IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 21-cv-02163-KLM

DARKOWL, LLC,

Plaintiff,

vs.

ARKOWL, LLC, et al.

Defendants.

Proceedings before KRISTEN L. MIX, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 1:27 p.m., May 15, 2023, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED. . .

APPEARANCES

JEREMY BUXBAUM, THOMAS HOLT, JR., and SABRINA DANIELSON, Attorneys at Law, appearing for the Plaintiff.

MICHAEL FRASIER, Attorney at Law, appearing for the Defendant.

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P R O C E E D I N G S

(Whereupon, the within electronically recorded proceedings are herein transcribed, pursuant to order of counsel.)

THE COURT: Good afternoon. This is 21-cv-02163 DarkOwl, LLC, vs. ArkOwl, LLC. Let's have counsel enter appearances, please, starting with counsel for the plaintiff.

MR. HOLT: Yeah. Thomas Holt of Perkins Coie, Jeremy Buxbaum of Perkins Coie and Sabrina Danielson of Holland & Hart.

THE COURT: Good afternoon.

MR. HOLT: Good afternoon.

MR. FRASIER: Thank you, Your Honor. It's Michael Frasier from Rubric Legal on behalf of the defendant ArkOwl.

THE COURT: Good afternoon.

MR. FRASIER: Good afternoon.

THE COURT: And who is this gentleman sitting with you?

MR. FRASIER: This is Mr. Rob Daline, the owner of ArkOwl.

THE COURT: All right, thank you.

All right, we're here for a hearing on plaintiff's motion to exclude evidence and testimony under Rule 702.

Counsel prepared to proceed for the plaintiff?

MR. HOLT: We are, Your Honor. We were hoping to address a few preliminary matters if we could.

THE COURT: You may. Just let me ask defense counsel if defendant is also prepared to proceed?

MR. FRASIER: Yes, Your Honor.

THE COURT: All right, thank you.

Go ahead with your preliminary matters, Mr. Holt.

MR. HOLT: Yes, Your Honor.

We want to be respectful of the Court's time. We've brought in a number of witnesses for the hearing and I just want to have an idea of how much time we're permitted to present the evidence. We're trying to work with opposing counsel to make sure that, you know, each party has roughly the same amount of time. I'm just trying to figure out how that would --

THE COURT: Well, I have to get you out of here by 6:00 p.m. I do not have this matter set for any further time, besides this afternoon. So that gives you, what, four and a half hours to work with.

We are going to need to take at least one midafternoon break. Nobody should sit for four and a half hours straight.

So, you know, do the best you can to get through the witnesses that you can. I mean, I encourage you to not be repetitive, I think that's very important. If we don't

finish by 5:45 p.m., we're simply going to have to reconvene the hearing at another time.

I mean, I'm certainly -- unless I am satisfied that I've heard what I need to hear, and I can't make that judgment at this point, of course.

So I think we have to play it by ear, but I am very hopeful that we'll be able to wrap this up by 6:00 and I encourage you to do what you can to streamline.

MR. HOLT: Yeah. We're hopeful of that, as well, and I think we should be able to work within those parameters.

THE COURT: Remember, also, you've got to speak into a microphone.

MR. HOLT: Yeah. You want me standing up --

THE COURT: I'm already going deaf and I'll be deafer by the end of this hearing.

MR. HOLT: Is it okay if I sit down so I'm closer to the microphone?

THE COURT: Sitting down is fine or standing at the podium is fine, either, as long as you're speaking into a microphone.

MR. HOLT: Yeah.

With respect to exhibits, we understand that Your Honor would like a hard copy as they're introduced.

THE COURT: I would.

MR. HOLT: Are you okay with the witnesses and opposing counsel just using electronic copies?

THE COURT: Absolutely okay with that. The reason why I request a hard copy is I frequently make notes on exhibits and it's easier for me to do that with my pen in my hand.

MR. HOLT: Okay. With respect to impeachment, you know, would you like the actual deposition transcript introduced as an exhibit? Or is it okay if we just read it into the record?

THE COURT: It's fine to read it into the record.

If there are disputes about what the deposition transcript says -- and I know that sounds incredible, but trust me, it occurs -- then I may ask for the transcript; but, otherwise, it's not necessary.

MR. HOLT: Okay. And then with respect to just opening remarks, we were hoping for just a couple of minutes to kind of frame out for the Court what will be presented today.

THE COURT: I think that's fine. I intended to give both sides a few minutes for opening remarks.

MR. HOLT: Okay.

THE COURT: Anything further from plaintiff or preliminary matters?

MR. HOLT: With respect to confidentiality, Your

Honor, there are some documents that will be introduced today that are AEO. We're, obviously, willing to take guidance from the Court on how you, you know, like to handle that, but we were thinking that, you know, we could have the principals for each party step out when AEO documents from the other side are presented.

THE COURT: Any objection to that from defense counsel?

MR. FRASIER: No, Your Honor.

THE COURT: All right, then that will be fine.

MR. BUXBAUM: Restriction of (indiscernible - away from mic) from the public record.

THE COURT: Well, yeah, I mean, if exhibits are admitted into evidence, there is a notation of that on the electronic record, but there is no copy of the exhibit that's necessarily a part of the record, so you don't need to be concerned about that. I'll make sure that copies of the exhibits that are admitted are maintained in confidence.

MR. BUXBAUM: Is there a transcript (indiscernible - away from mic)?

THE COURT: You have to request a transcript of the hearing. This is not a hearing before our Article III judges, who always have a court reporter present in the courtroom. This is a hearing before a magistrate judge. So bear in mind that if any side wants a transcript, you have

to request a transcript. It will usually take at least a week to obtain the transcript.

Also bear in mind, that I do not have realtime, which is the methodology used in -- by the Article III judges to see the questions and the answers as they are being transcribed by the court reporter while the trial is underway -- hearing is underway. So I may need you to repeat questions for purposes of objections, et cetera.

MR. HOLT: Sounds good, Your Honor.

THE COURT: Is that it?

MR. HOLT: That's all from plaintiff's counsel.

THE COURT: Anything further in a preliminary matter from defense counsel?

MR. FRASIER: Will there be any -- any sort of opportunity to provide a brief closing argument at the end of the hearing?

THE COURT: I hope so. It depends on time.

MR. FRASIER: Sure.

THE COURT: And we can revisit that at the conclusion of the day. If we've done everything but closings and you still want to give a closing, we can talk about maybe a possibility of submitting a closing in writing, for example. So let's hold that thought and talk about it later.

MR. FRASIER: Okay, thank you.

THE COURT: You're welcome.

MR. FRASIER: That's all I have.

THE COURT: All right, fair enough.

I've already, of course, received a signal from one of my hearing aids that battery has gone out because that's what always happens the moment that I step on the bench, so give me a moment to take care of that and then we'll get started.

MR. HOLT: Thank you.

(Pause in proceedings.)

THE COURT: In ten minutes the next one -- the other one will go. All right, thank you.

Plaintiff's counsel, you may begin.

MR. HOLT: Good afternoon, Your Honor.

We appreciate your time today and the opportunity to present additional evidence on DarkOwl's pending motion to exclude Mr. Kegan's (ph) survey.

Your order requests that the parties present evidence on two key issues. One, whether the parties are competitors; and, two, whether Mr. Kegan's survey captured the proper universe of respondents.

DarkOwl intends to call first Robert Daline, the CEO and founder of ArkOwl as a fact witness, as well as Mark Turnage, who is the CEO and co-founder of DarkOwl, as well as two experts: Mr. Kegan and then our rebuttal expert Hal

Poret.

On the first key issue the evidence will show that the parties are not direct competitors. In fact, they offer vastly different services for radically different use cases.

DarkOwl, as you will hear, provides its customers access to a massive database of dark web data. The data is not accessible through ordinary Internet search tools like Google. This data is mainly used for criminal activity, that might include such things as credentials circulated on the dark web.

DarkOwl provides this data to sophisticated cyber security professionals, including to national intelligence and law enforcement agencies and select organizations that go through a stringent vetting process. This data is used by DarkOwl's customers for purposes of assessing cyber security risk, enhancing data protection systems, and protecting national security.

THE COURT: Are you saying, Counsel, that the customers of DarkOwl are essentially entirely law enforcement related?

MR. HOLT: No, not entirely. We have a set of customers that have to go through the stringent vetting process before they have access to the dark web data that our client offers.

THE COURT: And what do are those nonlaw

enforcement customers who go through the stringent vetting process do?

MR. HOLT: They're --

THE COURT: They're criminals?

MR. HOLT: No. They're all involved in the cyber security industry.

THE COURT: Okay, thank you.

MR. HOLT: ArkOwl, on the other hand, offers what it advertises as an email and phone verification service. When an online purchase takes place, analysts at the seller will input the customer email and phone number into ArkOwl's search tool and then will receive back in realtime certain data that ArkOwl provides that may assist in determining whether the transaction is fraudulent and should be declined.

ArkOwl generally provides its services to fraud analysts that monitor purchases for their companies. So the parties' services and their target consumers are quite distinct, yet Mr. Kegan's survey was based on the assumption that the parties are direct competitors; i.e., they compete for the same business.

This false assumption resulted in the survey universe, the second key issue today, that is not representative of the purchasers of DarkOwl's services, which both parties agree is the proper universe here.

Mr. Kegan has acknowledged that he did very little to learn about DarkOwl or its services in designing his survey. Again, he believed the parties were direct competitors.

As a result, his screening questions to select the survey universe improperly focused on, first, potential customers of ArkOwl's services; namely, email and phone verification services, services that DarkOwl doesn't provide; or second, fraud prevention services, which is a term so broad and vague that it doesn't assist in targeting potential consumers of DarkOwl's niche services.

ArkOwl contends, nonetheless, that the correct universe was surveyed because ArkOwl and DarkOwl are competitors and thus, the potential customer bases overlap.

While the evidence is clear that the parties aren't competitors, even if there was some overlap, the survey is still fatally flawed because the screening questions did not ensure that the proper universe was actually surveyed, as DarkOwl's expert Mr. Poret will testify.

THE COURT: So let me ask you this, Counsel.

Is it your contention that the determination of whether the parties to the case are direct competitors or not is a determination for the Court or for a jury?

MR. HOLT: Well, this case is no longer before a

jury; but it's a fact determination that goes to the reliability of the survey, which we think is, you know, appropriate before the Court.

THE COURT: So if it's a fact determination for the Court because the case is no longer before a jury, is it the type of fact determination that should be made prior to the hearing of the entirety of the evidence on the claims?

MR. HOLT: We believe it is, Your Honor.

THE COURT: Why?

MR. HOLT: Well, it will, I think, significantly impact the presentation of evidence at trial and we don't believe that, you know, the Court -- the fact-finder should see a survey that we firmly believe is unreliable and we think it's prejudicial to DarkOwl to have that survey and that related testimony.

THE COURT: Why can't your objections to the survey be better handled simply on cross-examination of the surveyor?

MR. HOLT: Well, I mean, that's certainly one way to handle it; but, again, we believe the survey is so fundamentally flawed, that it shouldn't be presented to the Court.

THE COURT: So your concern is really about whether the Court sees the survey and what the Court makes of the survey? You're not even really worried about a jury

here? You're not worried about, you know, potentially not well educated in the areas of law, lay people misunderstanding what the survey is about? You want to keep it from the Court in its entirety?

MR. HOLT: We do, Your Honor. We believe that it's confusing and misleading for that evidence to be presented to the Court as a part of a trial. We believe it should be excluded in its entirety and, you know, the fact that it would be admitted and there is testimony, whether it's direct or cross, you know, presenting the survey or criticizing it is just -- it's prejudicial to us and we would like to exclude it at this stage so that we can streamline the issues for trial.

THE COURT: You, nevertheless, have a rebuttal expert, right?

MR. HOLT: We do.

THE COURT: And is the rebuttal expert, I presume because he's here today and going to testify, will talk about the propriety of the survey?

MR. HOLT: That is correct, Your Honor.

THE COURT: But your rebuttal expert did not prepare his own survey?

MR. HOLT: He did not.

THE COURT: So you're not prepared to offer an alternate survey to the survey that's been prepared by the

defendant?

MR. HOLT: That is right. And we will explain why that is the case throughout the day.

THE COURT: All right, thank you.

MR. HOLT: So based on the evidence and the parties' briefing, we believe that it's only appropriate for the Court to exclude Mr. Kegan's survey in its entirety.

Thank you, Your Honor.

THE COURT: Thank you.

Opening statement from defense counsel, if any?

MR. FRASIER: I'm sorry?

THE COURT: Opening statement from defense counsel, if any?

MR. FRASIER: Yes, Your Honor.

It occurred to me, though, with one other procedural matter that I don't think we addressed. To streamline matters, I believe we've agreed to only call witnesses once, so they're calling Mr. Daline and then I will just do my direct immediately after that.

THE COURT: Perfectly appropriate. I'm appreciated that you agreed to that. That's fine with the Court.

MR. FRASIER: Thank you, Your Honor.

THE COURT: You're welcome. Whenever you're ready.

MR. FRASIER: Yes.

Mr. Kegan should be allowed to testify at trial and present his findings from the survey that he conducted, because expert style survey is appropriate for the parties in this particular circumstance, and Mr. Kegan's screening questions appropriately captured a representative sample of the relevant universe.

DarkOwl, the plaintiff, would have the Court believe that the question on whether escort survey at all is reliable is if the parties have the exact same type of services, and that's not the law.

The question is whether or not the parties' services are the type of services that are similar and seen by the same types of customers in the same types of places, and there has to be some sort of competitive proximity and overlap.

And you will hear today that there is significant competitive proximity and overlap.

THE COURT: So let me just ask you: Does your client have, as a customer base, law enforcement-related officials?

MR. FRASIER: No, Your Honor. And what you will hear at trial today is that law enforcement -- law enforcement is not DarkOwl's primary focus and it hasn't been since at least 2017. Both parties for the last several

years have focused all of their marketing efforts at cyber security companies, companies that aggregate data from multiple sources and create their own product to serve people like retail establishments, banks, cryptocurrency or law enforcement.

So the primary focus of both entities is to sell data -- relevant data to cyber security companies for those companies to aggregate with other data and then use it in their products or resell it as a part of a more integrated package.

THE COURT: Thank you.

MR. FRASIER: The competitive overlap will also become more evident at trial when we -- when you hear from the witnesses, not only that both parties are focusing the same type of industry, but that both parties are providing email information -- relevant information about email addresses, about domains, about IP addresses that could all be used for the same purposes by the end-users, those users of the cyber security companies.

Moreover, it's not -- the dark net is not as black and white as DarkOwl would have you believe. Both parties are providing data that is breached data, meaning data that where there was some sort of security attack and the data was leaked, probably, on the dark net and then resold. Both parties have that data as part of their products.

THE COURT: Is that all that your client provides, is breached data?

MR. FRASIER: From the dark net?

THE COURT: Any breached data, whether it comes from the dark net or otherwise.

MR. FRASIER: No. The -- no. My client provides -- and you'll hear in his testimony that he provides a myriad -- significant different types of information about email addresses, including like the creation date, the number of times it's appeared in the ArkOwl database, associations with things, like domains that are also in the database or with social media accounts. And it provides information about IP addresses and social media accounts and domains, as I said.

DarkOwl doesn't only provide data from the dark net as well. There is no one accepted definition of the dark net. And you will hear today that although DarkOwl focuses on the dark net, what it describes as the dark net, it also has multiple other sources that is definitely not categorized as the dark net.

But the question isn't where -- where the data comes from. It's what are they doing with it? Who they are selling it to and for what?

And what you'll hear today is that they're doing the same types of things with it. They're marketing it in

the same way. They're marketing personally identifiable information to be sold to cyber security companies for them to use in things like fraud prevention.

You'll also hear that DarkOwl has targeted -- has identified, targeted, and directly solicited multiple of ArkOwl customers offering this PII data service. So there is -- this is more than just speculation. There is actual evidence that they have targeted these companies to sell to these companies the same type of information that ArkOwl sells.

The second question, on whether or not the -- the survey appropriately captured the relevant universe, you will hear evidence and testimony today that, in fact, the screening questions did use a funnel approach, to start broad and get narrowed to effectively capture those people who are making decisions about whether or not to hire vendors like ArkOwl and DarkOwl.

You will hear that the -- the sample that was captured has other data, other than the screening questions, including things like the job title, that further cement the question of: Does this sample contain a sufficient number of potential DarkOwl customers?

At the end of the day, this hearing should be -- should be taking place at a trial. This is questions of fact and I think both parties have struggled to figure out

how to fit it into a half a day because the significant amount of trial is over the question of to what extent is there competitive overlap between these two parties.

So the Court should deny this motion and let the parties proceed to trial on these issues.

THE COURT: All right, thank you.

All right, let me ask plaintiff to call their first witness, please.

MR. HOLT: Plaintiff calls Robert Daline.

THE COURT: All right, Mr. Daline, if you come forward and stand in front of the witness box and raise your right hand.

ROBERT DALINE,

having been first duly sworn, was examined and testified as follows:

THE WITNESS: Yes.

THE COURT: Please be seated and speak into the microphone.

THE WITNESS: Okay.

DIRECT EXAMINATION

BY MR. HOLT: :

Q. Good afternoon, Mr. Daline.

A. Good afternoon.

Q. Would you please state and spell your full name for the record.

A. Yes. Robert D. Daline -- Robert David Daline.
Q. And are you currently employed, Mr. Daline?
A. Yes.
Q. By whom?
A. By ArkOwl.
Q. And what is your role there?
A. I am the chief executive officer and co-founder.
Q. And when did you found ArkOwl?
A. With the state of Minnesota, I founded it in 2012.
Q. Okay. Would it be fair to characterize ArkOwl as an identity and verification service provider?
A. Yes.
Q. And is personal identifiable information verification ArkOwl's main focus?
A. And validation, yes.
Q. I understand that the term "PII" is used as an acronym in the industry for the term "personal identifiable information." Are you okay with me using PII throughout today's hearing?
A. As an acronym, yes.
Q. What type of PII does ArkOwl help its customers verify?
A. The email address, the phone number, a user's IP address, or even their physical address.
Q. Anything else?

A. We added a name match recently, so a name. And that's -- that's only the inputs.

Q. Right, right, right.

When you say "name match," can you explain to me what you're referring to there?

A. If a company inputs a full name, like Robert Daline, we'll say whether there was a match in our database or the databases that we check.

Q. Okay. And up until last year, was ArkOwl's focus on providing email and phone verification?

A. Up until last year, the only inputs were email, address, and phone number.

Q. Okay.

MR. HOLT: I would like to introduce into evidence as Exhibit 1 a printout from ArkOwl's website. Your Honor, may I approach the bench?

THE COURT: You may.

Q. (By Mr. Holt) Can you see the exhibit on your screen, Mr. Daline?

A. I can, yes.

Q. Do you recognize?

A. Yes.

Q. And what is this?

A. This is our -- our home page for our company website.

Q. And is this what it looks like today?
A. I believe so.
Q. I would draw your attention to the time-stamp at the bottom left corner that reflects it was captured today.
Do you see that?
A. Yes.
Q. And do you have any reason to believe that this is not what your home page currently looks like?
A. I do not have any reason to doubt that.
Q. And what is the first most prominent description of ArkOwl's services on its site?
A. Verify email addresses and phone numbers in realtime. I'm assuming you just wanted me to read it out loud, right?
Q. Yeah, that's great. Thank you.
A. Do you want me to keep reading?
Q. No, that's fine. Thank you.
A. No. Okay.
Q. It's my understanding that last year ArkOwl added IP address and physical address verification to its capabilities?
A. Yes.
Q. So is it fair to say that ArkOwl provides a platform that allows its users to use various PII as search inputs?

A. Yes.

Q. And in general terms, what outputs does an ArkOwl customer receive when inputting this information into ArkOwl's platform?

A. Oh, I mean, 81-plus on the website, but I think we're up to maybe -- maybe 150, including if you input a name or an email address, you might get a name back, potentially a location. You might get pictures. You'll also get breached data, whether the -- some of that breached data includes whether it was seen in the dark web. You'll get first and last seen date. You'll get domain data. And that's just for the email address.

For the phone number, you'll get the data breach information there too. You'll get the first seen, you'll get some social checks, you'll get first and last seen. For the IP address, you'll see the same where there is location associated with the IP. You'll also get the ISP network that the IP was on.

Do you want me to keep going, because there is a bunch of these, so . . .

Q. I think that's fine for now.

A. Okay.

Q. I appreciate the comprehensiveness of your response.

As part of the output, does ArkOwl ever provide

any password information to its customers?

A. We provide whether a password was in a breach, like a yes or no, like this data breach included passwords, but we do not include the passwords.

Q. How is that possible, if the search input doesn't include password field?

A. The search input includes the email address or the phone number. And with that, we'll say this email address was found in this data breach, along in this data breach included breaches of passwords, phone numbers, all of those PII data was leaked in the same breach and this email address was found in the breach.

So a user could assume that potentially, the password that they put into, you know, let's say Adobe.com, which was breached, the user name and password for their Adobe account was leaked. So it's just more of a yes-or-no check.

Q. Right. You're not actually providing password information to your customer?

A. No.

Q. And any sort of login credentials being provided by ArkOwl to its customers?

A. From the end-user, the customer, the output of the email address?

Q. Yes.

A. No.

Q. How is ArkOwl's data output then used by ArkOwl's customer.

A. The output is used to help verify as to whether the -- the customer that they're looking at, the entity is looking at, to verify legitimacy or not. So they're looking: Is this a potential fraud threat, or is this a potentially good -- good customer?

Q. And just so I'm clear, the verification itself, is that provided by ArkOwl, or is that provided by ArkOwl's customer?

A. It's provided by the customer. ArkOwl provides the data.

Q. Okay. And these data outputs that ArkOwl provides for these queries, are those essentially realtime?

A. Yes, except for the ArkOwl's database, which -- I mean, that's realtime. We store it, right?

Q. Can you explain that.

A. So ArkOwl stores a log of queries purchased, or a log of queries made by a particular -- by all of our clients collectively, so that we could provide the first seen date. So that's not a realtime check --

Q. Okay.

A. -- out to the Internet; that's a realtime check of our own database.

Q. But with respect to the input and the output that the customer receives, it's essentially realtime; it happens instantly?

A. Correct.

Q. Okay. So let me just set up a short hypothetical here to make sure I understand how the business works and to potentially frame it up cleanly for the Court.

Let's say --

A. I said I would be perfectly honest.

We do have a batch query, that if you query -- if you query like a thousand queries, it will tell you how much time is left until the result. So I'm -- you know, based on your question of realtime, they may have to wait for the batch.

Q. Okay, understood, thanks. So let's get back to that hypothetical.

Let's say that Nike is an ArkOwl customer. I go to buy a pair of shoes on Nike.com and as a part of that process, Nike has me provide my email address, my phone number, credit card information, the usual information that you would be required to provide in a commercial transaction.

Nike could then use ArkOwl's service to obtain information to determine if my email address and phone number that I provided can be verified. And then based on

that information, Nike can then approve or decline my transaction. Is that a fair capture of it?

A. Yes. We would provide the extra data that the customer didn't -- didn't give you.

Q. Okay. And all of this happens within a matter seconds or less?

A. Yes.

Q. Could you give me a rough idea of how many paying customers ArkOwl currently has.

A. Wow.

Q. I don't need specifics, I'm just ballparking it.

A. Yeah, we have -- we have a pay-as-you-go model for some customers, so it's a little harder to keep track of if we made a sale like two years ago. You know, they're still a paying customer, they're using ArkOwl today. So there is a lot of those.

I would say there is --

Q. Are we talking hundreds, thousands?

A. I think hundreds.

Q. Hundreds?

A. Hundreds, yeah.

Q. And of these paying customers, what percentage use ArkOwl's service to assess fraud in connection with online purchase transactions?

A. We -- ArkOwl provides the data. We don't

necessarily -- we're not necessarily sure to what extent the end-user is using the data for. I would assume, you know, if it's -- if it's a retail fraud department, that they would be using it the way I used it when I was in the retail fraud.

Q. But sitting here today, you're not aware of any other uses of ArkOwl's data, apart from -- in connection with an online transaction for paying customers?

A. Yes, I'm not aware.

Q. Okay.

A. Oh, wait.

Q. Yes.

A. We said retailer. We do have banks, cyber security companies, and we do have law enforcement in Europe using ArkOwl.

Q. The law enforcement officers in Europe, or law enforcement agencies in Europe, those are current customers?

A. Correct.

Q. And they're paying customers?

A. Correct.

Q. And you also mentioned a couple of other categories. Could you run through those for me.

A. Cyber security, so like whole fraud platforms.

THE COURT: I'm sorry, say that again. Whole?

THE WITNESS: -- fraud platform.

THE COURT: Oh, okay.

A. So there is -- when it comes to -- you know, when I was in -- I'll relate it to my experience.

When I was in online fraud, we would use a fraud platform to aggregate all the data that we were looking at, to help us review the order to see if it was fraud or if the customer was somebody trying to commit fraud or if they were legitimate, and it would take in all the data.

We used the Accertified platform when I was there, and Accertify would collect all of the orders, collect all of the data, and sometimes just the program itself would make a decision fraud or not. I was an analyst, I was required to look at orders and make the determination fraud or not, given the data that we were looking at, plus the data from any third-party tools.

Q. And this whole fraud platform that you refer to, is that being used in connection with online purchases?

A. Probably. I don't -- I don't know all of their customers.

Q. But you're not specifically aware of any other use?

A. I'm not specifically aware of any other use they would be using it for.

Q. Okay. You mentioned three, I think, when you provided your supplemental response. Could you run through

those again? I just want to make sure I have them correctly.

You mentioned an officer or law enforcement agency in the UK; is that right?

A. Yes.

Q. And can you tell me a little bit about that particular customer.

A. There are several. There are police departments and I'm not -- I'll confess, I've never been to the UK, so I've only seen the accounts come in, gone on the website. The website says, you know, Department of this London, or whatnot, you know, police, and then in their -- in their email footers, they say that they're police too.

I think, you know, there are several of those, but I'm not -- I'm not totally sure -- like, I haven't researched them a whole lot, outside of knowing that they're not -- they're not retail.

Q. Okay. And again, you said that those are paying customers?

A. Correct.

Q. Okay. And do you have any law enforcement customers that are within the U.S.?

A. I do not believe so.

Q. So we have law enforcement in the UK, you mentioned whole fraud platform. What was the third?

A. There was cyber security, banking, so like Thin Tech. Any -- anywhere online where you would take in an email address and need to research that was -- has been kind of more of the base of customers we've been building.

Q. Okay. And in that context, is it your understanding that the data that ArkOwl is providing to its customers is used in connection with the approval or verification on an online purchase transaction?

A. Correct. I believe our service is being used for fraud prevention and cyber security.

Q. In connection with online purchase transactions?

A. In -- in connection with -- with that, or cyber security or the -- the law enforcement in Europe. I don't know how they're using it in that. Maybe they are using it in Europe for online transactions too, I have no clue, because I just see the number of crews that come in.

Q. Understood.

But sitting here today, you're not aware of any customer using ArkOwl's information for anything other than supporting online purchase transactions?

A. I am not aware.

Q. Okay, thank you.

To your knowledge, are any of ArkOwl's paying customers using ArkOwl to assess cyber security risk in connection with insurance underwriting?

A. I am not aware.

Q. Okay. To your knowledge, are any of ArkOwl's paying customers using ArkOwl to assess the risk of a cyber attack?

A. I am not aware.

Q. To your knowledge, are you -- are any of ArkOwl's paying customers using ArkOwl to assess cyber security risk by monitoring ransom ware sites?

A. I am not aware.

Q. To your knowledge, are there any of ArkOwl's paying customers using ArkOwl in connection with national security threats or investigations?

A. I am also not aware.

Q. Roughly speaking, how many queries were run through ArkOwl's platform in 2022?

A. 19 million, roughly.

Q. So thousands of inquiries each day?

A. Yes.

Q. This is a high volume verification business?

A. Yes.

Q. Does ArkOwl use a variety of resources to generate outputs for its customer's inquiries?

A. Like data sources?

Q. Yes.

A. Yes.

Q. Okay. And are these all publicly available sources?

A. Some of them, no.

Q. Could you list for me the ones that are not.

A. The ones that were purchased partners with would be Whois. We use a company for Caller ID. That one is Telnyx. We used Have I Been Pwnd for breach data.

Q. Are these not all publicly available?

A. You need to purchase an account or --

Q. For Whois?

A. For use, yes.

Q. For Whois? You mentioned Whois?

A. For Whois, yes.

I think the information itself is publicly available, but the kind of bringing the data altogether and cleaning it up is what we use Whois for.

Q. So the way ArkOwl provides the data to its customers, you need some sort of account set up with some of these resources, but the information is all publicly available? I could go into Whois, Caller ID or Have I Been Pwnd and --

A. Yes.

Q. -- obtain information? Okay.

Does the --

A. Sorry. Our first and last seen isn't publicly

available, that's only through ArkOwl.

Q. Have I been seen?

A. No. First seen, so it's when ArkOwl first saw it in our -- in our own database.

Q. Okay. And that's simply an indication of when that particular PII first hit ArkOwl's database?

A. Correct.

Q. Okay. Does the output that ArkOwl provides to its customers contain data from the publicly accessible or surface web?

A. Yes.

Q. Are you familiar with the dark web?

A. I'm familiar with the term, but not familiar with using it.

Q. Okay. And in your own terms, like how would you describe the dark web?

A. The dark web is not the -- the Google and kind of the stuff that's -- you could readily go to maybe on your phone with a browser, I suppose. You know, an expert on dark web probably could go with their browser on their phone, but I'm not an expert in the dark web.

Q. Okay, but when I refer to the "dark web," you know generally what I'm referring to?

A. I know it's a place where you have companies -- you know, if you hear of breaches in the news, you also hear

it was leaked in the dark web or this was purchased off the dark web. You know, X amount of drugs were sold -- it seems like dark stuff happens in the dark web.

Q. Indeed, indeed.

Over the course of your career -- I think you answered this question, but I'm going to ask it anyway.

Over the course of your career, have you personally run a search on the dark web?

A. I have not.

Q. Do you know what a dark web search result would look like?

A. Is it something you can just do a search of? I don't --

Q. You're not familiar?

A. I'm not familiar.

Q. And to your knowledge, has anyone at ArkOwl ever searched the dark web?

A. To my knowledge, no.

Q. Does ArkOwl promote any dark web-specific services?

A. Yes, the breach data from Have I Been Pwnd.

Q. So it's your position that breach data and dark web data are synonymous?

A. No. But some of the breaches where it says, You know, this breach contained passwords and all of those PII

data, it will also say where the data -- data breach was leaked.

Q. Okay.

A. And so in the information of it, it will say: This was leaked on the dark web. These are the things that were leaked: Passwords, user names, email addresses, phone numbers.

Q. Okay, understood.

Just so I'm clear, you agree, though, that the dark web and breached data are distinguishable terms? They're not synonymous?

A. That's something that -- yes.

Q. So getting back to my question: Does ArkOwl promote any dark web-specific services? Can you provide --

A. We do not search the dark web.

Q. Okay. Are there any ArkOwl materials -- marketing materials that reference the dark web specifically?

A. If there are, I've forgotten about them.

Q. So let's go back to the breached data that you're referring to.

Does ArkOwl access the dark web to pull information that it provides to customers?

A. No. Like the Whois service, we access another service that does the breach data.

Q. And what is the name of that service?

A. That's Have I Been Pwnd, or Have I Been Pwnd.com.

Q. And what information is Have I Been Pwnd providing to ArkOwl?

A. They provide a reverse email address and a reverse phone number lookup. So where we input an email address or a phone number, and they provide which data breaches that email address has been in, or if the email address has even been in a data breach.

Q. Do you have firsthand knowledge of whether the data ArkOwl obtained from Have I Been Pwnd is actually coming from the dark web?

A. I do not. I -- I wasn't there when they put that data in their database.

Q. But it's your understanding that it's providing information regarding breach data, but you're not sure if it came from the dark web or the surface web or somewhere else?

A. Yeah, it claims it did. But like I said, we use their service because we've never been in the data -- in the dark web.

Q. You mentioned that Have I Been Pwnd represents that it's pulling information from the dark web. Where does it represent that?

A. It represents the -- when you search an email address in their service, some of the breaches that come up, their individual breaches -- and I'm using this as an

example, because I don't remember which breaches will say that. But let's say like the Adobe.com or the LinkedIn.com breach, it will say, you know, 220 million users were compromised in this breach by LinkedIn and this data was found to be leaked on the dark web and that's how we found out about it, and --

Q. So it's breached data certainly? That's what Have I Been Pwnd is providing, correct? Breached data?

A. Correct.

Q. But the data could be coming from the surface web?

A. If they say it's coming from the dark web, I just trust them. It could come from the surface web. I'm not -- you know, I wasn't there. They could be lying to us.

Q. So when you provide data from Have I Been Pwnd to your customers, is it giving an indication of whether the information was pulled from the dark web?

A. We pass along exactly what Have I Been Pwnd's API passes through to us, and sometimes Have I Been Pwnd's API will say this came from the dark web, so our customers would see that coming from ArkOwl.

Q. Do you recall testifying at your deposition that you don't know if Have I Been Pwnd gets its data from the dark web?

A. I remember that, because it was when I was searching ArkOwl one time after the deposition, I was like,

Oh, they do say it, they say it right here.

So I do remember that's inconsistent with my deposition, because I saw it after.

Q. And again, your subsequent review was going into the Have I Been Pwnd website and analyzing the information that it's providing to ArkOwl?

A. Yeah, we -- when I saw it coming through the API into ArkOwl.

Q. Okay.

A. That was -- that was the only review of saying, Oh, it says it's from the dark web.

Q. Just so I understand, you access Have I Been Pwnd, they generally are providing breached data, some of that breached data is on the surface web. It's your understanding that at least a portion of that data is coming from the dark web, as well?

A. That's what they claim.

Q. Okay. But again, just so I'm clear, ArkOwl itself is not searching the dark web?

A. ArkOwl itself is not searching the dark web.

Q. What companies has ArkOwl gone head-to-head with when selling its PII verification services?

A. We've gone head-to-head with any company that has advertised fraud data solutions. You know, typically, we go head-to-head with those that are providing email address

inputs and outputs for the email address --

Q. Sure.

A. -- in the form of data.

Q. And are those typically PII verification services?

A. Typically, yes.

Q. Okay. Do you recall during your deposition you had testified with regard to a few specific direct competitors?

A. Yes. There are those that we hear about more often when talking with clients.

Q. So Ekata, PIPL, LexisNexis and SEON, would you agree that those --

A. Yep.

Q. -- are those competitors?

A. Yep, those are competitors.

Q. And what about Email Hippo?

A. Email Hippo? I -- I haven't heard of them from a customer, but I've looked at their service and I've thought they look like a competitor.

Q. Okay. And all of these companies that we just ran through, they all provide PII verification services?

A. I haven't tried Email Hippo. I would assume so, based on their website.

Q. To your knowledge, do any of these particular competitors provide dark web database services?

A. SEON might. I don't -- I don't know -- I don't use -- I haven't looked at them, so --

Q. That's fair.

Sitting here today, you're not aware?

A. Yeah, I'm not aware today.

Q. Sitting here today, are you aware of any instances where ArkOwl has lost business to DarkOwl?

A. I'm not aware.

Q. Are you aware of any instances in which DarkOwl has lost business to ArkOwl?

A. Not aware.

Q. Are you aware of any instances in which a customer, or potential customer was deciding between DarkOwl services, on the one hand, and ArkOwl services, on the other?

A. Not that they would tell me, no. I'm not aware.

Q. To your knowledge, have you ever encountered DarkOwl at any industry events?

A. No.

Q. Are you aware of any companies who use DarkOwl services for any type of PII verification?

A. I have an assumption, but --

Q. No firsthand knowledge?

A. I mean, United States Postal Service, when we ran into them at the industry conference, I would assume they

use DarkOwl because they came up to us.

Q. For PII verification?

A. I assumed -- I assumed that, but --

Q. Don't pretend knowledge.

A. It's an assumption, right.

Q. Fair enough. We don't want you speculating.

A. Yep.

Q. Sitting here today, are you aware any of customer or potential customer deciding between these services of ArkOwl and a provider of dark web database services?

A. No, I'm not aware.

MR. HOLT: I have no further questions at this time, Your Honor.

THE COURT: Thank you.

Is there cross-examination, which is really direct examination?

MR. FRASIER: Thank you, Your Honor.

THE COURT: You're welcome.

THE WITNESS: Can you hear me okay?

THE COURT: Yeah, I'm doing just fine. Thank you very much.

THE WITNESS: I was expecting this chair to have wheels and when I got here it --

THE COURT: You're not the first to be fooled by that.

THE WITNESS: Because those had wheels and I get up and I'm like, Oh.

CROSS-EXAMINATION

BY MR. FRASIER:

Q. Good afternoon, Mr. Daline.

A. Good afternoon.

Q. You testified a minute ago that you were working in fraud prevention departments before forming ArkOwl; is that right?

A. That's correct.

Q. Approximately when was that?

A. That was back in 20 -- 2010 and 2011, so a while ago.

Q. What did you do when you were working as a fraud prevention specialist in 2010 and 2011?

A. I would be reviewing online orders. And that was my daily job, was to look at online orders, to look at the data as it came in. It was like a queue and I just take the next one in the queue.

So what happens when you order something online, a lot of times it goes right through because, typically, information verifies or the orders lower dollar, and so the decision for fraud are not is made pretty quickly.

But for bestbuy.com, where I worked first with high dollar Mac Book Pros or tiny technologies that were

high in fraud, a lot of orders made it before physical analysts who would sit down and review whether to let that go out the door or --

Q. What type of information were you looking for to make the determination?

A. The -- the whole thing was whether to -- we were looking for excuses to approve the order. So we're looking for something to tell me that the order is legitimate. You know, do they -- is the billing and shipping address, do they have the same name and do those names verify, and third parties, could they be relatives? You know, is this email address 12 years old? You know, does that -- could that look like legitimate behavior? If it's three seconds old, that really doesn't look like it's legitimate behavior.

But we are -- we are looking for any excuse to make a profit there and to make sure the good customer gets their order.

Q. Approximately how much time did you have to conduct these manual reviews?

A. I believe it was like five to eight minutes.

Q. Per review?

A. Per review.

Q. And how did your work as a fraud prevention specialist lead to ArkOwl?

A. Well, I kept seeing that there was -- we would

have third-party tools for address, we would have third-party tools for, like, a billing name with an address. We had a third-party tool to review the IP address or the device ID.

But when it came to email addresses, a Google search -- and we had like maybe five or eight different tabs open all the time with things that we would just throw email addresses into to say, Give me an excuse that this is a real person at the end of this. You know, is -- is this account registered somewhere? Or is this email address registered somewhere?

Q. So how did that turn into ArkOwl?

A. Well, it turned into ArkOwl because we -- we made ArkOwl as an email input, or we had the idea to have an email input that would just check all of these things that I was already doing as an analyst.

Q. You testified that you launched ArkOwl in approximately 2012; is that right?

A. We launched the website in 2011.

Q. All right.

A. But we launched the company in 2012.

Q. What did the ArkOwl website -- or what did the ArkOwl service look like in 2012?

A. In 2012 the -- we only had one data provider. We only had one data check, which was Yahoo Pulse. So -- and

basically what you do is, you would put in an email address and it had to be -- it had to be a Yahoo.com -- @Yahoo.com. You would plug it in and the output would be name, birthday, email creation, location and gender. And that's -- that was our only feature for, maybe, several months until we added Whois.

Q. And so it was a user interface?

A. A user interface, correct.

Q. Okay.

A. So much like Google, where you just go there and type -- type something in, you would go to ArkOwl and type in an email address.

Q. What types of businesses were ArkOwl's first customers?

A. Well, the very first one was Target, because I was working at Target at the time. And then it was bestbuy.com. And then bestbuy.com, the manager had shared us with the -- the MRC at the time, the Merchant Risk Council. And from that time on, we had a lot -- a lot more users, Apple, Amazon, Orbits. Online retailers were our early -- early days.

Q. Online retailers were your primary customers at the beginning?

A. Correct.

Q. Now, you mentioned somebody sending an email to

MRC?

A. Correct.

Q. When did that happen?

A. Jason Taylor, who was my manager at Best Buy, and then when I went to Target, he shared that around the time when we first started ArkOwl. We first started it in February. Jason had shared this in March.

Q. Of 2012?

A. Of 2012, yes.

Q. Right. And you said MRC is Merchant Risk Council; is that right?

A. Correct.

Q. What kind of companies comprise the Merchant Risk Council members?

A. Online retailers, fraud platforms, fraud software platforms, online banks, the vendors, the data solutions for those online retailers and banks, and fraud platforms.

Q. Are Merchant Risk Council members likely ArkOwl competitors or customers or vendors or what?

A. They could be all of the above. They could be customers, they could be competitors, or they could be vendors.

Q. What unites that Merchant Risk Council members?

A. They probably talk that, you know, there is no competitors in the field. It's just one big fight against

fraud.

Q. Okay. So ArkOwl's first customers were in retail. Did ArkOwl start acquiring customers that were not in retail?

A. Yes. Through -- through this, we started acquiring the -- you know, some fraud platforms: Cyber Source, Signifyd, Cell Secure (ph).

Q. Do you recall approximately when ArkOwl had the three customers you just mentioned?

A. Cyber Source was early on. I don't think Signifyd started until 2014, so I think Signifyd was 2014.

Q. And Cell Secure?

A. Cell Secure was pretty early on too. I think they might have been 2014, 2015.

Q. What is Cyber Source?

A. Cyber Source is an all-around cyber security fraud prevention platform. They take in, much like when we were using Accertified to review the manual, do things manual review, you could use Cyber Source for the same thing. They would take in all the orders, all the data. Cyber Source even can manage whole fraud departments. Instead of having your own fraud department, they can say, Hey, we'll take that under our roof so that you don't even need a fraud department.

Q. What is Signifyd?

A. I believe they do the same thing; they're a fraud platform that will take on the whole -- the whole fraud department or part of it. Whatever part that they need help with, a fraud department might need help with, Signifyd is there to say, We can help with that piece.

Q. So this was about a decade ago that you first acquired these customers. Does ArkOwl still have cyber security companies as customers?

A. Those are our main customers today.

Q. As of today, they're your main customers?

A. Correct.

Q. As of last year, roughly what percentage of ArkOwl's revenue came from the cyber security companies?

A. I believe it was upwards of 80 to 85 percent.

Q. Other than the three you've identified, what other cyber security customers does ArkOwl currently have?

A. We have Apruvd, a company called Getmelo (ph). Those are also fraud prevention platforms. I'm sure there are many, many others there.

Q. How do -- how do these security companies use ArkOwl's data?

A. I believe it's to help them stop fraud on some level. I'm -- I'm not totally -- I'm not totally sure. We just provide the data.

Q. What insight does ArkOwl have as to how its

customers are using ArkOwl's data?

A. We pretty much only have the volume, so the amount of queries performed in a particular day by a cyber security platform.

Q. Did ArkOwl ever make a conscious decision to focus marketing on cyber security companies?

A. Yes. In 2019 -- whenever the first time I went to the MRC was that -- when I went -- when I physically went there -- I think it was 2019 -- I found myself talking more with the other fraud prevention platforms and the other vendors in the space more than I was the retailers.

Q. All right. Let's -- let's jump back to ArkOwl services.

On your direct you described what ArkOwl services look like now, which is very different from what you described in 2012.

At what point did ArkOwl's service change from what you described as -- in 2012?

A. Yeah. I think sometime between 2012 and 2015 or '16, we added a few more social checks, social registrations where you could put in the email address and it would say yes or no to a Facebook, or yes and no to Twitter. We added the Whois domain information at that time.

So Whois is kind of that -- so at ArkOwl.com is the Whois part of the email address, the domain. So that

the Whois researches that to say was this domain created, like two days ago.

And then in 20 -- 2015 or 2016, we -- we massively increased our social checks. We added the breached data, we -- and kind of the main -- the main thing with that was also to launch the API.

Q. What's an API?

A. API is an applications programmable interface. It basically allows systems to connect to each other so that a system could connect to our data -- an analytic system could connect to our data and do machine learning, given our extra data.

Q. In your direct, you talked a little bit about Have I Been Pwnd.com. What -- I believe you testified that it contains both email addresses and phone numbers; is that right?

A. Correct.

Q. Has it always contained both email addresses and phone numbers?

A. No. I believe they added phone numbers last year or this year. It's recent.

Q. All right. And what information does Have I Been Pwnd give ArkOwl?

A. The output is to describe whether an email was in a data breach. So it might -- so if I plugged in my email,

it would say, RDaline@Gmail -- this is stricken from the record, right? No one will have RDaline@Gmail, but RDaline @Gmail has 20 breaches associated with it. And if you click on that in the ArkOwl interface, it will show exactly which breaches those are and we do display that in the API, as well.

So maybe I'm in the Adobe breached or the LinkedIn breached.

Q. How is the information you just described useful to your clients?

A. It's very useful in determining account takeover, whether there is an account takeover.

So the -- kind of the -- the really, like, Holy Grail of email verification is to see if something was created within the last few seconds, while on the flip side, the Holy Grail for the fraudster is getting a highly verified email to place your order with. And the best type of verified email you can get is the one that a customer has already used.

So if you can take a login and a password and sign in to somebody's, you know, Groupon account and place an order with a credit card that's saved in there, that looks really legit. And so you use the breached data to be like, Was this email address seen in any of these breaches? Could the order that I'm looking at be in a possible account

takeover?

Q. You briefly described the Merchant Risk Council. Are you aware of whether any Merchant Risk Council members utilize data from the dark web?

A. I -- I am not. I am not aware.

Q. Are you aware of whether any of the Merchant Risk Council members advertise using dark web data?

A. Oh, the vendors. Yes. SpyCloud is a -- is a member that's using -- or that advertise dark web monitoring. A company called Flashpoint. I saw that they had a dark web in their description. IPQualityScore, which also provides inputs of email address, phone number, IP address, they advertise dark web data.

Q. Do you know what IPQualityScore does?

A. They -- they provide data, as well as fraud scoring, for reverse lookups of IP address, email address and phone number. And I believe they also advertise the Vice ID.

Q. Is IPQualityScore a competitor of ArkOwl?

A. Yes.

Q. How do you know that?

A. Because I've actually demoed their data and I can see that it has an email input. I can put in an email and they advertise that they provide data in return for that email to help with fraud protection, which is what we do.

MR. FRASIER: I would like to offer an exhibit. Should I just resume numbering, Your Honor, so Exhibit 2?

UNIDENTIFIED SPEAKER: Counsel, is your computer plugged into the lectern?

MR. FRASIER: It should -- it says it is.

UNIDENTIFIED SPEAKER: It takes just a second.

MR. FRASIER: May I approach, Your Honor?

THE COURT: You may. Thank you.

MR. FRASIER: Apologies. This was working a minute ago.

Success.

Q. (By Mr. Frasier) Mr. Daline, I am showing you what has been marked as Exhibit 2. Do you recognize it?

A. Yes.

THE COURT: Let me make sure the record reflects counsel can see that on your screen, on your --

MR. HOLT: I can, Your Honor. Thank you.

THE COURT: All right, go ahead.

A. Yes.

Q. (By Mr. Frasier) What is Exhibit 2?

A. This looks like IPQualityScore's description of their features and plans, purchase plans.

Q. Where did this document come from?

A. IPQualityScore's website.

Q. Did you go to IPQualityScore's website?

A. I've been there, yes.
Q. Is that -- did you create this image?
A. I thought you might have. But, yeah, those tabs are all mine, yep.
MR. FRASIER: I offer Exhibit 2.
THE COURT: Any objection to 2?
MR. HOLT: No objection, Your Honor.
THE COURT: All right, Exhibit 2 is received.
(Exhibit 2 admitted.)
MR. FRASIER: I would like to offer one more. May I approach?
THE COURT: You may.
Q. (By Mr. Frasier) I'm showing you what's been marked is Exhibit 3. Do you recognize it?
A. Yes.
Q. What is Exhibit 3?
A. This is -- zoomed in on the page we were just looking at, if you click on the dark data question mark under one of IPQualityScore's plans.
Q. Where did this image come from?
A. IPQualityScore's website.
Q. Did you create this document?
A. I might have taken the screenshot, but I did not create the IPQualityScore's website.
Q. Thank you for that clarification.

MR. FRASIER: I offer Exhibit 3.

THE COURT: Any objection to 3?

MR. HOLT: No objection, Your Honor.

THE COURT: Thank you. 3 is received.

(Exhibit 3 admitted.)

Q. (By Mr. Frasier) And you said IPQualityScore. Do you compete with IPQualityScore?

A. Yes.

Q. What is ArkOwl's relationship with the company Socure?

A. Socure is a client of ArkOwl's.

Q. What does Socure do?

A. Socure advertises identity verification, but I have -- I have never used it.

Q. Is it a retail company?

A. No.

Q. What kind of company is it?

A. I believe it's a fraud protection identity company.

Q. What is ArkOwl's relationship with Apruvd?

A. Apruvd is a client.

Q. What is Apruvd?

A. Apruvd is a fraud prevention platform and they advertise -- they advertise their retailers, saying that they would like to see their canceled orders, because they

think they can approve a few, and Apruvd gets a cut of what they approved of the canceled orders.

Q. How long has Apruvd been an ArkOwl customer?

A. I believe so since 2017 or 2018.

Q. What is ArkOwl's relationship with Accertify?

A. Accertify is like a gateway to potential retailers and banks to provide data through them. They are a fraud platform.

Q. And what's ArkOwl's relationship?

A. We can provide data through them to whatever -- whoever their customers are.

Q. What is the company NICE Actimize?

A. It is similar to Accertify where it's a fraud platform and their focus is more on banks and -- and tech companies.

Q. And what's ArkOwl's relationship with NICE Actimize?

A. It's similar to Accertify in the fact that we would provide data to their customers through them.

Q. You testified that ArkOwl added phone number, IP and postal data; is that -- is that right?

A. That's correct.

Q. What phone number data does ArkOwl offer?

A. ArkOwl offers the breached data for phone numbers, caller ID, the phone carrier, whether it's like T-Mobile or

AT&T, information about the area code, saying, This area code is connected to this region. We also provide social checks, which provide back -- in some cases, names and pictures and birthdays.

Q. What IP data does ArkOwl provide?

A. ArkOwl provides location, geo location of an IP address, the ISP, which is kind of like the carrier for a phone number. And we also provide first seen/last seen from our own database for all of those data points -- or those data inputs, sorry.

Q. Are you familiar with the website about-fraud.com?

A. Yes.

Q. What is about-fraud.com?

A. About-fraud.com is a compilation and a collection of vendors in the fraud industry.

MR. FRASIER: May I approach, Your Honor?

THE COURT: You may.

MR. FRASIER: There we go, all right.

Q. (By Mr. Frasier) I am now showing you what's been marked as Exhibit 4. Is it in front of you, Mr. Daline?

A. Yes, I can see it.

Q. What is Exhibit 4?

A. This is the About-Fraud info graphic where they compile the -- all the vendors in the industry that have approached them.

Q. Where did this image come from?

A. The About-Fraud website, but it was potentially emailed to me.

Q. For Exhibit 4?

A. By -- it was -- I think it might have been emailed to me by About-Fraud or it was on their website, one -- one or the other.

MR. FRASIER: I offer Exhibit 4.

THE COURT: Well, first thing is, my version of it is different from what's on the screen.

MR. FRASIER: Oh, that is interesting.

THE COURT: Maybe they've updated it since you've printed this.

MR. FRASIER: Let me find the one that you have.

THE COURT: Mine says July 2020, so it might be a little old.

MR. FRASIER: May I just use paper copies for this exhibit, Your Honor?

THE COURT: Yeah, that would be fine. Any objection? Do you want to offer paper copy of Exhibit 4?

MR. FRASIER: Yes. I offer the Exhibit 4 that I just handed to you.

THE COURT: All right. Any objection to 4?

MR. HOLT: No objection, Your Honor.

THE COURT: 4 is received.

(Exhibit 4 admitted.)

Q. (By Mr. Frasier) Thank you for your patience through that.

Is what we're looking at an exhaustive list of fraud prevention service companies?

A. No, definitely not.

Q. Okay. Where does ArkOwl appear on this graphic?

A. ArkOwl appears under Data Consortium and Verification.

Q. Do you agree with that characterization?

A. I do.

Q. Are the other companies identified in the Data Consortium and Verification box ArkOwl competitors?

A. I would believe so, yes, the ones that I know and have researched and heard of.

Q. Which ones can you identify on the graphic that are your competitors?

A. Email Age, Ekata, potentially Whois XML, Email Hippo, IPQualityScore, People, MaxMind, Telesign, Digital Element.

Q. Are any of the companies in the Data Consortium and Verification box potential customers of ArkOwl?

A. Yes.

Q. Which ones?

A. We've explored Ekata. Email Age has come up to us

before inviting us to try their data and have us provide them with our data. IPQualityScore, potentially.

Q. In your experience in the industry, is it unusual to have companies that are both competitors and potential customers?

A. It's not unusual.

Q. Why not?

A. Because a lot of -- a lot of data softwares and solutions provide different data, and so our data is different than Ekata's data and it's different than Email Age's data. Even though the input of the email is the same, the data -- the data output is different, how we get the data is different.

Q. So you end up competing with them in some context, but potentially selling to them in other context?

A. Yes.

Q. Other than the ones that we just discussed, does ArkOwl have any existing customers on the broader graphic?

A. Yes.

Q. Which ones?

A. Let's see here. Socure, Signifyd, Cyber Source, and then conversations with more than several other entities.

Q. What do you mean, conversations with?

A. Well, they're potential customers, like potential

future -- they're in the pipeline.

Q. Which -- which companies have you specifically had a conversation with in the -- in the graphic you're looking at about becoming a customer of ArkOwl?

A. Ravelin, Frogstreet, Radial -- Radial, IDinsight.

Are we talking companies that we've had discussions with in the past as well?

Q. I'm talking about companies on this graphic that you have specifically discussed selling data to.

A. LexisNexis, Experian, RISK IDENT, TransUnion. They all just kind of blur together after a while.

Q. That's fine. Let's change topics for a minute. I would like to briefly discuss DarkOwl.

When did you first discover DarkOwl?

A. We first discovered DarkOwl in 2019.

Q. Did you ask DarkOwl to change its name in 2019?

A. I did not.

Q. Why?

A. Because I briefly skimmed over their website and thought that they potentially weren't in the same industry or a competitor.

Q. What made you think that they weren't in the same industry or a competitor?

A. Because I didn't see a whole lot on email data. I didn't see the word "email," I didn't see a whole lot of the

word "fraud," "data solution." I hadn't heard about it from any of our customers. I was the one to discover it.

I didn't -- you know, I think I saw kind of more of a, you know, words like "penetration test" or, you know, stuff that was more for -- more for something that was different.

Q. What changed?

A. Apruvd -- Corwin from Apruvd, one of our customers, sent me an email asking if we were affiliated with a company called DarkOwl and was saying -- asking if it was one of our projects and saying that they have been receiving sales emails from them.

MR. FRASIER: Your Honor, may I approach?

THE COURT: You may.

MR. FRASIER: I believe an electronic copy will work this time.

Q. (By Mr. Frasier) You're viewing what's been marked as Exhibit 5. Do you recognize it?

A. Yes.

Q. What is Exhibit 5?

A. This is the email from Corwin that I received.

MR. FRASIER: I would offer Exhibit 5.

THE COURT: Objection to 5?

MR. HOLT: No objection, Your Honor.

Q. (By Mr. Frasier) Who is Corwin Cole?

THE COURT: I'm sorry, 5 is admitted. Go ahead.

(Exhibit 5 admitted.)

MR. FRASIER: Thank you, Your Honor.

Q. (By Mr. Frasier) Who is Corwin Cole?

A. Corwin Cole is a CTO and co-founder of Apruvd.

Q. Okay. What was ArkOwl's relationship with Apruvd when you received this email?

A. They were a client. They were a client that I met with face-to-face already, both Corwin and the CEO.

Q. Is this the email you were referring to that changed your attitude?

A. Yes.

MR. FRASIER: Your Honor, may I approach?

THE COURT: You may.

Q. (By Mr. Frasier) You're now viewing what's been marked as Exhibit 6. Do you recognize Exhibit 6?

A. Yes.

Q. What is Exhibit 6?

A. This was a forward -- forward from Corwin of the sales email that it looks like Evan from Apruvd had received from Taylor Sharp of DarkOwl.

Q. When was this email sent in relation to the Exhibit 5 we were just looking at?

A. I believe it was shortly after.

MR. FRASIER: I would offer Exhibit 6.

THE COURT: Objection to 6?

MR. HOLT: I'm having a hard time seeing it.

MR. FRASIER: I can hand you a paper copy as well.

MR. HOLT: That would be great.

MR. FRASIER: I killed all these trees anyway, I might as well.

MR. HOLT: No objection, Your Honor.

THE COURT: All right, thank you. 6 is received.

(Exhibit 6 admitted.)

Q. (By Mr. Frasier) So you testified that Apruvd was a customer of ArkOwl's at this point; is that right?

A. Yes.

Q. What was ArkOwl providing Apruvd?

A. ArkOwl was providing Apruvd with data output for email addresses and phone numbers.

Q. Okay. Now, I'm going to flip down to the second page of Exhibit 6.

MR. BUXBAUM: Counsel, how much time more time do you have? You're well over your time.

MR. FRASIER: Sorry, this --

THE COURT: Wait a minute.

First of all, it's not your place to just, in the middle of an examination, ask that question. If you want to speak, you speak to the Court.

MR. BUXBAUM: Sorry.

THE COURT: Do you have an estimate for how long you might have?

MR. FRASIER: Maybe five more minutes, Your Honor.

THE COURT: Thank you. And I'm sorry, ask the beginning of the last question again, because I didn't hear it.

MR. FRASIER: Sure. I was just --

THE COURT: You were just getting to --

MR. FRASIER: -- flipping to the second page, yes.

THE COURT: Thank you.

Q. (By Mr. Frasier) Now, is the second -- is the second page of Exhibit 2 the same email chain that we were looking at?

A. I believe so, yes.

Q. From -- from the text of the second page of Exhibit 6, does it appear to be the first contact that DarkOwl had made to Apruvd?

A. Since -- in context, it's saying, "Reaching out to again," I would say no, but that's -- that's an assumption based on -- on the email.

Q. On the third paragraph of the second page of Exhibit 6, the person wrote, quote, DarkOwl provides a comprehensive data environment to monitor when personal identification info, (PII), is posted on behalf of your clients, end quote.

With your experience with Apruvd, are those data services useful to Apruvd?

A. Absolutely.

Q. How?

A. Apruvd only provides services for their clients. They provide fraud prevention services where they need to verify PII information, such as the output of an email address.

Q. In your opinion, could Apruvd have used DarkOwl's data services they're offering in this email for the same purpose as it was using ArkOwl's?

A. The same -- same purpose, yes.

Q. Why do you say that?

A. It may not be to the same effect, because our data is amazing, but for the same purpose, yes. If Apruvd was looking for an email address input to have output to verify whether there was an account takeover or whether the person is a legitimate -- has legitimate information online, whether leaked or on surface web, that is something that Apruvd could have used DarkOwl for that.

Q. In your opinion, do -- does ArkOwl compete with DarkOwl?

A. Yes.

Q. And why?

A. Because of that. Because there is an ability to

input an email address and give output to verify a customer for, whether it's -- whether the customer or client is legitimate or fraudulent.

MR. FRASIER: Thank you. I have no further questions.

THE COURT: Thank you.

Any recross? Recross, redirect?

MR. HOLT: Just a couple of minutes, Your Honor, if I may.

THE COURT: Yeah.

MR. HOLT: Thank you.

THE COURT: And also, Mr. Holt, did you intend to offer Exhibit 1 into evidence?

MR. HOLT: Yes.

THE COURT: I don't think you did. Is there any objection to 1?

MR. FRASIER: No, Your Honor.

THE COURT: All right, 1 is received.

(Exhibit 1 admitted.)

REDIRECT EXAMINATION

BY MR. HOLT:

Q. Mr. Daline, throughout your examination by Mr. Frasier, you repeatedly used the term "cyber security," and I think you said that the vast majority of your clients, I think you said maybe upwards of 85 percent, are in the

cyber security industry?

A. Correct.

Q. Is that right? How would you define the term "cyber security"?

A. I would define cyber security as being a broad umbrella.

Q. Do you believe that every company within the cyber security industry is a competitor of ArkOwl?

A. No.

Q. And did you not testify during my direct examination earlier that you're not personally aware of any of ArkOwl's customers using ArkOwl data for anything other than support in connection with online purchase transactions?

A. Online purchase transactions could be under that cyber security umbrella.

Q. And sitting here today, you're not aware of any other uses of DarkOwl's data by customers within the U.S.?

A. DarkOwl's? No.

Q. ArkOwl's?

A. ArkOwl's? No, not aware.

Q. So no other use cases within the U.S. that you're aware of, other than in support of verifying consumer transactions?

A. Within the U.S., I am not aware.

Q. You repeatedly used the term "fraud prevention" throughout your examination by Mr. Frasier as well. Do you believe that every single company that's involved in fraud prevention is a competitor of ArkOwl?

A. I do not.

Q. And, in fact, as you were going through Exhibit 4, you acknowledged that there are many companies on that exhibit, correct, that are not competitors?

A. Correct.

Q. Is it your position that every company that generates an output to the search of an email address for purposes of verifying the legitimacy of that email is in the cyber security industry?

A. No.

Q. So you discussed a couple of emails that were introduced as exhibits that were sent by Apruvd. Do you recall that?

A. Yes.

Q. And I believe you said that Apruvd is an ArkOwl customer, correct?

A. Yes.

Q. And Mr. Cole -- Corwin Cole, he sent you that email?

A. Correct.

Q. And is Mr. Cole a friend of yours?

A. He's a client, and I consider clients friends.
Q. And to your knowledge, is Apruvd a DarkOwl customer?
A. To my knowledge, I do not believe they are.
Q. And do you have any knowledge that Mr. Cole was confused between DarkOwl and ArkOwl?
A. Outside of that email that we looked at, no.
Q. Have you ever talked to Mr. Cole about being confused between ArkOwl and DarkOwl?
A. Potentially. We had a phone call after that email and I don't really remember how it went.
Q. Okay. And in fact, Apruvd has increased its sales volume with ArkOwl since you received Mr. Cole's email; isn't that true?
A. That's true.
MR. HOLT: Okay. I have no further questions, Your Honor.
THE COURT: All right, thank you. Is there going to be any redirect, re-redirect?
MR. FRASIER: No, Your Honor.
THE COURT: All right, let me follow up with a couple of questions and then counsel, of course, will be permitted to follow up on my questions.
So, Mr. Daline, I'm a little confused about your definition of cyber security and you refer to it as a "broad

umbrella" and I understand from your testimony that you believe that online purchase transactions are under the cyber security umbrella. Is that correct from?

THE WITNESS: Yes.

THE COURT: What else is under the cyber security umbrella, in your view?

THE WITNESS: Well, on- -- online transactions, the piece of it that I worked on, which was for fraud review, was under cyber security. Any online transaction -- just because it's an online transaction doesn't necessarily mean that there is a potential fraud threat or even a fraud review, but when it becomes the fraud department, that's under cyber security umbrella.

THE COURT: What else is under cyber security umbrella, in your definition?

THE WITNESS: In my definition, I believe DarkOwl -- when we first discovered them in 2019, I believed them to also be under cyber security umbrella, like pen testing -- penetration test to make sure, you know, website can't get breached. I believe that is also under cyber security.

I believe any threat that's technology-related could come under that "cyber security" term.

THE COURT: And are services related to penetration testing offered by ArkOwl?

THE WITNESS: No.

THE COURT: Are services related to testing of threats -- technology-related threats offered by ArkOwl?

THE WITNESS: The data to stop threats, yes. So the data to stop the threat of a fraudulent purchase online, yes.

THE COURT: But once a threat is made, further services are not offered by ArkOwl?

THE WITNESS: We do not provide any analytical services or anything past the raw data currently.

THE COURT: Thank you. Those are my questions.

Plaintiff's counsel, do you want to follow up on those at all?

MR. HOLT: No, Your Honor.

THE COURT: Defense counsel?

MR. FRASIER: No, Your Honor.

THE COURT: All right, thank you. Thank you.

Mr. Daline, you may step down.

THE WITNESS: Thank you.

THE COURT: All right, let's go a little bit further before we have a little break here.

Does plaintiff have another witness?

MR. BUXBAUM: We do, Your Honor. Plaintiff would like to call Mr. Mark Turnage, please.

THE COURT: And, Mr. Mark Turnage, I don't think

I've got your name right, but you can tell me what it is when you come up here.

Raise your right hand. What is your name?

THE WITNESS: I'm sorry?

THE COURT: What is your name?

THE WITNESS: Mark -- Mark Turnage.

MARK TURNAGE,

having been first duly sworn, was examined and testified as follows:

THE COURT: And speak into the microphone.

Whenever you're ready, Counsel

DIRECT EXAMINATION

BY MR. BUXBAUM:

Q. Good afternoon, Mr. Turnage. Thank you for your time today.

Would you please provide your full name for the Court.

A. Mark Turnage.

Q. Thank you.

Are you currently employed, Mr. Turnage?

A. I am. I'm the CEO and co-founder of DarkOwl.

Q. And could you give the Court a brief background of your education, starting with college.

A. Yes. I attended the University of Colorado Boulder, studied Arabic at the American University in Cairo,

did a graduate degree in Oxford and graduated from Yale Law School.

Q. Did you found DarkOwl?

A. Yes, I did, with my co-founder.

Q. Who is your co-founder?

A. Russ Cohen, who is sitting in the courtroom today.

Q. Could you please briefly explain the circumstances around the founding of DarkOwl.

A. Yes. In late 2015, early 2016, my co-founder Russ and I bought some software assets out of the bankruptcy of a cyber security services firm here in Denver. We took those assets, which we bought out of the bankruptcy, and formed DarkOwl.

Q. In general -- and we'll get into more detail in a moment. In general, what does DarkOwl do?

A. We monitor the dark net for threats that emerge, you know, from the dark net, and we built a platform that -- that does that.

MR. BUXBAUM: May I approach, Your Honor.

THE COURT: You may.

MR. BUXBAUM: This is an AEO document. I don't think we've dealt with this issue yet, but I do think that we agreed that (indiscernible - away from mic).

THE COURT: All right. So I presume this is an AEO document to which your client, who is on the stand, has

already had access?

MR. BUXBAUM: Yes.

THE COURT: All right. And so you're asking that Mr. Daline step out?

MR. BUXBAUM: Yes.

THE COURT: All right. Mr. Daline, if you would step outside, I'm going to send your counsel out to get you when we're done dealing with this document. Thank you.

MR. BUXBAUM: I can't see it anywhere.

Q. (By Mr. Buxbaum) Mr. Turnage, do you recognize this document?

A. Not -- I can't see what you're looking at, I'm sorry.

Q. Oh, you don't have one either? Is it --

THE COURT: Can we put it on the screens for display or not?

MS. DANIELSON: I'm trying, Your Honor.

THE COURT: You're having trouble?

MS. DANIELSON: I think it's frozen now.

MR. BUXBAUM: If I can approach, I can (indiscernible) from the bench.

THE COURT: Sure. Do you want to sit?

THE WITNESS: I can see it now.

Q. (By Mr. Buxbaum) Would you like a hard copy as well?

A. No. I'm fine, as long as I can see it on the screen.

Q. Do you recognize this document?

A. I do.

Q. And what is it?

A. I'm sorry?

Q. What is it?

A. It's a company deck that we used in 2018.

MR. BUXBAUM: I would like to offer this as exhibit -- where are we?

THE COURT: As Exhibit --

MR. BUXBAUM: 7.

THE COURT: -- 7. Any objection to 7?

MR. FRASIER: No objection.

THE COURT: 7 is received.

(Exhibit 7 admitted.)

MR. BUXBAUM: Thank you, Your Honor.

THE COURT: And I'm sorry, I didn't hear what the witness said. It's a company?

THE WITNESS: Deck

THE COURT: Deck.

THE WITNESS: It's a description of the company.

THE COURT: Flag deck, yeah. Got it.

Q. (By Mr. Buxbaum) If you could please turn to page 2. And just looking over page 2, is it -- is this a fair

overview of what the dark web is?

A. Yes. And in brief, the Internet is described on this slide as that iceberg. And the top of it, which is the surface web is where we all spend our time.

If you look for something on Google and it returns results, it's coming from the surface web. The middle part of the iceberg is the deep web. That's where the bulk of data that's found on Internet is actually stored. To get to that data, you have to have a password. So that would be a bank account, details of company network. This courthouse's own network would be considered part of the deep web because it's -- I cannot access that from my Google search bar.

Below that is the dark net and the dark net is where we focus our efforts. The dark net is considered dark because it requires -- usually requires proprietary browser to get access to. And once you're in the dark net, user identity is obfuscated and traffic is obscured, so it's become a haven for cyber criminals.

MR. BUXBAUM: Your Honor, I'm sorry, just one -- I don't know who these attendees are, but I think it would be appropriate for them to leave as well.

THE COURT: Yeah. So gentlemen, I need to ask who you are, because we're talking about some confidential information. So could you tell us who you are, please.

UNIDENTIFIED SPEAKER: Yes. He is my dad. I'm

just watching him testify (indiscernible).

THE COURT: Okay. Any problem with having your son and his friend here?

THE WITNESS: No problems.

THE COURT: All right, fair enough, thank you. Appreciate that.

MR. BUXBAUM: No problem. Sorry about that.

Q. (By Mr. Buxbaum) Mr. Turnage, just so -- so everyone is clear on terminology, is the dark web and the dark net the same thing?

A. Yes, we use them interchangeably.

Q. We've heard testimony today that the concept of cyber security services is a broad -- a broad concept that encompasses a number of different things.

Would you consider DarkOwl to be in the cyber security industry?

A. Yes.

Q. And just broadly, can you tell us what different types of businesses would be in the cyber security industry.

A. Yeah. It's an incredibly broad term, "the cyber security industry."

I mean, the cyber security industry incorporates everything from protecting the data that's on your cell phone to protecting the data that's on your company network, the courthouse. And it can include the LED lights in room

can have cameras in them. Monitoring those for abuse as part of the cyber security industry.

Monitoring threats among hackers is part of the cyber security industry. Performing tests and services on companies to see if they have exposure is part of the services industry.

My -- I believe there are something like 10,000 to 14,000 cyber security companies around the world and the diversity of services and technologies they offer is immense.

Q. Is it fair to say that some of those companies compete with each other and some do not?

A. I think that's fair.

MR. BUXBAUM: We can take that exhibit down now and bring Mr. Daline back in.

THE COURT: Thank you. And would you mind, Counsel, getting Mr. Daline? Thank you. You're closer to the door, so . . .

MS. DANIELSON: Yes.

THE COURT: You may. All right, go ahead.

MR. BUXBAUM: May I approach?

THE COURT: You may.

Q. (By Mr. Buxbaum) Show you a document that hopefully will be marked as Exhibit 8.

Go ahead and put that up, if you can. Is it

frozen again?

MS. DANIELSON: I apologize, Your Honor. Plaintiff (indiscernible).

THE COURT: Are you seeing it?

MR. BUXBAUM: I see it.

THE WITNESS: I can see it on my screen.

MS. DANIELSON: And then, Your Honor, on the right it, should say (indiscernible - away from mic).

THE COURT: I'm educable, amazing. All right, I think we've got it.

Thank you.

Q. (By Mr. Buxbaum) This is a document that was marked in discovery as DarkOwl 004368. Do you recognize this document, Mr. Turnage?

A. I do.

Q. What is it?

A. It's a page from our website talking about the use cases for the dark net data that we collect.

Q. And where it lists seven use cases, is that a fair representation of the core ways in which customers utilize DarkOwl's services?

A. It is.

Q. Let's walk through each of these use cases briefly.

MR. BUXBAUM: Can I offer that as Exhibit 8, Your

Honor?

THE COURT: Any objection to 8?

MR. FRASIER: No, Your Honor.

THE COURT: 8 is received.

(Exhibit 8 admitted.)

MR. BUXBAUM: May I approach?

THE COURT: You may.

MR. BUXBAUM: You can put that up.

MS. DANIELSON: You can just leave it here.

THE COURT: Thank you.

Q. (By Mr. Buxbaum) I am showing you a document that has been marked in discovery as DarkOwl 004376. Do you recognize this document, Mr. Turnage?

A. I do.

Q. And what is it?

A. It's a part of our website discussing the use case of threat intelligence.

MR. BUXBAUM: Okay. I would like to offer this into evidence as Exhibit 9, Your Honor.

THE COURT: Any objection to 9?

MR. FRASIER: No, Your Honor.

THE COURT: Thanks. 9 is received.

(Exhibit 9 admitted.)

Q. (By Mr. Buxbaum) Mr. Turnage, can you please explain what is meant by "threat intelligence" as a use case

for DarkOwl?

A. Yes. A lot of money has been spent in the cyber security industry protecting networks, protecting devices, protecting phones.

Threat intelligence refers to the intelligence of looking outside your company or your organization or your network for threats that are emerging to your organization.

So that can include hacker chatter, talking about attacking company's network. It can incorporate discussions about software vulnerabilities, it can be used to attack a company or an organization to get access to their data. There is a broad variety of uses, but you're looking outside the network for threat data.

Q. And what categories of customers is DarkOwl targeting or used by DarkOwl through this use case?

A. Other threat intelligence providers who would add dark net data to their platform as an enrichment source.

Q. And does this use have any connection to approving a commercial transaction in realtime?

A. No.

MR. BUXBAUM: May I approach, Your Honor.

THE COURT: You may.

Q. (By Mr. Buxbaum) Showing you a -- is it up yet? All right -- a document that was marked in discovery as DarkOwl 004373, do you recognize this document?

A. Yes.

Q. And what is it?

A. It's a page from our website.

MR. BUXBAUM: I would like to offer this into evidence as Exhibit 10, Your Honor.

THE COURT: Any objection to 10?

MR. FRASIER: No, Your Honor.

THE COURT: 10 is received.

(Exhibit 10 admitted.)

Q. (By Mr. Buxbaum) Mr. Turnage, could you please explain what is meant by "third-party risk" as a use case for DarkOwl?

A. Yes. Third-party risk is the means by which a large organization that has many vendors or many contractors assess the risk of those contractors.

And that's important because cyber criminals oftentimes gain access to large organizations, networks, through vendors. I mean, everybody remembers the case of Target that was breached six or seven years ago, the hackers that got into Target and stole tens of millions of credit cards came through their air-conditioning vendor and it wasn't even a main air-conditioner vendor. It was an air-conditioning vendor in a small city that they had one or two stores in, but they had access through to the Target accounting network.

So this is -- there is an entire cyber security industry that's built up to provide companies, like Target, with a cyber risk assessment of all of their contractors and all of their vendors.

Q. What categories of customer is DarkOwl targeting through this use case?

A. The third -- it's called vendor risk or third-party risk companies that provide those risk services.

Q. Does this use have any connection to approving a commercial transaction in realtime?

A. It does not.

MR. BUXBAUM: May I approach, Your Honor.

THE COURT: You may.

MR. BUXBAUM: Put that one up.

Q. (By Mr. Buxbaum) I'm showing you a document that was marked in in discovery as DarkOwl 004361. Do you recognize this document, Mr. Turnage?

A. I do. It's another page from our website.

Q. Okay.

MR. BUXBAUM: I would like to offer this into evidence as Exhibit 11.

THE COURT: Any objection to 11?

MR. FRASIER: No, Your Honor.

THE COURT: 11 is received.

(Exhibit 11 admitted.)

Q. (By Mr. Buxbaum) Mr. Turnage, can you please explain to the Court what is meant by "cyber insurance underwriting" as a use case for DarkOwl?

A. Yes. In -- in the last five to seven years cyber attacks have become so prevalent that most companies today buy cyber insurance policies to cover the costs if they are, in fact, attacked. The problem that the insurance companies have in underwriting those cyber policies is making an assessment of the risk of the actual companies that they're underwriting.

So if two similarly sized banks come in the door, one has spent millions and millions of dollars on hardening their cyber defenses, the other one has not, the cyber companies -- the insurance companies are unable to assess the level of risk.

So an entire sector of the cyber security industry has built up, really, in the last five to seven years where these companies assess cyber risk and then -- and then give that data to the underwriter so they can write the insurance policies.

Q. And what categories of customers is DarkOwl targeting through this case?

A. We supply data to the cyber risk company -- the cyber-insured tech companies that are looking in assessing the risk of the companies for underwriting purposes.

Q. And is there any way you can conceive of a connection between this use and approving a commercial transaction in realtime?

A. No.

MR. BUXBAUM: May I approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Buxbaum) I am now showing you a document that was marked as DarkOwl 004363 in discovery. Do you recognize this document?

A. I do. It's another page from our website.

MR. BUXBAUM: I would like to offer this into evidence as Exhibit 12, Your Honor.

THE COURT: Any objection to 12?

MR. FRASIER: No, Your Honor.

THE COURT: 12 is received.

(Exhibit 12 admitted.)

Q. (By Mr. Buxbaum) Mr. Turnage, can you please explain what is meant by "digital identity protection" as a use case for DarkOwl?

A. Yes. Digital identity refers to your identity, or our identities online and how those can be assessed and whether they can be risk-rated is the use case here.

Q. I notice on the first -- I noticed that the document references PII data. And specifically, it references 8 billion email addresses?

A. That's correct.

Q. Do you see that?

A. That's correct.

Q. Okay. Can you please explain how email addresses are -- for example, are used within this use case.

A. Yes. Email addresses by themselves are uninteresting. And in fact, many email addresses show up in the dark net, for example, on spam lists. Our clients are interested only in email addresses where they have live active passwords associated with them.

Q. And just to be clear, are any of your customers interested in finding out merely the presence or absence of an email address in the dark net?

A. The presence or absence?

Q. Or absence.

A. No. In fact, our system is not built to give them that information.

Q. Are you aware of any customers that are using DarkOwl data under this use case, digital identity protection, for PII verification purposes?

A. For PII verification, no.

Q. What categories of customers is DarkOwl targeting through this use case?

A. This is -- actually, almost all of our customers use -- at some level, use digital identity verification to

control their environment and their network and access to their network. But the only way that you can get access to a network is if you have an email that is associated to an actual password. I can't get -- I cannot get access to your law firm -- law firm's data because I have your email. That's a -- that's a -- it's not a vector for cyber risk.

Q. Does this use have any connection to approving a commercial transaction in realtime?

A. No. And in fact, we can't actually give this data in realtime.

MR. BUXBAUM: May I approach, Your Honor?

THE COURT: You may.

Q. (By Mr. Buxbaum) I'm going to show you a document that was previously marked in discovery as DarkOwl 004366.

Do you recognize this document?

A. I do. It's another page from our website.

MR. BUXBAUM: I would like to offer this into evidence as Exhibit 13.

THE COURT: Any objection to 13?

MR. FRASIER: No, Your Honor.

THE COURT: 13 is received.

(Exhibit 13 admitted.)

Q. (By Mr. Buxbaum) Mr. Turnage, can you please explain what is meant by "fraud protection" as a use case for DarkOwl.

A. Yes. I mean, "fraud" is an enormously broad term, but in the context of the use case for DarkOwl, it's primarily focused on financial fraud.

So account -- bank account information that's present and traded, bought and sold in the dark net, credit card information that is bought and sold in the dark net, other types of information. Increasingly crypto is a major vector of fraud in the dark net.

Q. I notice on this page there is a reference to email addresses, passwords and credit cards, for example.

Can you explain how email addresses and passwords are used within this use case.

A. Well, actually, the more important part of this exhibit is the plain text passwords. That's what our customers are interested in.

So what they want to know is, does -- is Mark Turnage's email alongside a plain text password that is live today and can give somebody access to my bank account at U.S. Bank. That's -- that's the use case here.

Q. Are you aware of any customers that use DarkOwl's fraud protection services as a -- for PII verification purposes for online transactions?

A. No. And it's not set up -- and our system is not set up to do that.

Q. What categories of customers is DarkOwl targeting

through this use case?

A. Other cyber security companies that provide services to financial institutions.

MR. BUXBAUM: May I approach, Your Honor.

THE COURT: You may.

Q. (By Mr. Buxbaum) I am showing you what has been previously marked in discovery as DarkOwl 004030. Do you recognize this document?

A. I do. It's another page from our website.

MR. BUXBAUM: I would like to offer this into evidence as Exhibit 14, Your Honor.

THE COURT: Any objection?

MR. FRASIER: No, Your Honor.

THE COURT: 14 is received.

(Exhibit 14 admitted.)

Q. (By Mr. Buxbaum) Mr. Turnage, can you please explain what is meant by "critical infrastructure" as a use case for DarkOwl.

A. Yes. So critical infrastructure is one of the prime targets for both cyber criminals and for nation-states that are active in the dark net.

In the recent -- in the current run -- Russian Ukraine war, the Russians have targeted, both Ukrainian and western European critical infrastructure with cyber attacks. And so we're talking about power plants, water treatment

systems, lighting systems, street grids, stoplight systems, anything that runs -- any infrastructure that could be attacked by a cyber.

Q. What categories of customers is DarkOwl targeting through this use case?

A. This is governments.

THE COURT: I'm sorry, I missed that. This is --

THE WITNESS: Governments.

Q. (By Mr. Buxbaum) And do you have examples of the types of government agencies that would be a customer or use this as a use case?

A. Yes. Intelligence agencies are the primary customers for this use case, who are trying to monitor what cyber criminals are targeting, how they're targeting it, what software vulnerabilities they're using. Is there chatter among those criminals about the -- and those cyber actors?

And oftentimes, these are private cyber actors acting on behalf of nation-states. The Russians are particularly known for that.

Q. Does this use have any connection to approving a commercial transaction in realtime?

A. I don't believe so, no.

MR. BUXBAUM: May I approach, Your Honor.

THE COURT: You may.

Q. (By Mr. Buxbaum) All right. I am showing you what was marked in discovery as DarkOwl 004370. Do you recognize this document?

A. I do. It's another page from our website.

Q. Okay. And can you please explain what is meant by "national security" as a use case for DarkOwl.

A. Yes. Increasingly, cyber actors and other nation-state adversaries of the United States are active in the dark net. I mentioned it in the context of the critical infrastructural deal -- but critical infrastructure use case. But increasingly, we find national security secrets, discussions that are of import to national security in the dark net.

So last year, we were approached by [redacted], which is [redacted] They invested in our company because [redacted] has a direct need for dark net data for their analyst teams. So that would be a use case here.

Q. Does this use case have any connection to approving a commercial transaction in realtime?

A. No.

MR. BUXBAUM: Your Honor, I would like to offer this into evidence as Exhibit 15.

THE COURT: Any objection to 15?

MR. FRASIER: No, Your Honor.

THE COURT: 15 is received.

(Exhibit 15 admitted.)

Q. (By Mr. Buxbaum) Mr. Turnage, other than the seven use cases that we've looked at that are featured on your website -- or on DarkOwl's website, are there any other core use cases for DarkOwl not included in the seven we just discussed?

A. Well, there is a growing use of cryptocurrency in the dark net. I said that it's a haven for criminal activity. It's the primary means by which criminals conduct business with each other.

So we -- we see a growing use case for monitoring crypto -- use of cryptocurrency in the dark net. So some of our crypto customers, for example, would want to know whether a bitcoin wallet has been used on a child pornography site and is it used to buy or sell. And if it has, then they will not reimburse -- they won't convert any of the crypto in that wallet to dollars, or whatever currency they're trying to concert it for. That's a growing use case that's not outlined on this website.

Q. Okay. For the categories of customers that DarkOwl targets, what industry sectors are they typically from?

A. Sorry, our customers you're referring to?

Q. Yes.

A. Yeah, sorry. 80 percent of our customers come from that broad category called cyber security industries. We don't generally target end-users: banks, retail, health care. Those companies generally are not our customers. We generally target just cyber security -- very sophisticated cyber security customers.

Q. And do you also target customers in sectors of thin tech, though, insurance tech?

A. Yeah. And I consider the insured tech and thin tech companies to fall under that very broad umbrella of cyber security, because the customers we're targeting in those areas are dealing with cyber risks.

Q. And what portion of your customers would make up government or national intelligence agencies?

A. Directly about 20 percent of our customers are government international intelligence and that number is growing. And then indirectly, because the number of the cyber security companies that we provide data to have as customers themselves government. That probably is another 20 to 25 percent of our customers. So overall, 45, 40, 45 percent of our customers.

Q. And at these customers, or prospective specific customers, who at those companies is making purchasing decisions?

A. Almost entirely we deal with the C suite. So

either the CEO, the CFO, the CTO or the chief information security officer. And the reason for that is, the nature of the data that we supply them is so sensitive that we have to be ensured -- we have to be sure that they understand the obligations of dealing with that data. So almost all of our customers are at the C suite level.

Q. And it probably goes without saying, but are DarkOwl purchasers sophisticated?

A. They have to be to use our data.

Q. Are DarkOwl users sophisticated?

A. They have to be to use our data.

Q. Do you consider DarkOwl's business as niche?

A. It's a very small niche under the large cyber security umbrella, yes.

Q. Okay. And how many other companies do you think are out there that do roughly what you do?

A. I can probably name them on one hand.

Q. Okay. We'll come back to that.

Mr. Turnage, is there a vetting process for the customers that DarkOwl takes on?

A. Yes. It's the most painful part of our sales process. We -- we require that all our customers who get access to our data sign quite comprehensive legal documents that prevent the misuse of that data by them or by their staff. So my sales team hates it. They actually get to a

point in the process where then the lawyers get involved and they have to go through that.

We also turn down probably 30 percent of the inbounds that we get from customers. We regularly get inbounds from nation-states that are adversarial to the United States. We don't sell to China, we don't sell to Russia, we don't sell to Iran, we don't sell to North Korea. They either approach us directly or they approach us through shell companies.

Q. And just to be clear, when you talk about being approached by foreign nation-states that may be adversaries of the United States, you're not talking about countries in those companies? You're talking about representatives of the nation-states themselves?

A. Representatives of the nation-states themselves or private actors acting on behalf of those nation-states that we are able to determine.

Q. Mr. Turnage, when did you first hear of ArkOwl?

A. When I received a letter from ArkOwl demanding that we stop using the DarkOwl brand.

Q. When I say the phrase "PII verification services," do you know what that means?

A. Broadly, just from looking at the website of ArkOwl.

Q. And so what is your understanding of PII

verification services?

A. My understanding is that PII verification services in the context of, say, a commercial transaction, looks at a number of data points to allow the merchant to make an assessment of whether or not that's a legitimate transaction or not.

Q. And is it your understanding that ArkOwl performs PII verification services?

A. That's my understanding, yes.

Q. Does DarkOwl consider PII verification a use case?

A. No, and our platform is not built for that.

Q. Why not?

A. I think the prior witness CEO, Mr. Daline, testified that he provides 80 or 100 data points, including things like: When was this email set up? Was it set up five minutes ago? What IP address is this person coming from and so on. We don't have any of that data. That's not our -- we don't have any of that data in our system.

Q. Have you encountered ArkOwl in the marketplace?

A. Never.

Q. Has a customer or potential customer ever suggested and wanted to or intended to use DarkOwl for PII verification services?

A. No. And in fact, I've never had a conversation outside the context of this litigation with anyone else

about ArkOwl. Never heard them mentioned in any context whatsoever by a customer, by a prospect. I've never seen them at a trade show, I've never seen them at a conference. I've never heard at all any publications or speeches or anything that they've done.

Q. Are you aware of any customer of DarkOwl's using DarkOwl data to perform PII verification services?

A. No.

Q. As CEO, are you familiar with DarkOwl's competitors?

A. I'm sorry, say that again.

Q. Are you familiar with DarkOwl's competitors?

A. Yes, I am.

Q. And who do you consider to be DarkOwl's competitors?

A. Our primary competitors are two companies out of the Israel. One is called Cyber 6 Skill, one is called Webbs. Both of them were founded by former Musaad cyber intelligence operative -- officers in Israel; that we compete against a company called Searchlight Cyber based out of the UK. And here in the U.S. we compete against a company called Bluestone Analytics, which is a subsidiary of a very large defense contractor.

Q. And what is the business focus of those companies that you just listed?

A. It's very similar to ours. They provide data to cyber security industry and national intelligence agencies.

Q. And do you believe that any of those companies provide PII verification services to support verification of online commercial transactions?

A. Not all, to my knowledge.

Q. Do you consider ArkOwl to be a correct competitor of DarkOwl?

A. No.

Q. Why not?

A. Not a single DarkOwl customer could get from ArkOwl what they get from us, and not a single ArkOwl customer, as I understand from Mr. Daline's explanation, can get from DarkOwl what they get from ArkOwl.

Q. Okay. Can you explain why you believe that in a little bit more detail?

A. Again, in the case of ArkOwl, ArkOwl has -- apparently has access to a wide range of surface web and other datasets that we don't have access to and don't provide our clients. And in the case of DarkOwl clients are coming -- DarkOwl's clients come to us to get intelligence from the dark net of a wide variety of sorts: hacker chatter, software vulnerabilities that are being sought, bought and sold on the dark net, vulnerabilities that are being discussed amongst hackers as a means to attack the

federal courthouse here in Denver and so on. That is not available, is I understand it, from Mr. Daline's explanation from ArkOwl.

Q. Earlier you heard Mr. Daline testify that some of ArkOwl's direct competitors are Ekata, PIPL, LexisNexis, SEON, Email Hippo and IPQualityScore. Do you consider any of those companies to be competitors of DarkOwl?

A. No. In fact, with the exception much LexisNexis, which I know from my days as a lawyer, as a case -- as a way to pull cases, I haven't really heard of many of those companies, or certainly run into them in the marketplace.

Q. Have you heard of a company called Apruvd?

A. No.

Q. Mr. Turnage, was there a time when DarkOwl utilized a third-party marketing service to send out marketing blasts?

A. Yes. Starting around 2020 we employed -- we wanted to expand the reach of our marketing, so we employed a company that had a team based in the Philippines that did email blasts in an attempt to draw out meetings.

Q. And did DarkOwl approve lists of businesses that the marketing blasts would be sent out to from that third-party agency?

A. No.

Q. Can we please look at the exhibit -- I believe it

was Exhibit 6 that was the email from Mr. Cole to Mr. Daline? How do we -- is it -- Michael, do we have a hard copy?

THE COURT: Yeah, if you need to get that from defense counsel to put it on the screen.

MR. FRASIER: Sure, I can put it on the screen.

THE COURT: That would be great, thank you.

MR. BUXBAUM: I just have a few questions about it.

MS. DANIELSON: Your Honor, may I approach?

THE COURT: You may.

Q. (By Mr. Buxbaum) Do you see that, Mr. Turnage?

A. Yes.

Q. If I could direct your attention to the email toward the bottom part of the page -- I know the print is small, but it says it's from Taylor Sharp to Evan McNiff (ph). Do you see that?

A. Yes, I see it.

Q. Okay. Do you see Taylor Sharp's email address, it says Taylor.Sharp@BD.DarkOwl.com?

A. Yes.

Q. Is that -- is that an email from DarkOwl?

A. It is not. It's from the third-party company that we hired to do marketing at. The BD stands for business development.

Q. Okay. And you were not aware of this email being sent to Apruvd; is that correct?

A. That's correct, and Taylor Sharp was not an employee of ours.

Q. Okay. And you've never heard of Apruvd before?

A. I'm sorry.

Q. And you've never heard of Apruvd before?

A. I've never heard of Apruvd.

Q. And you don't consider Apruvd to be a targeted customer?

A. I don't know enough about them to know whether they would be a targeted customer.

Q. Do you know how many of these types of blast emails would have been sent out through your third-party agent?

A. Many thousands.

Q. Did those generate any business?

A. They did not and we ended up terminating the agency as a result.

MR. BUXBAUM: You can take that down. Thank you, Counsel.

Q. (By Mr. Buxbaum) Mr. Turnage, DarkOwl uses emails as a search input; is that correct?

A. That's correct.

Q. And how long has it been doing that for?

A. Since its inception.
Q. Which was when?
A. I'm sorry?
Q. Which was when?
A. 2016.
Q. Okay. And do you believe there was outward facing marketing regarding that?
A. There was no question, yes.
Q. Okay. What about the fraud protection use case that we talked about a little bit ago; how long has that been something that DarkOwl has utilized and marketed?
A. Since inception.
Q. Which is in 2015?
A. 2015 -- late 2015 or early 2016.
Q. Okay. And would there have been publicly facing marketing regarding that use case?
A. Yes.
MR. BUXBAUM: Thank you, Mr. Turnage. I have no further questions at this time.
THE COURT: Thank you. Counsel, it's quarter to 4:00. Let's take a short break now and you may step down, Mr. Turnage.
And let's reconvene around 4:00 p.m. and see how much progress we can make at that time. We'll begin with cross-examination. Thank you.

(Recess taken from 3:44 p.m. to 4:05 p.m.)

THE COURT: All right. Ready for cross-examination, and -- yes, Mr. -- I hope I don't get your name wrong again. I should probably remember this.

MR. FRASIER: Mr. Daline, we're going to be talking about AEO documents at first, so I'll have you step out.

THE COURT: Mr. Turnage. Mr. Turnage, you may resume the stand. We'll have Mr. Daline leave, because we're going to use a confidential document, and whenever you're ready Mr. Frazier.

MR. FRASIER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. FRASIER: :

Q. Good afternoon, Mr. Turnage.

A. Good afternoon.

Q. We're going to start broad. DarkOwl is a SAS company, right?

A. Yes.

Q. Software as a service?

A. That's correct.

Q. DarkOwl is a data company?

A. That's correct.

Q. DarkOwl has a database that it has accumulated from the dark net, right?

A. Correct, primarily from the dark net.

Q. DarkOwl's products allow its customers to search the database that DarkOwl has accumulated, right?

A. Yes. They can either search the database or they can access to curated data feeds, or structured data feeds of certain types of data.

MR. FRASIER: May I approach, Your Honor?

THE COURT: You may. Thank you.

Q. (By Mr. Frasier) Showing you what has been marked Exhibit 16. This is a -- sorry, I'm going to -- I'm showing you what's been marked Exhibit 16. This is a product training manual; is that right?

A. It looks -- yes, it appears to be so, yes.

Q. I'm going to turn to page 6 of Exhibit 16. Page 6 that I'm showing you right now is a graphic reflecting DarkOwl's existing products and services; is that right?

A. That's correct. There has been one addition since this chart was put together.

Q. So this -- this chart was accurate as of last year?

A. It was accurate as of last year, correct. Accurate as of about two months ago.

Q. So in the graphic, the black cylinder called DarkOwl Collection represents the data that DarkOwl has aggregated?

A. That's correct.

Q. DarkOwl indexes certain data that it collects, right.

A. That's correct.

Q. DarkOwl indexes email addresses?

A. Among other things, yes.

Q. IP addresses?

A. Yes.

Q. Now, in the middle of the graphic on page 6 there is a box with the writing, Extracted IOCs/Structured Data. Do you see that?

A. That's correct, yes.

Q. IOC stands for indicators of compromise?

A. That's correct.

Q. And the data -- excuse me. The box that I just referenced is referencing a subdatabase that DarkOwl maintains?

A. Effectively, yes.

Q. And all the data in the Extracted IOC/Structured Database is data that has been indexed?

A. Has been indexed, yes.

Q. The -- this database, the extracted IOC's database, is available to your customers via API, right?

A. That's correct.

Q. The reason DarkOwl created the separate database

for extracted IOCs is to minimize the amount of noise your customers encounter when running searches; is that right?

A. That's correct. They can get access to the same data through the far left blue box called Vision API Search, but the structured database gives it to them in a more refined structured format.

Q. The structured data set allows users to get relevant information much more quickly, right?

A. Yes.

Q. The blue box underneath the Extracted IOC's Database called Vision API Entity --

A. Yes.

Q. -- do you see that?

A. Yes, I do.

Q. That represents a product of DarkOwl's?

A. Yes. The four -- the four lines under that are four separate products.

Q. Okay. And each of those products allows a DarkOwl customer to search the structure database for the specific item mentioned under vision API entity?

A. Yes, yes. Effectively, yes.

Q. And then the blue box immediately to its right called Vision API Entity Set allows DarkOwl users to search the same structure database for sets of data --

A. Right.

Q. -- as opposed to just one type?

A. Correct.

Q. For example, the DarkOwl user could use the entity Set API Product to search for every email in your database associated with a given domain?

A. Every email and password. It doesn't return just emails.

Q. You can't -- a customer couldn't search a password, right? They could certificate they would search an email?

A. They could search for password as well. We don't return just emails. We don't return a red light or a green light present or absent. We return an email and a password.

Q. I'm asking about input. So in the --

A. Excuse me?

Q. I'm asking about inputs.

A. Inputs.

Q. So a customer using the Vision API Entity Set would input an email domain and an email --

A. Or an email, yes.

Q. And with an entity set it could search both; is that right?

A. No. Well, yes, effectively -- so the difference is, if you search for JohnSmith@gmail, you would search in the left-hand box, just so you're looking for one email. If

you were looking for all gmail accounts, you would search in the right box. That's the input, that's right.

Q. It's your opinion that DarkOwl and ArkOwl are not competitors; is that right?

A. Yes.

Q. Do you believe there is any competitive overlap between DarkOwl and ArkOwl?

A. No.

Q. Now, this document we're looking at is designated as Attorney's Eyes Only. Is there any reason why ArkOwl would receive a competitive advantage from reviewing this document?

A. I'm not sure and I'm not sure how it -- how at what point in the process it got designated as Attorney's Eyes Only.

Q. Do you care if Mr. Daline hears your testimony regarding this exhibit?

A. I don't actually mind if he hears that testimony.

MR. BUXBAUM: No objection here.

THE COURT: You can go get him.

MR. FRASIER: May I.

THE COURT: Sure.

MR. FRASIER: Thank you, Mr. Turnage.

Q. (By Mr. Frasier) Now, when DarkOwl customers use the vision API entity product to run a search for an email

address, that user would get back all the surrounding contextual information in the metadata, right

A. No. It would just get the metadata, the email address and the passwords. It wouldn't get the contextual information.

Q. It would get when DarkOwl -- when that email address was scraped by DarkOwl?

A. I'm sorry, say that again.

Q. It would -- the user would see when the email address was scraped by DarkOwl?

A. Yes, too.

Q. Where it was found on the dark net?

A. Yes.

Q. Whether it was associated with a data breach?

A. In some cases, yes. Not in all cases.

Q. It would identify the specific data breach that that email address was --

A. Not currently.

Q. DarkOwl collects data leaks; is that right?

A. I'm sorry. DarkOwl collects?

Q. Data leaks.

THE COURT: Data links, I think.

Q. (By Mr. Frasier) Data leaks, L-E-A-K-S.

A. Data leaks. Yes, we do collect data leaks.

Q. And a data leak refers to data that a hacker has

extracted from inside a computer network?

A. That's correct.

Q. And then reposted or sold; is that right?

A. Reposted or sold, that's correct.

Q. Primarily on the dark net?

A. Well, our focus is primarily on the dark net, but many data leaks are posted on the surface web as well.

Q. DarkOwl has a specific API that monitors surface websites and dark net sites where ransom ware operators breached data?

A. That's correct. They're called --

Q. We've been using the term "dark net" a lot or "dark web," but there is no one accepted definition of the dark net?

A. Probably not. There is probably not -- no, I've never heard everybody agreeing to a single definition of the dark net.

Q. Some people would consider peer-to-peer networks as part of the dark net?

A. That's correct.

Q. Do you consider peer-to-peer --

A. I do. They require proprietary browser to get to and oftentimes user identities are obfuscated, but it also depends on which peer-to-peer networks you're talking about. So, for example, and I can talk on Apple Messenger. That's

a peer-to-peer network. That's not a dark net.

Q. Now, some people would include any password protected website in their definition of the dark net?

A. No, I've never heard that once in my career.

Q. Now, I asked you about your definition of the dark net in your deposition?

A. Correct.

Q. Would you -- would you consider any website that is password protected as part of the deep net?

A. Generally, yes, it's part of the deep net.

Q. But not --

A. Deep net, but not the dark net.

Q. Okay.

A. So the example I gave earlier I think when there was a slide up here, was my bank account information is password protected. That's part of the deep web, in my definition. It's not part of the dark net.

Q. Does DarkOwl collect data from the deep net?

A. Very rarely. The only data we collect from the deep web would be criminal forums that are password protected.

Q. Now, DarkOwl is focused on selling to companies in the cyber security industry?

A. Broadly, yes.

Q. That's your core target market?

A. Broadly yes, yes.

Q. Many of your customers' aggregate data from a broad variety of services, including the surface web, deep web and dark web?

A. Yes.

Q. They use DarkOwl's data to enrich other data from those other sources?

A. That's correct.

Q. They then aggregate all the data they acquired for their own customer's use?

A. That's correct.

Q. You mentioned --

A. Sorry, not in every case, but many of them do.

Q. Right. You mentioned that your customers have to sign a legal document. That's their end user license?

A. That's correct.

Q. Other than the end user license agreement, DarkOwl has no control over how its customers use the data you provide?

A. Just so we're clear, when you say "control," what do you mean by that?

Q. I would mean, for example, physical control via software that they can search something -- they can use it in one way, but not another way.

A. No. We have some control -- if that's your

definition, we have some control over how they use the data.

Q. What control do you have?

A. If they're using the user interface, we can monitor all their searches, and if -- for example, if I have Citibank and J.P. Morgan as a client and I see J.P. Morgan searching for Citibank data, we cut them off. That's a violation of the EULA. So we have control over that -- in that context.

We also have control by the EULA over whether they use the data that we give them to compete with us directly. So I don't want to find one of my clients showing up at a U.S. government agency and competing for my business.

Q. So you have a noncompete in the EULA --

A. It's not a noncompete. It's a use of data prescription.

Q. And you said EULA, you're referring to the end user license --

A. End user license agreement, excuse me, yes.

Q. I want to make sure we're not talking over each other so that --

A. Yeah, yeah, sorry.

Q. No problem.

You referenced a technical control or a physical control via the user interface. DarkOwl has no way of tracking what your customers are doing via your API

products, though?

A. We do not. We can track volume, what they do, but all of our -- we know what the use cases are, we know what they're using the data for.

Q. Now, DarkOwl has numerous potential use cases for its service?

A. That's correct.

Q. More than just what we looked at earlier this afternoon?

A. Well, I mean, those -- I would say that's a pretty accurate description and that's where we're putting our marketing dollars in terms of use cases.

Q. Those are use cases that you are specifically targeting?

A. Correct.

Q. Now, DarkOwl in the past has had customer prospects ask for things that no other customers of yours were doing?

A. Yes. I mean, some of these use cases came from customers approaching us, including [redacted] use case when [redacted] approached us.

Q. Sure. And there are potential use cases for DarkOwl services that are not currently being utilized by your customers?

A. If there are, would you let me know. I would love

to actually try and monetize those.

Q. In fact, you testified that if you knew about a use case, DarkOwl would be selling or trying to sell into that space?

A. It depends. It depends on whether we have a competitive advantage in that particular use -- you know, if somebody comes in the door and says, Hey, here is a use case, we would love to buy your data for this use case, it's not that simple. It's a question of whether we're competitive in that market, whether it makes sense in that market.

Q. What would you do to determine if it made sense in that market?

A. Well, for example, the supplier that Mr. Daline cited earlier today, Have I Been Pwnd, gives away their data for free. My investors would be quite upset with me if I decided to compete against Have I Been Pwnd? They give their data away for free. They give that information away for free. I don't compete against companies who do that.

And by the way, there are a range of other companies in the industry, including Google, Apple and others, who actually monitor for the presence or absence of an email address in the dark net for free. I don't compete against those companies.

So if somebody comes in and says, I'll give you

$100,000 to buy your data to monitor the presence or absence of an email address in the dark net, ultimately that's not going to be a sustainable client. They're going to figure out pretty quickly they can get that data for free.

Q. But if there were a use case out there that you discovered, you would be trying to sell to it?

A. I would certainly consider if there was a use case out there that I didn't know about.

Q. Now, I asked you about use cases in your deposition. Do you recall that?

A. I do.

Q. I asked you:

"Do you think there are potential use cases for dark web data -- for DarkOwl customers that are not currently being utilized by your customers?"

A. That's correct, I remember that question.

Q. And you answered:

"There may be. I mean, we have had -- in the past we have had customers, prospects walk in the door, and, you know, ask for things that no other customers are using"?

A. Yeah. And the example I give today in the court is [redacted] approached us and they weren't a use case that we were doing.

Q. And then you went on and said:

"But I -- it's hard for me to know what those are

today because if -- if we -- if I knew about them, we would be serving -- we would be selling or trying to sell into those spaces"?

A. Yeah. And my definition of a use case is something that's sustainably compatible -- competitive for us.

MR. FRASIER: Your Honor, may I approach?

THE COURT: You may. Mr. Frazier, did you intend to offer Defendant 16?

MR. FRASIER: Thank you, Your Honor. I offer Exhibit 16.

THE COURT: All right. Any objection to 16, Defendant 16?

MR. BUXBAUM: No objection, Your Honor, sorry.

THE COURT: Thank you. It is received.

(Exhibit 16 admitted.)

Q. (By Mr. Frasier) Mr. Turnage, I am not yet showing you the document because it's currently marked as Attorney's Eyes Only.

A. Okay, sorry. So I'm not supposed to look at this?

Q. No, it's -- you can look at, my client cannot.

A. Oh, sorry. I thought it was -- okay, sorry.

Q. I will not show you documents that you cannot look at, I promise.

MR. FRASIER: Why don't you step out.

MR. DALINE: Can I go to a side where I can't see it or do you want me out?

MR. FRASIER: Why don't you just step out for a minute and we'll see if -- all right.

There we go. We can publish it to the witness.

Q. (By Mr. Frasier) I'm showing you what has been marked Exhibit 17. Do you recognize this document?

A. I do, I do.

Q. This is a document that DarkOwl uses to onboard new employees?

A. We have in the past. I haven't seen this document used in awhile to onboard new employees.

Q. This document is also designated Attorney's Eyes Only. Is this a document that you believe ArkOwl would gain a competitive advantage from?

A. Perhaps. I would like to see what specific and then we can ask Mr. Daline to step back in. I just don't know what specifically you're going to question me about in the document.

Q. Okay. In flipping through this document, the page 2 that I'm showing you now is what DarkOwl will look like in 2015?

A. Correct.

Q. And then the second -- or the third page, rather, is a description of the product, the features and the data

sources that were added in that year?

A. That's correct.

Q. And in each subsequent year DarkOwl added fonts?

A. That's correct.

Q. And each year it added five features as well?

A. Correct.

Q. And it added new data sources?

A. Correct.

Q. And I'm allowed to ask you about each of these.

A. Sure.

Q. On page 16 of 18, this is the same image that we were looking at in the Product Training Manual, right?

A. That's correct.

Q. And you already testified that this graphic doesn't actually represent DarkOwl as of now because you have a new product?

A. We have added one more: Blue box.

Q. It's called Dark Sonar?

A. That's correct.

Q. And the ransom ware API was added just last year as well?

A. That's correct.

Q. In the last year DarkOwl has also added 14 new search templates?

A. A variety. I don't know if the exact number is

14.

Q. They've added several new search blocks this year?

A. That's correct.

Q. In the last year DarkOwl has added hundreds of new channels and servers?

A. That's correct.

Q. Do you know was DarkOwl, this graphic will look for 2024?

A. Broadly similar with some more additions.

Q. Do you know what additions will be in there for 2024?

A. I'm just trying to think what will be in 2024 that you would see. Well, what you would see is a box at the top of the UI, the user interface, which would be a collaboration platform for teams of analysts working together. And that's at the request of [redacted], to build to that collaboration platform so that their analysts can share data among themselves without us being able to see it.

Q. It will also include other data sources that DarkOwl might start using in the next year?

A. Yeah. If we start collecting from new data sources, it would include those as well.

MR. FRASIER: I offer Exhibit 17 --

A. But that's not shown on this -- data sources aren't shown on this slide. It would just go into that

black box at the top.

Q. (By Mr. Frasier) It would show up on -- in the parallel version of what's on --

A. Yeah, if this is updated and used in on boarding, it would show.

MR. FRASIER: I offer Exhibit 17.

THE COURT: Any objection to 17?

MR. HOLT: No objection, Your Honor.

THE COURT: Thank you. 17 is received.

(Exhibit 17 admitted.)

Q. (By Mr. Frasier) Now, DarkOwl did not initially target cyber companies?

A. Originally, when we started the business, we targeted for the first year of our operations, we targeted -- we generally targeted Fortune 500 companies.

Q. Prior to 2017 its go-to market strategy was to sell to banks, retail companies and health care companies?

A. Yeah, for about nine months, up until early 2017.

Q. And then what happened in 2017 was that DarkOwl got approached by a cyber security company asking you to -- to sell to them, right?

A. Yeah. What we found was that the Fortune 500 companies were not sophisticated enough to use our platform and we were approached by a cyber security company, a threat int- -- an [redacted] threat intelligence company asking if we

would license our database to their platform, sell them data.

Q. And so this was a potential customer coming to DarkOwl saying, Hey, we want to use your data?

A. Yes.

Q. And then did that cause DarkOwl to pivot -- to focus to selling to cyber security companies?

A. That's -- well, we pivoted because we recognized that if that cyber security company was coming to us and we were struggling in the marketplace with respect to the sophistication of the end-user, if there was an end-user group out there that was sophisticated enough to use our platform, it was other cyber security companies.

Q. Sure.

A. So we pivoted.

Q. You mentioned this in your direct a little bit.

But it was late 2020 that DarkOwl hired the third-party vendor to outbound sales generation?

A. I believe -- I believe it was 2020. I don't know if it was mid, late, early 2020 timeframe.

Q. Okay. And it was a company called Cieence spelled with a C?

A. C-I-E-E-N-C-E, that's correct.

Q. And you testified that that company sent out thousands of emails per week?

A. It did.

Q. Did DarkOwl receive regular reports from Cieence on their sales efforts?

A. Yeah. What they would send us -- the primary report we received from Cieence was meetings they had set up effectively. They were compensated not for sending out emails, not for doing any of that, they were compensated if they actually set up a meeting with a prospective client.

Q. Okay. And you had no visibility on who they were sending their emails to?

A. No.

Q. You had no --

A. In fact, it was a disaster because they sent emails to our customers asking for meetings, which was a complete disaster.

Q. Now, DarkOwl -- you testified that DarkOwl terminated that contract?

A. We did.

Q. But that wasn't until the fall of 2021, correct?

A. That's right. My -- the woman who was running business development for me went out on maternity leave for a period of six months and we allowed Cieence to continue their efforts; they had minimal success. And then I -- then there was an uproar from our clients were being approached by this third party, so we terminated them when she came

back from maternity leave.

Q. Okay. So you allowed DarkOwl to have this company sending out emails --

A. That's correct.

Q. -- for almost a year?

A. We hired them to do so, yes.

Our belief was that they would get better over time, that they would get more focused on understanding our core markets and our target markets, and they did not.

Q. DarkOwl didn't produce emails from Cieence in this case, did it?

A. Produce? Sorry.

Q. Produce them in the litigation, produce them as evidence in the case.

A. I don't even think we have those emails, actually. We never -- they were a separate stand-alone company. Like the first time that email that you showed here just now, I had never seen that before, or that messaging, either.

Q. So you had no visibility into the emails or messaging from --

A. I did not personally. And somebody in our marketing department may have had, but -- but this is the first time I've seen that email.

Q. Okay. And you don't know whether or not the DarkOwl marketing department was exercising any control over

the messaging.

A. We didn't have a very large marketing department.

Q. Okay. That was in the summer of 2021 that DarkOwl hired a new head of sales?

A. Hired?

Q. A new head of sales.

A. Yes, that's correct.

Q. Sorry, I could --

MR. FRASIER: Do you mind getting that? Pause just for a second while my client gets --

THE WITNESS: Yeah, no problem.

Q. (By Mr. Frasier) All right. So it was the summer of 2021 that DarkOwl hired --

A. Approximately, yes.

Q. -- hired a new head of sales?

A. Yes.

Q. Okay. Now, that head of sales eventually changed DarkOwl strategy to focus largely on inbound sales?

A. He tried to, yes.

Q. DarkOwl -- DarkOwl still kept two full-time sales representatives?

A. That's correct.

Q. And those sales representatives were doing outbound sales?

A. Some outbound and then dealing with inbound sales

as well.

Q. The shift to primary inbound sales generation in 2021 meant DarkOwl focuses its sales efforts on posting content and driving people to DarkOwl's website?

A. It was part of their strategy, yes.

Q. Is that still the strategy today?

A. No.

Q. When did the sales strategy change?

A. We fired them in February of this year and changed the strategy because it wasn't working.

Q. Okay. Changed to what?

A. We have an outbound strategy that is our primary method of lead generation now.

Q. What is the outbound strategy that you currently have?

A. We identify those companies that we want to target and target the CEO and the C suite for meetings to discuss whether our solution can add value to their product.

Q. And that changed just in the last few months?

A. It changed in January or February of this year.

Q. So in -- for a year in 2020, you're mostly doing outbounds?

A. For a --

Q. From fall of -- from late 2020 to fall of 2021 DarkOwl was doing mostly outbound sales generation?

A. No. Inbound. So from the fall of 2021 through 2022, we had -- we added inbound. And the way you generate inbound leads is by digital marketing, Google or other.

So if somebody searches for dark net monitoring on Google, it throws them to our website and we can see them coming in the door through the front door and respond to their needs.

What we found was that the level -- the quality of those leads was very, very poor, because our market is extremely small. It's a very focused market. And we were not generating leads from large sophisticated cyber security companies; we were generating leads from graduate students.

Q. Okay. I have a question about another exhibit that is currently marked Attorney's Eyes Only.

MR. FRASIER: Sorry, Rob. Your Honor, this document is a spreadsheet that I did not print out a digital copy, because you know how they look. May I just display it?

THE COURT: You may.

MR. FRASIER: Actually, I changed my mind, Your Honor. I'm starting with what I have a hard copy of.

This is Exhibit -- may I approach, Your Honor?

THE COURT: You may. And this also Attorney's Eyes Only?

MR. FRASIER: Yeah, it is Attorney's Eyes Only.

Q. (By Mr. Frasier) Mr. Turnage, you're being shown what's been marked Exhibit 17. Do you recognize this document?

A. I do. It's a document that I believe was produced by the VP of sales that we hired.

Q. All right. Now, this document is currently designated as "Attorney's Eyes Only." Is this something that ArkOwl could gain a competitive advantage in reviewing?

A. Again, I would love to see the slide before I answer that question, only because I don't remember exactly what's in this deck.

Q. You said this was prepared by the sales director?

A. The (indiscernible) sales director, correct.

Q. Now, it was his job to assign DarkOwl sales reps to particular leads, right?

A. To?

Q. To particular leads.

A. Yes.

Q. Now, this document that we're looking at, Exhibit 17, was presented to the DarkOwl sales team?

A. My understanding is -- my recollection is, yes, it was.

MR. FRASIER: I would offer Exhibit 17.

THE COURT: 18?

MR. FRASIER: Is it 18?

THE COURT: Yes, it's 18.

MR. FRASIER: Thank you.

THE COURT: Any objection to 18?

MR. HOLT: No objection, Your Honor.

THE COURT: All right, 18 is received.

(Exhibit 18 admitted.)

Q. (By Mr. Frasier) I'm going to flip to page 5 of -- it would be 4 of the paper copy where it says, "Key Prospect High Level."

Do you recognize this page?

A. I do.

Q. Now, on the titles on the right hand in the dark blue are titles -- are titles of the DarkOwl's target market; is that right?

A. In the -- in the views of the VP. He had been with the company about a month and put together, this was his thinking at the time.

Q. Do you agree with these titles being DarkOwl's target market?

A. Broadly, yes. I mean, VP of engineering is not usually a target for us. VP of engineering doesn't have binding authority for the type of product that we do.

Q. But, generally speaking, the dark box contains --

A. Generally speaking, yes.

Q. Okay. I'm flipping down to -- I'm not going to go

to this page. I think we all hated this graphic.

Turning to page 18 of the physical copy, this is, bottom marked DarkOwl 001327.

Now, the head of sales created the list appearing on this page to identify potential customers of DarkOwl, right?

A. That's correct.

Q. The list includes actual DarkOwl customers as well?

A. Yeah, which is -- it showed how little familiarity he had with our business. These are his target lists and it includes people who are already customers of ours.

Q. Now, he also included on this document Email Age?

A. I'm sorry, say that again.

Q. He included on the targets, the addressable markets, a company called Email Age?

A. I don't see it. If you could point it out to me, that would be great.

Q. It's in the Fraud Detection, Dark Net Quantification Box.

A. Yeah.

Q. Right there: He included PIPL?

A. I see it to the left of Email Age.

Q. Included Ekata?

A. I don't see it, but I can take your word for it.

Q. Included GBG Identity Verification Solutions?

A. I assume you're correct that it's on that list somewhere. Oh, there it is, right in the middle.

Q. Good eye.

A. It's -- yeah, small text.

Q. Now, I will show you the spreadsheet I referenced earlier.

MR. FRASIER: I'm sorry, did I offer that as an exhibit? I think I did.

THE COURT: You did not offer -- oh, yes, you offered 18. This has been received.

MR. FRASIER: Yes, thank you.

Q. (By Mr. Frasier) I'm showing you what was marked as a Deposition Exhibit 12.

THE COURT: Are you going to offer this into evidence, Mr. Frasier? If so, we'll call it Exhibit 19 --

MR. FRASIER: Okay.

THE COURT: -- for purposes of today.

MR. FRASIER: Thank you.

Q. (By Mr. Frasier) Now, the document we're looking at, Exhibit 19, is also a document created by the head of sales, correct?

A. That's my recollection, yes.

Q. And you produced in this case the most updated version of this document?

A. My guess is that -- was this -- just so I'm clear, was this separate from the deck you were just showing me?

Q. Yes, this is -- yes.

A. Okay. I haven't seen this document updated since this document was put together by him, so I assume you had the most updated version.

Q. Now, DarkOwl used this document to inform your website redesign in late 2021 or early 2022?

A. To in part, yes.

Q. I'm going to click on the third tab on the bottom called Big Data Targets. On the top line of tab 3 are names of DarkOwl's sales people, correct?

A. That's correct.

Q. Both rows 3 and 4 are DarkOwl sales reps?

A. That's correct.

Q. Now, the person who created this, it was his job to assign sales reps to leads?

A. This was his first attempt, yes.

Q. And this was the most updated version of this document?

A. It was only used for a while and it was realized -- what he did was he collected names from the Internet of these companies. And in many cases, the use case was nonsense; it didn't exist.

Q. But tab 3 is a list of companies -- your head of

sales at the time believed to be DarkOwl potential customers?

A. At the time, yes. He had just joined the company and he compiled this list of companies from the Internet and assigned the salespeople to go after them.

Q. And it included some of DarkOwl's prospects that you were chasing at the time?

A. I can't actually -- I don't know if that was the case or not. Probably. I mean, looking at -- but again, just to put this in context, on this list are clients of ours. So why would you assign companies to salespeople who -- when they're already clients?

Q. Now, C28 in green, [redacted]?

A. Yep.

Q. Subsequently became a DarkOwl customer?

A. That's correct.

Q. All right. Now, in G49, [redacted] also became a DarkOwl customer?

A. That's correct.

Q. And it's your best guess that the names in the parens after the companies indicated the salesperson has been assigned to go after that company?

A. I think that -- my guess -- my best guess is that they were in conversation and he has acknowledged -- they were already in conversation and he acknowledged that

they're already there.

Q. Now, E82 includes PIPL ([redacted]), do you see that?

A. Yep.

Q. Do you know if DarkOwl was engaged in conversations with PIPL when this document was created?

A. I don't know.

Q. But it's included on the --

A. It's included on the list, but I don't know if Jessica was talking to PIPL.

Q. All right. E98, your head of sales identified Signifyd as a potential DarkOwl customer?

A. Yeah. He's on -- it's on his list that he pulled from the Internet.

Q. And in F107, Interceptis (ph) by Accertify, right?

A. I see it on the list, yes.

Q. Now, F8 included the Actimize platform?

A. Sorry, your -- your screen is over your -- it's Actimize, yes. That's on the spreadsheet.

Q. All right. And in F157 included SEON, S-E-O-N?

A. It's right there on the spreadsheet.

Q. F30, he included Sitcon (ph), right?

A. That's correct.

Q. And he included Email Age?

A. That's correct.

Q. Feeds Eye (ph)?

A. That's correct.
Q. Frogster on F98?
A. Yes.
Q. GBG Identity Verification Services on F100?
A. Yes.
Q. Riskified (ph) on F150?
A. Yes.
Q. Sift Science (ph) on F160?
A. Yes. And none of them became customers.
Q. Do you know whether DarkOwl reached out to any of the customers?
A. I don't know if it reached out to them and none of those are customers of ours today.
Q. All right. Now, I just want to make sure that we're -- that you let me finish my question before you start answering your question.
A. Yes.
Q. We're just about done.
MR. FRASIER: I would like to offer Exhibit 19 into evidence.
THE COURT: Any objection to 19?
MR. HOLT: No objection, Your Honor.
THE COURT: Thank you. 19 is received.
(Exhibit 19 admitted.)
MR. FRASIER: Your Honor, I would like to confer

with opposing counsel just for a second on exhibits.

THE COURT: Sure.

(Counsel confer.)

MR. FRASIER: Thank you for your patience. I have a series of one- or two-page documents that we have agreed to combine into one exhibit to streamline things, so it will just take me a second here.

Thank you again for your patience.

Your Honor, may I approach.

THE COURT: You may.

Q. (By Mr. Frasier) All right. You mentioned Cieence, the outbound sales generation company.

A. I believe you mentioned them. But, yes, we've spoken about them.

Q. I'm showing you what's been marked as Exhibit 20. We can walk through it. It's a series of emails. So I'll start with this one marked as Bates ending in 136.

Do you recognize this document?

A. No.

Q. Now, this is an email from Cieence on behalf of DarkOwl; is that right?

A. Apparently so. I mean, everything looks like it's from Cieence too.

Q. Okay. And the document marked -- this is not in order -- 144 is also an email from Cieence on behalf of

DarkOwl?

A. It appears so, yes.

Q. And the document marked 145 is also an email from Cieence on behalf of DarkOwl?

A. It looks so, yes.

Q. And the email 147 is also an email on behalf of DarkOwl from Cieence?

A. Yes, it looks.

Q. And 148 is also an email from Cieence on behalf of DarkOwl?

A. It looks so, yes.

Q. 149 is also an email on behalf of DarkOwl from Cieence?

A. Yes.

Q. 150 is also an email from DarkOwl on behalf --

A. Yes.

Q. -- or Cieence on behalf of DarkOwl?

158 is the same?

A. Yes.

Q. All right, I believe that's all of them. I'm happy to flip through any of these if you have questions about specifics. I am not going to ask specifics about any one email.

But the series of emails that we're looking at now, the Exhibit 20, are all solicitations on behalf -- on

behalf of DarkOwl; is that right?

A. Yes, by Cieence on behalf of DarkOwl.

Q. Now, these were all directed to a company called Signifyd; is that right?

A. They appear to be, yes.

Q. Okay. And Cieence had Taylor Sharp sending emails?

A. Taylor Sharp is I think a made-up name. They were all Philippino employees of Cieence who were doing this. I think they made Anglicized names.

Q. And they contacted multiple different people at signified; is that right?

A. I think their strategy was to -- where they could get emails addresses from -- multiple emails addresses from cap, they would target them.

Q. Now, this document was produced in response to a subpoena to Signifyd, correct?

A. I would have to ask my attorneys that question, but I would assume so.

Q. DarkOwl doesn't have the emails that Cieence sent on behalf of DarkOwl?

A. No, we did not. We never preserve those emails.

Q. Okay. And all of these emails were Cieence trying to solicit business for DarkOwl?

A. Trying to get a meeting.

Q. For business?
A. For business.
Q. Okay.
MR. FRASIER: I have no further questions.
THE COURT: Do you want to offer 20?
MR. FRASIER: Yes, I do. Thank you, Your Honor.
THE COURT: Is there any objection to 20?
MR. HOLT: No objection, Your Honor.
THE COURT: 20 is received.
(Exhibit 20 admitted.)
THE COURT: Is there any redirect?
MR. HOLT: No redirect, Your Honor. And I was hoping that I could have maybe five minutes caucus with opposing counsel. We're running short on time and we have a number of witnesses that have flown in and we would love to pack everything in. We're willing to make some concessions if we can come to some agreements.
THE COURT: You may do that. Let me just tell counsel that to the extent that you need more time for the hearing, just so that everybody isn't freaked out, I do have availability this week, because I had a case of a separate trial on Wednesday that settled this morning. So there is some availability on my calendar on Wednesday. I know that may not be convenient for everybody else, but I wanted to throw that out there.

But if you would like to caucus for five minutes, I'll take a brief recess.

MR. HOLT: That would be great.

THE COURT: Thank you.

(Recess taken from 4:53 p.m. to 5:00 p.m.)

THE COURT: All right. We're back. Are we finished with the examination of Mr. Turnage?

MR. FRASIER: I am.

MR. BUXBAUM: We are, yes.

THE COURT: All right, thank you. Mr. Turnage may step down. He's already stepped down. All right, where do you want to go next? Does plaintiff have any additional witnesses?

MR. BUXBAUM: Your Honor, no additional fact witnesses from the parties, but we're looking at one hour. I guess we have a hard stop at 6:00. We've got three witnesses, and we're trying to come up with a schedule that works. It's going to be pretty tight, but --

THE COURT: And you actually don't have a full hour. I have to have you at the doors at 6:00.

MR. BUXBAUM: Okay.

THE COURT: So, you know, you've got to wrap up in the courtroom by, what, five minutes of or something.

MR. BUXBAUM: So I guess with that in mind, if we can be cooperative and just walk through the best --

MR. FRASIER: Yeah. I mean, I'll try to keep my direct of our expert. So, Your Honor, we have one more fact witness I'm going to call, very short, and then I will do the direct of our expert and they'll do a cross, and then they'll do a direct of their expert and I'll do the cross.

THE COURT: Okay.

MR. FRASIER: I'll try to my limit my directs to ten minutes.

THE COURT: Okay. And I appreciate your reference to collaborate. And I'm not trying to be at all dismissive of those efforts, but I'm telling you, we're not going to get done by ten minutes of 6:00, right? I mean, it's very unlikely we're going to get done by that time.

And I also am a little concerned about rushing you --

MR. FRASIER: Sure.

THE COURT: -- and having you feel like you're not getting a full opportunity to present everything you want to present. So -- and I understand how inconvenient it is for everybody to come back and there is a witness from out of town, et cetera, et cetera, but I think we have to get real about spending some time to reschedule the remainder of this hearing and talk about that for a minute.

I just don't see any way you're going to get done with the amount of witnesses you need to call.

MR. BUXBAUM: Well, Your Honor, we have two expert witnesses that have flown in. Our expert is flying to Houston for a trial immediately after this, so it's going to be really difficult. With that in mind, can I caucus with plaintiff's counsel again and see what we can do.

THE COURT: Yeah, why don't you see if you can reach some agreement. I mean, if you want to, I can have my courtroom deputy look at my calendar and tell you every available block of time that I have between now and the day that I retire, which is August 4, to finish this hearing. You know, we've got a trial date next month so we want to try to get this done prior to the trial, but, you know, if we don't get this done, there is a chance that the trial would have to be moved as well, and I don't want to put you in that position either.

So, you know, if you want to take a minute to look at my schedule and think about my schedule, I think it would be best. I don't think there is -- I cannot keep you in the building after 6:00. That's when the security officers leave, and if I could go until 9:00 p.m., I would go until 9:00 p.m., but I can't do it. So we don't have any choice. And I'm telling you, with the amount of back and forth that you've indicated in the number of witnesses, very little chance we're going to get done by 6:00.

MR. FRASIER: Your Honor, before we caucus would

Your Honor be open to taking -- to taking some testimony by Zoom for the --

THE COURT: Sure. I mean, you know, specially if counsel agree and there is no objection, we could have witnesses testify by video. We did that entirely in COVID times, as you well know. So that's always a possibility as well.

I mean, it also may ease a little bit of your worries about getting this done today. We don't necessarily have to have your experts fly in here from out of town to be in here in person. I understand you prefer that. I prefer that too, but honestly to get this done, that may not believe possible.

So something to think about.

MR. BUXBAUM: Can you give us two minutes.

THE COURT: Yeah, go ahead. I'll sit right where I am, try not to listen.

MR. BUXBAUM: Your Honor, in the Zoom situation that we would still have some people in court or would it be all.

THE COURT: Sure. You can do it however you want. If you've got folks who can be present in the courtroom, that's fine with me.

MR. BUXBAUM: Or, we could do (indiscernible - away from mic).

THE COURT: Yeah, I understand that.

MR. BUXBAUM: We could do it all by Zoom.

THE COURT: You could, you could do it all by Zoom. I mean, it's not ideal, but we can do it that way if we have to. And frankly, when it comes to counsel, I'm very reluctant to allow, for example, plaintiff's counsel to be present in the courtroom and not defense counsel. I mean, if some counsel are not going to be able to be present in person, I'm more likely to say no counsel are present in person.

MR. BUXBAUM: As you may recall, from when we were trying to schedule this, you know, with the experts traveling all around all the time, that's their job, you know, and we've got -- I know my colleague and I have a mediation in Spokane in a couple weeks, and I know you have concerns about getting us all in. We'll see what Tom and Mike talk, discuss.

THE COURT: Yeah. I mean, you know, you can always withdraw the motion.

MR. BUXBAUM: We're not going to withdraw the motion.

THE COURT: I said it in jest.

(Pause in the proceedings.)

MR. HOLT: Your Honor, I think we have a plan to proceed.

THE COURT: All right, what's the plan?

MR. HOLT: We're going to call -- I'm sorry, defendant's counsel is going to call Mr. Cohen, CFO of DarkOwl. It's about a ten-minute examination. I doubt we'll have anything for cross, and then we're going to put our rebuttal expert, Hal Poret. He's got a trial coming up and he's just going to be unavailable in the near term, and we'll try to get to Mr. Kegan. If we cannot, then we'll do a follow-up Zoom hearing, if that's okay.

THE COURT: All right, let's try it. Mr. Cohen.

RUSSELL COHEN,

having been first duly sworn, was examined and testified as follows:

MR. FRASIER: Thank you, Your Honor. Appreciate the flexibility from everybody here.

DIRECT EXAMINATION

BY MR. FRASIER: :

Q. Mr. Cohen, you are DarkOwl's president and CFO, right?

A. Correct.

THE CLERK: I'm sorry, Counsel, I need the witness' name.

Q. (By Mr. Frasier) Could you please state your full name.

A. My full name is Russell Cohen.

THE CLERK: Thank you.

Q. (By Mr. Frasier) And you're the president and CFO of DarkOwl

A. Yes, and co-founder.

Q. You're constantly trying to describe who could use DarkOwl's data in different ways, right?

A. Yes.

Q. And over time DarkOwl would emphasize some types of potential customers over other types of potential customers?

A. For marketing purposes, sure.

Q. You would agree that DarkOwl's data could be used in myriad of ways?

A. Yes.

Q. In fact, DarkOwl's enterprise customers use its data in many different -- for many different purposes?

A. Correct.

Q. Sometimes they use DarkOwl's data in ways that are surprising?

A. Yes.

Q. The market for dark net data service is not yet commoditized?

A. Correct.

Q. And you agree that DarkOwl is still learning what your core market is about and what customers want from that

core market?

A. We're getting better, but, yes.

Q. Now, DarkOwl's potential market is large, isn't it?

A. I believe so.

Q. It's more than a thousand potential customers?

A. How many governments are there? Sure.

Q. You said there are many thousands of potential customers?

A. Sure.

Q. In fact, DarkOwl tries to sell to everybody who touches on the broader cyber security space?

A. That's overly general, but we try to sell to people who hire sophisticated cyber security experts.

Q. Now, you recall giving your deposition in this case, right? You recall me asking you questions in your deposition?

A. Yes.

MR. FRASIER: Could we turn on the (indiscernible).

Q. (By Mr. Frasier) I was asking you about an exhibit and where you would put DarkOwl in any of the categories in the exhibit and you said:

"I would broadly say that we sell to everybody. We try to sell to everybody with -- who touches the broader

cyber security space, which is what this is trying to describe."

Is that right?

A. What line are we on? Oh, okay, towards the bottom.

Q. Starting at line 15.

A. Yeah. What is the exhibit?

THE COURT: The question is: Did you say that in your deposition? I can read it.

A. Yes, I said it.

MR. FRASIER: Mr. Cohen, I have no other questions for you. Thank you.

THE COURT: You're done?

MR. FRASIER: Yes, I'm done.

THE COURT: Oh, I'm sorry, I didn't hear that. All right. And there is no cross-examination?

MR. BUXBAUM: No questions, Your Honor.

THE COURT: Mr. Cohen, you may step down. All right. And does the plaintiff have any additional witnesses?

MR. BUXBAUM: Expert witnesses only.

THE COURT: All right.

MR. BUXBAUM: We would like to call Hal Poret.

HAL PORET,

having been first duly sworn, was examined and testified as

follows:

THE COURT: Whenever you're ready, Mr. Buxbaum.

DIRECT EXAMINATION

BY MR. BUXBAUM: :

Q. Good afternoon, Mr. Poret. Would you please state your name for the Court.

A. Hal Poret.

Q. Mr. Poret, are you currently employed?

A. Yes, I am.

Q. What is your job and title?

A. I run my own survey research company.

Q. Mr. Poret, could you briefly give us an overview of your educational and career background?

A. Sure. I have a bachelor's in math and a master's in math and then I also have a law degree from Harvard Law School. For the past 20 years I have worked in the field of survey research, designing and conducting well over a thousand surveys, both in the area of regular corporate market research and then also in connection with legal matters, such as this.

I work for another market research company for a while, but since 201 I've run my own survey research company.

Q. Thank you. Mr. Poret, were you retained as an expert witness by DarkOwl in this case?

A. Yes.

Q. And what was purpose of your engagement?

A. I was initially asked whether I could do my own survey, but for various reasons after looking into it, felt that I -- I didn't feel that I could reliably reach the proper universe in a case like there and feel confident that I had done a proper survey, so I indicated that I couldn't do that and I was ultimately then retained to review and analyze Mr. Kegan's survey.

Q. And why didn't you believe you could reach a proper universe of respondents to prepare your own likelihood of confusion survey?

A. Because when I looked into and came to understand what DarkOwl is, what DarkOwl does and, you know, what its services are and thought about who are the customers that I would have to try to reach, I realized this -- these are very sophisticated, complex services being marketed to very sophisticated organizations and you -- you know, to be able to reach people who are relatively high level, sophisticated positions in sophisticated organizations and get them to participate in a survey is -- is extremely difficult.

And most surveys that we do are done using general consumer panels and I certainly -- it was instantly obvious that it would be impossible to reach this universe through a general consumer panel. You can't just cast a net out into

the street and hope you're going to hit people who are, you know, officers at sophisticated organizations who would contract for services like DarkOwl. So that certainly wouldn't work.

And I considered trying to use a specialty business panel that maybe would be able to reach this particular niche, but when I looked into it, I ultimately didn't feel confident that I would be able to reach people who were truly prospective DarkOwl customers, even using a specialty business panel.

Q. And so you were engaged as a rebuttal witness?

A. Yes.

Q. And did you prepare a rebuttal report?

A. Yes, I did.

MR. BUXBAUM: Your Honor, may I approach.

THE COURT: You may.

Q. (By Mr. Buxbaum) Do you recognize this document, Mr. Poret?

A. Yes, this is my rebuttal report.

MR. BUXBAUM: Okay. I would like to offer this into evidence as Exhibit 21.

THE COURT: It is. Any objection to 21?

MR. FRASIER: No, Your Honor.

THE COURT: 21 is received.

MR. BUXBAUM: Thank you, Your Honor.

(Exhibit 21 admitted.)

Q. (By Mr. Buxbaum) Mr. Poret, what was your ultimate conclusion regarding the liability of Mr. Kegan's survey?

A. It was that it was too severely flawed in a number of critical ways to have any value or reliability on the topic of likelihood of confusion.

Q. If I could direct your attention to page 6 for just a moment, a line or two down from the top, you say, "Critical aspects of the Kegan survey design are based on an inaccurate characterization that the parties offer essentially the same type of service and that such service are directly competing alternatives." Did I read that correctly?

A. Yes.

Q. And could you please explain what you meant by that and why you said it?

A. Well, sure. In -- in designing a survey and explaining it, Mr. Kegan essentially indicated that he believes these are parties that are directly -- directly competing and serve the same marketplace and that, therefore, let him to select the -- the wrong universe, assuming that DarkOwl's potential customers are essentially the same as who ArkOwl's potential customers are, and it led him to select methodology that assumes that it would be appropriate to ask the same individuals to review ArkOwl's

website and DarkOwl's website in close proximity when that would only be appropriate if they really were directly competitive alternative services or so overlapping that the same consumer would in the real world actually consider those things in close proximity.

Q. Looking at page 2, the bottom paragraph, if I could direct your attention to that. Does that bottom paragraph reflect a summary of your opinion on the flaws in the survey?

A. Yes.

Q. Can you please just read the 1 and 2 in that paragraph?

A. Sure. Number 1 is serious flaws in the screening questions, prevented the survey from accurately identifying members of the relevant universe. And Number 2 is even to the extent the survey included some members of the relevant universe, the survey construct failed to obtain a sample that is representative of the universe.

Q. Could you please explain the role of screening questions in a survey in general?

A. Yes. The screening questions need to reliably identify the person taking the survey as a prospective customer of the relevant service, which in this instance works be DarkOwl's service.

Q. And for this case, what sort of respondents would

comprise an appropriate universe? I think you just answered DarkOwl customers?

A. That people would be in the relevant universe if they said they are actual or prospective customers of the type of service that DarkOwl offers, which we've heard described today and is a dark -- a dark web of searching and cataloging or indexing the service.

Q. And what was your ultimate opinion regarding the screening questions that Mr. Kegan used in his survey?

A. That they were extremely overbroad and inaccurate and could not have led to identifying the relevant universe. And in fact, there is no way to know whether even a single person who took the survey is in the relevant universe.

Q. Okay. Let's look at the first substance screening questioning. If you could turn to page 9 in -- or direct your attention to page 9. What was the first substantive screening question that Mr. Kegan used in the survey?

A. It asked which, if any, of the following types of services do you personally use as part of your job responsibilities and it offered a number of choices, and the respondent needed to select the choice data services in order to continue with the survey.

Q. So just to be clear, if -- if they selected any of the other answers other than data services they were excluded, but if they said they do use data services, that

was sufficient to move through to the next stage of the survey?

A. It's if they did select data services, they moved through. If they did not, they would be terminated.

Q. And do you believe that that screening question was flawed?

A. Yes. The term "data services" is so overbroad as to encompass so many different things that have nothing to do with what DarkOwl does. I mean, the most common use of the term data services that I see is to refer to all of the services that actually where company store their data and share their data: Dropbox, Google Drive, Apple, Microsoft. You know, there is countless things. I mean, I as a one-person business who does surveys, I use data services, I use Microsoft OneDrive, I use Dropbox, all kinds of things. So none of those have anything to do with DarkOwl.

And there is also lots of other things that people would think of as data services, like all of the companies who -- what they do is they take a company's sales data, for instance, and they mine it and they give you insights into it and they say, oh, here are your best customers and things like that.

So there are so many different services that would fall under the heading of data services that there is no reason to think that anybody who selected data services is

specifically referring to the type of dark web services that DarkOwl offers.

Q. So is it fair to summarize that concern as the data services requirement was quite overinclusive?

A. It's both overinclusive and underinclusive, because one problem is somebody who is a consumer of dark web services might not have picked data services, because the term "data services" wouldn't convey this type of dark web catalog service to them. So they could have been excluded improperly, which would make it underinclusive.

But mostly it's really overinclusive because of the fact that probably the vast, vast majority of things people would think data services apply to has nothing to do with what DarkOwl does.

Q. Let's look at the next screening question. I'll direct your attention to page 13. What was the next substantive screening question that Mr. Kegan used?

A. So if they selected data services, they were then which of the following type of vendor provided services do you personally use as part of your job responsibilities. And again, there is a number choices, but the ones that would qualify people for the survey were fraud prevention services or user or customer identification or data verification services.

Q. And do you believe that that screening question

was flawed?

A. Yes, in that again, these do not come even close to identifying somebody as a prospective DarkOwl customer, because in the case of user or customer identification or data verification services, that certainly is more of an attempt to possibly identify an ArkOwl customer, not a consumer of dark web services.

And again, in the case of fraud prevention services, the term "fraud prevention" is so vague and overbroad that it covers countless things that have nothing to do with what DarkOwl does. Again, such as, you know, banking services, credit card services, antivirus services. They're just -- there are so many things that fall under fraud prevention.

So the bottom line is, once somebody has answered, I use data services and I use fraud prevention services or user customer identification services, we still have no idea if what they have in mind has anything to do with what DarkOwl does.

And in fact, I was thinking if I took this survey, I would have qualified for it because I -- like I said, I use all kinds of data services and I would have thought, yeah, I use fraud prevention services, I use antivirus software on my computer, I -- my credit cards have fraud protection elements, my banking services have fraud

prevention aspects. So, you know, I would have qualified for this survey as a one-person business who, you know, would never have the slightest even thought for using something like DarkOwl.

Q. Mr. Poret, you made reference earlier to a distinction between general consumer panels and specialty panels. Just for the edification of us nontrademark survey experts, could you please explain what that difference is.

A. Sure. So most surveys are done with general consumer panels. It's basically millions of Americans who have signed up and said, I'm willing to take surveys, send me an invitation. And that works great for ordinary consumer products. If you need to study purchasers of cell phones or milk or potato chips, or even automobiles, you can just reach out to a consumer panel and there is going to be plenty of those on it.

For something like this, that -- that doesn't work. That would be searching for a needle in a haystack. You can't contact 100 people and hope that even one of them would be in the market for DarkOwl services.

So if you were going to even try to reach consumers of a sophisticated service like this that are people who are high-ranking executives at sophisticated organizations, you would have to at least try to use a business panel, which is something where special efforts

have been made to recruit people who have certain positions in business and are being paid much, much higher incentives to get them to be willing to do surveys about a specialized area.

Q. And Mr. Kegan did not use a specialty panel; is that correct?

A. No. Right, that's correct. Mr. Kegan testified that he used a general consumer panel and he also explained that 15 percent of the people who came in from the general consumer panel met the criteria and qualified for the survey.

And that alone proves beyond any doubt that this can't be a credible universe of prospective DarkOwl customers, because there is no way that 15 percent of people under general consumer panel are in the market for this highly specialized, sophisticated, and expensive service. It would be one in 10,000 or one in 100,000.

So I mean, the mere fact alone that these screening questions led to 15 percent of a general consumer panel saying, Yep, I checked these boxes, you know, that alone is -- is conclusive proof that the people who met these criteria are not prospective DarkOwl customers. They're people who thought data services and fraud prevention meant some of the much more ordinary typical things that I mentioned before.

Q. I believe you made a statement in your survey along the lines that, even if two companies happen to share a customer or a target customer, that wouldn't necessarily make those two companies competitors.

Can you just elaborate on that a little bit.

A. Sure. This same organization, of course, uses all kinds of different services. The same company uses payroll services, they use legal services, they use waste removal services from their office. So the mere fact that a particular company might use two different services on its own does not really tell you anything about the competitive relationship between those types of services.

Q. So just to be clear, is it your opinion that Mr. Kegan did not identify the relevant population or universe for his survey?

A. Yes, it's clear that people qualified for this survey on an improper basis and we literally could not identify a single person in the survey as a prospective DarkOwl customer.

Q. Your opinion, does the failure to identify a proper universe of respondents affect the reliability of a likelihood of confusion survey?

A. Yes, very, very much so.

Q. In your opinion, is the survey's failure to identify a proper universe a fatal flaw in the survey,

rendering it unreliable?

A. It certainly is in this case. I mean, flaws in a universe can range from small ones to large ones; but in this case, it's really the largest possible version of a flaw, because we really literally have no idea if the person who took the survey is even remotely in the ballpark here.

And it's a serious problem, because if it's, you know, somebody who is not really a prospective DarkOwl customer, first of all, they don't have the interest or attention to pay attention to these websites shown in the survey, they don't have the ability to understand them and see what -- what these services even mean, and they don't have the knowledge and sophistication that a real prospective DarkOwl customer would have to be able to understand what the service is and who the party they're dealing with.

So it would, in this case, the wrong universe would render this test, you know, completely artificial and unrealistic.

Q. And just to be clear, is it your opinion that, even if the companies could be shown to have some overlap in potential target customers, that the survey is still fatally flawed in the way it was constructed?

A. Yes, absolutely, because you don't -- you don't know if there is a single person in the survey who is a

DarkOwl customer, or prospective customer.

Q. You testified earlier that the survey makes a false assumption that the parties are direct competitors. Other than affecting the universe of respondents, did that misrepresentation or false assumption cause the survey to be reliable -- unreliable in other ways?

A. Yes. The main survey design is also unreliable for that reason, because Mr. Kegan used a format which is common in our area, but it's common for services or products that are either directly competitive or so highly related that the same consumer would consider them in close proximity.

Because what the survey is doing is it's essentially saying, imagine you're shopping for this type of service, here is a bunch of options, consider them. And that's realistic if the services really are ones that have competitive proximity, such that a real consumer might be out there thinking, Gee, should I use DarkOwl or should I use ArkOwl or should I use this other one?

Like, if that's not the case, then this entire methodology becomes artificial and just unrealistically suggestive and it just becomes kind of a simple, you know, matching game, Did somebody get a notice that there is some kind of similarity here? And say, Okay, yeah, that's -- these must be related.

Q. Other than the failure to identify a proper universe of respondents and artificial construct for the survey, I believe you identified other flaws unrelated to these issues with the survey. Can you please just briefly describe the other flaws that you identified with the survey that affect its reliability.

A. Sure. So I mean, one of them is on top of what we're talking about. The survey introduced DarkOwl's services as, quote, data services, and it also introduced ArkOwl services as, quote, data services. So it's sort of the exacerbating this process by basically telling the respondents these are the same type of service when they're not.

And then also, the survey, it's based on a very limited exposure to a web page, and while I don't blame Mr. Kegan for trying to use web pages, because there is not too much you can do in a survey, the reality, these are sophisticated services that require contracting for, you know, something that's expensive and very involved, and it's extremely difficult to simulate that type of consumer experience in a survey. It's certainly very, very difficult to do that realistically when all that's happening is a consumer in a survey is, you know, taking 30 seconds to glance at a web page from which it's going to be really hard to tell what these services really are.

So that -- you know, that was another problem.

And then another problem is -- with it is the lineup of the web pages that were being shown besides ArkOwl and DarkOwl. They're not -- those also are not really the competitors of DarkOwl, and so it's not really realistically -- realistically representing, you know, marketplace of options.

And then the final thing is -- is a very critical one. There is no control group. You know, do you ever hear about a scientific experiment, it's got a test group, the one that tries the medication and a control group that is given a placebo, which is identical, but lacks the medication, this survey did not have a control group. It had one single group. And a really proper likelihood of confusion survey should have a separate control group.

So that's one of the other big problems.

Q. And you detail these more in your report, correct?

A. Yes.

MR. BUXBAUM: Thank you, Mr. Poret. I have no further questions. It's your witness.

THE COURT: Thank you. Cross-examination?

CROSS-EXAMINATION

BY MR. FRASIER: :

Q. Thank you, Mr. Perot.

Mr. Perot, you're not an expert in the cyber

security industry?

A. You are correct.

Q. You're not an expert in DarkOwl services?

A. No.

Q. You're not an expert in the dark net, in general?

A. I am not.

Q. You didn't -- you didn't conduct any survey to determine what people thought of when they heard the phrase "data services," right?

A. Right.

Q. So it's just your lay opinion that people are likely to think of something that is not DarkOwl when they hear "data services"?

A. It's not quite so much that; it's that the phrase "data services" simply is so overbroad that there is no way to even know what people thought it meant, and there are so many possibilities of what it could mean that are different that we don't have any reliable information about what people meant when they said they use data services.

Q. All right. And that was -- that was just based on your personal belief and experience in hearing the phrase "data services"?

A. I wouldn't say it's just based on personal experience. It's also based on my professional experience of having done many surveys in all kinds of different

product and service categories, and you know, knowing what language is used to properly nail down a specific type of service.

Q. You don't contend that DarkOwl does not offer data services, right?

A. I certainly don't contend that their services are unrelated to the -- to data, but I do contend that the term "data services" is potentially very vague, inaccurate, and even misleading as -- as a stand-alone term to apply.

Q. You don't contend that data services primarily refers to services that DarkOwl does not perform?

A. I do think the term "data services" for the vast majority of people would make them think of something other than what DarkOwl offers, particularly considering that most people are not even aware that a thing, such as DarkOwl exists, because ordinary consumers have no reason to know about and use that kind of service.

Q. I'm not sure you answered the question.

The question was: You don't contend that data services primarily refers to services that DarkOwl does not perform?

A. I think the bucket of things that fall within data services do refer to things other than what -- what DarkOwl does. I think that term encompasses a large category of things, most of which are not what DarkOwl does.

Q. All right. On your deposition -- in your deposition, I asked you if -- let me pull up your deposition transcript.

I asked you the question:

"Is it your opinion that data services primarily refers to services DarkOwl does not perform?"

And you responded:

"No, I'm not using the term primarily in my opinion. I'm just stating, if you are writing proper screening questions, you need to -- to use terminology that do not leave you guessing as to what the person thought it meant and that you can rely on the answer."

So at the time you were not saying that data services primarily refers to something DarkOwl does not refer to?

A. I'm not sure I -- I'm not sure I followed that question.

Q. It is not your opinion that the term "data services" primarily refers to services that DarkOwl does not perform?

A. Well, I think what I was trying to say in my deposition is my primary point about the term "data services" is that it's overly vague, so it doesn't primarily refer to anything.

Q. Now, in your report, you did not assume that

DarkOwl services do not fall within the description of user or customer verification services, right?

A. I have had a little trouble following that question, but I don't think I made any assumption along those lines.

Q. And you're not an expert in user customer verification services?

A. No, I'm not an expert in that area.

Q. You're not an expert in fraud prevention services?

A. No.

Q. I believe you testified in your direct that for this type of survey to be valid, there needs to either be direct competition or, at least, enough competitive overlap such that potential customers would likely encounter both marks; is that -- is that accurate?

A. That's a fair enough summary.

Q. Now, your conclusion that Mr. Kegan did not survey the appropriate universe is based on information given to you by DarkOwl about who their customers are, right?

A. It's based, in part -- well, I mean, it's based primarily on my review of the materials relating to DarkOwl that I had access to in connection with this case, which, yes, some of those came from counsel for DarkOwl.

MR. FRASIER: Spreadsheet -- I apologize, Your Honor. Did the spreadsheet remain Attorney's Eyes Only?

It's Exhibit 19.

MR. BUXBAUM: Yeah, it did.

Q. (By Mr. Frasier) Now, on page 8 of your report, the very top, you describe DarkOwl's -- you write: DarkOwl customers include many other types of entities, including governments, law enforcement agencies, and other corporate entities that seek cyber security/intelligence analysis.

Do you see that?

A. Yes.

Q. And then you have a footnote to three documents?

A. Yes.

Q. And those documents were given to you by DarkOwl in response to your request for documents relating to DarkOwl's customers?

A. Yes.

Q. And one of those three documents was what has been marked as Exhibit 19 in this case; is that right?

A. Well, I'm sure you can tell from the number, so I have no reason to doubt that if you're saying this is one of those documents.

Q. Yeah. And I'm showing you -- I'm showing you what has been marked Exhibit 19. This is one of the documents that DarkOwl provided you to review in determining who their customers are.

A. Okay.

Q. Do you recall reviewing this document?

A. I mean, honestly, it's a little bit hard for me to tell, just from this view, whether this is that document, but it certainly looks consistent with the types of materials that I reviewed.

Q. And do you recall clicking through all three tabs on the bottom of Exhibit 12 -- or Exhibit 19?

A. Yes.

Q. And you didn't rely on anything DarkOwl told you about Exhibit 19 in reaching your conclusion?

A. I'm not even sure what conclusion you're talking about. But, no, I think it's fair to say I didn't rely on any of that for my analysis. I relied on the explanations that I gave previously.

Q. And so to be clear, you're not an expert on whether or not the parties are competitors?

A. No, I'm not substantively an expert on that topic.

Q. It's -- among other things, it's your opinion that if they are not competitors, this survey approach is not appropriate?

A. Yes, that's one of the things, but my position -- my opinion about the universe is not reliant on what you just mentioned, because the screening questions simply didn't get at the universe, regardless of whether they're competitors. But you're correct, that I'm not a substantive

expert in the nature of these parties' services. That just is relevant to the -- the valuation of the survey methodology.

MR. FRASIER: Okay, thank you. I have no further questions.

THE COURT: Thank you. Is there any redirect?

MR. BUXBAUM: No redirect, Your Honor.

THE COURT: All right, thank you. You may step down.

All right. It's quarter to 6:00. Do you want to get started with the final witness, as I understand it, or do you want to defer that to another day for a video presentation?

MR. FRASIER: I would prefer to do it all in one chunk, Your Honor, and have not have his testimony broken up.

THE COURT: I think that makes sense. Is there any objection to that from plaintiff's counsel?

MR. BUXBAUM: No, there is not.

THE COURT: All right. So let's talk before we depart about reconvening for purposes of the video testimony of Mr. Kegan; is that right? And he'll be the final witness on either side of this dispute?

MR. BUXBAUM: That's right.

THE COURT: All right. So give me a ballpark,

maybe how much time you think you might need with Mr. Kegan, both on direct and cross. I know it's difficult, but --

MR. FRASIER: I will say a half hour, so maybe we should block off an hour just in case, especially with technology being involved.

MR. BUXBAUM: Yeah, I think we can fit it in within an hour.

THE COURT: In an hour as well. So we're looking at half a day, is what I'm inclined to do, okay.

MR. BUXBAUM: Your Honor, I think an hour will cover both --

THE COURT: Both, direct and cost.

MR. BUXBAUM: Yes.

THE COURT: All right, fair enough. And why don't we start with the witness. Do we -- are there limitations that he has in terms of his availability to testify?

MR. FRASIER: So we can compare calendars. Mr. Kegan just actually raised a point that we had prepared his direct based on Your Honor's order about the scope of this hearing. And Mr. Poret's testimony certainly raised issues that were beyond the scope of that. And to the extent we need to address those additional issues, we will need a little bit more time than what we had originally outlined.

THE COURT: Well, chances are I'm going to build

in some, you know, additional time to whatever we end up landing on.

So I understand what you're saying -- and I think I would be foolish to assume it's only going to take an hour. I think it's likely going to take a little more than that, so I'll build in some extra time whenever we decide.

So why don't we start looking at dates, Counsel, and bearing in mind that we have a trial date that is set for some time in June, were you able to locate the trial date?

MR. BUXBAUM: June 26.

MR. HOLT: Yeah, June 26, Your Honor.

THE COURT: All right.

MR. BUXBAUM: Pretrial.

THE COURT: Yeah.

MR. BUXBAUM: Pretrial conference, I think, is 25th or something like that.

THE COURT: Yeah, I think it's right around that time. Okay. So that means, you know, sooner rather than later, we have to try to wrap this up so the Court can get you an order on this motion prior to the trial. And the order will have to be in writing and so there will have to be some time taken to draft the order.

So is there any chance that anybody is available this week, or should we just not even look at the rest of

this week? Is it out of the question?

MR. BUXBAUM: We don't need everyone. I mean, the good news is think we only need a smaller subsection.

THE COURT: I agree.

MR. BUXBAUM: We just need four of us.

MR. HOLT: Yeah. Certainly not tomorrow. Thursday or Friday would be preferable.

MR. BUXBAUM: Thursday or Friday on our side. Any chance over there?

UNIDENTIFIED SPEAKER: If it's Friday, it would need to be the in the middle of the day. My wife is working so I will have childcare observations.

MR. BUXBAUM: What's your availability at the end of this week, Your Honor?

THE COURT: I could do it between 10 a.m. and 2 p.m. on Friday.

MR. BUXBAUM: I'm trying to make it Mountain Central. So 10 a.m. is --

UNIDENTIFIED SPEAKER: 11 Central.

THE COURT: That would be 11 to 3:00.

MR. BUXBAUM: That would be perfect, Your Honor. 11 o'clock on Friday.

THE COURT: That work for plaintiff's counsel (indiscernible).

UNIDENTIFIED SPEAKER: Yeah, 10 Mountain, 11

Central, noon Eastern.

(Confer on scheduling.)

THE COURT: I see that that's -- I'm moving it. I'm moving that other matter.

All right. So 10 a.m. on Friday, May 19. Now, we're going to do this all by video, Counsel, and the witness will be present by video?

MR. FRASIER: That would be preferable.

THE COURT: So you'll need to communicate with Ms. Galera to make sure that you have the instructions that you need to get set up on our VTC, which is our video presentation. So you don't have to do that tonight, but you'll need to do that between now and then to make sure that it's set up appropriately.

Is there anything else I need to remind counsel of with respect to a video hearing at 10 a.m. on Friday?

THE CLERK: I don't think so, Your Honor.

THE COURT: That will take care of it.

All right, fair enough. So I appreciate counsel's efforts to try to get us through as much of this as we could today. I'll look forward to seeing you again by video at 10 a.m. on Friday. And I hear we're going to have four people present by video: The witness, Mr. Frasier and two attorneys for plaintiffs, or three?

MR. BUXBAUM: I guess three.

THE COURT: All right. So five people total present by video on Friday for his examination, and cross-examination. Fair enough. I will see you then. Thank you. We're in recess.

(Whereupon, the within hearing concluded at 5:50 p.m.)

TRANSCRIBER'S CERTIFICATE

I certify that the foregoing is a correct transcript, to the best of my knowledge and belief (pursuant to the quality of the recording) from the record of proceedings in the above-entitled matter.

/s/Dyann Labo — May 26, 2023

Signature of Transcriber — Date