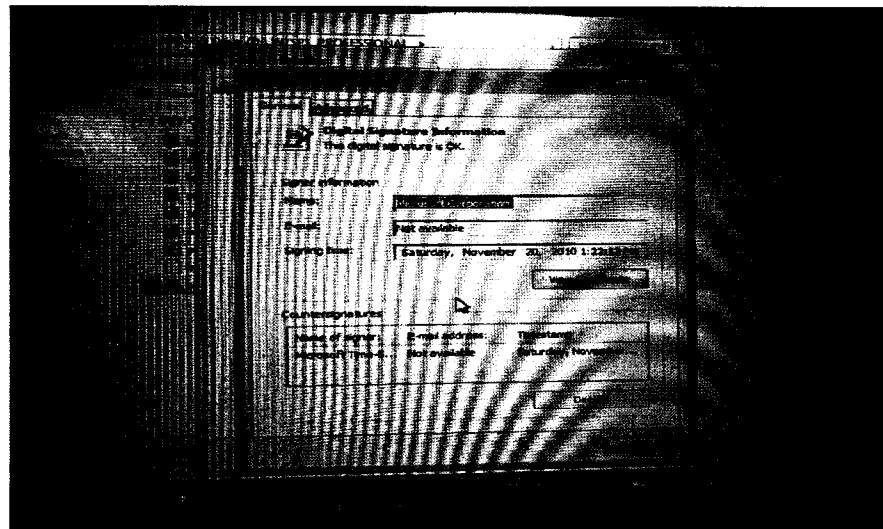


**Step 2.** Windows installation process completed 100%. At no time was I prompted to enter a 5 x 5 product key. The device operated as normal with no visible messaging as to the activation status.

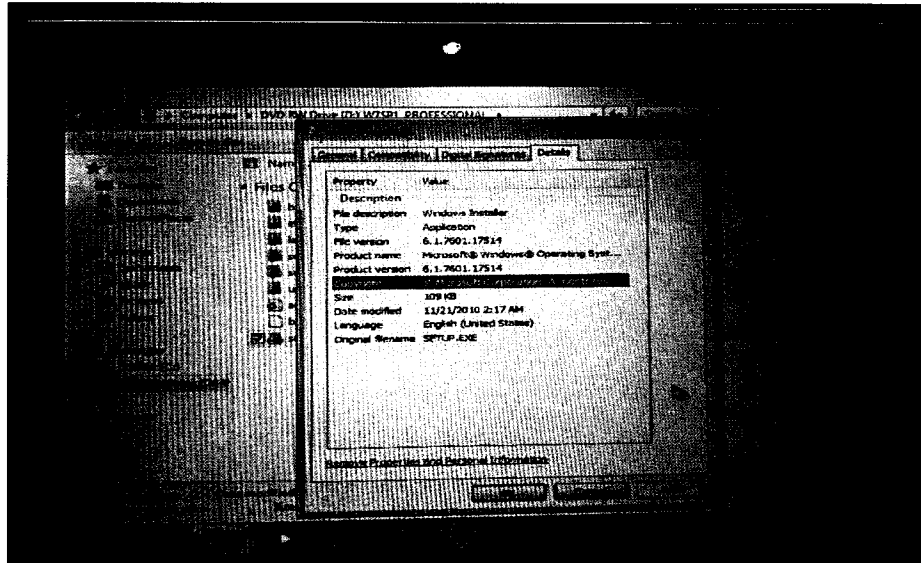
**Step 3.** Device activation status checked. The windows activation dialogue showed an invalid product key message (despite not having entered a product key). Also note the 'Contact Dell' message on the Lenovo device which confirms that the image was a 'Dell' image.



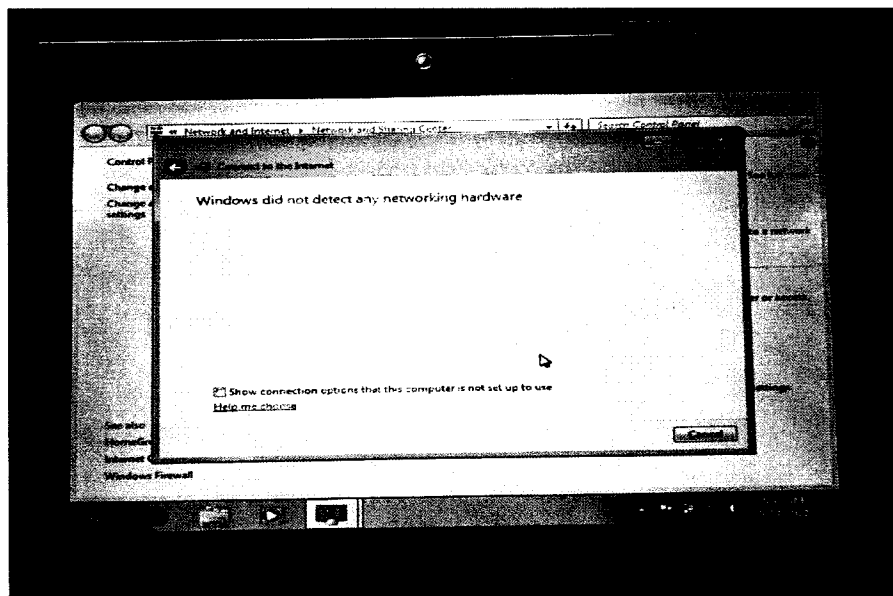
**Step 4:** Verified the digital signature and copyright information on the DVD setup.exe file.



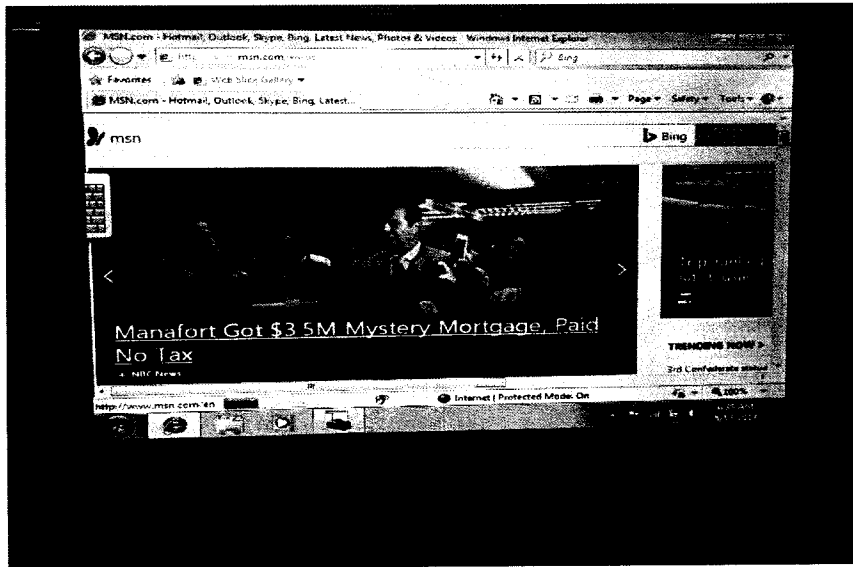




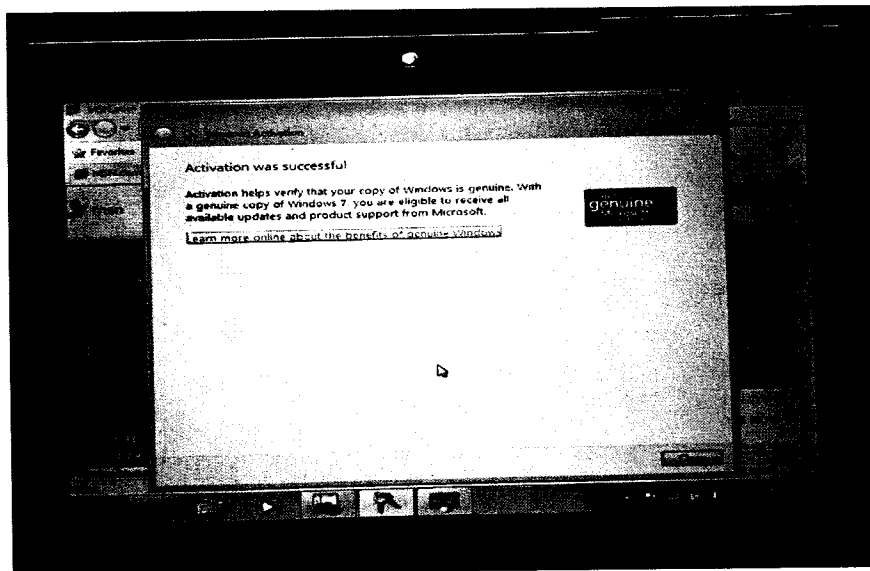
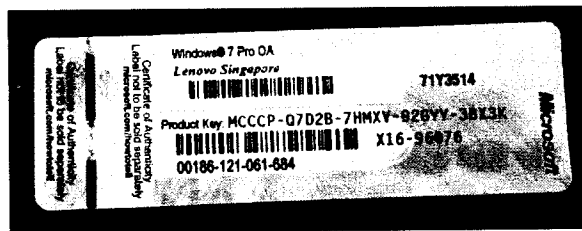
**Step 5:** Device was not connected to the network due to missing driver information for the network adaptor hardware.



To enable this, the network adaptor driver for the Lenovo X220 was downloaded to a USB stick and this was used to install the driver software which subsequently allowed the device to connect to the internet.



**Step 6:** I used the Windows 7 COA/product key supplied on the Lenovo X220 device to successfully activate the software over the internet.

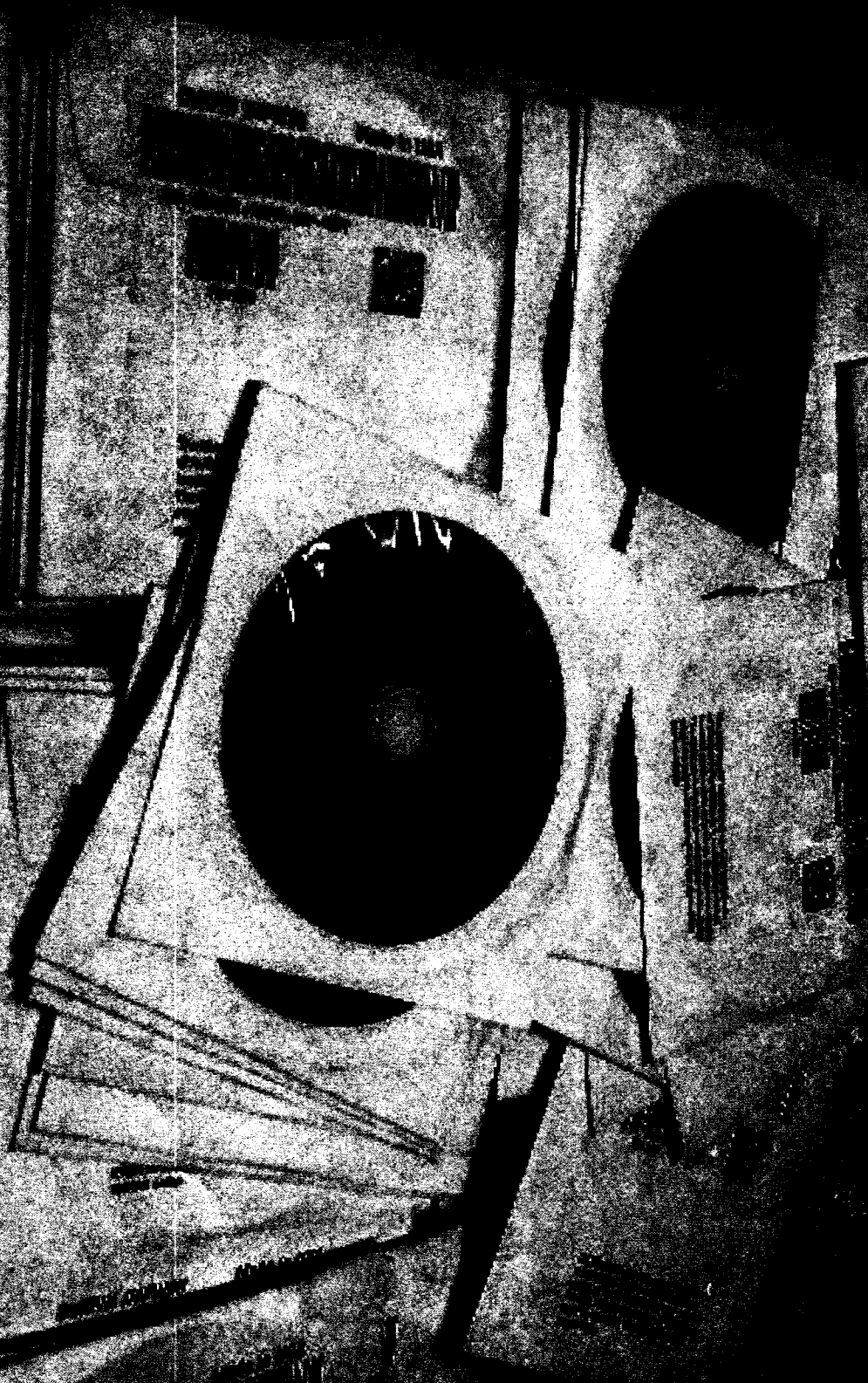
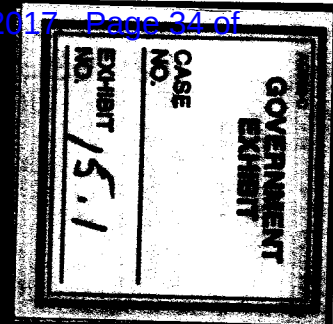


Note: at time of writing, the key is not showing an activation event in the Microsoft Key Information tool.



ACTIVATION HISTORY

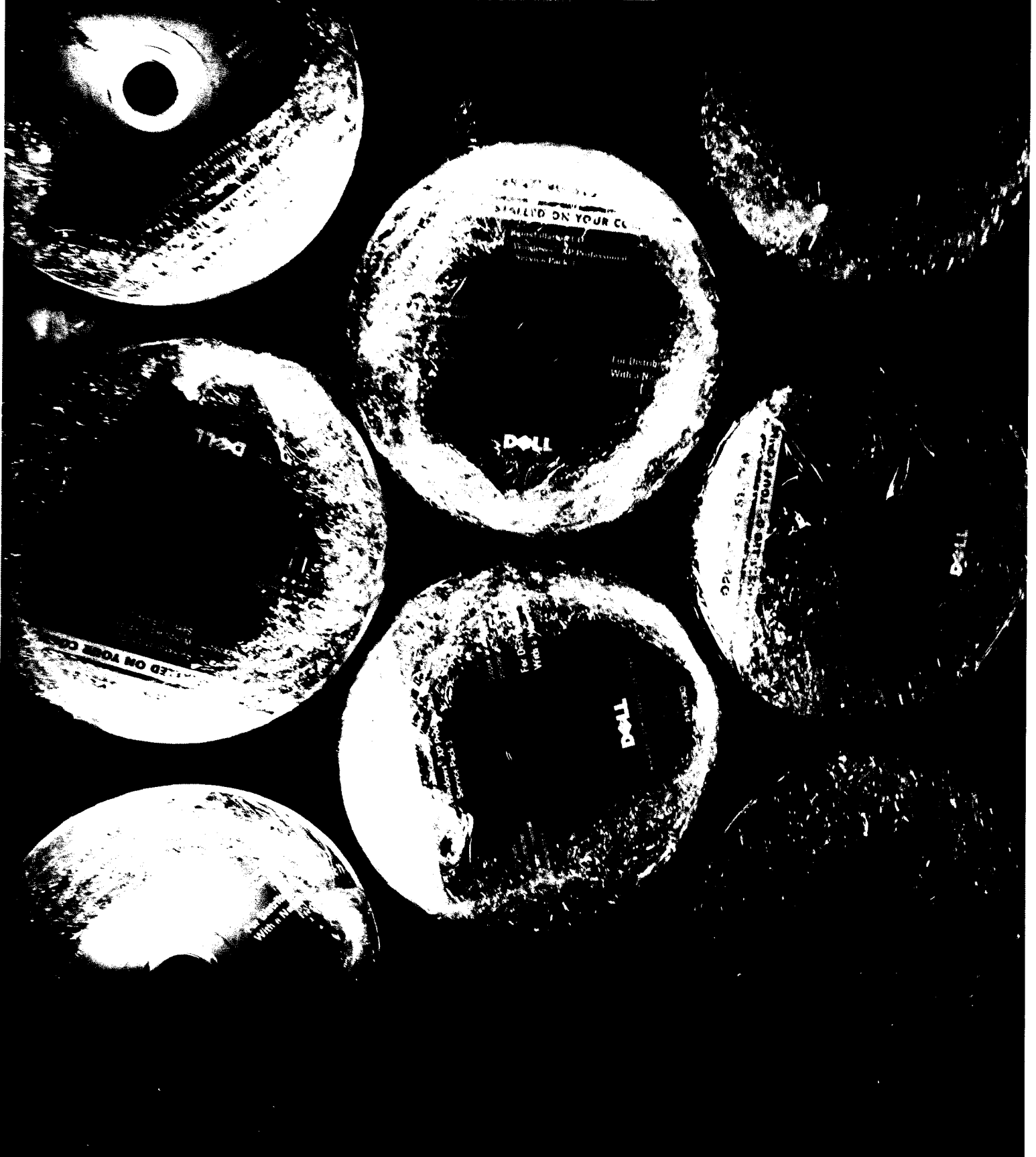
Activation Date (UTC)	Hardware ID	MPC	Mode
2017/05/17 01:36:35 PM	XgAAABMAMAAAAAEAAgABAAEA AAACAAAAAgABAAEA6GHcSj1yKK1 4CSSiCHCVFzDIJFIBbD1DQABAAE DAAIFAAMBAAQCAAUAAAACAAcA AAACAAAYQAAhRAAAcZAAAwKAA--		1



sto ho FL

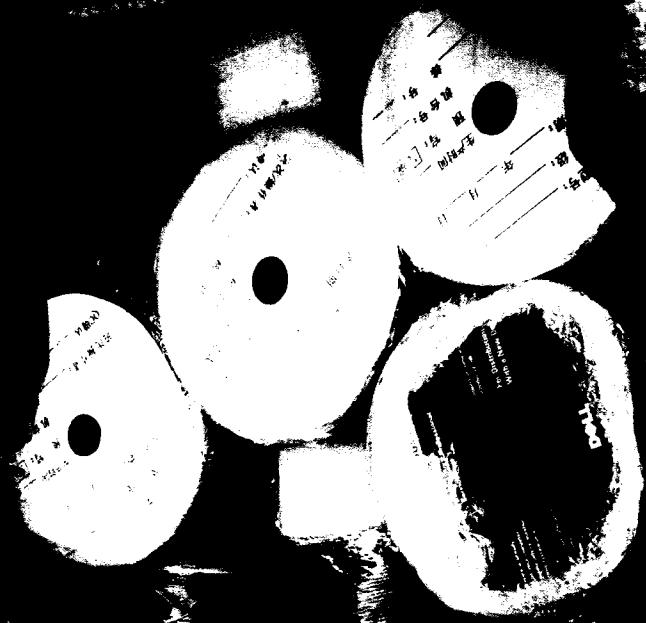






uc1 photo 3

GOVERNMENT EXHIBIT	
CASE NO.	EXHIBIT NO. 15.4



CC2

1M6-0241





LN 4 QJS

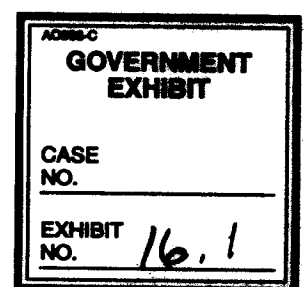
**Seizures of Counterfeit Discs**

<b>Seizure #</b>	<b>Location</b>	<b># of Discs</b>	<b>Software</b>
1	SFO	1439	XP3
2	SFO	2246	XP3
3	NY	12759	W7
4	WPB	1638	XP3
5	Dallas	4002	W7
		972	XP3
		198	XP2
6	WPB	1598	XP3
7	WPB	1600	XP3
8	WPB	1400	XP3
9	WPB	1400	XP3

**TOTAL:** 29252

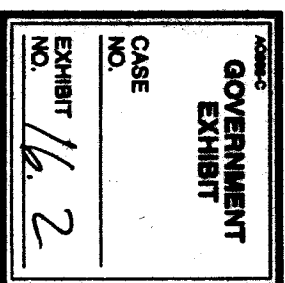
Breakdown of Software:

W7	16761
XP3	12293
XP2	198



Importations

Import #	Import Date	Source / Email #	Seized	Importer	Weight	Seized COG	Estimated COG
1	5/21/2011	237		RJW Technologies	20k		1260
2	5/23/2011	237		RJW Technologies	20k		1260
3	5/24/2011	237		Dell Inc	20k		1260
4	5/25/2011	237		Bob Wolff	20k		1260
5	5/30/2011	237		Dell Inc	20k		1260
6	5/30/2011	237		Dell Inc	20k		1260
7	7/28/2011	58		Clifford Lundgren	21k		1323
8	7/29/2011	58		Carl Lundgren	21k		1323
9	7/30/2011	61		Bob Wolff	21k		1323
9	7/30/2011	600		Bob Wolff	21k		1323
10	7/30/2011	61		Bob Wolff	21k		1323
10	7/30/2011	600		Bob Wolff	21k		1323
11	8/5/2011	213		Bob Wolff	21k		1323
11	8/5/2011	600		Bob Wolff	21k		1323
12	8/5/2011	213		Mr Robert Wolff	21k		1323
12	8/5/2011	600		Mr Robert Wolff	21k		1323
13	8/6/2011	213		Bob Wolff	21k		1323
14	8/6/2011	213		Mr Robert Wolff	21k		1323
15	8/9/2011	213		Mr Robert Wolff	21k		1323
16	8/9/2011	213		Bob Wolff	21k		1323
17	9/15/2011	322		Bob Wolff	22k		1386
18	9/15/2011	322		Lou Wolff	21k		1323
19	9/15/2011	322		RJW Technologies	21k		1323
20	9/16/2011	322		Lou Wolff	20k		1260
21	9/16/2011	322		Bob Wolff	20k		1260
22	9/16/2011	322		RJW Technologies	21k		1323
23	9/17/2011	358		Lou Wolff	21k		1323
24	9/17/2011	358		Bob Wolff	24k		1512
25	9/17/2011	358		RJW Technologies	21k		1323
26	9/19/2011	412		RJW Technologies	21k		1323
27	9/19/2011	412		Bob Wolff	21k		1323
28	9/19/2011	412		Lou Wolff	21k		1323
29	9/20/2011	412		Lou Wolff	20k		1260



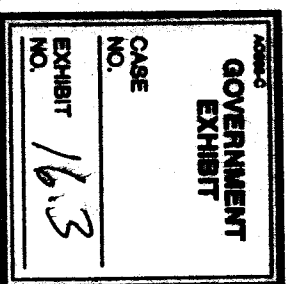
## Importations

30	9/20/2011	412		RJW Technologies	21k		1323
31	9/20/2011	LE Database		Bob Wolff	19k		1197
32	3/13/2012	147		RJW Technologis	22k		1386
33	6/17/2012	LE Database		Lou Wolff	35k		2205
34	6/17/2012	859		RJWBOB	24k		1512
35	6/17/2012	859		Lou Wolff	24k		1512
36	6/17/2012	859		Michael Gross	25k		1575
37	6/22/2012	LE Database		RJWBOB	35k		2205
38	7/20/2012	LE Database		Low Wolff	49k		3087
39	8/15/2012	139		Lou Wolff	38k		2394
40	8/16/2012	139		RJWBOB	38k		2394
40	8/17/2012	139		RJWBOB	38k		2394
41	8/17/2012	139		Michael Gross	45k		2835
42	9/2/2012	SFO Seizure	x	Lou Wolff	48k		
43	9/2/2012	SFO Seizure	x	Bob Wolff	43k		
44	9/2/2012	LE Database		Lou Wolff	48k		
45	9/3/2012	SFO Seizure	x	Lou Wolff	48k		1439
46	9/3/2012	SFO Seizure	x	Bob Wolff	43k		2246
47	9/3/2012	LE Database		Lou Wolff	48k		
48	10/29/2012	UC 2	x	Cliff Lundgreen	26k		1600
49	11/10/2012	UC 1	x	Cliff Lundgreen	25k		1598
50	6/8/2013	UC 3	x	Clifford E Lundgren	21k		1400
51	6/19/2013	SW LA	x	Clifford Lundgren	22k		1400
Total:							69363

63 CDs per Kilogram

**Wire Transfers from Wolff to Lundgren**

Wire #	Date	From	To	Amount	Ref
1	6/27/2011	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$1,000.00	
2	7/18/2011	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$4,800.00	
3	8/22/2011	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$15,700.50	
4	9/26/2011	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$4,500.00	
5	2/3/2012	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$3,300.00	
6	2/28/2012	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$5,500.00	
7	4/3/2012	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$1,750.00	
8	4/10/2012	Wolff's Chase Account	Lundgren's HSBC Hong Kong	\$7,375.00	
9	7/10/2012	Wolff's Chase Account	Lundgren's US Bank	\$5,508.00	
10	8/13/2012	Wolff's Chase Account	Lundgren's US Bank	\$12,129.75	
11	8/23/2012	Wolff's Chase Account	Lundgren's US Bank	\$8,475.00	
<b>Total:</b>				<b>\$70,038.25</b>	

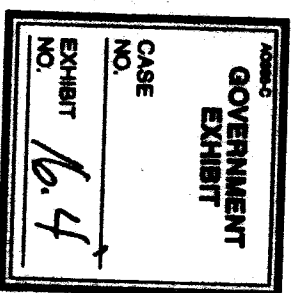


## PayPal Payments from WOLFF to LUNDGREN

Date	Email #	From		Amount	Fees	Total
2/3/2010		RJW Technologies, Inc.	Payment Received	\$100.00	\$4.20	\$95.80
3/27/2011		RJW Technologies, Inc.	Payment Received	\$3,001.37	\$117.35	\$2,884.02
4/30/2011	517	RJW Technologies, Inc.	Payment Received	\$1,450.00	\$56.85	\$1,393.15
6/1/2011		RJW Technologies, Inc.	Instant Trans Recvd	\$1,616.00	\$63.32	\$1,552.68
6/23/2011	457	RJW Technologies, Inc.	Pmt Received	\$5,800.00	\$226.50	\$5,573.50
1/5/2012	372 / 515 / 519 / 625 / 483	RJW Technologies, Inc.	Instant Trans Recvd	\$1,375.00	\$40.18	\$1,334.82

## Totals:

Gross Payments	\$13,341.63
PayPal Fees:	\$629.95
Net Payments:	\$12,883.97





Suite 2200  
1201 Third Avenue  
Seattle, WA 98101-3045  
(206) 622-3150 tel.  
(206) 757-7700 fax

**Bonnie MacNaughton**  
BonnieMacNaughton@dwt.com

May 19, 2017

*VIA EMAIL to [edward\\_cooley@flsp.uscourts.gov](mailto:edward_cooley@flsp.uscourts.gov)*

*VIA UPS OVERNIGHT to:*

The Honorable Daniel T.K. Hurley  
United States Courthouse  
701 Clematis Street  
West Palm Beach, Florida 33401

Re: United States v. Robert J. Wolff, et al., Case No. 16-80090-CR-Hurley/Hopkins

Dear Judge Hurley and Mr. Cooley:

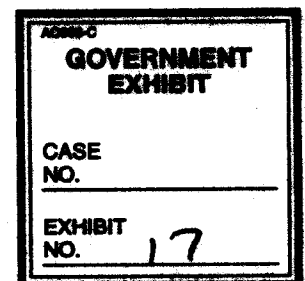
We represent Microsoft Corporation. We submit this letter in support of Microsoft's request for restitution from Defendants in the above-referenced matter.

The software industry loses billions of dollars in annual revenue from software piracy, namely, the unauthorized and unlawful copying, downloading, and distributing of copyrighted and trademarked software and related components. Software developers, like Microsoft, are not the only victims of software piracy. Consumers are also victims, as they are often deceived by distributors of pirated software who go to great lengths to make the software appear to be licensed and authorized by Microsoft. The prosecution of counterfeiters is extremely important not only to appropriately punish those individuals for their criminal actions, but also to deter others from engaging in the illicit global trade in decoupled product activation keys.

Microsoft has been informed by the government that as part of the Defendants' pleas, they have admitted they distributed approximately 28,000 counterfeit Microsoft Windows XP and Microsoft Windows 7 discs to customers involved in refurbishing computer systems. These sales of counterfeit operating systems displaced Microsoft's potential sales of genuine operating systems to those customers who would have otherwise acquired their software through Microsoft's Registered Refurbisher Program ("RRP").

The prices for Microsoft Windows XP and Microsoft Windows 7 in the RRP is:

Windows XP Home:	\$20
Windows XP Professional	\$25
Window 7 Home	\$25
Windows 7 Professional	\$40





May 19, 2017

Page 2


For purposes of restitution, Microsoft recommends that the Court use the lowest price available in the RRP for the products at issue to avoid the complexity of assigning individual values to each unit of counterfeit software. This is a conservative pricing approach and gives Defendant the benefit of having restitution awarded at the lowest price point available in the marketplace into which they were distributing counterfeits.

Based on these figures, Microsoft calculates its revenue losses as follows: 28,000 counterfeit copies multiplied by \$20 per copy multiplied by 75% (Microsoft's average profitability during the relevant time period), for a total of **\$420,000**. A Microsoft witness will be testifying at the sentencing and will provide any additional explanation of the above that the Court requires.

Microsoft appreciates the Court's attention to these issues and applauds the government's efforts to protect intellectual property and the victims of software piracy through the investigation and prosecution of infringers.

Very Truly Yours,

Davis Wright Tremaine LLP

  
Bonnie MacNaughton

cc: Client

**US V. WOLFF et al**

**15-80090-DTKH**

**EXHIBIT 18**

**FILED UNDER SEAL**

9)

: Path Dell\C\RECYCLER\S-1-5-21-2592123262-834108671-869673374-1003\Inbox.bak\Dc18.bak\Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already - Send me tracking info & I will sent you tracking info on next shipment. Thank You.

From Eric Lundgren <Eric@SourceCaptain.com>

To bob wolff <rjw@mindspring.com>

Sent 05/13/11 12:52:25 PM

Subject Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already - Send me tracking info & I will sent you tracking info on next shipment. Thank You.

I have worked into my total "AirFreight" with parcel post which is not checked by Customs. Customs views this as a waste of time to check for there are millions of packages that come into America per day in this format via E-bay etc.

This is how I send you in the CD's, this is how I send you in the PS-400's. But it is expensive!

There are tricks for bypassing customs with container's & LTL but currently this is how I get you these products without invoices past customs.

Hence, If you had a wholesale buyer, I would airfreight them to the buyer in (under 70LBS) boxes. Your customer will be thrilled, he can have them in less than 5-6 business days! haha

Please find me a wholesale customer if possible, if not - we can have you retail (But this moves too slow...) anyway to speed it up? Wholesale? Flea markets? Ect?

Thanks,

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On Sat, May 14, 2011 at 12:37 AM, bob wolff <rjw@mindspring.com [mailto:rjw@mindspring.com]> wrote:  
I'm awaiting the last order to complete the batch. The new batch will allow me to go to more(different customers).  
Please send them ASAP.

One question about the PS400. If you can't ship by freight without Canon invoice how will you send to a wholesale customer?

----- Original Message -----

From: Eric Lundgren

To: bob wolff

G #19

Sent: Friday, May 13, 2011 10:13 AM

Subject: Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already -  
Send me tracking info & I will sent you tracking info on next shipment. Thank You.

Bob,

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\*I will send you 5,000-7,000 Pieces then of the new batch (Good quality units).

\* Have you sold all of the last batch yet?

\*I will await the Spreadsheet this weekend with updates.

\*I look forward to any advice and/or solution for the 10K+ Worth of PS-400's that I am currently sitting on... Your the only one that I have moving these and I hope you can find a wholesale buyer because we will not have enough time to retail these before they become obsolete here in about 12 months.

Thanks,

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1. I will work on the 3 SP3 samples ASAP
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3. I have been adjusting the price of the PS-400, but still slow. I don't want to adjust too much because of all the costs(freight in, ebay and paypal fees, freight out)
4. I can sell 4000 pieces of the new batch quickly.

Bob

----- Original Message -----

From: Eric Lundgren

To: bob wolff

Sent: Friday, May 13, 2011 9:09 AM

Subject: Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already -  
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Bob,

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\*Regarding the Cannon's being sold on ebay/amazon - this is what I am hoping you do and why I sent you the boxes of 40PCS per box already... It costs me 250 USD (SHIPPING COST) just to AIR FREIGHT a single box of those to you! (If I sea-freight, they will require Invoice from Cannon which I do not have) Let's try and get the units you

have sold first before I risk the shipping cost to send you more... P.S. I do not think this product will be popular long enough to liquidate the 750 PCS that I have left on Ebay & Amazon...

\*Regarding the Balance sheet... I still have not recieved this from you - therefore I am unaware of how well you have been doing with the PS-400's and/or how many have sold thus far. Thus far I have not been paid for a single unit sent of PS-400's and would like to see your #'s on the CD's before the next batch arrives.

Please also give me projections of how many units (SP2) you can move if they are perfect quality? (I need to know how many to send to you.)

Thank You,

Best Regards,

Eric Lundgren  
CEO  
Source Captain Inc.  
Eric@SourceCaptain.com

Office US: 360-746-2449  
Office CN: (86) 755 15817433433  
Fax: (888) 408-2010  
SKYPE: ECACompany

IMG [<http://sourcecaptain.com/files/3812/8569/9912/Source%20Capta...>]

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Eric,

I will work on getting a few good SP3.

I have been working on the Canon, I have no luck selling the lot. I know I can sell them on Ebay in the \$30's to \$40's and more . Yes it would take some time, but you would get consistent flow of cash. Give it some thought.

Let me know when you have tracking on the new lot.

Bob  
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From: Eric Lundgren

To: bob wolff  
Sent: Thursday, May 12, 2011 11:54 PM

Subject: Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already -  
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Bob,

The new batch will be on its way to you asap. They are completed, packed, and at the logistics facility.

Thank you for staying on top of the details, it shows your professionalism. I will await your current inventory/sales balance to confirm.

As for SP3, The only unit that you got me was a burnt copy... We need the actual OEM unit and two or three of them... Can you find & send over to the same address in China?

It is too expensive for me to make a "FLOP" batch, It's best if I have 3 OEM samples to work with.

You'll see.. You got me over 3-OEM samples of the SP2 and your about to receive the results of this in the next batch... Magnifico!

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Eric,

tried reaching you by phone. The 202 pieces will go out today, I will forward you the tracking. After this shipment I will take the physical inventory and forward you the count of what is left and the sales details to date. We will be out very soon. I am looking forward to the new batch. What about SP3?

Bob  
----- Original Message -----  
From: Eric Lundgren  
To: bob Wolff

Sent: Wednesday, May 11, 2011 3:49 PM

Subject: Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already -  
Send me tracking info & I will sent you tracking info on next shipment. Thank You.

Bob,

I don't know what time it is there, but if they cannot go out today - please rush them tomorrow & provide tracking.

You must try to sell the rest soon... & provide update sales/stock balance.

I will provide tracking on the large re-load headed your way.

Let's try to talk tomorrow morning, when you wake up - give me a buzz first thing..

Thank You Bob.

Best Regards,

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Eric,

I will take care of the shipment. They will go out tomorrow. My customer has not pulled the trigger on the balance.  
That is imminent. I also have a few other possibilities.

I look forward to the new batch.

Bob

----- Original Message -----

From: Eric Lundgren

To: bob Wolff

Sent: Wednesday, May 11, 2011 4:22 PM

Subject: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already -  
Send me tracking info & I will sent you tracking info on next shipment. Thank You.

Hey Mr. Wolf,

I have sent you the next batch of Product so I hope that you are close to done moving the last batch.

To help, I have moved 200 myself. (We want to get rid of the "OK" looking disks ASAP.)

Please ship 202 Disks to the address below as soon as possible.

Coretek Sales/Ship/Receive  
7144 Weddington Rd Suite 140  
Concord, NC, 28027  
(Rush Delivery) 3 Day.

Please provide a tracking # and I will follow up with a tracking # for the disks that I have sent you.

Also, please update your "Inventory Balance Sheet/Sales Sheet" for our record.

Thank You.

--

Best Regards,

Eric Lundgren  
CEO  
Source Captain Inc.  
Eric@SourceCaptain.com

Office US: 360-746-2449  
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Attachments

Name (Alternate  
Body)

Logical Size 10,924

(Alternate Body)

10)

: Path Dell\VC\RECYCLER\S-1-5-21-2592123262-834108671-869673374-1003\Inbox.bak\Dc18.bak\Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already - Send me tracking info & I will sent you tracking info on next shipment. Thank You.

From Eric Lundgren <Eric@SourceCaptain.com>

To bob wolff <rjw@mindspring.com>

Sent 05/17/11 04:20:43 PM

Subject Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already - Send me tracking info & I will sent you tracking info on next shipment. Thank You.

Bob,

\* Please input the PS-400's shipped to you ( ) Boxes x (40 Units per Box) = \_\_\_\_ Units - \_\_\_\_ Sold Units = \_\_\_\_ Remaining. PayPal Payment \_\_\_\_ made to Source Captain.

\* Please input total disks remaining.

\* Please input total new disks Received. (When they come in.)

Please also try to sell the PS-400's wholesale if you can.

Thank You,

Eric Lundgren  
Source Captain Inc.

On Tue, May 17, 2011 at 11:39 PM, bob wolff <rjw@mindspring.com [mailto:rjw@mindspring.com]> wrote:  
Eric,

Enclosed is the spreadsheet on the CDs

----- Original Message -----

From: Eric Lundgren

To: bob wolff

Sent: Friday, May 13, 2011 11:52 AM

Subject: Re: BOB - PLEASE SHIP 202 MORE DISKS - I have another GIANT batch on their way to you already - Send me tracking info & I will sent you tracking info on next shipment. Thank You.

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Attachments

Name (Alternate  
Body)

Logical Size 12,449

(Alternate Body)

Phase2 International Traders, LLC

3523 Warick Dr.  
Dallas, TX 75229

## Purchase Order

Date	P.O. No.
8/14/2012	153

Vendor
RJW TECHNOLOGIES, INC R W 22255 LARKSPUR TR BOCA RATON, FL 33433

Ship To
Phase2 International Traders, LLC 3523 Warick Dr. Dallas, TX 75229

Item	Description	Qty	Rate	Amount
Misc	XPP SP3 DELL	4,000	4.00	16,000.00
Misc	WIN 7 SP1 32B DELL	4,000	3.00	12,000.00
			<b>Total</b>	\$28,000.00

--

G#21



The enclosed CD contains a complete version of  
your operating systems software.

This software has been pre-installed on your  
system.

Please store safely for future recovery of your  
software if needed.

LT1824

A088-C	
<b>GOVERNMENT EXHIBIT</b>	
CASE NO.	
EXHIBIT NO.	22

DE 159



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION

CASE NO. 16-CR-80090-HURLEY

**UNITED STATES OF AMERICA,**

Plaintiff,

vs.

**CLIFFORD E. LUNDGREN,**

Defendant.

CHANGE OF PLEA PROCEEDINGS  
BEFORE THE HONORABLE DANIEL T. K. HURLEY  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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*THE COURT:* Good morning, everybody. This is Case  
Number 16-80090, United States versus Clifford Eric Lundgren.

Let me begin by allowing the lawyers to make  
appearances. I will start by recognizing counsel for the  
Government.

*MR. MORRIS:* Thank you, Lothrop Morris for the United  
States and Special Agent Daniel Longo.

*THE COURT:* And for the defense?

*MR. REINHART:* Good morning, Bruce Reinhart and Ms.  
Sanchez for the Defendant, Mr. Lundgren.

*THE COURT:* It is my understanding there have been  
discussions on behalf of Mr. Lundgren, and as a result, Mr.  
Lundgren has come to court desiring to change his plea from not  
guilty to guilty. Is that correct?

*MR. REINHART:* It is, Your Honor.

*THE COURT:* Mr. Lundgren, would you come up to the  
lectern. I will ask Ms. Guerrero to administer the oath.

(Thereupon, the Defendant was duly sworn.)

*BY THE COURT:*

Q. Mr. Lundgren, would you introduce yourself?

A. Clifford Eric Lundgren.

Q. Mr. Lundgren, do you understand that by taking the oath you  
have taken, if you were not truthful, you would be put at risk  
with another crime, the crime of perjury and giving a false  
statement under oath?

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Do you understand that, too?

A. Yes, I do.

Q. Let me first suggest you relax, listen to the questions and  
go ahead and answer them as accurately and completely as you  
can.

I hope you understand that nobody, nobody wants you to  
plead guilty unless, number one, you really did whatever it is  
the Government is claiming. You have some idea of the  
allegations. And also, this is equally important, you should  
not plead guilty unless you come to the firm conclusion in your  
own mind that it is in your best interest to resolve the case  
this way.

If there is anything at all that I say and you don't  
understand and you want to talk about it in greater detail,  
please, stop me and let me know and we can have that  
discussion.

By the way, if in the course of our discussion you need to  
talk to counsel privately, let me know and I will give you that  
opportunity as well.

Okay?

A. Okay.

Q. I would like to start by asking you about your  
representation by counsel, and I suspect I know the answer to  
this already. Is it fair to say you or your family retained  
counsel, they are not court appointed?

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A. Yes, I retained counsel myself.

Q. Now, have you had an opportunity to discuss with your  
lawyers in detail all of the charges that have been brought  
against you in this case?

A. Yes, I have.

Q. And when you were having those discussions, did you also  
talk about, if there had to be a trial in this case, what the  
Government's evidence might consist of, and what you could do  
to defend yourself in light of that evidence?

Did you have those kinds of discussions?

A. Yes, yes, we did.

*THE COURT:* Hold on for a second.

Mr. Marshal, anything we needed to talk about?

*THE MARSHAL:* No, sir.

*THE COURT:* Okay, thank you.

*BY THE COURT:*

Q. Now, I have a couple of documents here, it is a Plea  
Agreement, and your name is typewritten on the first page, and  
if we go to the last page, your name is typewritten and there  
is a signature above that.

Mr. Lundgren, is that your signature?

A. Yes, it is.

Q. Now, before you signed this document, did you go over every  
single provision in this document with your lawyers?

A. Yes, we did.

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1 Q. Okay.

2 There is a second document here and it is called a

3 statement of facts, and, of course, once again your name is

4 typewritten on the very first page, and if you go to the last

5 page, you see your name is typewritten again, and there is a

6 signature above that.

7 Mr. Lundgren, is that your signature?

8 A. Yes, that is.

9 Q. Okay.

10 Now, before you signed this document, did you go over every

11 single sentence in this document with your lawyers?

12 A. Yes, we did.

13 Q. And this document suggests that you said things or did

14 things, when it talks about you, and it ascribes either words

15 or actions to you. Are those statements factually correct, are

16 they true?

17 A. Sorry, I am ready, sorry. Yes.

18 Q. In other words, did you say and do what it says you did?

19 A. Yes.

20 Q. Okay.

21 Now, may I ask you, are you satisfied with the advice and

22 services that your lawyers have been providing to you while

23 they have been acting for you in this case?

24 A. Yes.

25 Q. You seem to be hesitant about that. Are you okay on that?

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1 A. Yep.

2 Q. Okay.

3 Now, I wonder if you would tell me about yourself. How old

4 are you today?

5 A. I am 32 years old.

6 Q. Today are you a citizen of the United States?

7 A. Yes, I am.

8 Q. Where are you from?

9 A. Washington state, I lived most of my life in Washington

10 state and China.

11 Q. Where did you live in Washington?

12 A. Lynden, a Dutch town in the middle of nowhere.

13 Q. Tell me about your education background.

14 A. I went to Lynden --

15 Q. Is that L-I-N --

16 A. L-Y-N-D-E-N, a Dutch town right on the border.

17 Q. Right.

18 A. After high school, I went to Los Angeles and started my

19 first company called ECA Company.

20 Q. You did that right after high school?

21 A. Right after high school.

22 Q. Did your family go with you?

23 A. We were pretty poor, I went to live with my brother who was

24 going to UC.

25 Q. What kind of company?

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1 A. Environmental life.

2 Q. You had your life in the environmental area?

3 A. Yes.

4 Q. Did you have any academic schooling after high school?

5 A. Recently, yes, but most overseas and the United States, a

6 lot of mentors.

7 Q. I missed what you said.

8 A. With mentors, more mentorship.

9 Q. You went down to Los Angeles, started your own company.

10 How long were you in the Los Angeles area?

11 A. About four years.

12 Q. What did you do after that?

13 A. I went to Springfield, Illinois.

14 Q. What was the name of the company?

15 A. Environmental Computer Associates, ECA.

16 Q. That is you and your brother or yourself?

17 A. Just myself, it was an LLC.

18 Q. What did you do?

19 A. Recycling -- electronic recycling for Fortune companies,

20 all of American Airlines, at 19 years old I was doing American

21 Airlines, at 20, Sisco, Coca-Cola.

22 Q. When you say recycling, taking the computers, no longer

23 using them and recycling them?

24 A. At that time, taking the computers out of the corporate

25 sector, refurbishing them and putting them in the lower sector,

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1 \$99.

2 Q. The demand was there?

3 A. It was at that time. Nowadays we are extracting all the

4 parts and components and building new components, like a chop

5 shop but for computers.

6 Q. Where did you go after Illinois?

7 A. I went to China.

8 Q. Where?

9 A. Xiamen.

10 Q. Xiamen in Fujian Province?

11 A. Actually, yes.

12 Q. What did you do?

13 A. I started a company, Source Captain, sourcing parts to

14 people that want to refurbish parts.

15 Q. Tell me time wise, to the best of your recollection.

16 A. I would say 2000 -- probably 2000 -- I was 24 -- I was 19

17 the first time I went to China, and 24 the second.

18 Q. Do you speak Mandarin?

19 A. (Speaking Chinese.)

20 Q. How long were you there?

21 A. Approximately five years. I went to India, we were trying

22 to expand to India. That didn't work out so well.

23 Q. Here you are right in the forefront of the technological

24 change, and you did that. What happened next?

25 A. After India didn't work out, I was in India for a year,

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1 year and a half, I went back to China.

2 Q. Where were you in India?

3 A. Calcutta, I had an office in Sector Two Salt Lake in  
4 Calcutta and Mumbai, India, next to the airport, and we were  
5 doing programming there and trying to source all of the  
6 factories in mainland China and the United States, but we lost  
7 and Alibaba won.

8 Q. That is the Chinese equivalent to Google?

9 A. Yes, it is owned by Jack Ma, who is a multi billionaire,  
10 and I am not.

11 Q. A friend of President Trump, apparently.

12 A. Yes.

13 Q. You did that, and what happened after that? Did you come  
14 back to the United States?

15 A. Yes, I was flat broke and took a job in the United States  
16 as a vice-president of a company called Allied Trading, and I  
17 was fired after three weeks for not understanding the company  
18 culture. I asked what the company culture was, and it was to  
19 take advantage of companies.

20 So I left, went up across the street and opened up a one  
21 thousand square foot facility and bought that company that  
22 fired me, retained all of their employees, and now myself and  
23 my partner own that company.

24 Q. You sound like the epitome of an entrepreneur. Are you  
25 married today?

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1 A. No. To my company.

2 Q. It sounds like it is enormously engaging and time  
3 consuming, you have to be very dedicated to what you are doing,  
4 I understand that.

5 Let me ask you this, a couple of personal questions, and I  
6 am asking you this only so I can make an evaluation of your  
7 ability to make the judgment you are thinking of making this  
8 morning.

9 The first question is whether you have gone to see somebody  
10 we describe as a medical health professional, psychologist,  
11 anybody like that, because of mental illness.

12 Have you ever done that?

13 A. No. Never.

14 Q. How about illegal drugs, have you ever used illegal drugs  
15 yourself?

16 A. No.

17 Q. It is so important today here in the courtroom you are  
18 completely clear headed so you, yourself, can listen to  
19 everything that is said, so you can evaluate this information  
20 and make whatever judgments you think are the right judgments  
21 for yourself.

22 Do you feel you can do that?

23 A. Yes.

24 Q. Can I ask you about your physical health; how would you  
25 describe your physical health today?

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1 A. It was perfect, now I have ulcers, but it is from five  
2 years of this.

3 Q. Of this case?

4 A. Yes.

5 Q. A lot of worry, anxiety and tension?

6 A. Yep.

7 Q. Tell me the kinds of medicines you take. Do you take any  
8 prescription medicines?

9 A. I was prescribed one by a doctor that I take every night.

10 Q. Do you know what that is?

11 A. I don't know what it is called. I had over the counter  
12 stuff, it wasn't strong enough.

13 Q. How long have you been taking this medicine?

14 A. About a year now, year and a half.

15 Q. In the course of taking it, have you found that it distorts  
16 your ability to understand what is going on around you?

17 A. No.

18 Q. Okay, all right. Fine.

19 I want to take a second and review with you your rights  
20 under the United States Constitution. You want to think of  
21 these as protections built into the law so they will be  
22 available to you in a situation like this.

23 Number one, I want you to know what they are, and second, I  
24 want to make sure you thought about, if you do decide to plead  
25 guilty, one of the things you will be doing is giving up these

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1 rights, these protections.

2 When you think about it, that is what makes this such an  
3 important decision this morning.

4 The most important right is this: When somebody is alleged  
5 to have violated the law, there is no obligation they come to  
6 court and say they are going to plead guilty. Under the  
7 Constitution, you have the right to say my plea is going to be  
8 not guilty, I want to have a trial. As a matter of fact, I  
9 want 12 people to come in and sit as a jury.

10 It would be the jury that listens to all the information,  
11 all the evidence, and it is the jury that decides the result of  
12 the trial, the verdict in the trial.

13 So, do you understand you have the right to plead not  
14 guilty and have a trial by jury?

15 A. Yes.

16 Q. Okay.

17 Now, you told me -- and you have two very fine lawyers you  
18 retained to assist you in all of this.

19 I want you to understand that if we have a trial, they  
20 would be by your side from the beginning to the end of the  
21 process.

22 Do you understand that?

23 A. Yes.

24 Q. Do you understand that it is so important you be  
25 represented by counsel and if for some reason you could not

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1 afford your lawyers' services, do you understand the Court  
2 could appoint a lawyer to represent you through this entire  
3 process?

4 A. Yes, yes, I do.

5 Q. I want to make sure you understand the way a trial works  
6 because we say that the obligation to bring the evidence into  
7 the courtroom, that is something we put one hundred percent on  
8 the shoulders of the prosecutor, the Government. So, what that  
9 means is, the person who is alleged to have violated the law,  
10 they don't need to prove anything in a trial. You won't have  
11 to disprove anything, you wouldn't even have to speak in the  
12 trial.

13 Do you understand that?

14 A. Yes, I do.

15 Q. Now, of course, the way the Government normally tries to  
16 prove its charges, they call witnesses, and you understand in a  
17 trial, people come into the courtroom one by one, come over to  
18 the witness stand, take the oath and they are questioned by the  
19 prosecutor.

20 Now, if we had a trial in your case, you could sit over  
21 there at defense table and you would be able to look these  
22 witnesses right in the eye, hear whatever they have to say and  
23 you could talk to your lawyers about their testimony.

24 Do you understand that?

25 A. Yes, I do.

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1 Q. Do you understand that when the prosecutor finished asking  
2 his questions of a particular witness, that your lawyer would  
3 stand up in front of the jury and question that witness so he  
4 or she could show the jury whether there were any holes or  
5 weaknesses or inconsistencies in what that witness might be  
6 saying?

7 Do you understand your lawyer would do that?

8 A. Yes.

9 Q. Do you also understand that your lawyers have the ability,  
10 the authority to have court orders sent out, subpoenas that  
11 would force other people to come to the trial to testify on  
12 your behalf, or to have other evidence brought to the trial  
13 that would assist you?

14 Do you understand they would do that for you?

15 A. Yes.

16 Q. Now, remember I said at a trial the Government gets to call  
17 witnesses, and certainly you could call witnesses as well.

18 I want to make sure you have thought about this.

19 If we had a trial in your case, you, yourself, would have  
20 the absolute right to come up to the witness stand to take the  
21 oath, and then to explain to the jury from your point of view  
22 either what happened or what didn't happen in the case.

23 Do you understand you would be able to do that?

24 A. Yes, I do.

25 Q. Now, in this one area, the Constitution guarantees you an

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1 all important choice, because while you certainly could testify  
2 if that is what you wanted to do, the Constitution goes on and  
3 says you have the absolute right not to testify, the right to  
4 remain silent.

5 If for whatever reason you decided that you were not going  
6 to testify, well, first, I would explain to the jury that was a  
7 right guaranteed to you by the Constitution, and I would  
8 actually go a step further because when the jury got ready to  
9 leave at the end of the case, to go out and deliberate, I would  
10 instruct them and tell them they absolutely could not consider  
11 the fact that you had not testified.

12 So, do you understand you have that right to remain silent  
13 and not testify in the trial?

14 A. Yes, I do.

15 Q. Now, this is probably obvious to you, but let's talk about  
16 it for a minute.

17 Do you understand that if you do decide to plead guilty  
18 today, one of the things you are doing then is giving up all  
19 these rights, because we won't have a trial, no jury, no  
20 witnesses, in all likelihood the next time you would be present  
21 in court would be at the sentencing proceeding?

22 Do you understand that, too?

23 A. Yes, I do.

24 Q. Okay.

25 Mr. Lundgren, do you have a copy of the Plea Agreement in

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1 front of you?

2 A. Yes.

3 Q. Let's take a look at this.

4 I am looking at the first paragraph. It says you are  
5 agreeing to plead guilty to the crime that is charged in Count  
6 1, which is called the crime of conspiracy to traffic in  
7 counterfeit goods, and then also you are going to plead guilty  
8 to the crime that is set forth in Count 3 which charges you  
9 with criminal copyright infringement.

10 Are those the charges you agree to plead guilty to?

11 A. Yes.

12 Q. Okay.

13 We say that every single crime is made up of what are  
14 called elements or parts. In other words, these are specific  
15 facts that we say the Government has got to be able to prove,  
16 and we say they have to be able to prove them beyond a  
17 reasonable doubt before anybody could be found guilty of that  
18 crime.

19 So, let's pull these two apart, take a look at them and see  
20 what it is the Government would have to prove.

21 I am going to ask the lawyers to double check me, these are  
22 kind of unusual charges.

23 It is interesting, in federal law sometimes the planning to  
24 commit a crime can be a separate crime all by itself, and let  
25 me give you an example that really has nothing to do with this

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1 case, but I want to make sure you understand it.

2 We all would acknowledge that bank robbery is a crime.  
3 Well, if you had a group of people -- and for a conspiracy, the  
4 minimum is two, you can't have a conspiracy with one person.  
5 So you have a lot more than that.

6 If there were a group of people who said we ought to rob a  
7 bank, and so they talk about it, and one of the persons goes to  
8 a store to buy ski masks, another fellow goes to find a car  
9 they would use that is a get-away car, another person goes  
10 driving around trying to spot a likely target bank, if they did  
11 that, they would have committed the crime of conspiring,  
12 planning to commit a bank robbery, even though no bank robbery  
13 was ever committed.

14 Do you understand the difference there?

15 A. Yes, I do.

16 Q. The planning to commit a crime can be a separate crime all  
17 by itself.

18 Now, let's talk for a minute about the alleged goal of the  
19 conspiracy because it sounds like the goal of the conspiracy is  
20 to traffic, and I would imagine traffic means selling, buying,  
21 distributing counterfeit goods, goods that I suppose are meant  
22 to look like one thing, and here, I guess it is either  
23 Microsoft or something, but in fact they are really not.

24 THE COURT: What is the definition of counterfeit in  
25 this instance, does somebody have the elements of that crime?

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1 MR. REINHART: I do, Your Honor.

2 THE COURT: Could I see them?

3 MR. REINHART: Sure. Let me show it to Mr. Morris.  
4 I have one for Count 3 as well.

5 THE COURT: I appreciate that.

6 MR. REINHART: As to Count 1, the crime is trafficking  
7 in goods that contain a counterfeit mark, meaning the  
8 representation on the outside of the product is meant to  
9 misrepresent the origin of the product.

10 THE COURT: So the product itself does not have to be  
11 counterfeit, the --

12 MR. REINHART: The elements of the offense states  
13 goods containing a counterfeit mark.

14 THE COURT: All right. I got you.

15 Let's look at the crime itself, trafficking,  
16 trafficking means buying, selling, distributing, it is a  
17 commercial transaction usually.

18 As you just heard, the goods contain a counterfeit  
19 mark.

20 Does the crime require that the person knew that it  
21 contained a counterfeit mark?

22 MR. REINHART: Yes, it has to be willful, it has to be  
23 a mark that they know cannot be used.

24 THE COURT: You have knowing the goods have a --

25 MR. REINHART: You have to know you are doing

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1 something against the law, and know the mark is not a mark you  
2 can use.

3 MR. MORRIS: Because it is conspiracy, that adds the  
4 willfulness.

5 THE COURT: Yes, we are looking at the goal.

6 You are not charged with the goal, but in order to  
7 understand the charge, you have to understand the goal.

8 Trafficking in counterfeit goods, trafficking, buying  
9 and selling or distribution of them. Counterfeit means that it  
10 contains a counterfeit mark, a mark that simulates something  
11 else, but it is not authorized, and you knew it was a  
12 counterfeit mark, and there is an intentional element here, you  
13 knew the law forbade this, but you were still doing it.

14 BY THE COURT:

15 Q. Do you know what the goal would be?

16 A. Yes.

17 Q. The counterfeit mark, I suppose, when you think about it, I  
18 think in this case is the designation that it is Microsoft. I  
19 may be wrong about that.

20 THE COURT: What is the counterfeit mark they have  
21 alleged?

22 MR. REINHART: What I think the evidence would be,  
23 Your Honor, and what is admitted in the statement of facts is  
24 these are what are called reinstallation discs, which are  
25 actually distributed by Dell.

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1 THE COURT: Under a license from Microsoft?

2 MR. REINHART: Some of the software is Dell and some  
3 Microsoft. The counterfeit mark was when they were produced a  
4 label that was placed on them which purported them to be  
5 authentic discs containing Dell and Microsoft.

6 THE COURT: And manufactured by somebody else?

7 MR. REINHART: Correct, without permission from Dell  
8 to do that.

9 THE COURT: Okay.

10 BY THE COURT:

11 Q. So, do you understand the elements of that crime, the goal  
12 of the conspiracy?

13 A. Yes, I understand the Dell label itself is the issue, the  
14 software is not an issue, you can download it for free.

15 Q. I don't know that. The bottom line is, it has a  
16 counterfeit mark.

17 A. Yes.

18 Q. I want to make sure you understand the elements of the  
19 crime, the goal here. Remember, they didn't charge you with  
20 that.

21 The crime in Count 1 is called the crime of conspiracy, the  
22 planning to commit it.

23 A. Yes.

24 Q. Here is what they have to prove beyond a reasonable doubt  
25 before you could be found guilty of that crime.

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1 Number one, they have to prove there really was a group of  
2 people who were planning to commit this crime, they were going  
3 to market and distribute this counterfeit mark. They have to  
4 prove that you understood what the group was really up to,  
5 maybe not all the minor details, but you understood it was an  
6 effort to market the counterfeit product. And third, they have  
7 to prove, with that knowledge, you knowingly and intentionally  
8 joined the conspiracy. You did something to achieve the goals  
9 of the conspiracy.

10 Now, sometimes there is a fourth element, I want to double  
11 check it.

12 *THE COURT:* Is there a requirement of an overt act in  
13 this case?

14 *MR. MORRIS:* There is, Your Honor.

15 *THE COURT:* Okay.

16 *BY THE COURT:*

17 *Q.* Remember my example of the bank robbery? You go skiing,  
18 you by a ski mask, nothing wrong with that.

19 There are some conspiracy crimes where it is proved beyond  
20 the talking stage, they require proof of what is called an  
21 overt act.

22 It can be completely innocent, but something aimed at  
23 achieving the goal.

24 This particular conspiracy crime also would require proof  
25 that while you were a member of the conspiracy, either you or

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1 some other coconspirator engaged in an overt act to achieve the  
2 goal of the conspiracy.

3 Do you think you understand what the Government would have  
4 to prove before you could be found guilty of this crime?

5 *A.* Yes, yes, I do.

6 *Q.* Okay. Now let's move on to the crime charged in Count 3.

7 *MR. REINHART:* As part of this, the colloquy, at some  
8 point, if the Court could discuss with Mr. Lundgren the  
9 liability for the acts of a co-conspirator and aiding and  
10 abetting under Count 3. Some of the conduct in the proffer Mr.  
11 Lundgren did not do, but caused other people to do. He can be  
12 liable for the acts of others, either under the conspiracy or  
13 aiding and abetting the conspiracy.

14 *BY THE COURT:*

15 *Q.* Have you talked with your lawyers about the liability of a  
16 co-conspirator?

17 *A.* Yes.

18 *Q.* Let me tell you something, from what I have seen in my  
19 experience, this conspiracy crime is an incredibly dangerous  
20 crime because the law views the members of the conspiracy as  
21 agents of each other, as partners of each other, and so, the  
22 theory is that if a co-conspirator does something in  
23 furtherance of the conspiracy that was foreseeable, you  
24 understood it would be done, and it advances a goal of the  
25 conspiracy, you can be held liable for what the other person

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1 did.

2 Let me give you an example going back to the bank robbery  
3 example.

4 People commit a bank robbery and in the course of it  
5 somebody gets nervous, and one of the conspirators shoots  
6 somebody. Everyone in the conspiracy can become liable for  
7 that, it is foreseeable, something they would have known, and  
8 it happened, so they are all responsible.

9 Do you understand that concept?

10 *A.* Yes, yes, I do.

11 *Q.* Aiding and abetting is a slightly different legal concept.  
12 The theory of aiding and abetting is that the law recognizes  
13 anything you can do for yourself, usually it can be done  
14 through another person.

15 So, if somebody directs somebody to do something, they  
16 could be held liable for what the other person did under the  
17 concept of aiding and abetting.

18 Do you think you understand that?

19 *A.* Yeah.

20 *Q.* Okay. Now let's move on to the crime that is set out in  
21 Count 3.

22 This is the crime of criminal copyright infringement. The  
23 Government would have to prove that there was a valid  
24 copyright.

25 You understand, the copyright is when somebody has a mark

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1 or a product and they copyright it, so it is a valid copyright,  
2 and that it was infringed, it was used without the  
3 authorization of the owner of the copyright. It was done  
4 willfully, you knew what you were doing, you knew the law  
5 prohibited this, but you did it, and done for the purpose of  
6 commercial advantage or private financial gain by reproducing  
7 or distributing the valid copyright.

8 They have to prove there were ten or more copies with a  
9 retail value of \$2,500 or more, and they have to prove that  
10 this was done during a 180 day period.

11 *THE COURT:* Have I covered all of the elements of that  
12 offense?

13 *MR. REINHART:* Yes, Your Honor.

14 *MR. MORRIS:* You have, Your Honor.

15 *BY THE COURT:*

16 *Q.* Do you think you understand what the Government would have  
17 to prove before you could be found guilty of that offense?

18 *A.* Yes, Your Honor.

19 *Q.* Now, one of the things you absolutely need to know is, if  
20 you plead guilty for these crimes what is the worst possible  
21 punishment that could be imposed, because only by knowing that  
22 can you evaluate the risk you would be subjecting yourself to.

23 Come over to page two and look at paragraph three.

24 Let's talk first about the conspiracy charge. That is a  
25 pretty serious charge because the sentence, it could be a

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1 sentence of up to ten years in federal prison, and then after  
2 any prison sentence, there is a period of time called  
3 supervised release. That is a period of time after any  
4 imprisonment where somebody would be checking up on you, and  
5 there are usually other terms and conditions. That could be an  
6 additional three years.

7 And on top of all of this, there could be a monetary fine  
8 of as much as \$2,000,000, and this is the kind of case where  
9 there must be an order of restitution. If someone has been  
10 defrauded or lost money in this process, there would have to be  
11 an order of restitution.

12 So, do you understand that is the worst possible sentence  
13 for Count 1?

14 A. Yes, Your Honor.

15 Q. I am not saying that is going to be the sentence, but you  
16 have to understand the worst possible, the most serious  
17 configuration of that sentence.

18 Now let's turn to Count 3. That is slightly less serious,  
19 because it could be five years in federal prison, supervised  
20 release of three years, a monetary fine up to \$250,000, and  
21 restitution.

22 Do you understand that is the worst possible sentence for  
23 Count 3?

24 A. Yes, Your Honor.

25 Q. When somebody comes to court and even if there were a

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1 trial, and the jury returned a verdict, or somebody comes to  
2 court and they plead guilty, when you have more than one  
3 sentence, the sentences could be imposed in more than one way.  
4 They could be concurrently, if somebody serves a day for one  
5 sentence, they get credit for the other.

6 The other legal possibility is consecutively, one after the  
7 other.

8 In this case, the worst possible configuration of the  
9 sentence would be 15 years in federal prison, \$2,250,000 in  
10 monetary fines, three years supervised release and restitution.

11 Do you understand that is the most serious configuration of  
12 the sentences?

13 A. Yes, I do, Your Honor.

14 Q. Now, this next thing I know sounds so insignificant it is  
15 almost foolish, but there is a requirement that the Court  
16 impose a \$100 special assessment for each of these two crimes.

17 Do you understand that?

18 A. Yes, I do, Your Honor.

19 Q. Now, take a look on page three, paragraph six, because in  
20 that paragraph the Government is promising you that it would  
21 make a recommendation you get a reduction in what is called the  
22 guideline offense level because you have come to court today  
23 and you have admitted what you did, and you are accepting  
24 responsibility, and when you think about it, you are saving the  
25 Government the time and expense of a trial.

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1 Now, I need to make sure you understand that to be eligible  
2 for this reduction, there are things that you need to be  
3 willing to do.

4 The first is, number one, you would be willing to sit down  
5 with a Probation Officer face-to-face and tell them everything  
6 about your involvement in this offense.

7 Are you willing to do that?

8 A. Yes, Your Honor.

9 Q. The second thing, of course, would be you have not told any  
10 lies or made any misrepresentations to the Government to get  
11 them to go along with this disposition. And the third thing  
12 is, at least today looking forward, you really do intend to  
13 obey the law in the future, and today, you have the present  
14 intention of honoring that commitment.

15 Are you willing to do that, too?

16 A. Before and after this, yes. This is the only offense I  
17 ever had.

18 Q. I understand that. You may have made a mistake and didn't  
19 understand where you were going on this, but it sounds to me  
20 you are someone who has enormous drive in your field and so on.  
21 You know, we make mistakes in life and we pick up the pieces  
22 and move on. I am certainly hopeful you can do that, too.

23 A. Me, too.

24 Q. All right. Now, page five, I notice there is a whole list  
25 of things you agree to forfeit to the Government. Is that

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1 true, you have agreed to do that?

2 A. Yes, Your Honor.

3 Q. Okay. I want to take a second and I would like to talk  
4 with you about how a sentence is decided.

5 In all the federal courts all across the United States, any  
6 discussion about sentencing has to start with what are called  
7 the Federal Sentencing Guidelines. They were developed, and it  
8 was a serious effort, but an effort to achieve uniformity  
9 across the United States.

10 The theory is that people who have committed the same  
11 crime, and who have pretty much the same background, the hope  
12 is they would be treated as much alike as possible, and the  
13 co-existing hope is that if that happens, the whole system  
14 would be more fair.

15 Here is how they try to achieve this.

16 There is a committee in Washington that has gone through  
17 the law books. Next to every crime they place a range of  
18 points.

19 Now, let me tell you something, I have not seen -- other  
20 than this case, I have not seen anything quite like this  
21 before, but this case sounds to me like it is essentially a  
22 fraud case.

23 So, I suspect what drives the Guidelines here is the loss  
24 to the victim or the gain to the person who has committed it.  
25 The greater the financial loss, probably the more points you

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1 put next to that crime.

2 When you have a multi-person crime, and conspiracy is a  
3 multi-person crime, you need to look at the individual and say  
4 if Mr. Lundgren was involved in this, what was his  
5 responsibility?

6 The theory is, the leader would get more points than  
7 someone involved but further down.

8 Another thing you look at, and I suspect I know the answer  
9 to this, too, but you say, has Eric Lundgren ever been  
10 convicted of any other crime? I suspect the answer is no.

11 I have to tell you, sometimes that is not the case, but you  
12 say, all right, how many times, and the theory is you add  
13 points for every prior conviction.

14 Now, I have to tell you there are some other things you  
15 look at, but when you are done, you add up all these  
16 subcategories, you figure out the total number of points in  
17 your case, and then you need to go to the sentencing book.

18 There is a chart in the sentencing book.

19 Did your lawyers have a chance to show you that chart?

20 A. Yes, yes, they did.

21 Q. Is it fair to say you understand, at least in a rough  
22 sense, that when you know the total number of points in your  
23 case, and when you look at that chart, you understand that the  
24 chart ultimately is going to recommend what is called a  
25 recommended guideline imprisonment range?

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1 Do you understand that in a rough sense?

2 A. Yes. Yes, I do, Your Honor.

3 Q. Okay.

4 Now, and this is very, very important, as important as  
5 these guidelines are, what they do is generate a nonbinding  
6 recommendation, see, and because it is nonbinding, after  
7 looking at the guidelines, after consulting the guidelines, the  
8 judge has to turn to another statute where Congress set out a  
9 whole list of factors that need to be considered.

10 What that means is, ultimately, the sentence that is  
11 actually pronounced could end up being above the Guidelines,  
12 you see, more serious, or inside the Guidelines, and frankly,  
13 even below the guidelines.

14 Do you understand that?

15 A. Yes, yes, I do.

16 Q. The law says if you came to court and you listened to the  
17 sentence that was actually announced, if you felt that sentence  
18 was not a fair and reasonable sentence, the law says you would  
19 be entitled to take an appeal, to ask three judges on the  
20 Appellate Court to take a look at your case and decide whether  
21 the sentence was or was not a reasonable sentence.

22 Do you understand you would be able to take that kind of  
23 appeal?

24 A. Yes, Your Honor.

25 Q. Now, certainly it is reasonable to expect on the day of

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1 sentencing, Mr. Morris, whoever is representing the  
2 Government, is probably going to come to court and stand up and  
3 speak about the case from the Government's point of view and  
4 probably make some recommendations, and certainly it is  
5 reasonable to anticipate your lawyers will stand up and speak  
6 on your behalf and probably make some recommendations, too.

7 I need to make sure you understand, while I certainly will  
8 listen to what everybody has to say, the recommendations made  
9 by the lawyers are not binding on the Court.

10 Do you understand that?

11 A. Yes, I do, Your Honor.

12 Q. Do you understand that if for some reason I do not accept  
13 one or more of the lawyer's recommendations, that you would not  
14 be able to withdraw your plea?

15 Do you understand that, too?

16 A. Yes, I do.

17 Q. Now, the very last provision in this Plea Agreement, come  
18 over to page seven and take a look at what is listed as  
19 paragraph ten. What that says is, everything you are relying  
20 on to make this important decision is down here in writing.

21 In other words, there is nobody off on the side promising  
22 you something else or telling you something I have not been  
23 made aware of.

24 Mr. Lundgren, may I ask you, is your entire agreement with  
25 the Government contained in this document?

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1 MR. REINHART: Your Honor, there is one other  
2 provision, we missed it when we wrote this up.

3 The Government is agreeing that if the Court imposes a  
4 term of incarceration, they would not oppose a request that Mr.  
5 Lundgren self surrender. That is not contained in the  
6 agreement.

7 BY THE COURT:

8 Q. That is important, because a Plea Agreement, sometimes  
9 cases talk about it like a contract. The contract would bind  
10 you and bind the Government.

11 So, if they made that representation to you they can't come  
12 in on the day of sentencing and say, oh, no, we want him sent  
13 away this afternoon, they are bound by it.

14 Do you understand that is not binding on the Court?

15 A. Yes, I do.

16 Q. Okay, all right.

17 MR. REINHART: Other than that, we are not aware of  
18 any other agreement not contained in the Plea Agreement.

19 BY THE COURT:

20 Q. Mr. Lundgren, has anybody put any pressure on you or  
21 threatened you or induced you with money or anything else to  
22 get you to come to court today to plead guilty?

23 A. No, Your Honor.

24 Q. Are you doing this freely and voluntarily?

25 A. Yes, Your Honor.

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1 Q. Are you doing this because you really did, in fact,  
 2 knowingly and willfully join a conspiracy, the aim of which was  
 3 to traffic in counterfeit goods as I have previously defined  
 4 that crime to you this morning, counterfeit mark?  
 5 A. Yes, Your Honor.  
 6 Q. Are you doing this because you really did knowingly and  
 7 intentionally and willfully infringe on a valid copyright as I  
 8 previously defined that crime for you this morning?  
 9 A. I know that now, Your Honor. Now, as I stand before you, I  
 10 know that now. So I am fully aware of that now.  
 11 Q. Did you know it at the time, did you understand you were  
 12 violating the law?  
 13 A. At the time, I thought it was free ware, I thought I was  
 14 helping people.  
 15 Q. I understand that in terms of the contents, but what we are  
 16 talking about is infringing the valid copyright. Did you  
 17 understand you were doing that?  
 18 A. Yes, now, I understand exactly what I did wrong now.  
 19 Q. Well, there is one problem that I want to make sure you are  
 20 aware of.  
 21 The crime means at the time you did it, you knew you were  
 22 violating the law. That is one of the elements of willfulness,  
 23 you knew you were violating the law and you did it, you  
 24 understood there was a valid copyright and you were infringing  
 25 it.

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1 Did you do that knowingly and willfully?  
 2 A. Sorry, Your Honor.  
 3 THE COURT: Take a minute, yes.  
 4 (Pause.)  
 5 THE DEFENDANT: Your Honor, I knew I didn't have  
 6 permission from Dell to reproduce their Dell logo.  
 7 BY THE COURT:  
 8 Q. That is really what makes this case confusing, because the  
 9 software apparently you, yourself, told me a couple of times is  
 10 free.  
 11 But it is, I suppose, the misuse of the copyrighted mark  
 12 that suddenly turns it from being -- just the transmission of  
 13 free software into criminal copyright infringement?  
 14 A. Yes.  
 15 Q. I know we have -- so you admit you willfully and  
 16 intentionally did those things?  
 17 A. Yes, yes.  
 18 THE COURT: I know we have stipulated facts.  
 19 I would ask Mr. Morris if he would come up and set in  
 20 the record, if we had a trial on the two charges, what the  
 21 Government's evidence would have been.  
 22 I ask you to listen and I'll come back to see if you  
 23 think this is an accurate statement of what happened.  
 24 MR. MORRIS: Your Honor, if this case had proceeded to  
 25 trial, the United States would have proved the following facts

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1 beyond a reasonable doubt:  
 2 In or on about 2011, the Defendant was contacted by  
 3 Robert Wolff about producing multiple copies of Dell  
 4 reinstallation CD-ROMs for Microsoft Windows, these are  
 5 reinstallation discs, that could be resold to refurbishers of  
 6 Dell computers. At the time he was living in China. Wolff  
 7 represented that he had purchased an authorized retail copy of  
 8 a reinstallation disc from Dell for \$5. Wolff provided the  
 9 reinstallation disc to Mr. Lundgren.  
 10 Lundgren arranged for the reinstallation disc to be  
 11 reproduced by a Chinese manufacturer. He wasn't authorized by  
 12 Dell or Microsoft to reproduce these discs. Mr. Lundgren knew  
 13 that he was not authorized to reproduce these discs.  
 14 As part of the manufacturing process, labels were  
 15 affixed by the factory to the CD-ROMs that purported to be  
 16 labels authorized by Dell and Microsoft and that falsely  
 17 represented that the discs contained copyrighted software that  
 18 Dell and Microsoft had authorized to be included on the disc.  
 19 The labels were substantially indistinguishable from the labels  
 20 that were affixed to authorized reinstallation discs.  
 21 Mr. Lundgren was aware that the labels were misleading  
 22 and had not been authorized to be used.  
 23 On September 3rd, 2012, U.S. Customs and Border  
 24 Protection (CBP) officers at San Francisco International  
 25 Airport detained a shipment of 2,246 reinstallation discs that

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1 Lundgren had caused to be shipped from China to Wolff's address  
 2 in Boca Raton, Florida. They detained two different shipments,  
 3 one of those shipments was bound for New York.  
 4 When they found that shipment, they sent a notice that  
 5 the shipments were piracy to Mr. Wolff. Mr. Wolff forwarded  
 6 that to Mr. Lundgren. As a result of that, he knew, and he  
 7 went ahead and did another shipment to Mr. Wolff and he was  
 8 paid for it.  
 9 THE COURT: Mr. Lundgren, would you be good enough to  
 10 come back up to the lectern.  
 11 BY THE COURT:  
 12 Q. Mr. Lundgren, you listened as counsel for the Government  
 13 outlined what the Government's proof would have been if we had  
 14 a trial on the two charges. Do you admit you said and did the  
 15 various things Mr. Morris suggested?  
 16 A. Yes, Your Honor.  
 17 Q. Now, as you probably know, we divide crimes into two  
 18 categories. The less serious category is where a sentence  
 19 could be up to a year in jail, could be a misdemeanor.  
 20 Anything above that is classified as a felony.  
 21 Obviously, both of these crimes are classified as felonies.  
 22 Now, if I conclude you really know what you are doing, you  
 23 are making a voluntary and informed decision, what I would do  
 24 is, I would accept your pleas and in a sense put the Court's  
 25 seal of approval on it. The technical term for that is called

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1 adjudicating you to be guilty.

2 The moment that happens, though, you would be characterized  
3 as a convicted felon, and you automatically lose valuable civil  
4 rights, the right to vote, you would not be able to possess a  
5 firearm, or you couldn't serve on a jury or run for public  
6 office.

7 Do you understand you will lose those valuable civil  
8 rights?

9 A. Yes, Your Honor. I don't think I have a choice in that  
10 matter, I do -- but yes, I do.

11 Q. I think you can petition for the restoration of some of  
12 them, but I want to make sure you know it is one of the  
13 consequences of what follows through here.

14 Do you understand that?

15 A. Yes, I have been researching all the ways in the future,  
16 not being able to go to Canada and do my business, and my  
17 colleagues, yes, I am aware of it.

18 Q. Somebody like yourself involved in international business,  
19 these are things you need to think about very carefully, and we  
20 are all reading every day about border security and tightened  
21 travel arrangements and so on.

22 I want to make sure you understand what you are doing and  
23 you can see the consequences of that. Do you understand that?

24 A. In comparison to the alternatives, yes, I think this is my  
25 best option.

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1 Q. All right. We've talked about the right to trial by jury  
2 and all those intendant rights, and I am satisfied you  
3 understand those. And we have gone through the provisions of  
4 your plea agreement, and I am satisfied you understand the  
5 terms and conditions. And we've discussed the sentencing  
6 process, and again, I am satisfied you understand that.

7 But, is there anything I haven't touched on, any questions  
8 or concerns you have that you wanted to mention this morning?

9 A. Just that -- I, I want the Court to know I didn't think I  
10 was doing anything --

11 MR. REINHART: That is for another day.

12 THE DEFENDANT: Yes.

13 BY THE COURT:

14 Q. Is it still your desire to go forward and enter the two  
15 pleas we are discussing?

16 A. Yes, Your Honor.

17 THE COURT: Let me turn to Mr. Reinhart.

18 MR. REINHART: At this time, we change our previously  
19 entered plea of not guilty to Count 1 to a plea of guilty and  
20 previously entered plea of not guilty to Count 3 and plead  
21 guilty.

22 THE COURT: Mr. Lundgren, is that what you want to do?

23 THE DEFENDANT: Yes.

24 THE COURT: In Case Number 16-80090, the case of  
25 United States of America versus Clifford Eric Lundgren, it is

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1 the finding of the Court that Mr. Lundgren is competent and  
2 capable of entering informed pleas. I find both of the pleas  
3 are knowing and voluntary pleas, each one of which is supported  
4 by an independent basis in fact containing all of the essential  
5 elements of these two offenses.

6 Therefore, I accept Mr. Lundgren's pleas of guilty,  
7 and I adjudge him to be guilty first of the crime of having  
8 conspired to traffic in counterfeit goods, in violation of  
9 Title 18 United States Code, Section 2320, subsection (a)(1),  
10 and engaging in the crime of criminal copyright infringement,  
11 in violation of Title 17 United States Code, Section 506,  
12 subsection (a)(1)(A), and Title 18 United States Code, Section  
13 2319(a), and (b)(1)(B).

14 So I adjudge you to be guilty of those two offenses.

15 Now, Mr. Lundgren, I will ask a Probation Officer to  
16 get started right away on the Pre-Sentence Investigation  
17 Report. You will get a copy and I want you to sit down with  
18 your lawyers and go over it very, very carefully, and we will  
19 go ahead and have the sentencing.

20 I suspect one of the critical issues in this case,  
21 because I know Ms. Sanchez raised this in the beginning, is  
22 trying to figure out what is the loss.

23 Remember I said before, it is the loss that I think  
24 probably drives some of these Guidelines, and we will have to  
25 sit down and we will take as much time as we need to on that.

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1 If it looks like this will take longer than the normal  
2 sentencing, I would appreciate a little advance warning. I  
3 will give you whatever time you need on that.

4 I wonder if I could ask Mr. Morris if the Government  
5 would be willing to concede and stipulate -- if the Court held  
6 an evidentiary hearing this morning, is the Government willing  
7 to stipulate there would be clear and convincing evidence that  
8 Mr. Lundgren does not pose a danger to the community nor a risk  
9 of flight, and therefore may remain at liberty on the same  
10 terms and conditions as were previously set?

11 MR. MORRIS: Yes, Your Honor, the Government would so  
12 stipulate.

13 THE COURT: Based upon that, Mr. Lundgren, I will  
14 allow you to remain on the same terms set in the case.

15 This has been a bad experience for you, and we will  
16 deal with it, hopefully, and put this behind you.

17 THE DEFENDANT: Thank you, Your Honor.

18 MR. REINHART: Your Honor will set the sentencing by  
19 separate order?

20 THE COURT: I will do it by separate order.

21 We need enough time to get the Pre-Sentence Report  
22 completed.

23 MR. REINHART: I think we are going to need probably  
24 half a day for the sentencing. There will be testimony on both  
25 sides on the valuation.

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THE COURT: If you let Ms. Guerro know, I will put that aside for you. If it changes, let me know on that, too. Thank you very much.

(Thereupon, the hearing was concluded.)

\* \* \*

(End of requested transcript)

-oOo-

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: July 16, 2016

/s/ Pauline A. Stipes, Official Federal Reporter

Signature of Court Reporter

Pauline A. Stipes, Official Federal Reporter

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### **CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing Supplemental Appendix for the United States were mailed to the Court of Appeals via Federal Express this 17th day of November 2017, and that, on the same day, the foregoing appendix was filed using CM/ECF and served via CM/ECF on: Randall S. Newman, Esq., counsel for Clifford Eric Lundgren.

s/Aileen Cannon  
Aileen Cannon  
Assistant United States Attorney

*mw*

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NO. **17-12466-HH**

---

United States of America,

Appellee,

- versus -

Clifford Eric Lundgren,

Appellant.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

---

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**United States v. Lundgren, Case No. 17-12466-HH**  
**Certificate of Interested Persons**

In compliance with Fed. R. App. P. 26.1 and 11th Circuit Rules 26.1 and 28-1, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the CIP included in the appellant's initial brief, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the appellant's CIP.

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Barnes, Antonio J.

**Cannon, Aileen M.**

**Chipi, Nicole**

Cohen, Jacob Alain

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Ferrer, Wifredo A.

Garcia, Rolando

Golder, Randee J.

Greenberg, Benjamin G.

Lundgren, Clifford Eric

**Mariani, Nicole D.**

Microsoft Corporation (MSFT)



**United States v. Lundgren, Case No. 17-12466-HH  
Certificate of Interested Persons (Continued)**

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Newman, Randall S.

Reinhart, Bruce E.

Rifkin, Mark C.

Rodriguez, Hugo A.

Sanchez, Lily Ann

Schlessinger, Stephen

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### **Statement Regarding Oral Argument**

The United States of America respectfully suggests that the decisional process would not be aided significantly by oral argument, because the facts and legal arguments are presented adequately in the briefs and records before this Court.

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### **Statement of Jurisdiction**

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case. The district court entered its judgment against appellant Clifford Eric Lundgren on May 24, 2017 (DE:129). The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. § 3231. Lundgren filed a timely notice of appeal on May 30, 2017 (DE:140); *see* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and authority to examine Lundgren's challenge to his sentence under 18 U.S.C. § 3742(a).

### **Statement of the Issue**

Whether the district court clearly erred in determining, pursuant to Sentencing Guideline § 2B5.3(b)(1)(B), that Lundgren was accountable for an infringement amount of \$700,000 as a result of his criminal copyright infringement scheme.

### **Statement of the Case**

#### **1. Course of Proceedings and Disposition in the Court Below**

In February 2017, a grand jury in the Southern District of Florida returned a 21-count superseding indictment charging appellant Clifford Eric Lundgren and co-defendant Robert Wolff with, among other crimes, one count of conspiracy to traffic in counterfeit goods, in violation of 18 U.S.C. §§ 2320(a)(1) and (b)(1)(A) (Count 1), and one count of criminal copyright infringement, in violation of 18 U.S.C. § 506(a)(1)(A) and 18 U.S.C. §§ 2319(a) and (b)(1) and 2 (Count 3) (DE:62).<sup>1</sup>

Later that month, Lundgren pled guilty to Counts 1 and 3 pursuant to a written plea agreement with the government (DE:85).

In May 2017, the district court sentenced Lundgren to 15 months' imprisonment, a downward variance from the advisory guideline range of 37 to 46

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<sup>1</sup> Lundgren and Wolff also were charged with one count of trafficking in counterfeit goods, in violation of 18 U.S.C. § 2320(a)(1) and (b)(1)(A); one count of trafficking in illicit labels, in violation of 18 U.S.C. § 2318(a)(1)(A)(ii) and (c)(2) and (c)(3)(B); eleven counts of wire fraud, in violation of 18 U.S.C. § 1343; and six counts of mail fraud, in violation of 18 U.S.C. § 1341 (DE:62).

months' imprisonment (DE:129). The court also imposed a three-year term of supervised release and a criminal fine of \$50,000.00 (DE:129).

Lundgren filed a timely notice of appeal (DE:140). He is on bond pending resolution of this appeal.

## **2. Statement of the Facts**

### **a. Offense Conduct<sup>2</sup>**

In 2011, Lundgren was contacted by his co-conspirator Wolff about producing multiple copies of a Dell Reinstallation CD-ROM containing Microsoft operating system (“OS”) software (the “Reinstallation Disc”) that could be resold to refurbishers of Dell computers (DE:86:1). At the time, Lundgren was living in China (DE:86:1). Wolff represented that he had purchased an authorized retail copy of a Reinstallation Disc from Dell for \$5.00 (DE:86:1). Wolff provided the Reinstallation Disc to Lundgren, and Lundgren arranged for it to be counterfeited by a Chinese manufacturer (DE:86:1). Lundgren was not authorized by Dell or by Microsoft to reproduce these counterfeit Reinstallation Discs, and he knew that he was not authorized to do so (DE:86:1).

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<sup>2</sup> The description of the offense conduct is taken primarily from the stipulated factual proffer (DE:86; DE:159:35-36), as well as from undisputed portions of the PSI and the sentencing hearing (DE:145; *see* DE:134-2 (sentencing exhibits)). Part 2(e) below contains substantial additional facts derived from evidence elicited during the sentencing hearing.

As part of Lundgren's manufacturing process, labels that purported to be labels authorized by Dell and Microsoft were affixed to the Reinstallation Discs (DE:86:2). These illicit labels falsely represented that the copyrighted software contained on the discs was reproduced with the authorization of Dell and Microsoft, and they were substantially indistinguishable from the labels affixed to authorized Reinstallation Discs (DE:86:2). Lundgren was aware that the unauthorized labels and the unauthorized Reinstallation Discs were identical or substantially identical to the genuine discs (DE:86:2). In an e-mail exchange with Wolff, Lundgren told Wolff that: (1) "You would have to be an expert with a magnifying glass to know and/or see such tiny differences," and (2) "[Wolff] . . . should be able to sell these [Reinstallation Discs] back to anyone whom [sic] is not trying to sell them directly back to Bill Gates" (DE:145:23 (referencing GX6); DE:134-2 (pp. 9-10 of 71)).

In September 2012, U.S. Customs and Border Protection (CBP) officers at San Francisco International Airport detained a shipment of 2,246 Reinstallation Discs that Lundgren had caused to be shipped from China to Wolff's address in Florida, and a second shipment of 1,444 Reinstallation Discs that Lundgren had caused to be shipped from China to Wolff's father's address in New York (DE:86:2). Soon after, the CBP issued a notice of seizure to Wolff's father relating to the 1,444 disc shipment (DE:86:2). The notice stated that CBP believed the discs were

subject to forfeiture based on copyright violations (DE:86:2). Wolff forwarded a copy of the seizure notice to Lundgren by email (DE:86:2).

Despite having received that CBP notice, Lundgren shipped another package containing 1,598 unauthorized Reinstallation Discs to Wolff's address in Florida (DE:86:2; DE:159:36). All told, between June 2011 and November 2013, Lundgren caused approximately 28,000 counterfeit Reinstallation Discs to be shipped, directly or indirectly, to Wolff (DE:86:3), and Wolff sent approximately \$92,000 in wire transfers and PayPal payments to Lundgren (DE:145:36-41; DE:134-2 (pp. 46-47 of 71); GX16.3; GX16.4).

As part of the government's investigation, Wolff admitted to law enforcement that Lundgren knew he was selling the Reinstallation Discs as authentic to his customers (PSI ¶23). Law enforcement also recovered email and text message communications between Lundgren and Wolff in which Lundgren discussed the manufacture and shipment of the unauthorized Reinstallation Discs and celebrated the "steady income for the next year to come" that he and Wolff would receive as the "only ones capable of factory grade production" (PSI ¶¶22, 24-26, 30).

**b. The Pre-Sentence Investigation Report**

In anticipation of sentencing, the United States Probation Office prepared a Pre-Sentence Investigation Report (PSI). The PSI set Lundgren's base offense

level at 8 pursuant to Guideline Section § 2B5.3(a), which applies to criminal copyright and trademark infringement (PSI ¶38).

The PSI then recommended a fourteen-level increase in Lundgren's offense level to reflect the "infringement amount" under Section § 2B5.3(b)(1)(B) (PSI ¶39). That subsection provides that, if the "infringement amount" exceeds \$6,500, the offense level should increase by the corresponding number of levels in the fraud loss table in Section 2B1.1. USSG § 2B5.3(b)(1)(B). The guideline commentary in Note 2(A) further describes how to calculate the infringement amount, and it instructs to use the "retail value of the infringed item, multiplied by the number of infringing items" if the case involves any one of eight enumerated circumstances. USSG § 2B5.3(b)(1), cmt. 2(A).<sup>3</sup> As relevant here, one such circumstance is where "[t]he infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item." *Id.*, cmt. 2(A)(i).<sup>4</sup>

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<sup>3</sup> The term "retail value" is defined as the "retail price of that item in the market in which it is sold." USSG § 2B5.3, cmt. 2(C).

<sup>4</sup> A separate provision in the guideline commentary covers any circumstance other than the enumerated circumstances listed in Note 2(A). USSG § 2B5.3, cmt. 2(B). In those cases, Note 2(B) instructs to use the "retail value of the *infringing* item [as opposed to the *infringed* item] multiplied by the number of infringing items." *Id.*, cmt. 2(B) (emphases added). Lundgren, the government, and the district court agreed at sentencing that using the retail value of the infringed item in Note 2(A) applied to Lundgren's infringement amount (DE:145:8-13; DE:106:2-6), and

In this case, the PSI calculated an infringement amount of \$700,000 to reflect the \$25 per-unit price at which Microsoft made available genuine Microsoft OS software to computer refurbishers as part of its Registered Refurbisher Program (PSI ¶31 (multiplying \$25 by 28,000, which is the number of counterfeit Microsoft reinstallation discs that Lundgren caused to be shipped to Wolff as part of the conspiracy); GX18 (sealed pricing table (DE:145:61; DE:146:19))).<sup>5</sup> That \$700,000 figure triggered a 14-level increase in offense level under the cross-referenced loss table in Section 2B1.1 (PSI ¶39). And, because the offense involved the manufacture or importation of an infringing item, Lundgren's offense level increased by an additional two levels pursuant to Section § 2B5.3(b)(3)(A) (PSI ¶40).

Finally, the PSI recommended a three-level decrease in Lundgren's offense level to reflect his timely acceptance of responsibility (PSI ¶¶46, 47). All of that yielded a total adjusted offense level of 21 (PSI ¶48), which when combined with

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Lundgren does not challenge the applicability of Note 2(A) on appeal.

<sup>5</sup> As detailed below, *infra* pp. 27-28, under the Registered Refurbisher Program, any commercial entity that sells refurbished computer equipment in the secondary market can apply to Microsoft for a license to put genuine Microsoft OS software on its refurbished computers. The price at which registered refurbishers can purchase Microsoft OS Software through the RRP is less than the price at which Microsoft OS software is sold at standard retail locations (GX18).

Lundgren’s criminal history category of I (PSI ¶53), produced an applicable advisory guideline range of 37 to 46 months’ imprisonment (PSI ¶110).

**c. Lundgren’s PSI Objections and Motion for Downward Variance**

Lundgren filed three objections to the PSI (DE:108). First, Lundgren claimed that the PSI misstated the nature of the infringed item, contending that the infringed item was not “counterfeit Microsoft software” as stated in the PSI but rather “unauthorized Dell Reinstallation disks containing a counterfeit mark” (DE:108 ¶1). Second, Lundgren objected to the \$700,000 infringement amount, and he referenced an upcoming joint hearing to determine that valuation (DE:108 ¶2). Lastly, Lundgren objected to the PSI’s determination that Microsoft was a “victim” within the meaning of the Mandatory Victim Restitution Act (DE:108 ¶3). He claimed that “[t]he victim, if any, is Dell,” and he argued that, even assuming that Dell or Microsoft qualified as “victims” for purposes of restitution, neither had suffered any pecuniary loss (DE:108 ¶3).<sup>6</sup>

Separate and apart from his PSI objections, Lundgren filed a sentencing memorandum and an accompanying motion for a downward variance to a non-incarcerative sentence (DE:117). He set forth his view of the 18 U.S.C. § 3553(a)

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<sup>6</sup> Restitution is not at issue in this appeal, because no restitution was ordered by the district court in light of CBP’s seizure of the pirated discs prior to their dissemination into the market (DE:146:14-16).



factors, and he argued that the 37-to-46 month advisory range overstated the seriousness of the offense and did not account adequately for his individual characteristics as a business owner, “philanthropist social entrepreneur,” and “respected leader” in the field of electronic recycling (DE:117:1, 5-6). He also characterized his offense as “an aberrant episode” that he committed when he was young (DE:117:1), and he said that he had matured and grown since that time (DE:117:9).

On the question of harm, Lundgren argued that the advisory range “substantially overstate[d] the actual pecuniary harm to the copyright and trademark owner,” because licensed users of Microsoft software can obtain Reinstallation Discs for free from Dell or by downloading it at no cost from various websites (DE:117:10). And, he claimed that although he knew that he was conspiring with Wolff to sell counterfeit Reinstallation Discs unlawfully to refurbishers—and although “the unauthorized disks contained software that was identical to the authentic disks”—he did not think there would be a financial loss to Dell or Microsoft, because licensed users of Microsoft software can obtain replacement reinstallation discs from Dell or other websites for free, and he thought he was simply helping consumers who did not know about, or did not know how to access, the free software downloads (DE:117:4-5).

**d. Government's Response to Lundgren's PSI Objections and Sentencing Memorandum**

The government responded to Lundgren's PSI objections (DE:112). The government explained that it would establish through testimony and other evidence that, (1) contrary to Lundgren's suggestion, the infringed item is "counterfeit Microsoft software" (DE:112:1)—not "unauthorized Dell Reinstallation Discs containing a counterfeit mark" (DE:108 ¶1); (2) the infringement value of each Reinstallation Disc is \$25, which represents the per-disc price, at the low end, at which Microsoft licenses its software to registered refurbishers as part of its Registered Refurbisher Program (RRP) (DE:112:1 (referencing PSI ¶31)); (3) the Reinstallation Discs "contained unauthorized Microsoft software that was protected by valid copyrights and contained Microsoft labels that were protected by trademarks" (DE:112:2); and (4) Microsoft was properly classified as a victim for restitution purposes (DE:112:2).

The government also filed a sentencing memorandum (DE:106). The memorandum noted the extensive and long-term nature of the conspiracy, which involved the manufacture and importation of thousands of discs containing Microsoft's intellectual property (DE:106:7). The government also expanded on the significance of the copyright and trademark protections, noting (1) the important role of the courts to protect intellectual property rights (DE:106:1); (2) the multi-

billion-dollar losses suffered by American companies each year at the hands of international trade in pirated goods (DE:106:7); and (3) the many additional consequences to the economy from such counterfeiting, including lost sales, lost brand value, reduced innovation, and losses to customers who purchase counterfeit goods (DE:106:7). Finally, the government disputed Lundgren's claim that Microsoft suffered only minimal pecuniary injury, noting that Microsoft had lost the sale of its software as a direct consequence of Lundgren's actions, and further noting that the counterfeit discs trafficked by Lundgren appeared to a reasonably informed purchaser to be indistinguishable from the genuine product (DE:106:5).

Ultimately, in accordance with its commitment in the plea agreement (DE:85 ¶7), the government recommended a sentence of 18 months' imprisonment—a downward variance from the 37-to-46 advisory guideline range (DE:106:7).<sup>7</sup>

**e. Sentencing Hearing**

On May 22, 2017, the district court held the first of two sentencing hearings (DE:145). The first hearing was an evidentiary hearing on the infringement amount during which four witnesses testified (DE:145), *infra* pp. 12-34, and the second

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<sup>7</sup> Lundgren's co-conspirator, Wolff, cooperated with the government and was sentenced to six months' home confinement and four years' probation (DE:142). As part of his cooperation, Wolff made controlled calls to Lundgren at the direction of law enforcement, sent monitored email and text messages to Lundgren, and consented to a search of his computer (PSI ¶¶20-30). Wolff did not appeal.

hearing concerned the parties' arguments in support of an appropriate sentence based on the 18 U.S.C. § 3553(a) factors (DE:146).

At the start of the first hearing, Lundgren reiterated and expanded upon his earlier written objections to the PSI (DE:145:9-12). In his view, absent a license and product key that could be used to “activate” the Microsoft OS software, the Reinstallation Discs had no value or had a “negligible” value (DE:145:9; DE:145:12 (“If you take that disc and try to install it on the HP computer, you cannot get through unless you prove you have a license to install it on the HP computer.”)). Lundgren did not dispute that the use of the retail value of the “infringed item” was the appropriate formulation within Note 2(A) to Section 2B5.3(b)(1) (DE:145:9, 201-202). But, he claimed that, because the Reinstallation Discs did not have a product key, the infringement amount under Section 2B5.3(b)(1)(B) really should be zero, or close to zero—not \$700,000 (DE:145:9).

The government countered that the appropriate retail value was \$25 per disc, which represented the lowest amount at which an authorized refurbisher can purchase Microsoft OS software from Microsoft through the RRP (DE:145:197-200). That \$25 figure, the government added, reflected the undisputed fact that the conspiracy to which Lundgren and Wolff had pled guilty was a conspiracy to sell unauthorized Reinstallation Discs to computer refurbishers (DE:145:199-200; *see* DE:86:1).

**i. Special Agent Daniel Richichi**

Special Agent Daniel Richichi of the Department of Homeland Security testified and authenticated the seized evidence in the case, including various copies of Microsoft XP and Windows 7 counterfeit Reinstallation Discs (DE:145:14-15, 34-35). He also testified about various emails found on Wolff's computer, including one email sent from Lundgren to Wolff with the following subject line: "Re: Hello Bob, Update Please? WHAT IS GOING ON? MY REPLIES ARE IN "HIGHLIGHT" BELOW..." (GX6; DE:134-2 pp. 9 of 71; DE:145:20-25). As explained by Agent Richichi (DE:145:20-25), Lundgren was responding to an earlier email sent to him by Wolff in which Wolff described a customer's complaints with the Reinstallation Discs, including the use of the letter "o" instead of a zero on the IFPI number (a particular code on the disc), and the absence of a period after the term "U.S.A." In Lundgren's response, which Lundgren included within the body of the original email, Lundgren wrote:

*(These issues are VERY VERY minor... You would have to be an expert with a magnifying glass to know and/or see such tiny differences... ) You must have been trying to supply these units to Amazon directly or someone whom is an expert in this field... Anyone whom buys these would not notice a O or 0 when it comes to a font this size "U.S.A. (or) U.S.A" C'mon Bob, you should be able to sell these units to anyone whom is not trying to sell them directly back to Bill Gates. If they are not perfect, it is because the unit that we received from the USA retail on Ebay was not perfect... We made an identical copy of said unit from the same factories that manufacture for Dell..*

If you can retain this buyer – I am sure that I can get him another batch with a “.” After the A and O instead of O. hehe

*But for now – Please sell some of these units... You MUST have some other buyer's for this product – and if you do not, then find some. It has been months and I have not seen the return that I was expecting to use for my India project buddy...*

*Don't leave me hanging on this one.. Work hard and get these moved to any other buyer. No normal company or buyer will notice such issues and every month that you spend sitting on this product is another month XP get's [sic] older and my assets become worthless... Come thorough [sic] on this one Bob.. Get it done... Make it happen... Make me proud so that our business can grow and we can keep WINNING!*

The choice is yours but no matter what you choose. Keep in touch!

Thanks,

E

(GX6 (italics added but all other punctuation in original); DE:134-2 pp. 9-10 of 71; DE:145:20-25).

Agent Richichi also testified about three other emails that Lundgren sent to Wolff. In the first email, Lundgren discussed traveling to the factory in China where the molds of the discs were being made (DE:145:27-29; GX8 (DE:134-2 p. 15 of 71)). He touted that he and Wolff “w[ould] be [the] only ones capable of factory grade production” once they got the molds for Windows XP3 and Windows 7, and he noted that that would “ensure a steady income for the next year to come!” (GX8).

In the second email, Lundgren wrote to Wolff regarding certain missing boxes that Customs had seized, and he coached Wolff on what to say and how to act if Customs called (GX9 (DE:134-2 pp. 16 of 71); DE:145:29-30). He instructed Wolff, for example, to “play stupid” and to “[a]ct upset” if Customs called (GX9). And, he told Wolff to tell Customs that he ordered the product “from an asset management broker overseas”; “the product was guaranteed to be real”; and he [Wolff] “paid a very high price for it.” *Id.*

In the third email, Lundgren responded to Wolff regarding the missing boxes by saying that “Customs can’t tell the difference and therefore is not legally allowed to hold them. hehe,” and by noting that he “look[ed] forward” to continuing his business relationship with Wolff, because he had “many more products” that he wanted to send to Wolff from India and China (GX10 (DE:134-2 p. 19 of 71); DE:145:31).

**ii. Jonathan McGloin**

Jonathan McGloin testified next as an expert witness for the government (DE:145:42-153). McGloin works as an Operations Program Manager for Microsoft in its OEM Operations Division (DE:145:42, 51). As detailed in the sections below, McGloin explained the way in which Microsoft licenses and protects its software, and he discussed the functionality of the counterfeit Reinstallation Discs that Lundgren and Wolff trafficked. The court made several findings on the record

that it found McGloin's testimony to be "credible and worthy of belief" (DE:145:212, 214-215).

**a. Licensing of Microsoft OS Software, Security Features, and Reinstallation Discs Generally**

McGloin described the relationship between Microsoft and the Original Equipment Manufacturers (OEMs) to whom Microsoft licenses its proprietary software (DE:145:42-43). An OEM "is a company that produces hardware devices, PC's or other related computer hardware" (DE:145:42). In order for OEMs to sell computers containing Microsoft OS software, the OEMs enter into a direct licensing agreement with Microsoft (DE:145:42-43). This direct licensing agreement permits OEMs to pre-install a copy of Microsoft's OS software onto each new computer, creating a perpetual license that accompanies that particular device (DE:145:43). Hence, if the purchaser of that original computer sells it to someone else or gives it away, the Microsoft OS software license "travels with" the device to the new end user in perpetuity (DE:145:118-119; *see* DE:145:57, 144).

One of the conditions of the Microsoft-OEM licensing agreement is that OEMs agree to provide a "recovery solution" to the end user in the event of a hardware malfunction (DE:145:43-44). That recovery solution can come in different forms, including, as relevant here, a Reinstallation Disc that contains an "exact copy" of the original Microsoft OS software that comes pre-installed on the



computer as sold by the OEM (and it is the same software both visually and functionally as the software that Microsoft sells at retail stores like Best Buy) (DE:145:43-44, 71-72).<sup>8</sup> OEMs are prohibited from selling Reinstallation Discs separately in a commercial means, and OEMs must ensure that such discs are given only to those who lawfully purchased or acquired a Microsoft software license (DE:145:44-45, 54-56, 81, 131-132).

Furthermore, to protect its intellectual property and to secure its supply chain, Microsoft has a series of mandatory rules governing the manufacture of reinstallation discs, including, for example, the requirement that discs come stamped with different alphanumeric codes (DE:145:73-80). These codes are very small and denote different types of information, including the origin of the disc (DE:145:75-78). And, if someone else put one of these codes on a counterfeit disc, that would be “very significant,” because “it would be an attempt to mimic a genuine disc” (DE:145:77). For this reason, Microsoft conducts periodic security audits on the vendors and replicators involved in the manufacture and distribution of reinstallation

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<sup>8</sup> (DE:145:71-72 (“A. An exact copy of what was preloaded on the computer is contained on the disc. Q. So it is in effect, as for purposes of the master software image, the same as you get with the retail version, at least that portion of it? A. That portion of it, the Microsoft software portion of it.”); DE:145:111-112 (McGloin testifying that the software on a reinstallation disc looks the same and performs the same as the master Microsoft software image that someone would buy if they walked into Best Buy and purchased a retail version of Microsoft software)).

discs, and it employs a digital crimes team that specializes in detecting potentially counterfeit products (DE:145:74-80).

McGloin also testified about “certificate[s] of authenticity” (DE:145:45). A certificate of authenticity, or a “COA,” is a paper-based label that “contains security features, much like a bank note or [a] passport that is adhered to [stuck to] a device” (DE:145:45). During the conspiracy period, COAs typically contained a “product key” that could be used to activate the Microsoft OS software and verify the authenticity of the software license (DE:145:47). Importantly, however, an end user who purchased a computer with pre-loaded Microsoft OS software would not need the product key to activate the software (DE:145:47-48). This is because Microsoft allows devices sold by large OEMs like Dell to “bypass activation,” which means that an end user can start operating the computer without having to enter a product key (DE:145:48 (“COURT: So, if somebody bought a Dell laptop, and got it home, they plug it in and operate it? McGLOIN: Yes. COURT: And the end user does nothing else? McGLOIN: Correct. It gives the end user a nice experience, it works. THE COURT: It works.”)).

What this creates, McGloin noted, is something called an “unconsumed” product key—i.e., a product key that goes unused, so to speak, because an end user never has had to enter it into the system, and hence Microsoft has not registered the use of that key as an “activation event” (DE:145:50-54). This “unconsumed”

product key exists in “around 98 percent” of cases, McGloin testified, where the software was pre-installed by the OEM; there has not been a hardware failure; the end-user has not had to enter the product key; and Microsoft has not registered the use of that product key as an activation event (DE:145:50-54).

In light of the vast number of unconsumed product keys, it is “very common,” McGloin explained, for computer refurbishers unlawfully to remove COAs with unconsumed product keys from one device and stick them on another device as a way to grant a Microsoft software license impermissibly to an otherwise unlicensed device (DE:145:51). Indeed, there “is quite a large market for obtaining product keys from other devices and reselling them through a particular market, on Ebay or other means,” because they “[can] be used . . . in the refurbished market as a genuine license” (DE:145:81-82). And, as relevant here, these unconsumed product keys can be used unlawfully to activate and use pirated versions of Microsoft OS Software like the Microsoft OS software contained on Lundgren’s counterfeit Reinstallation Discs:

COURT: [H]ave you experienced that knowledgeable people, realizing this, actually do detach the label and then use it on a new device, a refurbished device or something else?

McGLOIN: Yes, Your Honor, that happens all the time.

COURT: When that happens, what occurs? In other words, assuming they have the reinstallation feature or reinstallation disc, does that just mean the software gets installed and up and running?

McGLOIN: It will work and perform to the end customer as a genuine authorized copy, yes, sir.

COURT: Does Microsoft recognize that as a pirating of its product?

McGLOIN: Yes, the licensing is for the device.

COURT: For the machine?

McGLOIN: Correct.

(DE:145:52-53; *see* DE:145:56-57).

**b. The Similarity and Functionality of Lundgren's Counterfeit Reinstallation Discs as Compared with Genuine Discs**

McGloin also testified about the visual and functional similarity between the counterfeit Reinstallation Discs that Lundgren trafficked versus genuine Reinstallation Discs.

As to their visual similarity, McGloin noted that Lundgren's counterfeit discs were "visually identical" to that of a genuine reinstallation disc (DE:145:88-89). McGloin reiterated this visual-similarity point later in his testimony, noting that, unless he "looked at the codes and analyzed th[em] forensically," there was nothing visually on the counterfeit discs that would tell him they were illegitimate (DE:145:92-94; *see* DE:145:99-100 ("Yes, visually it [the counterfeit Reinstallation Disc] looks like it should and contains all of the information as we saw from the [genuine] template.")).<sup>9</sup>

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<sup>9</sup> *See* GX6 (Lundgren writing to Wolff stating that any issues as to the coding on the

As to the functional similarity of Lundgren's counterfeit Reinstallation Discs, McGloin described a series of test installations that he performed demonstrating that Lundgren's counterfeit Reinstallation Discs could be used, without a license or product key, to install functional Microsoft OS software onto a computer (DE:145:87-106).

In the first test, McGloin used one of the counterfeit discs to install a counterfeit copy of Windows XP onto a Compaq Presario computer (DE:145:90-100). As McGloin explained, the installation process was completed successfully; the software started; and it looked identical to a legitimate version of Windows XP (DE:145:92-93). When asked by the district court how the counterfeit Reinstallation Disc's installation process compared to what a user would see when using a legitimate Reinstallation Disc, McGloin stated that the process was "[e]xactly the same," and that "[a user] would not know any different" (DE:145:92-93 ("COURT: How does this [counterfeit disc] compare with yours in terms of what you would see had you been using a legitimate disc? McGLOIN: Exactly the same. COURT: Are they indistinguishable? McGLOIN: You would not know any

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counterfeit discs are "very, very minor," that a person "would have to be an expert with a magnifying glass to know and/or see such tiny differences," and that he (Wolff) "should be able to sell these units to anyone whom [sic] is not trying to sell them directly back to Bill Gates").

different.”); *see* DE:145:97 (noting that the installation process looked “authentic” and gave an impression that it was “genuine software”)).

McGloin also testified that, when he ran the test with the counterfeit XP Reinstallation Disc, he was not prompted to enter a product key at the point in the installation process where he would have expected such a prompt (DE:145:94). Later, once the software was fully installed, McGloin saw a message in the background noting that he had “30 days to activate effectively”—but he explained that the operating system would continue to function, with no reduced functionality, even after the end of that 30-day period, and even if the user did not enter a license number or a product key (DE:145:95-97). This is because, as McGloin noted, Microsoft Windows XP and Microsoft Windows 7 did not have a “functionality step” (DE:145:95-97). In other words, Microsoft Windows XP and Microsoft Windows 7 OS would “nag” the user to enter a product key, and the user would not receive software updates from Microsoft without a product key, but nevertheless the operating system would continue to function, even without a product key (DE:145:95-98; *see* DE:145:102 (“A. It displayed this message, but it continued to work.”); DE:145:96 (COURT: “[I]t has all of the indicators, impressions of legitimacy. McGLOIN: Yes, Your Honor.”)).<sup>10</sup>

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<sup>10</sup> On other versions of Microsoft OS software that are not at issue in this appeal, such as Windows Vista, Microsoft *did* include a functionality step, which

In addition to the Windows XP test, McGloin also testified that he ran two additional tests using one of Lundgren's counterfeit Reinstallation Discs to install Microsoft Windows 7 Professional onto a Lenovo tablet (DE:145:100-105).

In the first of these Windows 7 tests, McGloin typed in the product key that was listed on the COA on the back of the Lenovo, and the software recognized it (DE:145:104-105). That meant, in effect, that McGloin had used Lundgren's counterfeit Windows 7 Reinstallation Disc together with an "unconsumed" product key on his old computer to obtain a "fully activated device"—with no prompts to enter a product key, and with all of the applicable Microsoft updates (DE:145:104-105 ("Yes, this is a fully activated device, and there would be no problems and you get all the updates."); *see* DE:145:148-149 (further explaining how he was able to use an unconsumed product key from an old device to arrive at the same functionality using Lundgren's counterfeit Reinstallation Disc)). And, he had been able to do so even though the counterfeit software on the counterfeit Reinstallation Disc corresponded to a Dell device, not a Lenovo (DE:145:104).

In the other Windows 7 test, McGloin again managed to use the infringed copy of Windows 7 to install a functional version of Microsoft 7 without ever entering a product key (DE:145:100-105). As with the XP test, the "installation

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presumably would have affected the functionality of software without a product key (DE:145:95-96).

process started up and proceeded to go,” and the computer operated as he would have expected it to (DE:145:100-101). McGloin did receive prompts for a product key and a message signaling that the product key was invalid (although he had not entered a product key), but, as noted, the software continued to work in a manner indistinguishable from the genuine installation process (DE:145:102-103).

After hearing the above testimony, the district court commented as follows:

COURT: [I]f I understand your [McGloin’s] testimony, if anyone looked visually at the disc, your testimony is, as I understand it, it is indistinguishable from a legitimate disc, and following through on that, if you ran the contents, the programs, they, too, are indistinguishable from what one would see if you had a legitimate reinstallation device. Is that the thrust of what you are saying?

McGLOIN: That is correct.

COURT: Okay. The only fly in the ointment, if it is at all, is this business where the activation prompt occurs, and the fact that it subsequently repeats itself, but you just told us if you happen to have a device that has an activation key on it that seems to be good enough, you could silence the prompt.

McGLOIN: I did perform another test subsequent to this, and didn’t enter the product key, and it performed and hasn’t prompted me at all.

(DE:145:105-106).

On cross-examination, Lundgren pressed McGloin on the functionality of Microsoft OS software installed without a product key, and McGloin confirmed his earlier testimony (DE:145:115-116, 127-131, 141-142). He stated, for example, that Lundgren’s counterfeit Reinstallation Discs installed “full version[s]” of



Microsoft OS software, with the same “functionality” as retail versions of Microsoft OS software minus certain additional services like updates and services from Microsoft (DE:145:115-116; *see* DE:145:127).

Similarly, when Lundgren’s counsel suggested that the Microsoft software was not fully operational without a product key, McGloin said no, stating:

McGLOIN: It installed the software, I am able to use it, I could connect to the internet, I could continue to use it.

Q: It is not equivalent to the software you sell for \$295?

McGLOIN: [It has the] [s]ame functionality in terms of the software.

(DE:145:141-142).

Later, when Lundgren pressed McGloin on what would happen after the 30-day activation period provided for in Microsoft’s end user licensing agreement, McGloin further explained that he would still be able to use the operating system after that period (DE:145:128-131). He acknowledged that the *written* terms of the license agreement give a 30 days to activate the software, but he made clear that, in practice, the computer would not shut down after 30 days, and the user still could use the software (DE:145:130). In other words, the product key is there to verify that a genuine license has been installed—because only licensed end users who pay for the software are lawfully entitled to use it—but in reality, the computer will allow the user to continue using the software without a product key (DE:145:130 (“A. It

will actually allow you to use this, despite what it says. It doesn't completely shut down or prevent you from using it."); DE:145:130 ("There are genuine cases where a customer may have a problem with activation, we [Microsoft] don't want to shut down the operability of the device.")).

On redirect, McGloin again confirmed that Lundgren's counterfeit Reinstallation Discs could be used to install Microsoft OS software onto an unlicensed device, thereby resulting in the loss to Microsoft of a sale of genuine Microsoft OS software (DE:145:149). Specifically, McGloin confirmed that a user could use Lundgren's counterfeit Microsoft OS software and "have the same functional operating system[,] even on a different kind of computer" (DE:145:149).

**c. Microsoft's Registered Refurbisher Program and the Lawful Market for Microsoft OS Software**

McGloin also testified about the various means through which Microsoft OS software can be acquired lawfully. As noted, he stated that Microsoft has direct licensing agreements with OEMs under which OEMs pay Microsoft for the right to install Microsoft software on new devices. *Supra* pp. 15-16. That OEM license is for pre-installation on new devices, which means that the license is attached to the device in perpetuity, and so an original end-user lawfully can sell or give the computer away (including the Reinstallation Disc that comes with it), because the license travels with the machine (DE:145:43, 57, 119, 144).

Under this framework, it is not possible for someone simply to go to Dell and purchase Microsoft OS software, because Dell's permission to license the software is only for pre-installation on new devices (DE:145:43, 66-67). And, because the Reinstallation Disc "has to be sold with the device," an OEM cannot sell Reinstallation Discs separately in a commercial means:

A. Microsoft does not allow OEM's to sell recovery discs separately in a commercial means. It is not viewed as a standard on the product, it has to be sold with the device.

Q. An OEM can't say I have an extra 30,000 recovery discs, I am going to sell them to Mr. Lundgren?

A. That is not allowed.

(DE:145:81; *see* DE:145:177-178).

But, if the original end user loses the Reinstallation Disc that came with the new device, then the user can contact the OEM directly, and the OEM is authorized as part of its license with Microsoft to provide a replacement reinstallation disc or to allow the user to download the software for free through an OEM-provided download service—but only if the OEM first ensures that the computer originally had a genuine license installed (DE:145:54-56, 132, 143-145).

In addition to having direct licensing agreements with OEMs, McGloin also testified about Microsoft's Registered Refurbisher Program (RRP) (DE:145:51, 58-60). Under the RRP, any commercial entity that sells refurbished computer

equipment in the secondary market can apply to Microsoft for a license, at a reduced price, to put genuine Microsoft OS software on its refurbished computers (DE:145:60, 83-84, 134; *see* DE:145:146 (“Refurbishers want to sell it with an operating system on it. People don’t want to buy a device if you don’t have an operating system on it.”)). Like OEMs, registered refurbishers are required as part of its license agreement with Microsoft to provide a recovery solution, like a Reinstallation Disc (DE:145:135), and that disc, as noted, contains an identical copy of the Microsoft OS software (DE:145:71).

Take the following example. A large corporation like American Airlines or Chase Bank may wish to sell large numbers of its old computers to a computer refurbisher (DE:145:58-60, 134). Before it does so, the corporation will almost always “wipe” the hard drives of those computers, which will include deleting the OS software (DE:145:58-59, 83). At that point, the computers have no software, and there are only a limited number of ways through which Microsoft OS software can be put back onto them: (1) the refurbisher can, without joining Microsoft’s RRP, use the reinstallation discs that came with the computer originally (if it has them) in order to install the operating system (DE:145:121-122, 133-134); (2) the refurbisher can go to a retail store and buy individual copies of Microsoft OS Software at a higher retail price; (3) the refurbisher can purchase a commercial license; or (4) the refurbisher can join Microsoft’s RRP and get access “at a lower cost to refurbish the

device and put on a new license, a new copy of the software” (DE:145:60; *see* DE:145:67-68, 134).

McGloin also testified about the various “royalty rates” at which Microsoft sells its OS software, including through the RRP (DE:145:61-64). He referred in particular to Government Exhibit 18, which is a pricing table organized by type of customer: large OEM, small OEM, large refurbisher, small refurbisher, and retail customer (GX18). It reflects, among other things, the higher price at which Microsoft sells its software at retail stores versus the discounted rates that Microsoft charges refurbishers through its registered refurbisher program (DE:145:61-66).

Per Mr. McGloin’s estimates, the lowest amount that Microsoft charges small registered refurbishers is \$25 per unit (GX18; *see* DE:145:218).<sup>11</sup> Lundgren did not challenge McGloin’s testimony that Microsoft sells its OS software to registered refurbishers at \$25 per unit, and he does not do so on appeal.

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<sup>11</sup> For Windows XP, the refurbisher price is \$25 per unit, and for Windows 7, it is \$40 (GX18). The government made an accommodation to recommend the use of the lower \$25 figure for all 28,000 Reinstallation Discs, however, and the court accepted that accommodation, noting that it was “beneficial to the Defense” (DE:145:217-218).

**d. Illegal Market for Microsoft OS Software**

McGloin also testified about the substantial impact to Microsoft caused by the type of piracy in which Lundgren was engaged (DE:145:113-114). He noted, for example, that counterfeiting is a “major competitor” and a “big business” (DE:145:80), and he described the “black market for illegitimate or counterfeit Microsoft software” as “very vibrant”:

There is a huge demand for free or low cost software. People like things at reduced prices, there is a large market out there for lower cost software.... It [the black market] displaces the sale of a genuine software license, so if you purchase the license on the black market it means you haven't purchased a new device with a new license from Dell or you haven't purchased a new license from Microsoft, it is taking a sale away from a genuine license.

(DE:145:84).

McGloin also described how Microsoft “employ[s] a team to police” such counterfeiting (DE:145:80), because counterfeiting causes a “loss of revenue” and also “a diminishment of the brand and reputation” (DE:145:113-114).

**iii. Glenn Weadock**

After McGloin testified, Lundgren called Glenn Weadock as a defense expert (DE:145:154-184). Weadock is an IT consultant who specializes in training related to Microsoft OS software (DE:145:154, 160-163). In his opinion—an opinion deemed “not credible” or “worthy of belief” by the district court (DE:145:215)—the value of the Reinstallation Discs trafficked by Lundgren was “zero or near zero,”

because, as he claimed, the Reinstallation Disc “does not come with a license,” and the only way a user can legitimately use the software is with a valid license (DE:145:164-167; DE:145:167 (“Q. In your opinion, without a code, either product key or COA, what is the value of these reinstallation discs? A. Zero or near zero.”)).

Weadock further stated that the software Lundgren illegally reproduced can be downloaded for free by licensed users from Microsoft’s website as well as many OEM websites (DE:145:167-168, 175-176). In Weadock’s view, because Microsoft and Dell offer licensed end users the ability to download the software for free, the actual software itself (absent a license) has no value (DE:145:167-168).

Weadock also testified about the functionality of Microsoft OS software without a valid license (DE:145:165-167). In his opinion, the user does not get the functionality of the software without proving that he has a valid license (DE:145:165-171); in the case of Microsoft XP, the “system will not function” or “boot up” after 30 days without a valid license, he claimed, and although Windows 7 is “more tolerant,” there still would be “degradations of functionality” (DE:145:170-172 (noting absence of security updates and also a legend that appears on the screen saying the software is not genuine)).

When Weadock was asked why someone would pay for a Reinstallation Disc of the sort trafficked by Lundgren if it has no value, he responded that it carries a “convenience value” for customers who are not “comfortable downloading software

through the internet,” but he described that value as “low,” and he said that “[i]t would not be anywhere near the retail value of the product when you go into Best Buy and purchase a reinstallation version” (DE:145:172).

On cross-examination, the government asked Weadock “where [one] could download 16,000 versions of [the reinstallation software] in 2011” (DE:145:177). Weadock responded: “[i]f I bought 16,000 computers from Dell, I could go to their website and provide each of the service tag numbers for each of the computers and download all of those copies” (DE:145:177). When the government asked more specifically if someone “could get 16,000 versions of the recovery disk” without buying 16,000 computers, Weadock said no, adding: “If you want a reinstallation CD, you have to provide a serial number or [a] service tag number, some proof you licensed that computer for that operating system” (DE:145:178).

On redirect examination, Weadock reiterated his opinion that the counterfeit Reinstallation Discs would have value only if coupled with a license or product key (DE:145:178-179). The district court then pressed Weadock as to his zero dollar valuation, noting in the following exchange that the defendant spent \$80,000 on a criminal enterprise to create counterfeit discs he now argues have no value (DE:145:180).

COURT: What is your view why somebody is going to China to have 16,000 counterfeit discs produced? What do you think they are doing? Is this a charitable thing? I don’t mean to be—what is your take on



this? You say it has no value, it might be convenient for the customer. What do you think is going on? They spent \$80,000, if I understand one of the exhibits, to produce this. What do you think was happening?

WEADOCK: I can't speak for the Defendant, Your Honor.

COURT: But you need to speak. You came in and told me, in your expert opinion, these have no value at all, which I understand that.

WEADOCK: Right.

COURT: Here is clearly a criminal enterprise, these gentlemen have pled guilty to crimes, and we know from the exhibits—again, I don't have it right in front of me, but looking at the monies from Chase and so on, it is about \$80,000. What is your sense as to what was being done?

WEADOCK: My sense is that the discs have value as a convenience to the end user who will be able to install Windows on those computers.

(DE:145:179-180).

The district court also asked Weadock whether he denied that there was a market for the counterfeit Reinstallation Discs that Lundgren illegally reproduced (DE:145:182-183). Weadock acknowledged that “obviously there had to be some market for the enterprise,” and that the Reinstallation Disc “allows [a user] to easily install Windows” (DE:145:183). But, Weadock continued to opine that the discs have “zero or little, zero or low [value]” (DE:145:184-185).

**iv. Brent Kelley**

As a final witness, Lundgren called Brent Kelley, CEO of Power On Computer Services, to testify regarding the secondhand computer market and Reinstallation Discs (DE:145:185-194). Kelley testified that he acquires used computers from large companies, wipes them of their existing OS software, and resells them—and sometimes receives the Reinstallation Discs that came with the computers originally (DE:145:187-190). He added that the inclusion of Reinstallation Discs with the purchase of a refurbished computer is a matter of customer satisfaction or convenience (DE:145:189). But, he made clear that his company does not go out and buy reinstallation discs, and that it is the refurbishers who install the software before reselling the devices (DE:145:190-191, 204).

**v. District Court's Factual Findings and Imposition of Sentence**

After hearing the above testimony, the court heard more argument from the parties. The government reiterated the basis for its \$700,000 infringement amount, which derived from a \$25 per disc valuation multiplied by the stipulated 28,000 unauthorized discs trafficked by Lundgren as part of the conspiracy (DE:145:197-200). The \$25 figure, as noted, reflected the fact that (1) Lundgren and Wolff aimed to sell the unauthorized discs to refurbishers, and (2) the lowest price at which Microsoft sells its OS software to refurbishers is \$25 per unit.

In response, Lundgren agreed that his unauthorized Reinstallation Discs contained identical copies of Microsoft OS software, but he nevertheless claimed that the retail price should be the price at which Wolff sold the counterfeit discs during the conspiracy—\$3 for Windows 7, and \$4 for Windows XP (DE:145:201-203).

The court rejected Lundgren's call to use the price that would have been paid by the infringers on the black market, noting:

[Y]ou are talking to me about the prices that the violators would pay. That is not the standard. The standard here, if it is an exact copy, and we all agree it is an exact copy, if it is an exact copy, the question as a matter of law is, what is the retail price of Microsoft, not what the infringers are paying or able to get. They are obviously engaging in an outlaw market, an illegal market that has a depressed value. That is why they are there, because the product is cheaper, not in Redland, California buying from Microsoft.

(DE:145:203).

Ultimately, the court concluded that it would use the \$25 per disc price proffered by the government and the Microsoft expert (McGloin) (DE:145:218). In reaching its decision, the court made the following findings and credibility determinations on the record, in the following order (DE:145:208-218):

- “[T]he reinstallation disc contains an exact copy of the Microsoft software that was pre-installed by the original equipment manufacturer” (DE:145:209).

- “[S]omeone can sell their computer and the new purchaser essentially inherits the license and has the right, if they lose the reinstallation disc, to be able to go to the original equipment manufacturer and the testimony is really, without dispute, that you can obtain a free copy of it” (DE:145:210).
- “[N]ormally [under Section § 2B5.3(b)] one would use the value of the infringing article unless, unless certain exceptions occur, in which case you turn and you use the retail value of the infringed—of the authentic item. And one of those situations is when the infringing item is or appears to a reasonably informed purchaser to be identical or substantially equivalent to the infringed item or is a digital or electronic reproduction of the infringed item” (DE:145:211).
- “[W]hat Mr. Wolff and Mr. Lundgren did—and what they have acknowledged that they did—is that they produced and obtained—had produced these exact copies of the legitimate reinstallation discs” (DE:211-212).
- “I recognize there has been a dispute in the testimony about what you could do with one of these things, and I have certainly listened to Mr. Weadock’s testimony and Mr. McGloin’s testimony. I find Mr. McGloin’s testimony to be credible and worthy of belief that he did take the installation device and

was successful in installing it on two different computers and that it worked. That is, it worked in the sense that it functioned” (DE:145:212).

- “I understand Mr. Weadock tried to do it and he was unsuccessful. I understand, too, that Microsoft, probably with the XP or one of them—I may have them mixed up. One would close down after 30 days. Windows 7, apparently was more tolerant and you might have to put up with a continuing prompt that would ask you to activate it and follow those steps, but ultimately, if you didn’t do it, what happened is, apparently a legend would come up telling you that you had software that is not genuine” (DE:145:212).
- “[O]ne has to assume that in doing what they did that Mr. Wolff and Mr. Lundgren, both of whom are very intelligent people and have had a lot of experience in this field, that they understood the market that was out there ... and that the aim was to sell these counterfeit copies to small refurbishers who would be able to use them and be able to provide the user with a functioning computer and operating system” (DE:145:212-213).
- “I have a copy of the counterfeit disc, and I have a copy and copies of the authentic discs. Candidly, there is no way, there is no way a reasonably prudent person would be able to differentiate between the two. I guess that is the expertise of the counterfeiters ... in China who are masters in having

achieved this. You just wouldn't be able to tell.... So, there is no way that the normal person would be able to tell the differences" (DE:145:213-214).

- "I find credible and worthy of belief Mr. McGloin's testimony with respect to what appeared on the screen when you loaded the disc into the computers. It's identical to the legitimate screen that would appear" (DE:145:214).
- "I would also point out ... that there is [an] alternative to the first part in [note] 2A [to § 2B5.3(b)(1)], subsection I, and that is, is a digital or electronic reproduction of the infringed item. That is exactly what we are dealing with" (DE:145:215).
- "[T]hen the debate becomes ... what is the value of the infringed device? Now, there is a split in testimony on this. Mr. Weadock suggested that the value is either zero or nominal. Mr. McGloin has suggested that the value is one of the values set forth on Government's Exhibit 18. I appreciate Mr. Weadock's testimony, he is obviously someone with experience in this area, but I reject his testimony as not credible nor worthy of belief. I find that Mr. McGloin's testimony is the correct view on that, and is in fact credible and worthy of belief" (DE:145:215).
- "[Y]ou need to step back for a second and say, look, we are in the real world, why were these people doing what they were doing? ... [T]his was a business, a business venture in which they invested about \$80,000 in the hope,

certainly, of, number one, being able to market the product, and secondly, obtain a profit. Now, so, clearly there is a value to these” (DE:145:215-216).

- “I understand the contention is, well, this doesn’t have any value if you don’t have a license. But ... that suggests you are dealing with honorable people, law-abiding people, people who would think it is important that you have a license.... [T]here is illegitimate piracy going on, and it happens. This is a huge problem in the intellectual property area....” (DE:145:216).
- “[T]he reinstallation disc ... is just the means of installing the software. The item that has been—or the product that has been infringed is the Microsoft software. The potential valuations, I think, are all accurate as set forth on 18, but I accept what I think is a reasonable accommodation in this case because I suspect it does accord with what was in fact the Defendant’s intentions, and that is to market these counterfeit reinstallation discs to small registered refurbishers. And I do think that in looking for the retail value, it is correct to look to the retail value that a registered—Microsoft registered, Microsoft approved small refurbisher, the monies paid to Microsoft” (DE:145:217-218).
- “For Windows XP, that is \$25 per unit of Windows XP, and for Windows 7, that is \$40 for Windows 7.... I will accept that [the Government is further willing to discount the Windows 7 to \$25], although it is at odds with what I

think is the credible testimony, but I want to do it in a way that is beneficial to the Defense that the Government is willing to accede” (DE:145:218).

The district court then convened the hearing to determine an appropriate sentence (DE:145:219). At the final hearing, the court adopted the advisory guideline range of 37 to 46 months’ imprisonment (DE:146:20). Lundgren spoke on his own behalf, describing his entrepreneurial and philanthropic achievements, his regret and shame for the crime he committed, and his hope that the court would grant him a non-incarcerative sentence (DE:146:39-48). Several other character witnesses also testified for him, all of whom generally described him as trustworthy and reliable (DE:146:23-39). Finally, Lundgren’s attorney reiterated his request for a sentence of house arrest (DE:146:49).

The government recommended a sentence of 18 months’ imprisonment, which it noted already reflected a downward variance from the 37-to-46 advisory range (DE:146:54). The governmental referenced (1) the seriousness of Lundgren’s conduct and the harm to the industry caused by Lundgren’s infringement scheme; (2) the economic loss to the software industry due to counterfeiting; (3) the importance of celebrating entrepreneurship when done correctly but not allowing the theft of others’ ideas; and (4) the deliberate effort involved in Lundgren’s counterfeiting enterprise, which included traveling to China, locating the right factories capable of supplying counterfeit discs and labels, and then coordinating



over the course of a couple of years to promote his business (DE:146:51-57). Finally, the government noted that a probationary-type sentence would send the wrong message, and that although Lundgren had accepted responsibility by ultimately pleading guilty, his zero-dollar valuation reflected the false narrative that “he never sold this for the reason we know he sold it, which was for refurbishers to use the software” (DE:146:52-53).

After hearing argument from the parties, the district court set forth its consideration of the 18 U.S.C. § 3553(a) factors (DE:146:58-65). The court noted the power of software as a technological advancement, the tremendous importance of safeguarding copyright protections, and the brand and reputational harm caused by piracy (DE:146:58-65). The court referenced the visual and functional similarity of Lundgren’s counterfeit discs, noting the inability to “tell them apart” from the genuine discs (DE:146:61). The court also acknowledged Lundgren’s personal achievements, but explained that it had to consider the need to promote general deterrence as well, and that what Lundgren and Wolff had done was “wrong”—it “required skill, it required thought, [and] it wasn’t a quick thing,” as evidenced by the emails showing his careful actions (DE:146:65). Finally, the court stated: “[I]t is pretty clear you understood that you were essentially highjacking legitimate software. You may have said, well, it is okay, and other rationalizations ... but it is pretty clear you were doing that” (DE:146:65).

Ultimately, the district court imposed a downward variance of 15 months' imprisonment as to Count 1 and 15 months' imprisonment as to Count 3, to be served concurrently (DE:146:66; DE:129:2).

### **3. Standard of Review**

This court reviews *de novo* a district court's interpretation of the Sentencing Guidelines and accepts its factual findings unless clearly erroneous. *See United States v. Crawford*, 407 F.3d 1174, 1177-78 (11th Cir. 2005). The district court's determination of the infringement amount in a case involving counterfeit merchandise is a factual finding reviewed for clear error. *United States v. Lozano*, 490 F.3d 1317, 1322 (11th Cir. 2007). "Clear error review is deferential," and this Court will not disturb a district court's findings unless it is "left with a definite and firm conviction that a mistake has been committed." *United States v. Monzo*, 852 F.3d 1343, 1345 (11th Cir. 2017) (internal quotation marks omitted)). Generally, this Court accepts a credibility determination unless it is "so inconsistent or improbable on its face that no reasonable factfinder could accept it." *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002) (internal quotation marks omitted).

### **Summary of the Argument**

Lundgren argues that the district court clearly erred in determining that he was accountable for an infringement amount of \$700,000 under Section 2B5.3(b)(1)(B)

of the Sentencing Guidelines. His theory, which he bases largely on the testimony of an expert witness whom the district court found not credible (DE:145:215), is that the discs that he sold as part of a for-profit criminal conspiracy should have been valued at zero, because, according to him, they are “worthless” without a product key or license from Microsoft. Lundgren is wrong. The court correctly found that the counterfeit discs that he trafficked offered a visually identical and functional version of genuine retail Microsoft OS software when installed, regardless of the entry of a license or product key (DE:145:212-215). That finding is rooted in substantial record evidence, including in the detailed testimony of the government’s Microsoft expert, whom the district court expressly credited (DE:145:212, 214-215).

Moreover, given Lundgren’s undisputed aim to sell his counterfeit discs to computer refurbishers, the district court appropriately used the lowest possible retail price at which Microsoft sells its OS software to computer refurbishers. That price, unchallenged by Lundgren, is \$25, and the stipulated number of discs that Lundgren trafficked is 28,000—yielding an infringement amount of \$700,000. As Lundgren’s own emails make clear, he was engaged in a calculated, for-profit enterprise to counterfeit and sell thousands of Reinstallation Discs containing identical copies of Microsoft OS software to computer refurbishers who could not detect the difference. Those discs function in substantially the same way as genuine Microsoft OS software, regardless of the entry of a product key, and indeed, that is

why Lundgren so eagerly tried selling them for a “steady income,” even boasting that only an expert like “Bill Gates” could detect their counterfeit nature.

There is no error, clear or otherwise, in the district court’s careful, credibility-laden findings. Lundgren’s already downwardly varied sentence of fifteen months’ imprisonment (from a range of 37 to 46 months’ imprisonment) should be affirmed.

### **Argument**

#### **The District Court Properly Calculated the Infringement Amount in this Case at \$700,000.**

Lundgren argues that the district court clearly erred in calculating an infringement amount of \$700,000 (Br. 9-19). His sole contention is that the court misunderstood a purported key distinction between the value of Microsoft OS software *with* a license and a product key versus Microsoft OS software *without* a license and product key (Br. 14). According to him, because the counterfeit Reinstallation Discs that he trafficked did not come with a license or a product key, they offered only a worthless, inactivated version of Microsoft OS software with no value (Br. 15). Hence, he says, the value of the infringed item should have been zero, or close to zero—a theory he says is bolstered by the fact that authorized purchasers of genuine Microsoft OS software can download replacement OS software directly from Microsoft or from licensed OEMs for free online (Br. 16).

Lundgren is incorrect. The district court carefully considered the evidence over the course of a lengthy evidentiary hearing, understood the factual and legal issues presented, and came to the well-supported and credibility laden conclusion that Lundgren was accountable for a \$700,000 infringement amount. Lundgren's erroneous argument to the contrary, and his insistence on a zero-dollar valuation, rests on the testimony of a defense expert whom the district court found not credible, and it should be rejected (DE:145:203).

As a preliminary matter, we clarify what is not in dispute in this appeal.

First, Lundgren agrees, as he did below, that the district court used the correct infringement value formulation as found in Note 2(A) to Guideline Section § 2B5.3(b)(1) (Br. 9, 12-13). That commentary directs the court to use “the retail value of the infringed item, multiplied by the number of infringing items” when “[t]he infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.” USSG § 2B5.3, cmt. 2(A)(i)(I)-(II). Lundgren agrees that both of those conditions apply here, and he further agrees that the “infringed item” in this case is genuine Microsoft OS software (Br. 13 (“There was and is no dispute that the unauthorized copies of the discs containing OS software that Mr. Lundgren pled guilty to ... were digital or electronic reproductions

of the Windows OS that were identical or substantially equivalent to the version of the software included on the Dell reinstallation discs.”)).

Second, as he stipulated when he pled guilty (DE:86:1), Lundgren does not dispute that the purpose of his conspiracy was to sell the counterfeit Reinstallation Discs to computer refurbishers (Br. 13 (“Wolff asked for Mr. Lundgren’s help in reproducing Dell reinstallation discs that Wolff planned to sell to Dell computer refurbishers”); DE:86:1).

Finally, Lundgren does not challenge the accuracy of the retail prices listed in Government Exhibit 18 or, in particular, the validity of the low-end \$25 price at which Microsoft sells its OS software to registered refurbishers as part of its Registered Refurbisher Program.

His sole claim, as noted, is that the district court was “confused” by the evidence (Br. 10, 15, 17, 19) and should have ascribed to the discs a value of zero on the theory that they have no value absent a license or product key (Br. 14). The district court made no error.

First, and most importantly, the district court correctly found that the counterfeit discs that Lundgren trafficked did in fact offer a visually identical and functional version of Microsoft OS software when installed, regardless of the entry of a license or product key (DE:145:212-215). The court credited the government’s

Microsoft expert (McGloin) on this point,<sup>12</sup> and that finding is well supported in the record.

Indeed, as detailed above, McGloin was able, using Lundgren's unauthorized discs, to install a full version of Microsoft OS software with the same functionality as a genuine retail version of the software. *Supra* pp. 20-25.

In one test, overlooked entirely by Lundgren in his brief, McGloin used an "unconsumed" product key from a different device to load a *fully functional operating system*—without any "nagging" prompts for a product key, and with all of the regular "add ons" that Microsoft would provide to a legitimate user (e.g., updates) (DE:145:104-105, 148-149). As McGloin observed, over 98% of computers sold by OEMs possess COAs with unconsumed product keys (DE:145:52). Thus, it is "very common" for computer refurbishers to transfer COAs with unconsumed product keys from one device to another as a means of impermissibly granting a license to an otherwise unlicensed device (DE:145:51). Indeed, McGloin showed this to be the case; he used an unconsumed product key from the COA adhered to the back of an old Lenovo tablet to install and activate a

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<sup>12</sup> (DE:145:212 ("I find Mr. McGloin's testimony to be credible and worthy of belief that he did take the installation device and was successful in installing it on two different computers and that it worked. That is, it worked in the sense that it functioned."); DE:145:214 ("I find credible and worthy of belief Mr. McGloin's testimony with respect to what appeared on the screen when you loaded the disc into the computers. It's identical to the legitimate screen that would appear.")).

pirated yet fully functional copy of Microsoft OS software using Lundgren's counterfeit discs (DE:145:104-105).

In the two other test installations, McGloin again managed to use Lundgren's unauthorized Reinstallation Discs to install functional versions of Microsoft OS software—and he did so notwithstanding the absence of a license or product key. *Supra* pp. 20-25 (referencing DE:145:90-106, 115-116, 127-131, 141-142). This is because, as he testified, both Microsoft Windows XP and Microsoft Windows 7 did not have a “functionality step,” and so the software continued to function, without shutting down, even beyond the 30-day activation period (DE:145:95-97). McGloin reiterated this point several times, stating that (1) Lundgren's counterfeit Reinstallation Discs installed “full version[s]” of Microsoft OS software (DE:145:115); (2) users could “access the internet on a nonactivated machine” (DE:145:127); (3) even where a user fails to enter a license or product key, the software “will actually allow [the user] to use it, despite what it says,” and it will not “completely shut down or prevent [the user] from using it” (DE:145:130); and (4) the counterfeit copies of the Microsoft OS software sold by Lundgren provided the same functionality as genuine retail Microsoft OS software (DE:145:141-142).

To be sure, in some of the test installations, McGloin received “nagging” prompts asking him to enter a product key, including a notice that he had 30 days to activate in conformity with the terms of Microsoft's license agreement. *Supra*



pp. 21-23. He also acknowledged that he would not receive certain product updates or services without a product key. *Supra* pp. 21, 24. But, contrary to Lundgren's claims (Br. 15), McGloin was clear that he was able to install a visually identical and substantially equivalent operating system that functioned, notwithstanding the absence of a product key, and despite the terms of the 30-day limit in Microsoft's license agreement. *Supra* pp. 20-25. And, of course, those "nagging" prompts were not an issue when he used the "unconsumed" product key on the back of his old computer (DE:145:104-105)—an illegal practice that he described as "very common," and a practice that yielded a *fully functional operating system just as a genuine end user would experience* (DE:145:51 ("Q. Have you, in your experience, ever seen instances where people, whether it is a refurbisher or somebody else who wants to circumvent the product key, where they take the COA off one and put it on another? A. Yes, it happens all the time."))).

In light of this record evidence, and given Lundgren's undisputed aim to sell his counterfeit discs to computer refurbishers, the district court rightly found that the appropriate value of the infringed software is the retail price at which Microsoft sells refurbishers genuine copies of Microsoft OS software (DE:145:215-218). The government presented unchallenged evidence that (1) Microsoft sells its software to registered refurbishers at price of \$25 (at the low end) (GX18); and (2) the number of discs that Lundgren trafficked was 28,000 (DE:86:3)—yielding an infringement

amount of \$700,000 under Section § 2B5.3(b)(1)). The court made a finding on the \$25 retail value (DE:145:218), and Lundgren does not dispute the accuracy of that figure.<sup>13</sup>

Instead, he simply repeats his flawed premise, which is that the district court should have used a value of zero because, as he claims, the discs that he trafficked offered only an inactivated, limited operating system (Br. 15). He relies on his discredited expert (Weadock) for this “worthless” proposition (Br. 14 n.8), but the court expressly rejected that zero-valuation testimony as “not credible [l]or worthy of belief,” choosing instead to credit McGloin’s testimony on the valuation of the infringed item (DE:145:215). These well-considered credibility determinations warrant substantial deference, and there is nothing about them that can be deemed “contrary to the laws of nature” or “so inconsistent or improbable on its face that no reasonable factfinder could accept [them].” *Ramirez-Chilel*, 289 F.3d at 749 (internal quotation marks omitted); see *Rivers v. United States*, 777 F.3d 1306, 1317

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<sup>13</sup> In fact, the use of the \$25 figure is a conservative estimate that inures to Lundgren’s benefit. The retail price of the same Microsoft software at retail stores is \$119 on the low end (\$119 for Windows 7 Home and \$199 for Windows XP Home). Nevertheless, on the government’s recommendation, the district court agreed not to use that much higher retail-store price, noting that Lundgren’s target market was computer refurbishers (DE:145:217). Moreover, even within the registered refurbisher category, the court made another “beneficial” accommodation to the defense by using the \$25 figure for *both* Windows XP and Windows 7—even though Windows 7 was priced at a higher, \$40 price (DE:145:218).

(11th Cir. 2015) (“We will uphold a district judge’s credibility determination unless the court’s understanding of the facts appears to be unbelievable.” (internal quotation marks omitted)).

Nor is there a reason to think the district court, who presided over a lengthy evidentiary hearing and clearly understood the factual and legal issues at play (DE:145:208-218), was “confused” about the with-a-key versus without-a-key distinction. To the contrary, the court honed in on that precise issue and rejected Lundgren’s “specious” argument (DE:145:203, 215-216), noting the reality of the conspiracy to which Wolff and Lundgren had pled guilty as reflected in Lundgren’s emails (DE:145:179-180, 215-216). They were engaged in a calculated, illegal, for-profit business to counterfeit genuine Microsoft software so they could sell it to refurbishers who could not detect the difference, and it was Lundgren who boasted in emails that only an “expert with a magnifying glass” or “Bill Gates” could tell otherwise (DE:145:213-214; DE:145:20-25 (discussing emails); DE:146:65 (“[I]t is pretty clear you understood that you were essentially highjacking legitimate software.”)). These e-mails underscore Lundgren’s obvious profit motive, *supra* pp. 12-14, and they severely undermine his discredited narrative that he was trying simply to help licensed Microsoft software owners who did not know about, or could not access, free downloads of the Microsoft operating system software.

Finally, Lundgren faults the government for failing purportedly to prove the value of a Reinstallation Disc without a product key (Br. 10). That criticism, however, rests on an invalid premise. There is no freestanding market for the purchase of thousands of reinstallation discs without a product key (DE:145:81, 177-178).<sup>14</sup> Indeed, there is no separate commercial means by which an OEM can sell recovery discs, and the only legal way in which a computer refurbisher can buy thousands of genuine Reinstallation Discs is through the Microsoft RRP. *Supra* pp. 26-28. Moreover, the only time a licensed OEM can supply a reinstallation disc is if the end-user can show that the computer originally had a genuine license (DE:145:54-56, 132, 177-178). Thus, although it is true that a *licensed* owner of *genuine* Microsoft OS Software can download replacement Microsoft software for free after proving that he or she has a genuine license—*that is not what is happening here*. As the district court found, this is a criminal copyright infringement scheme, in an “outlaw market” (DE:145:203), to pirate and duplicate functional versions of

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<sup>14</sup> (DE:145:81 (“Q. Is there a retail market for recovery discs, outside of OEM’s? A. Microsoft does not allow OEM’s to sell recovery discs separately in a commercial means. It is not viewed as a standard on the product, it has to be sold with the device. Q. An OEM can’t say I have an extra 30,000 recovery discs, I am going to sell them to Mr. Lundgren? A. That is not allowed.”); DE:145:178 (“Q. If you don’t have 16,000 computers, could you get 16,000 versions of the recovery disc? A. I don’t think so. Q. You don’t? A. No. When you go to Dell, you have to provide them—if you want a reinstallation CD, you have to provide a serial number or service tag number, some proof you licensed that computer for that operating system.”).

Microsoft OS software and sell them for a profit as purported genuine copies of the software to computer refurbishers (DE:145:203, 215-216). Those discs—as the district court found (DE:145:212-215)—are visually identical and function in substantially the same way as genuine Microsoft OS software, and that is why Lundgren so eagerly tried selling them, prodding Wolff to make the sales so he could “ensure a steady income for the next year to come” (GX9). *Supra* p. 14.

Simply put, this appeal is about a battle of the experts, at best, and the law is clear that where, as here, the district court has weighed that competing evidence and made reasonable credibility determinations based on ample evidentiary support, this Court should not disturb its determinations on appeal. *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574-75 (1985) (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”). *See Pioneer Hi-Bred Int’l v. Holden Found Seeds, Inc.*, 35 F.3d 1226, 1238 (8th Cir. 1994) (“We will not disturb the district court’s decision to credit the reasonable testimony of one of two competing experts.” (quoting *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1218 n.7 (3d Cir. 1993))); *Amstar Corp. v. Envirotech Corp.*, 823 F.2d 1538, 1543 (Fed. Cir. 1987) (“When, as here, the evidence consists solely of competing expert opinions, we have no basis for overturning the district court’s credibility determinations.”); *An-Son Corp. v. Holland-America Ins. Co.*, 767 F.2d 700 (10th Cir. 1985) (noting that, when

the evidence consists primarily of conflicting expert testimony, the appellate court is loath to disturb the trial court's findings based upon such evidence).

The district court did not err, clearly or otherwise, in calculating the \$700,000 infringement amount.

### **Conclusion**

Lundgren's already downwardly varied sentence of fifteen months' imprisonment should be affirmed.

Respectfully submitted,

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<sup>15</sup> This brief was prepared with the assistance of Nicole Chipi, a third year law student at the University of Miami School of Law and intern at the United States Attorney's Office, Southern District of Florida.

### **Certificate of Compliance**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,470 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally-based typeface using Microsoft Word 2016, 14-point Times New Roman.

### **Certificate of Service**

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 17th day of November, 2017, and that, on the same day, it was filed using CM/ECF and served via CM/ECF on Mark C. Rificin, Esq., Randall S. Newman, Esq., and Hugo A. Rodriguez, Esq., counsels for Appellant Lundgren.

*Aileen M. Cannon*

Aileen Cannon  
Assistant United States Attorney

*ab*



No. 17-12466

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**UNITED STATES OF AMERICA,**  
*Plaintiff-Appellee,*

v.

**CLIFFORD ERIC LUNDGREN,**  
*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Southern District of Florida  
Criminal Case No. 9:16-cr-80090-DTKH-2

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**REPLY BRIEF OF DEFENDANT-  
APPELLANT CLIFFORD ERIC LUNDGREN**

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to 11<sup>th</sup> Cir. R. 26.1-1, Appellant, Clifford Eric Lundgren, provides the following list of interested persons:

Altchiler, Robert Y.  
Barnes, Antonio J.  
Cohen, Jacob Alain  
Dell Inc. (DVMT)  
Ferrer, Wifredo A.  
Garcia, Rolando  
Golder, Randee J.  
Greenberg, Benjamin G.  
Lundgren, Clifford Eric  
Microsoft Corporation (MSFT)  
Morris, Lothrop  
Newman, Randall S.  
Reinhart, Bruce E.  
Rifkin, Mark C.  
Rodriguez, Hugo A.  
Sanchez, Lily Ann  
Schlessinger, Stephen  
Smachetti, Emily M.  
Wolff, Robert J.  
Wolf Haldenstein Adler Freeman & Herz LLP

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## INTRODUCTION

The Government's response to Lundgren's opening brief makes this case easy for the Court to decide. Lundgren's principal argument is that the Government failed to meet its burden to prove the value of the infringed product, leading the trial court to base its Guideline calculation on the value of a *fundamentally different product: a copy of Windows OS with a new license and product key*. The Government's response fails to answer the substance of Lundgren's argument. Notwithstanding the considerable rhetoric, complications, and obfuscations in its lengthy response brief, *nowhere does the Government point to any evidence of the value of the product Lundgren was convicted of infringing: a free copy of Windows OS without a license or a product key*.

Moreover, the response brief *admits* that the Government failed to prove the value of Windows OS without a license or product key, that the Windows software was free to every Dell refurbisher, and that every Dell computer at issue here included a Certificate of Authenticity ("COA") evidencing a valid license and product key affixed to each machine (which the Government also admits belong to the hardware rather than the user). The reinstallation disc was merely a "recovery solution" – *i.e.*, a means of getting the free OS back onto admittedly authorized computers in the event of a catastrophic failure. Indeed, the trial court found that any consumer who lost his or her reinstallation disc could obtain a *free*

replacement copy from the original equipment manufacturer. Vol. II, DOC 145, p. 210. The Government attempts to excuse its failure to prove the value of the infringed product on the basis that there is no market for a free copy of Windows OS without a license or product key. There is no market for that product ***because it has no value***. The Court should not overlook that basic economic principle, which does not relieve the Government of its burden of proof or justify the trial court's erroneous calculation of the value of the infringed product.

The Government also attempts to argue that the free copy of Windows OS without a new license or product key is “visually and functionally equivalent” to a copy of the software with a new license and product key. There are at least three flaws in the Government's argument. *First*, as the Government admits, an inactivated copy of Windows OS “nags” users with constant prompts to enter a product key to activate Windows, which would alert any consumer to the fact that the operating system had not been licensed. *Second*, Microsoft's end-user license agreement expressly provides that an inactivated copy of the operating system ceases to function after the initial 30-day trial period. Vol. I, DOC 145, pp. 128-29. And *third*, despite the Government's argument, the trial court found that at least one version of the operating system (either Windows XP or Windows 7) shuts down after the 30-day trial period. Vol. II, DOC 145, p. 212.

For these reasons, as discussed more fully below, because the Government

failed to meet its burden to prove the value of the infringed product, leading the trial court to erroneously base its Guideline calculation on the value of a *fundamentally different product*, the Court must reverse Lundgren’s sentence.

### **ARGUMENT**

#### **I. THE GOVERNMENT ADMITS IT OFFERED NO EVIDENCE OF THE VALUE OF THE WINDOWS OS WITHOUT A NEW LICENSE AND PRODUCT KEY**

To obfuscate the issues, the Government argues that Lundgren’s appeal “is about a battle of the experts” as to the value of the infringed product Lundgren was convicted of infringing: Windows OS without a license or a product key contained on a Dell reinstallation disc. That is not Lundgren’s argument: Lundgren is not asking this Court to accept the testimony of his expert as evidence of the value of the infringed product. Rather, Lundgren argues that the Government failed to meet its burden to prove the value of the Windows OS without a license and product key and offered no evidence to support that value.<sup>1</sup> Instead, the Government offered evidence of the value of the software with a brand new license and product key, a completely different – and much more valuable – product than what Lundgren pled guilty to infringing. Significantly, The Government offered no evidence from its expert witness at the sentencing, Jonathan McGloin of Microsoft, or any other witness that reinstallation discs with a new license and product key were the same

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<sup>1</sup> The Government did not dispute that it bears the burden to prove the value of the infringed item.

thing as discs without a license and product key or that the two items had the same value.

Indeed, the Government admits it offered no evidence of the value of Windows OS without a license or product key. The Government blames its lack of evidence on the fact that there is no market for copies of Windows OS without a license and product key. The reason there is no market for a copy of Windows OS without a product key is, as the Government admits, that a licensed owner of Windows “can download replacement Microsoft software for free after proving that he or she has a genuine license.” Br. at 51. And of course, as the Government admits, every Dell computer had a COA evidencing a genuine Windows license and product key affixed to it. Br. at 17; Vol. I, DOC 145, p. 47.

Regardless of the reason for the lack of a market for Windows OS without a product key – which was already affixed to every Dell computer – the simple fact is that the Government failed to prove the value of the infringed product, which led the trial court to base its Guideline calculation on the value of a completely different product (*i.e.*, Windows OS *with* a new product key). The value of that product is obviously much greater than the value of free software without a new product key.

Although the Government makes much of the fact that a replacement copy of the Windows OS requires proof of a genuine Microsoft license, the Government

admits that *every* Dell computer manufactured during the relevant time period had a COA evidencing a genuine Microsoft license and product key affixed to the machine; that the Microsoft license is “married” to the computer; and that every owner of a Dell computer was able to obtain a replacement copy of Windows OS using the COA and product key affixed to the computer. Br. at 17, 25 and 51. Given those admissions, it is clear that no market exists for replacement Windows OS because the software can be readily obtained *for free*. Indeed, as the trial court found and as the Government concedes, anyone with a valid Windows license could obtain a *free* reinstallation disc, which included a full version of the Windows OS, from the original equipment manufacturer (Dell in this case) using the Windows COA affixed to each and every computer at issue here. Br. at 51; Vol. II, DOC 145, p. 210.

Faced with the undeniable fact that replacement copies of the Windows OS are easily obtainable for free, the Government has concocted two illogical hypothetical situations to support its argument.

*First*, the Government hypothesizes that Lundgren and his co-defendant, Wolff, intended to sell reinstallation discs to Dell refurbishers, who intended to install a Windows OS on refurbished Dell computers from the reinstallation discs using so-called “unconsumed” product keys. Br. at 18. The Government offered no evidence to support its illogical hypothesis, and undisputed facts completely



undermine it.<sup>2</sup> As the Government concedes, *every* Dell computer during the relevant time period had a genuine Windows COA, including a valid license and product key, affixed to it. Br. at 17. No Dell refurbisher would have ever needed to use an “unconsumed” product key to activate Windows because a *valid product key was affixed to each and every Dell computer*. Refurbishers simply use the existing valid product key to activate Windows on the refurbished Dell computers. No matter how hard the Government tries to argue otherwise, it cannot escape the fact that refurbishers do not need to use any “unconsumed” product key to activate Windows.

Next, the Government hypothesizes that Lundgren intended to sell reinstallation discs to Dell refurbishers, who would use them to install an unlicensed version of Windows OS on a refurbished Dell computer so that the computer had a functioning (but unauthorized) operating system. That hypothesis also makes no sense because every Dell computer at issue here had a genuine Windows COA and valid product key affixed to it.<sup>3</sup>

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<sup>2</sup> There is no dispute that Lundgren and Wolff planned to sell reinstallation discs containing replacement Windows OS to Dell refurbishers. There is also no dispute that during the relevant time period, every Dell computer sold had a COA and product key affixed to the computer. Therefore, during the relevant time period, a Dell refurbisher had a valid Microsoft license and product key for *every* computer it intended to refurbish.

<sup>3</sup> If the Court were to ignore the fact that every computer at issue here had a Windows COA and accept the Government’s hypothesis that some non-Dell computers did not have a valid COA and product key affixed to it, no computer

## **II. THE GOVERNMENT’S EXPERT DID NOT SUPPORT ITS ARGUMENT AND PROVIDED NO BASIS FOR THE DISTRICT COURT TO VALUE THE INFRINGED PRODUCT**

To equate the value of Dell reinstallation discs without a product key to the value of Microsoft installation discs with new licenses and product keys, the Government argues that the unactivated Windows OS installed on a computer from a Dell reinstallation disc had the same functionality as a licensed version of the operating system (*i.e.*, one that has been activated with a valid product key). However, the Government’s expert witness McGloin, admitted that an unactivated copy of Windows XP “could only be used off line without connecting to the internet” after the initial 30-day trial period before the software expired. Vol, I, DOC 145, p. 95. That is not the same functionality at all. Moreover, all three tests done by McGloin do not support the government’s argument. Indeed, McGloin’s tests show that an unlicensed – unactivated – copy of Windows would not be marketable at all.

In his first test, McGloin installed Microsoft Windows XP onto a Compaq Presario computer using one of Lundgren’s discs. He did not enter a product key during the installation process. Thereafter, because McGloin did not enter a product key, Windows repeatedly “nagged” him to enter a product key and warned him that updates would not be installed until a valid product key was

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refurbisher could realistically sell a computer with an unlicensed copy of Windows OS due to functionality restrictions built into the software.

entered. Computers that have not been authorized with a valid product key, which constantly “nag” users for the product key and cannot be updated, are unmarketable. Refurbishers could not sell such computers with only “unauthorized” copies of the Windows OS installed because of the way Windows informs consumers of illegitimacy. In short, Windows OS effectively prevents a Dell refurbisher from selling an unlicensed computer to a consumer as that consumer would instantly recognize (via the “nagging” prompts) that the OS on the refurbished computer was unlicensed.<sup>4</sup>

In McGloin’s second test, he installed Windows 7 onto a Lenovo computer using Lundgren’s disc. In that test, McGloin *entered* the product key from the COA attached to the back of the Lenovo computer itself to activate the Windows OS. McGloin used a valid product key from the back of the Lenovo computer to activate the software. The fact that Lundgren’s disc worked after entering a valid product key affixed to the computer is irrelevant as Lundgren’s argument is that Microsoft Windows OS *without* a product key has little or no value.<sup>5</sup> Likewise, the

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<sup>4</sup> Furthermore, McGloin failed to perform the Windows OS test on the Compaq Presario beyond 30 days.

<sup>5</sup> The Government argues that McGloin activated the Widows 7 software with an “unconsumed” product key to suggest that Lundgren’s reinstallation discs could be used for a nefarious purpose. But McGloin used Lundgren’s reinstallation disc for the exact purpose it was intended: to reinstall Windows on a computer that already had a valid Windows license. Microsoft was not harmed at all by that use because McGloin could have obtained a free reinstallation disc from Lenovo or Compaq (the OEMs of the computers McGloin used for his tests), since he already had a

Government's argument that McGloin was not "nagged" to enter the product key again, after he entered it during the installation process, is specious. Once the product key from the back of the Lenovo computer was entered, the Windows software on that computer was fully activated.

In his third test, McGloin again installed Windows 7 using one of Lundgren's reinstallation discs. This time, he did *not* enter a product key when prompted to do so. Thereafter, Windows repeatedly displayed a message that it was not validly activated and repeatedly prompted McGloin to buy a product key online. Vol. I, DOC 145, pp. 101-02. Even though McGloin was able to install the operating system, as a practical matter, the fact that Windows 7 "nagged" him to buy a product key to activate the software would have prevented refurbishers from selling computers with inactivated copies of Windows OS to consumers.

During his testimony at the sentencing, McGloin denied that Windows 7 ceased to operate if no product key was entered during the initial 30-day trial period. Vol. I, DOC 145, p. 96:2-4. He claimed that Windows functioned beyond 30 days<sup>6</sup> but "nagged" users to enter a product key. McGloin did not conduct any

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valid product key on the computers, without buying another copy of Windows with a new product key from Microsoft.

<sup>6</sup> As discussed above, McGloin admitted that an unactivated version of the Windows OS could only be used "off line without connecting to the internet" after the initial 30-day trial period for the software expired. Vol. I, DOC 145, p. 95:11-12.

tests of Windows 7 after the 30-day trial period to substantiate his claim. Moreover, McGloin appears to have been confused about the functionality of Windows 7 after the 30-day trial period. He testified that a “functionality” feature was first built into Windows Vista, which disabled the operating system if no product key was entered within 30 days, implying that Windows 7 was released before Windows Vista and did not include the “functionality feature.” Vol. I, DOC 145, p. 95:24-25. However, Windows Vista was actually released three years *before* Windows 7.<sup>7</sup> The functionality feature, which disabled the operating system after 30 days, was built into the operating system long before Windows 7 was released.

Thus, McGloin’s tests actually support Lundgren’s argument that a replacement copy of Windows OS without a valid product key has little or no value to any computer refurbisher.

### **III. THE REAL FACTS REFUTE THE GOVERNMENT’S ARGUMENT AND THE DISTRICT COURT’S IMPLICIT ASSUMPTION THAT A COPY OF THE WINDOWS OS WITHOUT A PRODUCT KEY HAD THE SAME VALUE AS A COPY WITH A PRODUCT KEY**

Most of the Government’s arguments are built upon an implicit assumption that Dell refurbishers did or would have installed the Windows OS onto each Dell computer from the individual reinstallation discs that Lundgren made. No

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<sup>7</sup> See [https://en.wikipedia.org/wiki/Timeline\\_of\\_Microsoft\\_Windows](https://en.wikipedia.org/wiki/Timeline_of_Microsoft_Windows) (last visited Dec. 13, 2017) (Windows Vista released November 30, 2006; Windows 7 released October 22, 2009).

refurbisher testified that that was the case. That assumption is unwarranted and illogical. No doubt, the Dell refurbishers had their own copy of the Windows OS – in effect, a “master” copy – which they could have used to install the software on refurbished Dell computers using the product key that the Government admits was affixed to each and every Dell computer without opening individual reinstallation discs to do so. Obviously, the refurbishers were able to install the Windows OS on the computers without actually receiving any reinstallation discs from Lundgren or his co-defendant, Wolff.

Building upon that assumption, the Government argues that Lundgren’s discs deprived Microsoft of sales of genuine copies of the software. That argument is nonsense. As the District Court found, and as the Government concedes, anyone with a valid Windows license could obtain a *free* reinstallation disc from the original equipment manufacturer (in this case, Dell). Every Dell computer in this case had a COA evidencing a valid Windows license affixed to it. Thus, even if the Court were to accept the Government’s assumption that refurbishers intended to install the Windows OS from the individual reinstallation discs rather than their own “master” copy of the software, they would not have purchased any copies of the software from Microsoft. Rather, they would have obtained free copies of the reinstallation discs – which included full copies of the Windows OS – from Dell using the Dell service tag for each individual computer. The refurbishers would

have been inconvenienced by having to request individual reinstallation discs for each computer, and Dell would have been inconvenienced by having to supply those free discs to the refurbishers. In reality, what Lundgren did simply allowed the refurbishers to avoid that inconvenience, and the true value of the infringed product – if it had any value at all – was the nominal value of providing that convenience to the refurbishers.

The Government also argues that refurbishers often used “unconsumed” product keys from one computer to activate Windows OS on *another* computer. Br. at 46. That argument is completely irrelevant here. As the Government concedes, *every Dell computer at issue in this case had a genuine COA – including a valid product key – affixed to it.* Br. at 3. No Dell refurbisher had to use a product key from one computer on another computer in order to activate Windows on any computer at issue here.<sup>8</sup>

More to the point, instead of adopting the Government’s unsubstantiated arguments regarding the assumed value of the Windows OS without a product key, the Court should consider the real facts in deciding whether the infringed product had the same value as a copy of the operating system with a product key. The real facts make it absolutely clear that the District Court miscalculated the value of the

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<sup>8</sup> The Government offered no evidence that any refurbisher tried to use “unconsumed” product keys to change the version of Windows that had been installed on the refurbished Dell computers.

infringed product under the Guidelines.

Most importantly, Microsoft's agreement with Dell, an OEM, required Dell to provide a *free* "recovery solution" to the purchaser of every new computer to be used in the event of a catastrophic malfunction. As the Government admits in its response brief, the recovery solution came in different forms, one of which was a reinstallation disc. Br. at 15. Undoubtedly, many of the used Dell computers to be refurbished came with reinstallation discs. Likewise, some of those computers acquired by Dell refurbishers undoubtedly did not include a reinstallation disc. However, a refurbisher did not need a reinstallation disc to reinstall the Windows OS. A free copy of the operating system was readily and legally obtainable on the internet, and the refurbishers were able to install the free copy of Windows onto all of the refurbished computers without obtaining reinstallation discs from Lundgren or Wolff – or from anyone else – by using the COA and product key affixed to every Dell computer at issue in this case and to virtually every other brand-name computer at that time. Vol. I, DOC 145, p. 49.

For that reason, refurbishers needed the reinstallation disc only to provide the "recovery solution" to consumers. As the Government readily admits, Dell refurbishers could obtain *free* replacement reinstallation discs from Dell by providing the service tag or serial number for the computer to Dell. Br. at 51 n.15. Doing so would have been time consuming for the refurbishers. Despite the



Government's argument and the District Court's speculation, Lundgren made the reinstallation discs not for the Dell refurbishers to use to install the Windows OS on the refurbished computers, but rather for the refurbishers to include as a "recovery solution" when they resold the computers. Since the refurbishers already had a COA (including a valid product key) affixed to every refurbished computer, Lundgren made the reinstallation discs simply as a matter of convenience for the refurbishers to avoid having to obtain the discs for free from Dell.

The District Court failed to understand that the Windows OS on Lundgren's reinstallation discs was worth nothing more than the minimal effort the refurbishers would have expended to obtain a free replacement copy of the "recovery solution" from Dell. Since the reinstallation discs were available for free from Dell, the refurbishers would be unwilling to pay any more than a nominal sum to purchase the discs in bulk from anyone to avoid the inconvenience of having to obtain free discs from Dell using the serial number or service tag for each individual computer. The Government offered no evidence of the value of the inconvenience to the refurbishers, just as it offered no evidence of the value of the Windows OS without a product key.

Because the Government utterly failed to meet its burden to prove the value of the infringed product or what refurbishers would have paid to avoid the inconvenience of having to obtain free replacement reinstallation discs from Dell,

the District Court clearly erred and had no basis to compute the value of the infringed product under the Guidelines. For that reason, the Court must reverse Lundgren's sentence.

**CONCLUSION**

For all the foregoing reasons, Lundgren respectfully requests that this Court vacate the sentence imposed by the District Court and remand this case back to the District Court for further proceedings.

Dated: January 2, 2018

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionally spaced typeface using Microsoft Word in a 14-point font size and Times New Roman type style and contains exactly 3,599 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

Dated: January 2, 2018

s/ Randall S. Newman

Randall S. Newman

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15th day of December 2017, the foregoing Brief of Defendant-Appellant Clifford Eric Lundgren was served on all counsel of record by CM/ECF and seven copies of the same were mailed to the Clerk of the Court via Federal Express overnight delivery.

By: s/ Randall S. Newman