

# EXHIBIT 38

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR : NO.  
TESTING AND MATERIALS : 1:13-cv-01215-TSC-  
d/b/a ASTM : DAR  
INTERNATIONAL; :  
NATIONAL FIRE :  
PROTECTION :  
ASSOCIATION, INC.; :  
and AMERICAN SOCIETY :  
OF HEATING, :  
REFRIGERATION, AND :  
AIR CONDITIONING :  
ENGINEERS, :  
Plaintiffs :  
vs. :  
PUBLIC.RESOURCE.ORG, :  
INC., :  
Defendant :

Videotaped deposition of JOHN C.  
JAROSZ taken at the law offices of Veritext  
Legal Solutions, 1250 I Street NW,  
Washington, DC, commencing at 10:09 a.m.  
THURSDAY, AUGUST 27, 2015, before Debbie  
Leonard, Registered Diplomate Reporter,  
Certified Realtime Reporter.

PAGES 1 - 260

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(continued)

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1 INDEX TO WITNESSES  
2  
3 WITNESS: JOHN C. JAROSZ PAGE  
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5 BY MR. BRIDGES 8  
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9 INDEX TO EXHIBITS  
10 PAGE  
11 EXHIBIT DESCRIPTION MARKED  
12 Exhibit 1 Expert Report of John C. Jarosz 6  
13 June 5, 2015  
14 Exhibit 2 Handwritten notes 97  
15 Exhibit 3 Handwritten notes 97  
16 Exhibit 4 Spreadsheet 175  
17 "NFPA Publication Sales  
18 2009 to 2013"  
19 JAROSZ02443  
20 Exhibit 5 Article 210  
21 "ASHRAE Takes on Energy  
22 Standard"  
23  
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Page 4

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1 DEPOSITION SUPPORT INDEX  
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3 INSTRUCTION NOT TO ANSWER:  
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2 (Jarosz Exhibit 1 marked for

3 identification.)

4 \* \* \*

5 THE VIDEOGRAPHER: We are now

6 on the record.

7 Please note that the

8 microphones are sensitive and may pick

9 up whispering and private

10 conversations.

11 Please turn off all cell phones

12 or place them away from the

13 microphones, as they can interfere

14 with the deposition audio.

15 Recording will continue until

16 all parties agree to go off the

17 record.

18 My name is Jonathan Perry. I'm

19 here representing Veritext. Today's

20 date is August 27th, 2015. The time

21 is approximately 10:09 a.m.

22 We are at the offices of

23 Veritext, located at 1250 I Street

24 Northwest in Washington, D.C.

25 The caption on the case is the

Page 6

1 American Society for Testing and

2 Materials, et al., versus

3 Public.Resource.Org, Incorporated,

4 case filed in the US District Court

5 for the District of Columbia, Case

6 Number 1:13-cv-0215 [sic] TSC-DAR.

7 The name of the witness is

8 John C. Jarosz.

9 Would counsel present please

10 introduce themselves and state whom

11 they represent.

12 MR. BRIDGES: This is Andrew

13 Bridges of Fenwick & West for the

14 defendant, and with me is Matthew

15 Becker.

16 MR. FEE: Kevin Fee from Morgan

17 Lewis on behalf of ASTM.

18 MR. REHN: Thane Rehn from

19 Munger, Tolles & Olson on behalf of

20 the National Fire Protection

21 Association.

22 MR. CUNNINGHAM: Blake

23 Cunningham of King & Spalding on

24 behalf of the American Society for

25 Heating, Refrigerating, and

Page 7

1 Air-Conditioning Engineers.

2 THE VIDEOGRAPHER: Today our

3 court reporter is Debbie Leonard with

4 Veritext. Would you please swear in

5 the witness.

6 \* \* \*

7 JOHN C. JAROSZ,

8 having been first duly sworn, testified as

9 follows:

10 \* \* \*

11 EXAMINATION

12 \* \* \*

13 BY MR. BRIDGES:

14 Q. Good morning, Mr. Jarosz.

15 A. Good morning, Mr. Bridges.

16 Q. What do you do for a living?

17 A. I'm an economist.

18 Q. What types of work do you do as

19 an economist?

20 A. I'm not exactly sure what

21 you're asking. I am employed at an economic

22 consulting firm, and I am involved in applied

23 microeconomics and industrial organization,

24 among other things.

25 I apply much of my expertise to

Page 8

1 the valuation and evaluation of intellectual

2 property rights. Some of that work is in the

3 context of damages assessments. Some of it

4 outside such contexts. Some of my work is in

5 litigation, and some of my work is not.

6 Q. Have you valued any of the

7 intellectual property at issue in this case?

8 MR. FEE: Objection. Form.

9 MR. REHN: And --

10 MR. FEE: Wait. Before we go

11 any further, should -- do you want to

12 get into a stipulation that they don't

13 have to join every objection that one

14 or the other plaintiffs makes, or do

15 you want us to make them all seriatim?

16 MR. BRIDGES: I'll stipulate to

17 that.

18 MR. FEE: Okay.

19 THE WITNESS: I'm not exactly

20 sure what you mean by "value," but I

21 haven't done a formal valuation of any

22 of the IP. I have evaluated the

23 intellectual property rights, and I

24 have done the assessment that you see

25 in my expert report.

Page 9

1 BY MR. BRIDGES:  
2 Q. Have you made any attempt to  
3 put a value on any of the intellectual  
4 property rights claimed by the plaintiffs in  
5 this case?  
6 MR. FEE: Objection to form.  
7 THE WITNESS: What do you mean  
8 by "value"?  
9 BY MR. BRIDGES:  
10 Q. I mean by "value" what you  
11 referred to earlier when you stated that  
12 among your activities is the valuation of  
13 intellectual property rights.  
14 A. I have not done a formal  
15 valuation, and I have not assigned a dollar  
16 amount to any of the intellectual property  
17 rights at issue here.  
18 I have evaluated the rights and  
19 determined issues associated with harm and  
20 irreparable harm. You see my results  
21 contained in my report.  
22 Q. What do you mean by "evaluating  
23 the intellectual property rights"?  
24 A. I have looked at, from an  
25 economist's perspective, the rights and the

Page 10

1 impact of having IP protection or not having  
2 IP protection for the subject matter at  
3 issue.  
4 Q. Have you done anything else to  
5 evaluate the intellectual property rights of  
6 the plaintiffs?  
7 MR. FEE: Objection to form.  
8 THE WITNESS: I've done the  
9 analyses underlying my report, but the  
10 summary of the work that I've done and  
11 the conclusions that I've drawn are  
12 contained in my report. I don't have  
13 other conclusions that are not  
14 contained in those -- in that report.  
15 BY MR. BRIDGES:  
16 Q. What intellectual property  
17 rights of plaintiffs have you evaluated?  
18 A. The copyrights at issue here.  
19 I'm sorry. Let me be -- let me  
20 alter that by saying I have evaluated the  
21 alleged copyrights at issue here, and I have  
22 evaluated the trademark rights at issue here.  
23 Q. Why did you change your  
24 testimony to refer to "alleged copyrights"  
25 instead of "copyrights"?

Page 11

1 A. I don't know that there -- I --  
2 let me start this over again.  
3 I believe there are fights  
4 about whether the plaintiffs are entitled to  
5 these copyrights. I don't know that there's  
6 been a conclusion by this Court that they are  
7 valid rights. I'm working under the  
8 assumption that they are, but I believe the  
9 defendant is disputing those rights.  
10 Q. What did you do to evaluate  
11 trademark rights in this case?  
12 A. What I've done is summarized in  
13 my report. I have an understanding that  
14 there are marks and logos at issue that are  
15 important to the plaintiffs and that Public  
16 Resource activities impair the rights of the  
17 plaintiffs in those trademarks and may  
18 possibly cause confusion in the marketplace.  
19 Q. What work did you do to  
20 determine whether any activities of the  
21 defendant does or may cause confusion in the  
22 marketplace?  
23 A. The work that you see is  
24 summarized in my report. I haven't done  
25 anything beyond that which is summarized

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1 here.  
2 Q. And by the "report," you're  
3 referring to Exhibit 1 that I've marked and  
4 placed before you?  
5 A. Yes.  
6 Q. Where did you state your  
7 conclusions in your report regarding  
8 trademark rights of the plaintiff -- of the  
9 plaintiffs?  
10 A. In part, I think it's covered  
11 in paragraphs 150 and 151. It may be covered  
12 in other sections.  
13 Q. Take the time and let me know  
14 what other sections trademark rights are  
15 covered in.  
16 MR. FEE: Objection. Are you  
17 asking him to read the whole report  
18 and answer that now?  
19 MR. BRIDGES: No. Presumably  
20 he's relatively familiar with it, so  
21 it wouldn't require him to read it and  
22 spend a great deal of time. I  
23 don't -- he's referred to his report  
24 in his answer, so I just want to make  
25 sure that I have a complete

Page 13

4 (Pages 10 - 13)

1 understanding.  
 2 MR. FEE: All right. Well,  
 3 take as long as you need to answer  
 4 that, then.  
 5 THE WITNESS: In part, you see  
 6 it addressed in paragraph 30.  
 7 Right now, those are the  
 8 sections that I see that touch on that  
 9 topic. There may be others that I'm  
 10 overlooking right now.  
 11 BY MR. BRIDGES:  
 12 Q. And do you need more time?  
 13 MR. FEE: Objection. Asked and  
 14 answered.  
 15 THE WITNESS: I don't think so.  
 16 I've looked through at a fairly  
 17 cursory level. If you want me to read  
 18 the whole report to make absolutely  
 19 sure, I will, but I'm not sure if  
 20 you're asking me to do that, but --  
 21 BY MR. BRIDGES:  
 22 Q. No, I wouldn't want to take the  
 23 time, unless counsel is willing to give me  
 24 lots of extra time or if you want to do it  
 25 during a break. But if you're confident that

Page 14

1 those are the paragraphs that cover the  
 2 evaluation of trademark rights, then we can  
 3 proceed.  
 4 A. I'm not sure if there's a  
 5 pending question, but I didn't say I was  
 6 confident that those are the only places.  
 7 Q. Oh, then take more time,  
 8 please.  
 9 A. I think --  
 10 Q. Then please --  
 11 A. -- that those are the three  
 12 that address it.  
 13 Q. Well, what else reflects your  
 14 evaluation of trademark rights in this case?  
 15 A. Okay. If you'd like, I'll take  
 16 a little bit more time looking at the report.  
 17 I think in paragraph 2, I  
 18 believe part of the copying is the marks  
 19 and/or logos.  
 20 Q. And that paragraph 2 reflects  
 21 your evaluation?  
 22 MR. FEE: Objection to form.  
 23 THE WITNESS: Yes. My  
 24 evaluation includes understanding the  
 25 issues and then drawing conclusions

Page 15

1 from the facts.  
 2 BY MR. BRIDGES:  
 3 Q. All right. I would like to  
 4 know where in the report your report reveals  
 5 any observations or conclusions by you about  
 6 the evaluation of the trademark rights.  
 7 MR. FEE: Just so the record is  
 8 clear, you're withdrawing the previous  
 9 question now?  
 10 MR. BRIDGES: No. It's a new  
 11 question.  
 12 MR. FEE: Okay. Well, he  
 13 didn't --  
 14 Are you finished going through  
 15 the entire report and identifying  
 16 everywhere where you've evaluated the  
 17 trademarks?  
 18 Or do you not want him to keep  
 19 doing that?  
 20 MR. BRIDGES: I just -- I just  
 21 asked him a question. I'd like an  
 22 answer to the question.  
 23 MR. FEE: Okay.  
 24 BY MR. BRIDGES:  
 25 Q. I'd like to know where in

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1 the -- in the report your report reveals any  
 2 observations or conclusions by you about your  
 3 evaluation of the trademark rights of the  
 4 plaintiffs.  
 5 MR. FEE: Objection. And I  
 6 think it would be misleading if it's  
 7 not stated for the record that he has  
 8 not gotten past paragraph 2 in  
 9 responding to the prior question, and  
 10 you've instructed him not to further  
 11 proceed with respect to that question.  
 12 You can go ahead and answer the  
 13 current question.  
 14 THE WITNESS: So right now, I'm  
 15 working under the assumption that  
 16 there's only one pending question, and  
 17 that is your most recent question.  
 18 BY MR. BRIDGES:  
 19 Q. Yes.  
 20 A. Part of the implications of  
 21 loss -- I'm sorry.  
 22 Part of the implications of  
 23 trademark infringement are reflected in  
 24 paragraph 6, though they're not stated there.  
 25 That is when I address harm. That

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1 encompasses both the harm of loss of  
 2 copyright protection and the repercussions of  
 3 trademark infringement.  
 4 Same answer with regard to  
 5 paragraph 7.  
 6 There are also counterpart  
 7 paragraphs at the end of the report that I  
 8 think are identical to 6 and 7, so I won't  
 9 identify those numbers.  
 10 Though I didn't say it in a  
 11 number of paragraphs, I make reference to  
 12 conclusions with regard to the copyright  
 13 infringement.  
 14 I understand that the copyright  
 15 infringement is associated with certain  
 16 actions that, in part, encompass trademark  
 17 infringement, though I don't think I  
 18 explicitly said that in every section in  
 19 which I discover -- in which I discussed the  
 20 copyright protection and the conclusions  
 21 flowing from that.  
 22 I don't think I have anything  
 23 else to add besides what I have discussed  
 24 already.  
 25 Q. What conclusions do you see

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1 about a likelihood of confusion in the  
 2 marketplace arising from the defendant's use  
 3 of the marks?  
 4 A. I haven't drawn any conclusions  
 5 with regard to that topic.  
 6 Q. And what conclusions have you  
 7 drawn about the economic value or dollar  
 8 value of the plaintiffs' trademarks?  
 9 A. I have not assigned a dollar  
 10 value to the plaintiffs' trademarks.  
 11 Q. What conclusions have you drawn  
 12 about any harm to the plaintiffs arising from  
 13 the defendant's alleged use of the  
 14 plaintiffs' marks?  
 15 A. I've drawn the conclusion that  
 16 there could be harm if the materials, in  
 17 fact, are inaccurate use -- inaccurate  
 18 copies, therefore impacting the reputation of  
 19 either the materials or the organizations in  
 20 the marketplace.  
 21 Q. What studies did you rely upon  
 22 for that conclusion?  
 23 MR. FEE: Objection. Vague.  
 24 THE WITNESS: Nothing other  
 25 than what you see reflected in my

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1 report.  
 2 BY MR. BRIDGES:  
 3 Q. What facts did you rely upon  
 4 for that conclusion?  
 5 A. Well, I understand that there  
 6 has been some inaccurate copying and  
 7 dissemination of plaintiff materials. I  
 8 don't recall exactly where I got that  
 9 information from, but I believe that there's  
 10 some materials, for instance, that have been  
 11 copied and disseminated that are upside-down.  
 12 There are other materials that are difficult  
 13 to read. There may be materials that are  
 14 disseminated with the thought that those are  
 15 the most recent standards when, in fact, they  
 16 may not be.  
 17 Q. You have no idea how you  
 18 learned that information?  
 19 A. I don't recall --  
 20 MR. FEE: Objection. Vague.  
 21 And form.  
 22 THE WITNESS: I don't recall,  
 23 sitting here right now. I may have  
 24 seen representations in some of the  
 25 written materials, but I don't recall

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1 what those written materials are.  
 2 BY MR. BRIDGES:  
 3 Q. Have you seen any upside-down  
 4 pages in any of the defendant's materials?  
 5 A. I don't recall seeing that  
 6 personally, no.  
 7 Q. Have you seen any  
 8 difficult-to-read materials produced by the  
 9 defendant?  
 10 A. I don't recall that right now.  
 11 Q. Do you know what rationale the  
 12 defendant has for disseminating materials  
 13 that are not the most recent standards?  
 14 MR. FEE: Objection. Form.  
 15 THE WITNESS: I'm not sure that  
 16 I know, no.  
 17 BY MR. BRIDGES:  
 18 Q. On what information -- I'd like  
 19 for you to recall all the information on  
 20 which you relied for the determination that  
 21 the defendant may have engaged in activities  
 22 that may have caused any harms to the  
 23 plaintiffs' reputation.  
 24 MR. FEE: Could you read that  
 25 back -- oh, I have it here. Forget

Page 21

1 it.  
 2 Objection to form. You're  
 3 asking him to recall, without having  
 4 all the materials in front of him?  
 5 MR. BRIDGES: Yeah.  
 6 MR. FEE: Okay.  
 7 THE WITNESS: It's all laid out  
 8 in my report, and the sources are  
 9 provided in my report. I've not  
 10 memorized all those.  
 11 BY MR. BRIDGES:  
 12 Q. But I don't think your report  
 13 refers to upside-down materials, does it?  
 14 A. I don't recall for sure, but I  
 15 thought some of the documents that I cited  
 16 make reference to those materials. I'm not  
 17 sure that I cited the, for instance,  
 18 upside-down materials, but I think I have  
 19 discussions about that phenomenon.  
 20 Q. With whom?  
 21 A. In written materials that I've  
 22 cited.  
 23 Q. Have you had oral discussions  
 24 about what you have referred to as that  
 25 phenomenon?

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1 A. Yes.  
 2 Q. With whom?  
 3 A. Counsel here.  
 4 Q. With anybody else?  
 5 A. I don't think so. It's  
 6 possible, but I'm not recalling anything  
 7 else.  
 8 Q. And when you say discussions  
 9 with "counsel here," you're referring to the  
 10 counsel at the table here today at the  
 11 deposition?  
 12 A. Correct.  
 13 And we should add to that  
 14 Jordana Rubel, who's been a person that I've  
 15 had conversations with over the last several  
 16 months.  
 17 Q. What did you do to verify any  
 18 of the statements to you from counsel about  
 19 these facts you've referred to about the  
 20 materials that the defendant has  
 21 disseminated?  
 22 A. I don't think I did separate  
 23 verification. I may have seen some documents  
 24 that provide or provided confirmation of that  
 25 fact, but I don't recall separately going out

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1 beyond the document production to verify that  
 2 information.  
 3 Q. But you don't recall seeing any  
 4 defective materials yourself, correct?  
 5 A. That's correct. I do not.  
 6 Q. You just relied upon the word  
 7 of others, correct?  
 8 MR. FEE: Objection. Vague.  
 9 Mischaracterizes his testimony.  
 10 THE WITNESS: I relied upon  
 11 written documents I saw and  
 12 conversations that I had.  
 13 BY MR. BRIDGES:  
 14 Q. What written documents did you  
 15 see that discussed these issues?  
 16 MR. FEE: Objection. Asked and  
 17 answered.  
 18 THE WITNESS: And I'm sorry. I  
 19 can't point you to the particular  
 20 ones. Perhaps, through the course of  
 21 the day, my memory will be refreshed  
 22 on that.  
 23 BY MR. BRIDGES:  
 24 Q. If you relied upon those  
 25 written documents, would you have cited to

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1 those written documents in your report?  
 2 A. Perhaps.  
 3 Q. Why do you say "perhaps"?  
 4 A. I can't say with absolute  
 5 certainty what I do. But often, if something  
 6 is a direct support for a factual  
 7 observation, I will often cite that source,  
 8 but not always.  
 9 Q. What previous -- strike that.  
 10 What training or education have  
 11 you ever received with respect to standards  
 12 development organizations?  
 13 MR. FEE: Objection to form.  
 14 THE WITNESS: I don't recall if  
 15 I've had a course in standard  
 16 development. Probably it has been  
 17 part of some of the economics courses  
 18 that I've taken over the years.  
 19 In my profession and the work  
 20 that I've done in the last 30 years,  
 21 I've had occasion to look at and  
 22 evaluate standards organizations and  
 23 the output from those organizations.  
 24 So it is among the topics that  
 25 I've investigated in the course of my

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1 consulting career.  
 2 BY MR. BRIDGES:  
 3 Q. In what context?  
 4 A. There have been several matters  
 5 I've had, litigations, that have involved  
 6 standard setting organizations and the  
 7 outputs from those organizations.  
 8 Q. What organizations?  
 9 A. Well, some that come to mind  
 10 are ETSI, IEEE, the Blu-ray Association,  
 11 MPEG, MPEG L.A., the Philips 6C and Philips  
 12 3C organizations. Those are among the ones  
 13 that come to mind.  
 14 Q. And what types of litigation  
 15 did your work relating to those standard  
 16 setting organizations involve?  
 17 MR. FEE: Objection to form.  
 18 THE WITNESS: It was almost all  
 19 intellectual property litigation, with  
 20 probably the bulk of the analyses  
 21 undertaken with regard to patent  
 22 rights.  
 23 BY MR. BRIDGES:  
 24 Q. Do you recall --  
 25 A. I guess I should -- there were

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1 probably some breach of contract matters as  
 2 well.  
 3 Q. Did you work on any matters  
 4 involving copyright law where you became  
 5 familiar with the work and outputs of  
 6 standards setting organizations before this  
 7 case?  
 8 A. Probably, but I cannot say that  
 9 with absolute certainty. I've been involved  
 10 in several matters over a course of many  
 11 years.  
 12 Q. Can you name any copyright  
 13 matter involving a standards development  
 14 organization that you recall?  
 15 A. Not now, without going back and  
 16 looking at my records.  
 17 Q. Would they be listed in the  
 18 cases attached to Exhibit 1?  
 19 A. That would summarize some of my  
 20 records. The cases that are embodied in my  
 21 tab 1 are those that led to deposition or  
 22 trial testimony. I've been involved in many  
 23 matters beyond those.  
 24 Q. But sitting here, you cannot  
 25 recall any copyright case involving a

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1 standards development organization that  
 2 you've worked on?  
 3 A. Again, I'd have to go back and  
 4 look at my records. I can't right now recite  
 5 any, but there very well could be one or  
 6 more.  
 7 Q. Did you review any of your work  
 8 in -- from earlier copyright cases involving  
 9 standards development organizations in  
 10 connection with your work in this case?  
 11 A. Not to the best of my memory,  
 12 no.  
 13 Q. What background do you have in  
 14 the creation of standards by standard  
 15 development organizations?  
 16 MR. FEE: Objection to form.  
 17 THE WITNESS: In the context of  
 18 some of my consulting assignments, I  
 19 have examined processes undertaken by  
 20 SDOs.  
 21 BY MR. BRIDGES:  
 22 Q. Anything else?  
 23 A. Nothing else comes to mind.  
 24 I've certainly looked at the output  
 25 associated with those processes, but there's

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1 nothing else that comes to mind.  
 2 Q. What processes undertaken by  
 3 standards development organizations did you  
 4 examine?  
 5 MR. FEE: Objection. Are you  
 6 asking prior to the report still?  
 7 MR. BRIDGES: Yes.  
 8 MR. FEE: Okay.  
 9 THE WITNESS: I'm not quite --  
 10 MR. BRIDGES: Or other than in  
 11 this case.  
 12 MR. FEE: Okay.  
 13 THE WITNESS: I'm not quite  
 14 sure what you're asking. I've seen  
 15 discussion of the some of the  
 16 processes of various organizations.  
 17 I'm not -- I'm not quite sure what  
 18 you're asking. Perhaps you could ask  
 19 it somewhat differently.  
 20 BY MR. BRIDGES:  
 21 Q. Well, no. You said, quote, "I  
 22 have examined processes undertaken by SDOs."  
 23 So my question is, what  
 24 processes undertaken by standards development  
 25 organizations did you examine?

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1 A. It sounds like the same  
 2 question to me.  
 3 Q. Specifically, what processes  
 4 did you examine?  
 5 A. That still sounds like the same  
 6 question, but let me try to answer it by  
 7 saying I've looked, for instance, at the  
 8 mechanisms that ETSI undertook in developing  
 9 standards. So I am familiar generally with  
 10 the processes that it follows. Similarly  
 11 with regard to other standard setting  
 12 organizations.  
 13 Q. What other standard setting  
 14 organizations?  
 15 A. Well, I think I identified  
 16 those a few moments ago. Do you want me to  
 17 repeat those?  
 18 Q. Well, if -- are you saying  
 19 that, for all of those organizations, you  
 20 examined their processes?  
 21 A. In some dimension, probably for  
 22 most of the organizations, I had at least  
 23 some knowledge of the process. I can't say  
 24 that I investigated in depth all of the  
 25 processes for all of the organizations that

1 have been involved in my consulting  
 2 assignments that are standards oriented.  
 3 Q. What do you recall about your  
 4 investigation of the processes by which  
 5 standards development organizations create  
 6 their standards?  
 7 A. I should say I -- SDO is  
 8 probably not the right term to use. I should  
 9 probably say standards setting organizations.  
 10 There may be a distinction between an SSO and  
 11 an SDO.  
 12 But, generally, each SSO has a  
 13 process that's unique to its organization.  
 14 Some solicit input from a wide range of  
 15 constituents; some from a more narrow range.  
 16 The ones that I have examined  
 17 have all been fairly careful in the work that  
 18 they've done, seeking input at many steps  
 19 along the way.  
 20 Some organizations, like SDOs  
 21 at issue here, seek a broader array of inputs  
 22 than do others.  
 23 Some organizations, standards  
 24 setting organizations, include primarily or  
 25 only manufacturers and sometimes large

1 manufacturers only. Others include a wider  
 2 array of companies.  
 3 In all instances, though, the  
 4 companies are trying to -- the standards  
 5 setting organizations are trying to develop  
 6 at least some form of consensus -- sometimes  
 7 it's very broad consensus; sometimes it's  
 8 more narrow consensus -- about what would be  
 9 good for that standards setting organization.  
 10 Sometimes the SSOs are  
 11 interested in what's best for the  
 12 manufacturers and the ability for them to  
 13 supply in an interoperable environment. In  
 14 some cases, the SSOs are very alert to the  
 15 needs of consumers and users of products and  
 16 services that comply with standards.  
 17 Q. You've distinguished between  
 18 standards setting organizations and standard  
 19 development organizations. What is the  
 20 distinction that you -- that you identify  
 21 between the two?  
 22 A. I think I said I didn't know if  
 23 there is for sure a distinction, but I think  
 24 an SSO is perhaps a broader concept than an  
 25 SDO, but I might be wrong on that.

1 I know the companies -- I --  
 2 the plaintiffs here are SDOs. The  
 3 associations are, among other things, in the  
 4 business of creating and developing  
 5 standards.  
 6 There could be other SSOs that  
 7 have different constituents that are of  
 8 interest to them. I don't know for sure that  
 9 an SSO is a broader concept than an SDO, but  
 10 it could be.  
 11 Q. What do you understand to be  
 12 the constituents of the plaintiffs in this  
 13 case?  
 14 MR. FEE: Objection to form.  
 15 THE WITNESS: I laid that out  
 16 in my report. In summary, I believe  
 17 they try to include in the process  
 18 both those -- both supply-side  
 19 entities and demand-side entities.  
 20 BY MR. BRIDGES:  
 21 Q. Who else are plaintiffs'  
 22 constituents?  
 23 MR. FEE: Same objection.  
 24 THE WITNESS: I can't think of  
 25 anything that doesn't fall within

1 those two categories as the  
2 constituents of the plaintiffs.  
3 BY MR. BRIDGES:  
4 Q. Only entities are constituents  
5 of the plaintiffs?  
6 MR. FEE: Objection. Vague.  
7 THE WITNESS: An individual can  
8 be an entity, in my mind. It's not  
9 necessarily a company.  
10 BY MR. BRIDGES:  
11 Q. And what do you mean by a  
12 supply-side entity or person?  
13 A. Those companies or individuals  
14 that provide products or services that, among  
15 other things, comply with the standards.  
16 Q. Do you mean anything else by  
17 supply-side entities or individuals?  
18 MR. FEE: Objection to form.  
19 THE WITNESS: I don't think so.  
20 BY MR. BRIDGES:  
21 Q. What do you mean by demand-side  
22 entities or individuals?  
23 MR. FEE: Same objection.  
24 THE WITNESS: Just so that  
25 there's no confusion between us, I

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1 believe an entity can encompass an  
2 individual.  
3 BY MR. BRIDGES:  
4 Q. I understand, but I want the  
5 record to be clear. And since "entity" tends  
6 to suggest a non-breathing person, I would  
7 like to include both breathing persons and  
8 non-breathing legal persons in my question.  
9 A. I'm not sure if that's a  
10 question.  
11 Q. The pending question was, what  
12 do you mean by demand-side entities or  
13 individuals?  
14 MR. FEE: Objection to form.  
15 THE WITNESS: Okay. I'm not --  
16 I'm not sure I used the phrase  
17 "entities or individuals" when I  
18 talked about demand side.  
19 Regardless, it's companies or  
20 individuals that are the users or  
21 potential users of products or  
22 services that, in part, comply with  
23 the standards.  
24 BY MR. BRIDGES:  
25 Q. Are you aware of any other

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1 constituents of the plaintiffs?  
2 MR. FEE: Objection to form.  
3 THE WITNESS: Nothing else  
4 comes to mind, although I'm certainly  
5 open to learning that I have not  
6 included something that I should  
7 include.  
8 BY MR. BRIDGES:  
9 Q. What about regulators?  
10 A. I'm sorry. What's the  
11 question?  
12 Q. What about regulators?  
13 MR. FEE: Objection to form.  
14 THE WITNESS: I heard those  
15 words. I don't understand the  
16 question.  
17 BY MR. BRIDGES:  
18 Q. You don't understand the  
19 question?  
20 A. Correct.  
21 Q. You've referred to supply-side  
22 entities. You've referred to demand-side  
23 entities. I'm saying now what about  
24 government -- what about regulators? You  
25 don't understand that question --

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1 A. I don't.  
2 Q. -- in this context?  
3 A. Are you asking whether a  
4 regulator is on the demand side or supply  
5 side?  
6 Q. I'm asking whether regulators  
7 are constituents of the plaintiffs.  
8 MR. FEE: Objection to form.  
9 BY MR. BRIDGES:  
10 Q. Have you ever given that any  
11 thought?  
12 A. Which question --  
13 MR. FEE: Objection. Compound.  
14 THE WITNESS: -- should I  
15 answer?  
16 BY MR. BRIDGES:  
17 Q. Both.  
18 MR. FEE: Objection to form.  
19 THE WITNESS: The question of  
20 have I given that any thought,  
21 perhaps.  
22 To the question of are they a  
23 constituent of the plaintiffs here, I  
24 guess in some dimension they are.  
25 They are interested parties because

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1 they have both supply-side and  
 2 demand-side interests that they  
 3 consider.  
 4 BY MR. BRIDGES:  
 5 Q. Don't they also have regulatory  
 6 interests aside from being supply side or  
 7 demand side?  
 8 MR. FEE: Objection to form.  
 9 THE WITNESS: What do you mean  
 10 by "regulatory interests"?  
 11 BY MR. BRIDGES:  
 12 Q. You don't understand the term?  
 13 A. No, I don't know what you mean  
 14 by that term.  
 15 Q. Do they have public interests  
 16 other than supply or demand side interests?  
 17 MR. FEE: Objection to form.  
 18 THE WITNESS: I don't know that  
 19 it would be "other than," because I  
 20 think of the public interest as being  
 21 either demand or supply side. I don't  
 22 know what might not be included.  
 23 BY MR. BRIDGES:  
 24 Q. What about somebody that has a  
 25 safety interest? How do you classify them as

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1 a constituent of the plaintiffs?  
 2 MR. FEE: Objection to form.  
 3 THE WITNESS: It depends on who  
 4 that is. I have an interest in my  
 5 house being safe, for instance, and I  
 6 consider myself as part of the  
 7 demand-side constituency.  
 8 I think that there could be  
 9 companies that are in the business of  
 10 manufacturing smoke detectors, for  
 11 instance. I would think of them  
 12 primarily as being on the supply side,  
 13 although they're certainly alert to  
 14 the demand-side considerations.  
 15 BY MR. BRIDGES:  
 16 Q. How do you understand the  
 17 plaintiffs here -- strike that.  
 18 What do you understand to be  
 19 the process by which the plaintiffs develop  
 20 standards?  
 21 MR. FEE: Objection to form.  
 22 THE WITNESS: I don't know all  
 23 the steps. I've summarized some of  
 24 the steps that I understand in the  
 25 report.

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1 The Web sites and information  
 2 that I looked at for each of the  
 3 plaintiffs certainly give more detail.  
 4 But, in essence, a need for a  
 5 standard is brought to the attention  
 6 of the group. That need can be  
 7 identified from any number of places.  
 8 And then a group is chartered  
 9 with assessing what that need is and  
 10 how best to respond to that need.  
 11 That group often comes up with  
 12 proposals to respond to the issue and  
 13 adjusts that proposal as it gets more  
 14 input and gives more thought.  
 15 Ultimately consensus is arrived  
 16 at for each of the organizations, and  
 17 a standard is developed and published.  
 18 The processes are slightly  
 19 different for each of the  
 20 organizations but generally follow  
 21 that route.  
 22 BY MR. BRIDGES:  
 23 Q. How do the processes differ  
 24 among the three plaintiff organizations?  
 25 MR. FEE: Objection to form.

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1 THE WITNESS: I don't know all  
 2 of the differences. They may have, in  
 3 part, been summarized in my report. I  
 4 see, for instance, on page 29,  
 5 paragraph 70, I have identified the  
 6 four steps that I saw that NFPA  
 7 follows in developing standards.  
 8 BY MR. BRIDGES:  
 9 Q. I'm just asking you -- you  
 10 don't need to spend time going through the  
 11 report. I just want to know, sitting here  
 12 today, how you understand the processes  
 13 differ.  
 14 MR. FEE: Object to form, to  
 15 the extent you are asking him not to  
 16 look at his report. I think he should  
 17 be permitted to do that.  
 18 THE WITNESS: Just by -- just  
 19 going by memory, I don't recall  
 20 substantial differences in the  
 21 processes. I understand each one to  
 22 follow the general scheme that I  
 23 identified a few moments ago. I'm  
 24 quite sure that there are differences  
 25 in each plaintiff's implementation of

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1 that scheme.  
 2 BY MR. BRIDGES:  
 3 Q. You used the word "group"  
 4 several times in discussing the process by  
 5 which the standards -- the plaintiffs develop  
 6 standards. What did you mean by "group"?  
 7 A. I don't recall exactly what  
 8 context I used it in, but I think of a set of  
 9 individuals representing either themselves or  
 10 companies that have interest in the topic and  
 11 might have some thoughts as to how best to  
 12 address that topic and develop a standard.  
 13 The groups can be wide  
 14 assortments. Sometimes they're individual  
 15 users. Sometimes they're large company  
 16 representatives. Sometimes they're small  
 17 company representatives. Sometimes there  
 18 are -- they are employees of the SDO.  
 19 But each one of the SDOs tends  
 20 to have a fairly wide and diverse set of  
 21 groups that addresses these topics.  
 22 Q. You say some members of the  
 23 groups may be individuals, correct, and their  
 24 own -- acting on their own interest; is that  
 25 correct?

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1 A. That's my understanding, yes.  
 2 Q. Why is that your understanding?  
 3 How -- what -- what's the basis of your  
 4 understanding?  
 5 A. I think I've probably seen that  
 6 in some of the written materials, but I can't  
 7 point you to particular materials that --  
 8 that I relied on for that.  
 9 Q. And you said that some  
 10 individuals may participate in groups as  
 11 representatives of large companies; is that  
 12 correct?  
 13 A. Yes.  
 14 Q. Some individuals may  
 15 participate as -- participate as  
 16 representatives of small companies, correct?  
 17 A. Yes.  
 18 Q. And I don't think you mentioned  
 19 that any individuals participate as  
 20 representatives of government?  
 21 A. That's probably also the case.  
 22 Q. What types of governments?  
 23 MR. FEE: Objection. Vague.  
 24 Form.  
 25 THE WITNESS: I don't know in

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1 particular, but the -- the options are  
 2 federal, state, and local.  
 3 BY MR. BRIDGES:  
 4 Q. Have you --  
 5 A. But I don't know that each  
 6 group assessing the need for a standard  
 7 always has representations at each level of  
 8 government.  
 9 Q. What do you know about  
 10 participation by employees of standards  
 11 development organizations in what you call  
 12 the "groups"?  
 13 MR. FEE: Objection to form.  
 14 THE WITNESS: My memory is that  
 15 each one of the standard development  
 16 organizations that are at issue here  
 17 have at least one employee that's --  
 18 that's involved in the process.  
 19 Sometimes those employees are  
 20 facilitators. Often that's the case.  
 21 Sometimes they have substantive input.  
 22 But they often help the process along.  
 23 BY MR. BRIDGES:  
 24 Q. And what do you mean by  
 25 "substantive input"?

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1 A. Some people may have particular  
 2 knowledge about a particular industry or  
 3 topic. They all have some knowledge about  
 4 the standards development process.  
 5 Q. Do you have any understanding  
 6 as to why the various individuals in the  
 7 groups participate in the standards  
 8 development process?  
 9 MR. FEE: Objection to form.  
 10 THE WITNESS: Generally,  
 11 they're interested in addressing a  
 12 topic of some concern and coming to a  
 13 resolution, one that's acceptable to,  
 14 at the very least, the party that  
 15 they're representing and one that  
 16 is of -- has sufficient consensus  
 17 support to be a practical and  
 18 acceptable solution to a pending  
 19 problem.  
 20 BY MR. BRIDGES:  
 21 Q. What do you mean by "a pending  
 22 problem"?  
 23 A. Typically, there's a need  
 24 identified, and the SDO has decided a  
 25 standard may help address that need. For

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1 instance, the fire at the shirt factory in  
 2 New York a hundred years ago, it was  
 3 identified that we didn't want those  
 4 disasters to occur in the future and that we  
 5 would like to investigate avenues to minimize  
 6 such risks.  
 7 Q. What do you mean by "avenues to  
 8 minimize such risks"?  
 9 A. Well, consideration is given to  
 10 determining whether there should be quality  
 11 standards that manufacturers should comply  
 12 with in order to reduce the disastrous  
 13 outcomes that occur because of fires, for  
 14 instance.  
 15 Q. And what do you mean by  
 16 "quality standards"?  
 17 A. Just by way of example, to have  
 18 more ingress and egress available to  
 19 employees and to have that as a requirement  
 20 or have a standard that may eventually be  
 21 incorporated into law so that buildings are  
 22 erected in such a way to allow employees to  
 23 leave the building rather than be engulfed in  
 24 flames.  
 25 Q. And what do you mean by

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1 "incorporated into law"?  
 2 MR. FEE: Objection. Calls for  
 3 a legal conclusion. Form.  
 4 THE WITNESS: As an economist,  
 5 I generally understand it to be that  
 6 there's some federal, state, and local  
 7 laws that make reference to certain  
 8 standards and have that reference as  
 9 part of the law.  
 10 The legal implications I am  
 11 certainly not an expert in, and I  
 12 hesitate to characterize any more than  
 13 I have.  
 14 BY MR. BRIDGES:  
 15 Q. Well, you, in fact, have a law  
 16 degree, correct?  
 17 A. I have a law degree. I am not  
 18 now, nor have I ever been a practicing  
 19 attorney.  
 20 Q. Okay. But you have a juris  
 21 doctor degree, correct?  
 22 A. Is that different from a law  
 23 degree?  
 24 Q. It's a type of law degree.  
 25 A. I -- I didn't know that, but I

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1 do have a JD.  
 2 Q. You don't have a Ph.D. in  
 3 economics, correct?  
 4 A. Correct. I was in the Ph.D.  
 5 program and have completed most of the  
 6 requirements for my Ph.D. but not all.  
 7 Q. What interests do you  
 8 understand the plaintiffs to have -- strike  
 9 that.  
 10 What interests do you  
 11 understand the plaintiffs to have in having  
 12 standards incorporated into law?  
 13 MR. FEE: Objection to form.  
 14 THE WITNESS: I think that's  
 15 laid out in my report in a variety of  
 16 ways; but generally, the plaintiffs  
 17 are interested in effectuating their  
 18 charters, and that is they want to  
 19 address certain problems in an  
 20 effective way. And if those solutions  
 21 get incorporated into standards and  
 22 those standards get incorporated by  
 23 reference into law, that can be an  
 24 effective way for dissemination of a  
 25 solution.

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1 BY MR. BRIDGES:  
 2 Q. What do you mean by  
 3 "effectuating" the plaintiffs' charters?  
 4 A. Well, each plaintiff has a goal  
 5 or set of goals it would like to achieve,  
 6 whether that's safety or interoperability.  
 7 But generally, they want to achieve a  
 8 socially good purpose and one that is good  
 9 for members of the industry.  
 10 Q. In your answer, you're  
 11 referring specifically to these plaintiffs?  
 12 A. Yes.  
 13 Q. Do these plaintiffs have an  
 14 interoperability goal?  
 15 A. I don't think explicitly, but I  
 16 think -- I don't think as part of the charter  
 17 for the plaintiff, but I think with regard to  
 18 certain topics that they address  
 19 interoperability helps achieve some of those  
 20 goals of the individual topics that help  
 21 achieve the overall goals of the  
 22 organization.  
 23 Q. What are some of the goals of  
 24 interoperability that you've identified for  
 25 plaintiffs?

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1 A. That I've identified in my  
2 report?  
3 Q. In your work on -- in your work  
4 on this matter for the plaintiffs.  
5 A. I'm not exactly sure what  
6 you're asking, but I talked about the merits  
7 of interoperability and why these  
8 organizations -- why certain standards are  
9 oriented toward interoperability.  
10 I think one of the specific  
11 illustrations is -- of the need for and the  
12 achieving of interoperability goals is the  
13 NEC. That allows one to safely and  
14 effectively receive power across the world.  
15 That's good for manufacturers, and it's good  
16 for consumers.  
17 Q. You said that plaintiffs are  
18 interested, I believe, in addressing certain  
19 problems in an effective way. Do you recall  
20 that?  
21 A. Generally I recall that, yes.  
22 Q. And, generally speaking,  
23 referring to these plaintiffs, what are the  
24 problems you understand them to be trying to  
25 address?

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1 MR. FEE: Objection to form.  
2 THE WITNESS: I've laid that  
3 out in my report. In page 64 I've  
4 laid out, in essence, the ASTM  
5 mission, as I understand it.  
6 In paragraph 68 I've laid out  
7 the NFPA mission, as I understand it.  
8 And in paragraph 73 I've laid  
9 out the ASHRAE mission, as I  
10 understand it.  
11 BY MR. BRIDGES:  
12 Q. So now my question is, what are  
13 the problems that you understand the  
14 plaintiffs are trying to address in an  
15 effective way?  
16 MR. FEE: Objection to form.  
17 THE WITNESS: Well, generally,  
18 they're addressing the mission that  
19 they have here and their individual  
20 problems that are brought to the SDOs'  
21 attention that, if addressed  
22 effectively, would help each  
23 organization fulfill its mission.  
24 BY MR. BRIDGES:  
25 Q. So generally speaking, what are

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1 the problems that they are trying to address?  
2 MR. FEE: Same objection.  
3 THE WITNESS: Generally, ASTM  
4 is addressing problems associated with  
5 public health and safety; support --  
6 protection and sustainability of the  
7 environment; overall quality of life;  
8 the reliability of materials, product  
9 systems, and services; and  
10 facilitating international, regional,  
11 and national commerce.  
12 BY MR. BRIDGES:  
13 Q. Now, those are problems?  
14 A. They are trying to achieve  
15 their mission by addressing problems that may  
16 stand in the way of achieving those missions.  
17 Q. So please give me an example of  
18 some problems that the plaintiffs are trying  
19 to address. My questioning has been focused  
20 on problems. You've been responding about  
21 mission, but I -- I'd like for you to  
22 identify some of the problems, generally  
23 speaking, that you understand the plaintiffs  
24 are trying to address.  
25 MR. FEE: Objection to form.

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1 Compound.  
2 THE WITNESS: I thought I did,  
3 so I'll try with some different words.  
4 BY MR. BRIDGES:  
5 Q. Can you answer without  
6 reference to your report --  
7 A. I'd rather --  
8 Q. -- based on your general  
9 knowledge?  
10 A. I'd rather not.  
11 Q. Well, I'd rather that you tell  
12 us what you can recall about the -- about the  
13 problems that plaintiffs are trying to  
14 address.  
15 A. So you don't --  
16 MR. FEE: Objection.  
17 THE WITNESS: -- want me to  
18 look at my report? This is just a  
19 memory contest?  
20 BY MR. BRIDGES:  
21 Q. No, it's not a memory contest.  
22 I'd like to know what you happen to know,  
23 sitting here.  
24 A. I'd like to do that by looking  
25 at my report.

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1 Q. You may after I get your answer  
2 first.  
3 A. Okay.  
4 MR. FEE: Objection to making  
5 this a memory test and not allowing  
6 him to review materials he's indicated  
7 he needs to review to fully and  
8 accurately respond to the question.  
9 If you can answer without  
10 looking at your report, go ahead.  
11 THE WITNESS: By way of  
12 example, ASTM has addressed problems  
13 associated with the safety of  
14 amusement rides.  
15 By way of example, NFP [sic]  
16 has addressed problems associated with  
17 electrical fires in buildings.  
18 By way of example, ASHRAE is  
19 addressing -- but I'm not thinking of  
20 a good example for ASHRAE right now.  
21 I apologize. I'd have to look at my  
22 report.  
23 BY MR. BRIDGES:  
24 Q. Okay. And I believe that you  
25 testified -- bear with me just a second. Let

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1 me get the exact testimony.  
2 You said earlier that the  
3 plaintiffs are interested in effectuating  
4 their charters, and that is they want to  
5 address certain problems in an effective way.  
6 And if those solutions get incorporated into  
7 standards and those standards get  
8 incorporated into law, that can be an  
9 effective way for dissemination of a  
10 solution.  
11 Do you recall that testimony?  
12 A. Yes, I do.  
13 Q. What did you mean by  
14 "solutions" in that context?  
15 A. Standards are a form of  
16 solution.  
17 Q. In what respect?  
18 A. They provide definition around  
19 what is a best practice, an advisable  
20 practice, and that practice is intended to  
21 address existing and potential problems.  
22 Q. And what do you mean by  
23 "practices" in that -- in your answer?  
24 A. Perhaps you could read it back,  
25 and that will help me answer the question.

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1 Q. You said standards "provide  
2 definition around what is a best practice, an  
3 advisable practice, and that practice is  
4 intended to address existing and potential  
5 problems."  
6 What did you mean by "practice"  
7 in that answer?  
8 A. It was an example of what  
9 somebody should do.  
10 Q. And what do you mean by "what  
11 somebody should do"?  
12 MR. FEE: Objection. Vague.  
13 THE WITNESS: I don't know how  
14 to define it any more than that. I'm  
15 sorry.  
16 BY MR. BRIDGES:  
17 Q. Is it a course of action that  
18 somebody should take?  
19 A. That would be another way to  
20 say it. I don't think that's a definition.  
21 It's -- it's another presentation of what I  
22 said.  
23 Q. Is -- a suitable method for  
24 accomplishing a goal?  
25 MR. FEE: Objection to form.

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1 THE WITNESS: That -- that  
2 could be an example, yes.  
3 BY MR. BRIDGES:  
4 Q. And would it be in terms of  
5 some of plaintiffs' standards?  
6 MR. FEE: Same objection.  
7 THE WITNESS: I think so.  
8 BY MR. BRIDGES:  
9 Q. Would it be optimal or best  
10 procedures for accomplishing a result?  
11 MR. FEE: Objection to form.  
12 THE WITNESS: That could be.  
13 I'm not sure that that's a definition,  
14 but it -- that's a possibility.  
15 BY MR. BRIDGES:  
16 Q. And does that apply to  
17 plaintiffs' standards?  
18 MR. FEE: Same objection.  
19 THE WITNESS: I'm sorry. What  
20 is the question?  
21 BY MR. BRIDGES:  
22 Q. That plaintiffs' standards  
23 articulate optimal procedures for  
24 accomplishing certain results.  
25 MR. FEE: Objection to form.

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1 THE WITNESS: I don't know that  
2 I've seen that. I think that they are  
3 consensus based, and what one party  
4 may define as optimum may be different  
5 from what another party defines as  
6 optimal.  
7 But I think they're the result  
8 of a variety of parties coming  
9 together and sometimes balancing  
10 interests and opinions.  
11 BY MR. BRIDGES:  
12 Q. And recommending certain  
13 procedures for accomplishing certain  
14 outcomes?  
15 A. By way --  
16 MR. FEE: Objection to form.  
17 THE WITNESS: By way of  
18 example, yes.  
19 Are we at a point for a break?  
20 We've been going a little over an  
21 hour.  
22 BY MR. BRIDGES:  
23 Q. I'd like to go a little bit  
24 further to conclude a line of questioning.  
25 It will be about ten more minutes.

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1 incorporated into law, that can be an  
2 effective way for dissemination of a  
3 solution.  
4 What makes incorporation into  
5 law an effective way for dissemination of a  
6 solution with respect to the plaintiffs'  
7 activities?  
8 MR. FEE: Objection to form.  
9 THE WITNESS: I -- I'm  
10 certainly not --  
11 MR. FEE: It mischaracterizes  
12 his prior testimony.  
13 THE WITNESS: I -- I'm not a  
14 legal expert, and I'm not an expert of  
15 an -- on the topic of incorporation by  
16 reference into law.  
17 But if a particular statute  
18 lays out that legally someone must  
19 follow what's laid out in certain  
20 standards, I would expect that,  
21 because most people are interested in  
22 lawful rather than unlawful activity,  
23 that people would follow that dictate.  
24 BY MR. BRIDGES:  
25 Q. And that incorporation into law

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1 MR. FEE: Are you okay with  
2 that?  
3 THE WITNESS: I'm okay with  
4 that. I don't know what you mean by  
5 "a little bit further."  
6 BY MR. BRIDGES:  
7 Q. About ten more -- about ten  
8 more minutes.  
9 A. I'd rather keep it closer to  
10 now than ten minutes from now.  
11 Q. Well, let me just finish a  
12 couple of things here.  
13 MR. FEE: Well, you take a  
14 break whenever you want to take a  
15 break.  
16 MR. BRIDGES: Well, I -- I'm in  
17 the middle of a line of questioning.  
18 MR. FEE: There's no question  
19 pending. He can take a break now if  
20 he wants. If he's willing to give you  
21 a couple more minutes, then that's  
22 great, too.  
23 BY MR. BRIDGES:  
24 Q. You said that if solutions get  
25 incorporated into standards and standards get

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1 would be effective for dissemination of a  
2 standard?  
3 MR. FEE: Same objections.  
4 BY MR. BRIDGES:  
5 Q. Is that your testimony?  
6 A. It's not necessarily the most  
7 effective way, but it -- as -- as far as I  
8 know, it would be an effective way.  
9 Q. What are other effective ways  
10 for dissemination of a standard?  
11 A. I -- I haven't given that any  
12 thought. I would just be speculating.  
13 MR. BRIDGES: Okay. We can  
14 take a break.  
15 THE WITNESS: Thank you.  
16 THE VIDEOGRAPHER: Off the  
17 record at 11:12.  
18 \* \* \*  
19 (Recess from 11:12 a.m. to  
20 11:23 a.m.)  
21 \* \* \*  
22 THE VIDEOGRAPHER: On the  
23 record at 11:23.  
24 BY MR. BRIDGES:  
25 Q. Mr. Jarosz, have you evaluated

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1 any harms that the plaintiffs have actually  
 2 suffered to date as a consequence of the  
 3 defendant's activities?  
 4 MR. FEE: Objection to form.  
 5 THE WITNESS: To the extent I  
 6 have, it's embodied in my report.  
 7 You'll see there's a little bit of  
 8 evidence of actual tangible harm to  
 9 date, and there's certainly more  
 10 discussion of harm. The tangible  
 11 evidence I have is reflected in my  
 12 report.  
 13 BY MR. BRIDGES:  
 14 Q. And what do you understand that  
 15 evidence to be?  
 16 A. I believe the number of  
 17 downloads from the Public Resource  
 18 dissemination have been fairly substantial.  
 19 I believe that the purchase of publications  
 20 has declined some at the plaintiffs -- at the  
 21 various plaintiffs. It certainly has not  
 22 risen. Those are among the things that come  
 23 to mind.  
 24 I think I discuss the topic in  
 25 more depth in paragraph, among other thing --

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1 among other places, in paragraph 133 of my  
 2 report.  
 3 Q. Have you been able to quantify  
 4 any financial losses to plaintiffs as a  
 5 consequence of defendant's activities?  
 6 A. No.  
 7 Q. Why not?  
 8 A. Not with any great certainty.  
 9 Q. Why not?  
 10 A. Well, I don't have the records  
 11 that would allow me to do that. Moreover, I  
 12 am not sure that the impact from the past  
 13 will be close to the impact that will occur  
 14 in the future if the Court finds that there  
 15 has been no copyright or trademark  
 16 infringement.  
 17 Q. Why do you make the statement  
 18 you just did? What's your basis for it?  
 19 MR. FEE: Objection to form.  
 20 THE WITNESS: I think there  
 21 were a few things in my statement.  
 22 Which would you like me to expound on?  
 23 BY MR. BRIDGES:  
 24 Q. Just that sentence. I'd like  
 25 to know what the basis is for the sentence

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1 you just said, quote, "I am not sure that the  
 2 impact from the past would be close to the  
 3 impact that will occur in the future if the  
 4 Court finds that there has been no copyright  
 5 or trademark infringement."  
 6 A. It's everything laid out in my  
 7 report. I -- it's really the -- at the heart  
 8 of what I did.  
 9 Q. And please summarize for me  
 10 what data you base that statement on.  
 11 A. That's identified in my report.  
 12 Q. Okay. Show me, please, in the  
 13 report.  
 14 A. It's all of what's in  
 15 Exhibit 1.  
 16 Q. No, I want -- I want the basis  
 17 for your statement that the impact from  
 18 conduct to date -- strike that -- that you're  
 19 not sure that the impact from the conduct to  
 20 date would be close to the impact that will  
 21 occur in the future if the Court find --  
 22 makes a certain finding, right?  
 23 A. Correct.  
 24 Q. So please identify for me  
 25 something specific that forms the basis of

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1 that statement.  
 2 MR. FEE: Objection. Asked and  
 3 answered.  
 4 THE WITNESS: Among other  
 5 things, paragraphs 112 through 155.  
 6 BY MR. BRIDGES:  
 7 Q. So these are the "Costs of  
 8 Losing Copyright Protection"; is that  
 9 correct?  
 10 A. That's the title of this  
 11 section, and then there's some discussion of  
 12 trademark protection as well.  
 13 Q. And those would be the harms  
 14 that you identify that would flow from a  
 15 decision by the Court that the plaintiffs  
 16 cannot enforce their copyrights against the  
 17 defendant, correct?  
 18 MR. FEE: Objection to form.  
 19 THE WITNESS: What I can say --  
 20 I'm sorry.  
 21 MR. FEE: I just objected to  
 22 form.  
 23 THE WITNESS: What I can say  
 24 with a reasonable degree of certainty.  
 25 BY MR. BRIDGES:

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1 Q. So those would be harms caused  
2 by a court decision?  
3 MR. FEE: Same objection.  
4 THE WITNESS: By continuing  
5 activities by the defendant that are  
6 not halted by the Court.  
7 BY MR. BRIDGES:  
8 Q. Well, it comes across, frankly,  
9 in your report as though you're identifying  
10 harms that would flow from a court decision.  
11 MR. FEE: Objection.  
12 BY MR. BRIDGES:  
13 Q. Is that correct or not?  
14 A. No, I think you --  
15 MR. FEE: Mischaracterizes the  
16 report.  
17 THE WITNESS: -- you misread  
18 it. I don't think I said that or  
19 meant to say that.  
20 BY MR. BRIDGES:  
21 Q. So what harms have occurred  
22 from the -- from the defendant's conduct to  
23 date?  
24 A. At the risk of repeating  
25 myself, some of that is summarized in

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1 paragraph 133, with regard to tangible  
2 evidence on harm. With regard to other  
3 evidence, it's throughout the report.  
4 Q. So why would it make a  
5 difference to what the defendant's harms  
6 are -- strike -- strike that.  
7 Why would it make a defendants  
8 [sic] to the plaintiffs' harms if the  
9 plaintiffs' harms were continue with --  
10 strike that.  
11 Is it your testimony that harms  
12 to plaintiffs would be different depending on  
13 the particular basis of the Court's ruling?  
14 MR. FEE: Objection. Vague.  
15 THE WITNESS: I -- I don't  
16 understand your question.  
17 BY MR. BRIDGES:  
18 Q. It looks as though you're  
19 stating what the harms would be if the Court  
20 found that incorporation by reference would  
21 cause the plaintiffs to lose copyright  
22 protection; is that correct?  
23 A. I don't --  
24 MR. FEE: Objection. Vague.  
25 THE WITNESS: -- think so. I

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1 think basically what I'm saying is  
2 what would -- or addressing, is what  
3 would be the harm to the plaintiffs if  
4 there's no permanent injunction.  
5 BY MR. BRIDGES:  
6 Q. Well, what did you mean by  
7 "losing copyright protection" in the  
8 paragraph -- in the heading VI on page 48?  
9 A. In essence, you can think of it  
10 as what would happen if there's no permanent  
11 injunction. In other words, what the  
12 defendant has done in the past and what it's  
13 likely to do in the future is allowed to  
14 continue.  
15 Q. And you immediately go into  
16 paragraph 112 talking about Emily Bremer,  
17 correct?  
18 A. I don't know what you mean by  
19 "immediately." It's the first paragraph in  
20 Section VI.  
21 Q. Right. Was Emily Bremer in the  
22 passage you referred to referring to the  
23 presence or absence of a permanent injunction  
24 in this case?  
25 A. I don't think explicitly she

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1 was addressing that issue, no.  
2 Q. Do you think implicitly she was  
3 referring to this case?  
4 A. No. I thought you were asking  
5 about permanent injunction. I don't think  
6 she was addressing the -- an injunction  
7 issue. She was addressing the concept of  
8 copyright protection.  
9 Q. And that's what you quoted her  
10 for, right, was for the concept of copyright  
11 protection for standards?  
12 MR. FEE: Objection. You're  
13 referring just to paragraph 112?  
14 BY MR. BRIDGES:  
15 Q. You may answer.  
16 MR. FEE: Objection to form.  
17 THE WITNESS: I -- I don't  
18 understand the question.  
19 BY MR. BRIDGES:  
20 Q. You quoted her in  
21 paragraph 112, correct?  
22 A. Yes. From one of her two  
23 articles, yes.  
24 Q. Right. Regarding the concept  
25 of copyright protection?

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1 A. Generally. I think she's  
2 talking about standards development and  
3 incorporation by reference. I don't remember  
4 if she said at the very beginning of the  
5 article that it was about copyright  
6 protection, but she certainly talks about  
7 copyright protection.  
8 Q. And you're quoting her about  
9 losing copyright protection, and you're  
10 placing it in the context of harms of the  
11 loss of copyright protection, correct?  
12 MR. FEE: Objection to form.  
13 THE WITNESS: This excerpt  
14 doesn't specifically talk about losing  
15 copyright protection, but it talks  
16 about the concept of it. If there was  
17 no longer copyright protection granted  
18 to the SDOs, what would be the  
19 repercussions.  
20 BY MR. BRIDGES:  
21 Q. And that's the context that you  
22 identified in the first line of  
23 paragraph 112, correct?  
24 A. Yes.  
25 MR. FEE: Objection to form.

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1 BY MR. BRIDGES:  
2 Q. Let me direct your attention to  
3 paragraph 35 of your report. It says, "With  
4 regard to expansion beyond the specific  
5 actions of Public Resource here, the  
6 'product' offerings of Public Resource -  
7 scans of paper copies of standards with some  
8 rekeying of text and some redrawing of  
9 diagrams (with some containing errors) -  
10 represent a rudimentary first step in the use  
11 of Plaintiffs' standards that is likely to  
12 become much more sophisticated if the Court  
13 holds that third parties are free to use  
14 Plaintiffs' standards with impunity after  
15 they are incorporated by reference into law."  
16 Do you see that?  
17 A. Yes, I do.  
18 Q. That is your statement,  
19 correct?  
20 A. Yes.  
21 Q. What are the steps that you're  
22 envisioning there beyond the rudimentary  
23 first step that you identify?  
24 A. I think they're laid out in the  
25 next sentence.

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1 Q. "Such products" --  
2 A. And in the next two sentences.  
3 Q. And these are other products  
4 that "could include more sophisticated  
5 Web-based availability, published  
6 compilations of incorporated standards, and  
7 other ancillary products that incorporate the  
8 standards"; isn't that correct?  
9 A. You didn't read that right. It  
10 starts "such products could include."  
11 Q. Okay. Otherwise, that reading  
12 is correct, correct?  
13 A. I think so.  
14 Q. You consider that to be harm to  
15 the plaintiffs?  
16 MR. FEE: Objection. Vague.  
17 THE WITNESS: It could be, yes.  
18 It's likely to be, if the copyright  
19 infringement or the assumption of a  
20 copyright infringement continues. It  
21 could broaden.  
22 BY MR. BRIDGES:  
23 Q. Right. But the fact that these  
24 other types of products would enter the  
25 marketplace is part of the harm that you

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1 envision from the defendant in this case?  
2 MR. FEE: Objection to form.  
3 THE WITNESS: It's potential --  
4 there's a potential that the defendant  
5 could do that. There's also the  
6 potential that other parties could do  
7 that.  
8 BY MR. BRIDGES:  
9 Q. What --  
10 A. I don't know for sure what the  
11 defendant has in mind.  
12 Q. Why did you take into account  
13 harms caused by other parties in this case?  
14 A. Because --  
15 MR. FEE: Objection. Lack of  
16 foundation.  
17 Go ahead.  
18 THE WITNESS: If no copyright  
19 protection is allowed here, in other  
20 words, there's no permanent  
21 injunction, Public Resource and other  
22 parties like it will have freedom to  
23 do what the plaintiffs believe they  
24 should not have freedom to do.  
25 BY MR. BRIDGES:

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1 Q. In other words, if the Court  
2 makes a decision in a certain way, there will  
3 be harms from persons or entities other than  
4 Public.Resource.Org to the plaintiffs? Is  
5 that your testimony?  
6 MR. FEE: Objection to form.  
7 THE WITNESS: You used the  
8 phrase "in a certain way." I don't  
9 know what you mean by that. I'm  
10 addressing the issue of whether there  
11 should be a permanent injunction or  
12 not.  
13 BY MR. BRIDGES:  
14 Q. So your view is that, if the  
15 Court does not enter a permanent injunction,  
16 the plaintiffs will suffer harms from parties  
17 other than Public.Resource.Org. Is that your  
18 testimony?  
19 A. That potential exists. I don't  
20 know for sure. That's, in part, why the harm  
21 is irreparable or very difficult to quantify.  
22 Q. The -- what harm?  
23 A. Continuing activity of Public  
24 Resource and others. I don't know exactly  
25 what will happen, but the potential is that

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1 there could be very broad dissemination of  
2 the standards, which would impact these SDOs  
3 tremendously.  
4 Q. What harm would  
5 Public.Resource.Org cause to plaintiffs if  
6 there is no permanent injunction?  
7 A. A permanent injunction would --  
8 lack of a permanent injunction would harm the  
9 SDOs.  
10 Q. That wasn't my question. My  
11 question was, what harm would  
12 Public.Resource.Org cause to plaintiffs if  
13 there is no permanent injunction?  
14 A. At the very least, it's  
15 associated with its historical dissemination  
16 of these standards, and there would be, in  
17 essence, a carte blanche for other  
18 organizations or individuals to access those.  
19 So my expectation is that the  
20 dissemination of the materials that have  
21 already been disseminated will expand.  
22 It could also be the case that  
23 Public Resource will undertake further  
24 activities that would disseminate either  
25 already disseminated standards or other

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1 standards.  
2 Q. What further harm would  
3 Public.Resource.Org cause to plaintiffs with  
4 respect to the standards at issue in this  
5 case if no -- if the Court does not  
6 permanently enjoin Public.Resource.Org?  
7 MR. FEE: Objection to form.  
8 THE WITNESS: If there's no  
9 permanent injunction, there will, in  
10 essence, be a message sent to the  
11 marketplace that the standards that  
12 have already been disseminated are out  
13 there and can be used by others.  
14 So right now my expectation is  
15 that some number of consumers of the  
16 standards have been reluctant or  
17 unknowing as to the standards  
18 disseminated by Public Resource. Now  
19 there will be more knowledge about  
20 that and more approval of that  
21 activity. That is if there's no  
22 permanent injunction.  
23 BY MR. BRIDGES:  
24 Q. What harms will plaintiffs  
25 suffer if the Court rules that the plaintiffs

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1 do not own the copyrights in this case?  
2 MR. FEE: Objection. Calls for  
3 speculation.  
4 THE WITNESS: In essence,  
5 you're asking if there's no copyright  
6 infringement?  
7 BY MR. BRIDGES:  
8 Q. No. What harms -- have you  
9 identified what harms the plaintiffs would  
10 suffer if the Court rules that the plaintiffs  
11 do not own the copyrights at issue, that  
12 there are no copyrights that the plaintiffs  
13 own --  
14 MR. FEE: Objection to form.  
15 BY MR. BRIDGES:  
16 Q. -- at issue in this case?  
17 A. I haven't addressed or thought  
18 about that issue. There are also, don't  
19 forget, trademark issues.  
20 Q. I'm asking about copyright, so  
21 I ask you to confine your answers to my  
22 questions.  
23 My question is, what -- you  
24 assume for purposes of your analysis that  
25 plaintiffs own valid copyrights, correct?

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1 A. I assume that there's copyright  
2 infringement. I don't know that I've made an  
3 explicit assumption with regard to ownership.  
4 Q. And you assume infringement  
5 without assuming ownership of the copyrights?  
6 A. I haven't made any explicit  
7 assumption with regard to ownership. I know  
8 that's an issue in this case, but it's well  
9 beyond my expertise.  
10 Q. So if it turns out that -- do  
11 you understand your testimony to have any  
12 bearing on whether plaintiffs' standards are  
13 copyrightable?  
14 MR. FEE: Objection. Calls for  
15 speculation.  
16 I would instruct you to not  
17 disclose any communications you had  
18 with counsel that weren't the basis  
19 for any of your opinions in this case.  
20 You can otherwise answer.  
21 THE WITNESS: Could you read  
22 that back or ask it again, please?  
23 BY MR. BRIDGES:  
24 Q. Do you understand your  
25 testimony and opinions in this case to have

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1 any bearing on whether plaintiffs' standards  
2 are copyrightable?  
3 MR. FEE: Same objection and  
4 instruction. Plus objection, calls  
5 for a legal conclusion.  
6 THE WITNESS: I don't know one  
7 way or the other. I've not taken on  
8 that assignment.  
9 BY MR. BRIDGES:  
10 Q. Do you understand whether your  
11 testimony and opinions in this case are  
12 relevant to whether plaintiffs deserve  
13 copyright protection in this case?  
14 MR. FEE: Objection. Calls for  
15 a legal conclusion.  
16 And same objection with respect  
17 to communications between you and  
18 counsel that were not the bases for  
19 your opinions or your report.  
20 THE WITNESS: I don't know one  
21 way or the other. I did not take on  
22 that assignment.  
23 BY MR. BRIDGES:  
24 Q. Do you mean by your analysis  
25 and opinions to suggest in any way that

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1 plaintiffs deserve copyright protection for  
2 these standards?  
3 MR. FEE: Objection to form.  
4 THE WITNESS: I don't have an  
5 opinion on that one way or the other.  
6 I have not thought about that topic.  
7 BY MR. BRIDGES:  
8 Q. Do you have any expertise in  
9 copyright law as a field of law?  
10 MR. FEE: Objection. Vague.  
11 THE WITNESS: No, I don't have  
12 legal expertise. I have expertise in  
13 looking at harm associated with  
14 copyright infringement.  
15 BY MR. BRIDGES:  
16 Q. Do you have any expertise with  
17 respect to harm caused by invalidation of  
18 copyrights?  
19 MR. FEE: Same objection.  
20 THE WITNESS: I'm not quite  
21 sure I'm fully appreciating your  
22 question. Again, I'm an expert in the  
23 economics of IP protection. One of  
24 the areas in which I do work is harm  
25 associated with copyright protection.

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1 BY MR. BRIDGES:  
2 Q. Have you done any work in this  
3 case to quantify what harms plaintiffs would  
4 suffer if a court were to rule that they  
5 lacked copyright rights in the standards at  
6 issue in this case?  
7 MR. FEE: Objection to form.  
8 Go ahead.  
9 THE WITNESS: Not explicitly,  
10 to my knowledge.  
11 BY MR. BRIDGES:  
12 Q. Have you done anything  
13 implicitly?  
14 MR. FEE: Same objection.  
15 THE WITNESS: Not to my  
16 knowledge.  
17 BY MR. BRIDGES:  
18 Q. Have you done any work in this  
19 case to analyze the incentives that  
20 participants have in the standards  
21 development process?  
22 MR. FEE: Objection to form.  
23 Vague.  
24 THE WITNESS: I have in the  
25 sense that I've examined the materials

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1 that I've cited, and some of those  
 2 talk about the standard development  
 3 process and why participants are  
 4 active in the process. So in that  
 5 regard, I've considered incentives.  
 6 BY MR. BRIDGES:  
 7 Q. What do you understand the  
 8 incentives to be?  
 9 A. Well, for the supply side  
 10 constituents, they're interested in effective  
 11 manufacturing and selling of products that  
 12 will -- and services that will be well  
 13 received in the marketplace; and on the  
 14 demand side, the constituents are interested  
 15 in products and services that address certain  
 16 quality and compatibility issues or problems  
 17 and help resolve those.  
 18 Q. Do you know who actually  
 19 creates the text of the standards?  
 20 MR. FEE: Objection to form.  
 21 THE WITNESS: Are you talking  
 22 about who actually types in the words?  
 23 BY MR. BRIDGES:  
 24 Q. No.  
 25 A. Because I don't know what you

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1 mean by "creates the text."  
 2 Q. Who actually suggests the  
 3 words?  
 4 A. I think a number of  
 5 constituents do, typically.  
 6 Q. What types of constituents  
 7 suggest the words of the standards?  
 8 MR. FEE: Objection to form.  
 9 THE WITNESS: I think it's  
 10 sometimes SDO employees. I think,  
 11 more times than not, it's industry  
 12 participants, often supply-side  
 13 people, sometimes demand-side people.  
 14 Frequently those people are working  
 15 from preexisting standards or similar  
 16 standards and revising those as  
 17 appropriate.  
 18 So I think a number of people  
 19 have input to the words.  
 20 BY MR. BRIDGES:  
 21 Q. Do you actually know of  
 22 instances where SDO employees have proposed  
 23 text as opposed to editing text?  
 24 A. I can't --  
 25 MR. FEE: Objection --

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1 THE WITNESS: -- point to --  
 2 MR. FEE: -- form.  
 3 THE WITNESS: -- any particular  
 4 instances as I sit here now.  
 5 BY MR. BRIDGES:  
 6 Q. Can you think of any other  
 7 motivations that the participants in the  
 8 standards writing process have?  
 9 A. I'm sorry. Other than what?  
 10 Q. Other than the incentives you  
 11 referred to earlier of the supply-side  
 12 constituents and the demand-side  
 13 constituents.  
 14 A. Nothing else comes to mind,  
 15 although I'm certainly open to the fact that  
 16 I haven't thought of or expressed all the  
 17 incentives.  
 18 Q. Well, what other incentives can  
 19 you think of as you sit here?  
 20 A. As I just said, nothing else  
 21 comes to mind.  
 22 Q. What incentives do you  
 23 understand the plaintiffs to have in  
 24 developing standards?  
 25 MR. FEE: Objection to form.

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1 THE WITNESS: I think,  
 2 generally, they want consensus among  
 3 interested parties in how to address a  
 4 particular issue or problem that those  
 5 constituents face.  
 6 They are each non-profit  
 7 organizations, so they're not  
 8 intending to profit off their  
 9 activities, but they're certainly  
 10 intending to fund their activities  
 11 going forward.  
 12 BY MR. BRIDGES:  
 13 Q. What do you understand the  
 14 activities of the standards development  
 15 organizations to be in creating the standards  
 16 at issue in this case?  
 17 MR. FEE: Objection to form.  
 18 THE WITNESS: At the very  
 19 least, they facilitate the process  
 20 through arranging logistics. They do  
 21 other things, including participate in  
 22 discussions, and -- as I understand  
 23 it, and create versions of proposed  
 24 standards.  
 25 They also serve as a

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1 clearinghouse for resources.  
 2 BY MR. BRIDGES:  
 3 Q. When you say they "create  
 4 versions of the proposed standards," it's, in  
 5 fact, the various groups, as you call them,  
 6 that create versions, perhaps with a staff  
 7 member from the organizations themselves,  
 8 correct?  
 9 MR. FEE: Objection to form.  
 10 Vague.  
 11 THE WITNESS: I think that's  
 12 sometimes correct.  
 13 BY MR. BRIDGES:  
 14 Q. Do you know that --  
 15 A. Perhaps often.  
 16 Q. Or perhaps always?  
 17 A. Perhaps always.  
 18 MR. FEE: Objection.  
 19 BY MR. BRIDGES:  
 20 Q. How do the plaintiffs serve as  
 21 clearinghouses for resources?  
 22 A. They allow a forum for the  
 23 various constituents to identify and address  
 24 issues that those constituents face in a  
 25 particular subject area.

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1 standards, print copies of standards,  
 2 and disseminate copies of standards.  
 3 They are involved in teaching  
 4 and training sometimes associated with  
 5 standards.  
 6 They participate in advertising  
 7 campaigns about the output of the SDO.  
 8 Those are among the things that  
 9 they contribute.  
 10 BY MR. BRIDGES:  
 11 Q. And when you say "providing  
 12 people to be involved and pay salaries,"  
 13 you're talking about the -- generally  
 14 speaking, the staff members who may functions  
 15 as liaisons to various committees and groups  
 16 that draft the standards?  
 17 MR. FEE: Objection to form.  
 18 Lack of foundation.  
 19 BY MR. BRIDGES:  
 20 Q. Is that what you understand?  
 21 A. Staff people that help  
 22 facilitate. Some are purely helping in a  
 23 logistics front. Others are helping on a  
 24 more substantive front. They pay their  
 25 salaries. They pay taxes, provide benefits.

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1 Q. What investments do you  
 2 understand the plaintiffs to make in the  
 3 standards development process?  
 4 MR. FEE: Objection to form.  
 5 THE WITNESS: Are you asking  
 6 for dollar amounts, or are you asking  
 7 for types of activities?  
 8 BY MR. BRIDGES:  
 9 Q. Types of -- types of  
 10 expenditures.  
 11 MR. FEE: Same objection.  
 12 THE WITNESS: There are many  
 13 types, as I understand it. One type  
 14 is simply providing people to be  
 15 involved in the process and paying the  
 16 salaries of those people.  
 17 I think they probably provide  
 18 computing resources to help produce  
 19 the standards.  
 20 I think they probably provide  
 21 meeting resources.  
 22 I think they probably provide  
 23 an e-mail exchange mechanism by which  
 24 information is shared.  
 25 I think they create copies of

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1 They provide travel expenses. Those are some  
 2 of the things that are done.  
 3 Q. On page 76 -- sorry -- page 33.  
 4 Let me ask you to turn to paragraph 76 of  
 5 your report. Are you there?  
 6 A. I am, yes.  
 7 Q. In the final sentence, it says,  
 8 "In fiscal year 2014, ASHRAE spent more than  
 9 \$1 million to cover the costs of developing  
 10 or updating its standards."  
 11 Do you see that?  
 12 A. I do, yes.  
 13 Q. Are -- on -- how many years is  
 14 the typical cycle for revision of ASHRAE's  
 15 90.1 standard?  
 16 A. That is under continuous  
 17 maintenance, and I think that's -- it's  
 18 supplemented and updated automatically every  
 19 three years. Perhaps they address it more  
 20 frequently, but at least every three years.  
 21 Q. So it would be fair to assume  
 22 that, during one cycle, ASHRAE spent  
 23 something over \$3 million to cover the costs  
 24 of developing or updating its standards?  
 25 A. You said at least \$3 million?

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1 Q. Right. Or approximately  
2 \$3 million?  
3 A. Are you limiting it just to  
4 90.1 or all its standards?  
5 Q. Well, that's a good question.  
6 What -- what's -- what did you intend the  
7 last sentence in paragraph 76 to refer to?  
8 All of its standards or 90.1?  
9 A. I think it's all of its  
10 standards, but we could visit the screenshot  
11 from the Web site to confirm that.  
12 Q. Okay.  
13 A. I -- I could be wrong. I don't  
14 think I am, but I could be.  
15 Q. Okay. In the previous  
16 sentence, you say, "ASHRAE and its volunteer  
17 members devoted more than 86,400 man-hours,  
18 3,600 hotel nights, and 1,200 round-trip  
19 flights as part of the process."  
20 And that -- "the process"  
21 appears to refer to updating the ASHRAE 90.1  
22 standard, correct?  
23 A. Yes.  
24 Q. When you say "ASHRAE and its  
25 volunteer members," and then you give those

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1 statistics, those statistics refer primarily  
2 to the man-hours, hotel nights, and  
3 round-trip flights of the volunteer members?  
4 MR. FEE: Objection. Vague.  
5 THE WITNESS: Probably. As  
6 opposed to ASHRAE-employed staff.  
7 BY MR. BRIDGES:  
8 Q. Do you know how much ASHRAE's  
9 volunteer members and their employers --  
10 strike that.  
11 Do you know how much ASHRAE's  
12 volunteer members and their employers spent  
13 in salaries and disbursements for the  
14 man-hours, hotel nights, and round-trip  
15 flights that were part of the process of  
16 updating the ASHRAE 90.1 standard?  
17 A. I don't know, but it -- I would  
18 imagine it's a noticeable amount, but I don't  
19 know the amount.  
20 Q. What would be your best  
21 estimate?  
22 A. I don't have a best estimate.  
23 Q. Would it be probably over  
24 \$10 million?  
25 MR. FEE: Objection to form.

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1 THE WITNESS: Again, I don't  
2 have an estimate.  
3 BY MR. BRIDGES:  
4 Q. Do you know -- did ASHRAE pay  
5 for the time, the hotel bills, and the plane  
6 fares of its volunteer members in updating  
7 the ASHRAE 90.1 standard?  
8 A. I would expect rarely. It's  
9 possible that there are certain instances in  
10 which there was some set of out-of-pocket  
11 expenses covered, but I would imagine the  
12 bulk of the time it's the volunteer's  
13 employer.  
14 MR. BRIDGES: Sorry. How long  
15 have we been going? I didn't get when  
16 we went back on.  
17 MR. FEE: 34 minutes.  
18 BY MR. BRIDGES:  
19 Q. Did you speak with Emily Bremer  
20 at any point in this case?  
21 A. No.  
22 Q. How did you become acquainted  
23 with her writings?  
24 A. I think Kevin Fee and/or  
25 Jordana Rubel brought to my attention that

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1 she had written on this topic. I don't  
2 recall whether then we separately obtained  
3 her two articles or Mr. Fee slash Ms. Rubel  
4 provided those to us.  
5 Q. What independent work did you  
6 do to research writings regarding the  
7 economics of standards development?  
8 MR. FEE: Objection to form.  
9 THE WITNESS: We did  
10 independent research in the sense that  
11 people that work with me did a  
12 literature search to determine what  
13 writings had been done in the area.  
14 I was previously aware of some  
15 amount of the scholarship to begin  
16 with.  
17 BY MR. BRIDGES:  
18 Q. How is that literature search  
19 reflected in any documents?  
20 A. The results are shown in my  
21 tab 2, and in particular it is page 2 of my  
22 tab 2, at the bottom.  
23 Q. And were these items found by  
24 you or your team?  
25 MR. FEE: Objection to form.

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1 THE WITNESS: Yes, with the  
2 exception that, in the first instance,  
3 lawyers at Morgan Lewis brought to our  
4 attention the Bremer -- the existence  
5 of Bremer articles.  
6 BY MR. BRIDGES:  
7 Q. Did you study any of the  
8 materials that Bremer -- strike that.  
9 Bremer's articles are law  
10 review articles, correct?  
11 A. Yes.  
12 Q. Did any plaintiff -- did your  
13 team's research identify any articles that  
14 you chose not to include in tab 2?  
15 A. I don't think so.  
16 Q. Did any plaintiff or its  
17 counsel furnish you with correspondence  
18 between the plaintiffs and Emily Bremer for  
19 review?  
20 A. No, not to my knowledge.  
21 Q. How many conversations with  
22 representatives of the plaintiffs did you  
23 have?  
24 MR. FEE: Objection.  
25 I would instruct you not to

1 answer questions regarding  
2 communications with counsel, unless  
3 they formed the basis of your  
4 opinions, in which case you can answer  
5 questions with respect to those  
6 conversations.  
7 BY MR. BRIDGES:  
8 Q. So I -- I'll change my question  
9 slightly.  
10 How many -- how many  
11 conversations did you have with non-lawyer  
12 employees or former employees of the  
13 plaintiffs?  
14 A. None that the -- that did not  
15 include the lawyers.  
16 Q. Right. I'm -- so I'm asking  
17 you to tell me what they were. If the  
18 presence of lawyer -- if you had a  
19 conversation with a -- with an employee or  
20 former employee of the plaintiff, I'd like to  
21 know what that was. So the fact that lawyers  
22 may have been present wouldn't excuse it from  
23 the scope of the answer.  
24 A. I had somewhere between four  
25 and six conversations with people who were at

1 the various plaintiffs.  
2 Q. With whom?  
3 A. They are all identified in  
4 paragraph 10 of my report.  
5 Q. Which of those did you  
6 personally have conversations with?  
7 A. All of them, as I recall. It's  
8 possible there's someone I did not, but I'm  
9 not remembering that being the case.  
10 Q. Approximately how long did you  
11 spend with -- did you have conversations with  
12 any of them together?  
13 A. Yes, several of them were  
14 together.  
15 Q. Which ones?  
16 A. I don't recall all  
17 combinations. I can say with some confidence  
18 that there was never more than one plaintiff  
19 on a call. In other words, there were  
20 several people from a particular plaintiff on  
21 a call, but not more than one plaintiff.  
22 So I had various combinations  
23 of calls with ASTM that may have occurred on  
24 three occasions; with NFPA, one or two  
25 occasions; and with ASHRAE, one or two

1 occasions.  
2 Q. And approximately how long  
3 total did you spend in conversations with  
4 representatives of each plaintiff?  
5 MR. FEE: Objection to form.  
6 THE WITNESS: Cumulatively,  
7 somewhere between three and five hours  
8 is my best guess right now.  
9 BY MR. BRIDGES:  
10 Q. When you say cumulative --  
11 "cumulatively," you mean for all plaintiffs?  
12 A. Yes. Meaning I'm -- I've added  
13 up the conversations I had across all three  
14 plaintiffs.  
15 Q. Right. What's your best  
16 estimate as to the period of time you spent  
17 with each plaintiff?  
18 A. With ASTM, it may have been two  
19 to three hours. For NFPA, one to two hours.  
20 For ASHRAE, one to two hours. That's my best  
21 guess right now.  
22 \* \* \*  
23 (Jarosz Exhibit 2 and Jarosz-3  
24 marked for identification.)  
25 \* \* \*

1 BY MR. BRIDGES:  
2 Q. Mr. Jarosz, I'm handing you  
3 Exhibits 2 and 3. I'll represent that these  
4 were furnished to us by e-mail last night, I  
5 think around 6 p.m. Eastern or thereabouts.  
6 Can you please identify  
7 Exhibits 2 and 3?  
8 MR. FEE: Objection to form.  
9 THE WITNESS: To the best of my  
10 knowledge, Exhibit 2 is notes that  
11 Mr. Chapman took in conversations that  
12 we had with various people, and  
13 Exhibit 3 is notes that Mr. Hamasaki  
14 took in conversations with plaintiff  
15 personnel.  
16 BY MR. BRIDGES:  
17 Q. Did you take any notes of  
18 conversations with plaintiffs' personnel?  
19 A. I believe I did, but I did not  
20 keep those notes. Those were -- I followed  
21 my normal procedure. And by the time we got  
22 to the report, I had not kept those notes.  
23 Q. Did you have those -- did you  
24 refer to those notes in drafting your report?  
25 MR. FEE: Objection. Vague.

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1 THE WITNESS: Not that I  
2 recall.  
3 BY MR. BRIDGES:  
4 Q. In your report --  
5 A. Well, I guess I should say, I  
6 looked back at the notes at some time, and  
7 the report was done over a period of time.  
8 So I guess in some dimension I did, but as it  
9 came toward the final stages, I did not.  
10 Q. Well, I'm just curious, because  
11 your report indicates, among a number of the  
12 footnotes, there's citations to conversations  
13 with various persons. And I'm trying to  
14 figure out how -- on what you drew to cite  
15 specifically to various conversations in your  
16 report. And I'll give you examples.  
17 Footnotes 193, 194, and 196 through 200.  
18 On what were you relying in  
19 referring to those conversations?  
20 MR. FEE: Objection to form.  
21 THE WITNESS: Conversations  
22 with Mr. Chapman and/or Mr. Hamasaki.  
23 BY MR. BRIDGES:  
24 Q. So you were relying on  
25 conversations with Messrs. Chapman and

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1 Hamasaki?  
2 MR. FEE: Objection. Vague.  
3 THE WITNESS: Yes, in part.  
4 BY MR. BRIDGES:  
5 Q. What else, other than relying  
6 upon conversations with them?  
7 A. And the memory that I had of  
8 the conversations with the individuals.  
9 Q. And you -- but you didn't rely  
10 upon your own notes?  
11 A. Not at the point that I was  
12 drafting up footnotes, no.  
13 Q. Why would you take notes and  
14 then dispose of them before you wrote your  
15 report?  
16 A. Well, I find it -- I find it  
17 useful to follow along in a conversation by  
18 taking notes so that I can follow up with  
19 certain points. I find it useful to write  
20 things down. It helps in the memory process.  
21 But I did not keep those notes in the final  
22 drafting of the report.  
23 Q. Why would you -- when you had  
24 those conversations, did you anticipate that  
25 you were going to prepare a report?

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1 A. I thought that there was a very  
2 good possibility, yes.  
3 Q. Why did you not retain notes of  
4 conversations to have on hand for the  
5 preparation of your report?  
6 A. I followed my normal procedure.  
7 I don't typically take notes. I'm not a  
8 great note-taker, and my handwriting leaves  
9 much to be desired. So I tend to find my  
10 notes themselves to be of limited assistance.  
11 Q. And that's your normal  
12 procedure, is to throw away notes that  
13 reflect conversations that you rely on?  
14 A. No. My normal procedure is to  
15 keep materials that I do rely upon and not  
16 keep materials that I don't need to rely  
17 upon.  
18 Q. And you didn't need to rely  
19 upon any of your notes to recall your  
20 conversations, so you went and discussed the  
21 conversations with two other persons?  
22 A. Yes.  
23 Q. Did -- I see -- it's my  
24 understanding that your report cites  
25 conversations with Stephen Comstock 17 times,

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1 conversations with Jim Thomas 11 times,  
2 conversations with Jim Pauley seven times,  
3 conversations with John Pace four times,  
4 conversations with Stephanie Reiniche four  
5 times, and conversations with Mark Owen three  
6 times.  
7 Did you make the citations to  
8 those conversations in the report based on  
9 your memory?  
10 MR. FEE: Objection. Lack of  
11 foundation.  
12 THE WITNESS: In part, and I  
13 think in part the citations were put  
14 there based on the memory and  
15 knowledge of Mr. Chapman and  
16 Mr. Hamasaki.  
17 BY MR. BRIDGES:  
18 Q. Did you get any materials from  
19 Mr. Chapman and Mr. Hamasaki other than  
20 Exhibits 2 and 3 on which you relied in  
21 preparing this report?  
22 MR. FEE: Objection. Lack of  
23 foundation. Mischaracterizes his  
24 testimony.  
25 THE WITNESS: Actually, as a

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1 factual matter, this is the very first  
2 time I've seen these notes. I've  
3 never seen these before.  
4 BY MR. BRIDGES:  
5 Q. What did you rely upon in  
6 making all of the detailed references to  
7 conversations in the report?  
8 A. My --  
9 MR. FEE: Objection. Asked and  
10 answered.  
11 THE WITNESS: My memory of  
12 conversations with those individuals  
13 and conversations that I had with  
14 Mr. Hamasaki and Mr. Chapman.  
15 BY MR. BRIDGES:  
16 Q. Did anyone else prepare the  
17 language regarding that -- the information  
18 from those conversations that you relied upon  
19 in creating your report?  
20 A. No, not to my knowledge. Now,  
21 lawyers did look at draft of the report,  
22 although we're not going into the substance  
23 of it. But that was -- we could, in part, be  
24 refreshed if we were wrong as to any cite,  
25 but I don't think we were.

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1 Q. Did you rely upon the writing  
2 of the language by other people in deciding  
3 to include language regarding information  
4 learned from conversations in your report?  
5 MR. FEE: Objection. Vague.  
6 THE WITNESS: I can answer that  
7 by saying Mr. Hamasaki, Mr. Chapman,  
8 and I were all involved in this  
9 project and the report. It was the  
10 case that we all had some input in the  
11 writing of the words, though I was  
12 responsible for and directly  
13 supervised all of it.  
14 BY MR. BRIDGES:  
15 Q. And did you rely upon input  
16 from Mr. Hamasaki and Mr. Chapman in the form  
17 of written input, such as drafts?  
18 MR. FEE: Objection.  
19 THE WITNESS: As I --  
20 MR. FEE: Hold on a second.  
21 I don't believe that you're  
22 entitled to discovery regarding his  
23 drafts, and I'll instruct him not to  
24 answer that --  
25 MR. BRIDGES: I --

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1 MR. FEE: -- unless you have --  
2 unless there's something in there that  
3 makes this subject to an exception of  
4 Rule 26, as limitation on discovery  
5 from experts, which I'm not aware of.  
6 MR. BRIDGES: I am entitled to  
7 discovery about materials he relied  
8 upon --  
9 MR. FEE: Okay. That's fair.  
10 MR. BRIDGES: -- and that is my  
11 question.  
12 MR. FEE: Okay.  
13 BY MR. BRIDGES:  
14 Q. And I'd like to know if you  
15 relied upon drafts prepared by other persons  
16 regarding the statements and facts for which  
17 conversations are mentioned in the citations.  
18 MR. FEE: Objection to form.  
19 THE WITNESS: I don't know how  
20 to answer that besides what I said a  
21 moment ago, and let me perhaps say it  
22 a little bit differently and see if  
23 that's responsive.  
24 Mr. Hamasaki, Mr. Chapman, and  
25 I were all involved in this project

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27 (Pages 102 - 105)

1 and in this report. We were all  
 2 involved in writing and rewriting and  
 3 talking and questioning one another.  
 4 BY MR. BRIDGES:  
 5 Q. And were you relying, in part,  
 6 upon the memories or recorded memories of  
 7 Mr. Hamasaki and Mr. Chapman?  
 8 MR. FEE: Objection. Vague as  
 9 to "relying."  
 10 And if you're asking him if  
 11 he's relied upon those conversations  
 12 as the basis for facts or assumptions,  
 13 you can answer it. If you mean relied  
 14 in any other context, you shouldn't  
 15 answer it.  
 16 THE WITNESS: I certainly  
 17 didn't rely on any recordings of  
 18 conversations. I had not seen any  
 19 notes. This is the first I've seen  
 20 notes from Mr. Chapman and  
 21 Mr. Hamasaki.  
 22 We talked about virtually all  
 23 of these topics. I don't know if you  
 24 would call that "relying" or not. But  
 25 we worked together on this project.

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1 BY MR. BRIDGES:  
 2 Q. Did they prepare draft language  
 3 referring to information from those  
 4 conversations with citations to those  
 5 conversations that you relied upon in  
 6 completing the report?  
 7 MR. FEE: Objection. Vague as  
 8 to "relied."  
 9 To the extent that should be  
 10 interpreted as meaning relied upon for  
 11 reaching any conclusions in your  
 12 report or relied upon for assumptions,  
 13 you can answer it. You shouldn't  
 14 answer it otherwise.  
 15 THE WITNESS: I just don't know  
 16 how to answer that question besides  
 17 saying, at various points in time, one  
 18 or the other -- others of us were  
 19 involved in the Word document that we  
 20 created. So it was almost never the  
 21 case that the three of us were in the  
 22 Word document at the same time.  
 23 So there were times that, for  
 24 instance, Mr. Hamasaki was doing some  
 25 work in the document and then I would

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1 go behind him or vice versa.  
 2 So I don't know if that answers  
 3 your question, but that's the process  
 4 that we followed.  
 5 BY MR. BRIDGES:  
 6 Q. And did the process include  
 7 their writing the facts that corresponded to  
 8 the conversations with plaintiffs' employees  
 9 and your reviewing and revising what they had  
 10 written?  
 11 MR. FEE: Objection.  
 12 To the extent that question  
 13 calls for responsive information that  
 14 is unrelated to bases that form your  
 15 opinions or conclusions or assumptions  
 16 that you made, I would instruct you  
 17 not to answer that portion of the  
 18 question. You can otherwise respond.  
 19 THE WITNESS: We all reviewed  
 20 and revised the document. I don't  
 21 think that there were any facts that  
 22 came only from one of them that I  
 23 wasn't aware of.  
 24 BY MR. BRIDGES:  
 25 Q. Were there recollections that

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1 came from them that you relied upon in  
 2 creating your report?  
 3 MR. FEE: Same objection and  
 4 same instruction.  
 5 THE WITNESS: There may have  
 6 been confirmations of things that I  
 7 recalled or knew, but I don't think  
 8 that they brought to my attention  
 9 things that I didn't previously know.  
 10 BY MR. BRIDGES:  
 11 Q. And what types of confirmations  
 12 were there things that you relied upon in  
 13 approving this report?  
 14 MR. FEE: Same objection and  
 15 instruction.  
 16 THE WITNESS: Virtually  
 17 everything you see in the report, all  
 18 three of us were involved in it, and  
 19 all three of us were confirming and  
 20 denying things or evaluating things  
 21 along the way.  
 22 MR. BRIDGES: I think we have  
 23 to pause for a change of media, so why  
 24 don't we take a break.  
 25 THE VIDEOGRAPHER: Off the

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1 record at 12:17. This is the end of  
 2 media unit number 1.  
 3 \* \* \*  
 4 (Recess from 12:17 p.m. to  
 5 12:32 p.m.)  
 6 \* \* \*  
 7 THE VIDEOGRAPHER: On the  
 8 record at 12:32. This is the  
 9 beginning of media unit 2 in the  
 10 deposition of John Jarosz.  
 11 BY MR. BRIDGES:  
 12 Q. Mr. Jarosz, your report, as I  
 13 referred to earlier, cites a number of  
 14 conversations with employees of the  
 15 plaintiffs. For what purpose did you have  
 16 conversations with the plaintiffs' employees?  
 17 A. To learn more about the  
 18 organization and their view as to the impact  
 19 of continued copyright protection --  
 20 continued copyright infringement and  
 21 trademark infringement.  
 22 Q. What view did you learn from  
 23 them?  
 24 MR. FEE: Objection to form.  
 25 THE WITNESS: Well, I solicited

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1 and learned many facts about the  
 2 organizations. I also learned that  
 3 each one of them viewed continued  
 4 copyright infringement and trademark  
 5 infringement as quite detrimental to  
 6 their organizations, detrimental to  
 7 the members, detrimental to the  
 8 public.  
 9 They viewed continued IP  
 10 infringement as potentially  
 11 devastating to their organizations.  
 12 BY MR. BRIDGES:  
 13 Q. These were their views?  
 14 A. Yes. I'm just paraphrasing, of  
 15 course.  
 16 Q. What members did you interview?  
 17 A. None, other than the employees.  
 18 I don't know if you call those "members" or  
 19 not. But the volunteer membership, I didn't  
 20 go to.  
 21 THE VIDEOGRAPHER: Excuse me.  
 22 Counsel, could you move your  
 23 microphone to your lapel? Thank you.  
 24 BY MR. BRIDGES:  
 25 Q. What members of the public did

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1 you interview?  
 2 A. I don't think I interviewed any  
 3 members of the public either.  
 4 Q. What steps did you do to  
 5 ascertain the views of the members of the  
 6 organizations, other than the employees?  
 7 A. I read the materials that were  
 8 produced here. I read the deposition  
 9 testimony of the various individuals. I read  
 10 the articles published by Ms. Bremer. And I  
 11 read the other academic literature and  
 12 practical literature that I had.  
 13 Q. Which of those sources stated  
 14 the views of the non-employee members of the  
 15 various organizations?  
 16 A. I don't know that views of --  
 17 that their views were explicitly addressed in  
 18 my report or represented. I understood what  
 19 the impacts of the lack of honoring the  
 20 copyrights and trademarks would have, but I  
 21 don't know that I saw non-employee member  
 22 views explicitly summarized.  
 23 Q. So what steps did you do to  
 24 ascertain the views of the members of the  
 25 organizations --

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1 MR. FEE: Objection.  
 2 BY MR. BRIDGES:  
 3 Q. -- other than their employees?  
 4 MR. FEE: Asked and answered.  
 5 THE WITNESS: Well, I talked to  
 6 the employees, and they interact with  
 7 the members on a very regular basis,  
 8 so they gave me some sense of what the  
 9 views of the members were.  
 10 It also could be that some of  
 11 the perspectives of the members are  
 12 reflected in some of the documents I  
 13 identified in tab 2.  
 14 BY MR. BRIDGES:  
 15 Q. Well, I'm just trying to find  
 16 out where -- it sounds as though -- strike  
 17 that.  
 18 It sounds as though a minute  
 19 ago you said you couldn't recall anything  
 20 specifically calling out views of  
 21 non-employee members, correct?  
 22 A. Correct. I think that's right.  
 23 Q. What did you do to verify the  
 24 statements that employees of the plaintiffs  
 25 made about the views of the non-employee

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1 members of their organizations?  
2 A. I did what I normally do in an  
3 assignment like this and look at the produced  
4 materials.  
5 Q. And the produced materials did  
6 not call out specifically any views of  
7 non-employee members of the plaintiff  
8 organizations, correct?  
9 A. I don't recall any specific  
10 views being summarized. My memory may not be  
11 perfect on that, though.  
12 Q. What research, if any, did you  
13 do among members of the public about whether  
14 lack of copyright protection for the  
15 plaintiffs' standards would be detrimental to  
16 the -- to the public?  
17 A. The information that I reviewed  
18 is in tab 2. I didn't have material beyond  
19 what is identified in tab 2.  
20 Q. So what in tab 2 reflects your  
21 steps to ascertain the views of members of  
22 the public?  
23 MR. FEE: Objection to form.  
24 THE WITNESS: I think the  
25 Bremer articles, in part, address

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1 that. I think some of the federal  
2 government's circulars that I  
3 identify, in part, reflect the  
4 reviews, in particular the NTTAA of  
5 1995 and OMB Circular A-119. I think  
6 they, in part, reflect public views.  
7 There are probably other things.  
8 BY MR. BRIDGES:  
9 Q. Did you review OMB Circular  
10 A-119 personally?  
11 A. Yes. As I recall, I did.  
12 Q. Did you review any materials  
13 pertaining to the discussions or  
14 deliberations of the Administrative  
15 Conference of the United States in connection  
16 with your research or analysis?  
17 A. What particular materials or  
18 meetings are you referring to?  
19 Q. Any.  
20 A. I don't recall, but it's  
21 possible.  
22 Q. Does tab 2 refer you to any  
23 documents that would provide you information  
24 about the discussions or deliberations of the  
25 Administrative Conference of the United

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1 States other than law review articles by  
2 Emily Bremer?  
3 A. As I sit here right now, I'm  
4 not aware of any documents that discuss the  
5 deliberations, but my memory is not perfect.  
6 Q. Do you know if there was a  
7 consensus in any relevant committee of the  
8 Administrative Conference of the United  
9 States regarding the conclusions that  
10 Ms. Bremer states in her law review articles?  
11 A. I don't.  
12 MR. FEE: Objection. Vague.  
13 BY MR. BRIDGES:  
14 Q. Do you know whether there was  
15 any dissent in any relevant committee of the  
16 Administrative Conference of the United  
17 States regarding the conclusions that  
18 Ms. Bremer states in her law review articles?  
19 MR. FEE: Objection to form.  
20 THE WITNESS: I don't.  
21 BY MR. BRIDGES:  
22 Q. Do you know why persons get  
23 appointed to the Administrative Conference of  
24 the United States?  
25 A. I may have known that, but I

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1 don't recall that sitting here now.  
2 Q. Do you know whether  
3 Ms. Bremer's articles -- strike that.  
4 Do you know whether  
5 Ms. Bremer's law review articles reflect a  
6 view of the Administrative Conference of the  
7 United States --  
8 MR. FEE: Objection to form.  
9 BY MR. BRIDGES:  
10 Q. -- or of any of its committees?  
11 MR. FEE: Objection to form.  
12 THE WITNESS: I'm not aware  
13 that they officially reflect that. I  
14 believe she gathered information, and  
15 they may, in fact, represent the views  
16 of some or all members, but I don't  
17 think that's -- that either article is  
18 an official representation --  
19 BY MR. BRIDGES:  
20 Q. Are you --  
21 A. -- of that body.  
22 Q. Are you aware of the fact that  
23 her articles -- her law review articles  
24 specifically disclaim her articles as the  
25 views of any government entity and indicate

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1 that they are her personal views?  
2 A. I wouldn't be surprised and  
3 may -- I may have read that, but I would  
4 expect that that would be in the first  
5 footnote of one or both articles.  
6 Q. What did you do to examine the  
7 alleged facts that the representatives of  
8 plaintiffs stated to you in their  
9 conversations with you?  
10 MR. FEE: Objection to form.  
11 THE WITNESS: I looked at --  
12 MR. FEE: Asked and answered.  
13 THE WITNESS: I'm sorry. I  
14 looked at the document production and  
15 the other materials shown in tab 2.  
16 BY MR. BRIDGES:  
17 Q. You looked at the document  
18 production that the plaintiffs' counsel  
19 furnished you?  
20 A. In part. There were other  
21 things in tab 2 that were not provided to me  
22 by plaintiffs' counsel.  
23 Q. What other materials in  
24 tab 2 -- strike that.  
25 Please identify for me in tab 2

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1 the materials that plaintiffs' counsel  
2 furnished you.  
3 A. I don't know with absolute  
4 certainty, but let me give you my best guess.  
5 I believe all the depositions that are shown  
6 on page 1. I believe the Bates ranges at the  
7 very top of the page were provided by  
8 counsel.  
9 The deposition transcripts and  
10 exhibits were provided by counsel. I believe  
11 the financial statements and plans were  
12 provided by counsel. I believe the legal  
13 documents were provided by counsel. I  
14 believe the miscellaneous items were provided  
15 by counsel.  
16 I don't know about the cases  
17 and laws. I just don't remember if we  
18 separately gathered those or were provided  
19 those.  
20 The analyst reports, articles,  
21 books, and presentations, I think we gathered  
22 all of those, with the possible exception of  
23 the two Bremer articles. I don't recall if  
24 counsel provided that or we obtained those  
25 separately.

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1 I believe counsel did not  
2 provide the Web site screenshots, but I might  
3 be wrong on that.  
4 Q. And did you do anything --  
5 what, if anything, did you do to test the  
6 validity of the factual assertions that the  
7 plaintiffs made to you in your conversations  
8 with their employees?  
9 MR. FEE: Objection to form.  
10 Asked and answered.  
11 THE WITNESS: Well, we looked  
12 at materials. If we found things that  
13 conflicted with what we learned, that  
14 would prompt us to investigate  
15 further. But I don't recall seeing  
16 any documentary evidence that  
17 conflicted with facts that were  
18 provided by plaintiff personnel, but I  
19 might be wrong.  
20 BY MR. BRIDGES:  
21 Q. Did you investigate  
22 independently whether documents existed that  
23 contradicted plaintiffs' statements of facts?  
24 A. Not with that in mind. We  
25 looked at the documents and were mindful of

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1 whether there were conflicts within documents  
2 or conflicts between documents and other  
3 information, but I don't recall that we saw  
4 anything that gave us substantial pause.  
5 There were probably some things  
6 where there were some uncertainties whether  
7 there was a conflict or not and some where  
8 there were insignificant conflicts, but I  
9 think mostly the information we saw did not  
10 conflict with the information we learned from  
11 plaintiff personnel.  
12 Q. Did you investigate  
13 independently whether other documents, apart  
14 from the documents plaintiffs furnished you,  
15 existed that contradicted plaintiffs'  
16 statements of facts --  
17 MR. FEE: Objection to form.  
18 BY MR. BRIDGES:  
19 Q. -- in conversations with you?  
20 A. Yes, in the sense that we  
21 gathered some information that we did not  
22 receive from plaintiffs' counsel, but all of  
23 that is identified in tab 2.  
24 Q. Which part of tab 2?  
25 A. Well, as I said, I think the

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1 Web sites we gathered ourselves, and I think  
2 the reports and articles, with the exception  
3 of the Bremer articles, we gathered  
4 ourselves.  
5 Q. Do you know why you got no  
6 documents from NFPA, no Bates range documents  
7 from NFPA?  
8 MR. REHN: Object to form --  
9 THE WITNESS: I don't know why  
10 we did not receive Bates documents --  
11 THE REPORTER: Wait.  
12 MR. REHN: Sorry. Object to  
13 the form. Lacks foundation.  
14 THE WITNESS: I don't know for  
15 sure that we didn't receive  
16 Bates-stamped documents, but I believe  
17 some of the documents we received were  
18 NFPA documents.  
19 BY MR. BRIDGES:  
20 Q. Do you recall seeing any NFPA  
21 documents that -- in which NFPA personnel  
22 stated that they could not show any harm from  
23 the defendant's activities?  
24 A. Received any documents that  
25 said that?

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1 Q. Uh-huh.  
2 A. Perhaps you would have  
3 something that would refresh my memory. I  
4 don't recall, sitting here right now, but  
5 it's possible.  
6 Are you talking about  
7 historical -- historically no harm, or are  
8 you talking about prospectively?  
9 Q. Either one. Did you -- do you  
10 recall seeing any internal NFPA documents  
11 that call into question where NF -- whether  
12 NFPA has suffered any harm from the  
13 defendant's activities?  
14 A. I don't recall documents on it.  
15 There may have been some deposition testimony  
16 about past activities, but I don't know if it  
17 was activities prior to Public Resource  
18 actions here or after.  
19 Q. Do you recall learning about  
20 any litigation that NFPA had engaged in  
21 pertaining to standards and copyright?  
22 A. I think I heard that there's  
23 some overseas litigation involving Public  
24 Resource. Whether that involves NFPA, I  
25 don't know.

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1 Q. What did you hear about  
2 overseas litigation involving Public  
3 Resource?  
4 A. I think I heard that there was  
5 a German -- or a suit in Germany, but I'm not  
6 sure that I learned much more than that. I  
7 don't recall what status that suit -- what  
8 the status of that suit is.  
9 Q. Do you recall anyone disclosing  
10 to you litigation involving NFPA in the  
11 United States that pertained to standards and  
12 copyright?  
13 A. It's possible, but I don't  
14 recall any, sitting here right now.  
15 Q. Do you recall inquiring about  
16 public statements of fact that NFPA has made  
17 regarding copyright and standards in  
18 litigation other than this litigation in the  
19 United States?  
20 MR. FEE: Objection to form.  
21 THE WITNESS: I do not.  
22 BY MR. BRIDGES:  
23 Q. Are you familiar with a case  
24 called Veeck, V-E-E-C-K?  
25 A. I'm familiar with an opinion in

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1 the Veeck case.  
2 Q. What do you know about that  
3 opinion?  
4 MR. FEE: Objection.  
5 I would instruct you not to  
6 disclose anything you know about that  
7 opinion that was a result of  
8 communications with counsel and that  
9 did not form the basis of any of the  
10 opinions in your report or any of the  
11 assumptions that you relied upon in  
12 reaching your conclusions.  
13 THE WITNESS: I did talk with  
14 counsel about that case, and that case  
15 didn't form any basis for any of my  
16 observations or conclusions here.  
17 BY MR. BRIDGES:  
18 Q. Why did the Veeck case not form  
19 any basis for any of your observations or  
20 conclusions here?  
21 A. I don't know how to answer that  
22 question. I -- it didn't present any facts  
23 that were specific to this case, as far as I  
24 recall.  
25 Q. What do you recall of the facts

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1 of that case?  
2 A. I recall generally it had to do  
3 with activities of certain municipalities  
4 using what was copyrighted or what was  
5 claimed to be copyrighted material by a group  
6 that developed materials explicitly to be put  
7 into the law.  
8 Q. Do you recall what the decision  
9 was in the opinion you seem to be familiar  
10 with?  
11 MR. FEE: Objection to form.  
12 THE WITNESS: I think,  
13 generally, that copyright protection  
14 was not available. I'm sure there was  
15 more to it, but that's my general  
16 opinion, my general memory.  
17 BY MR. BRIDGES:  
18 Q. And copyright protection was  
19 not available for what?  
20 A. Well, the asserted copyrights  
21 in that matter.  
22 Q. And do you recall what the  
23 matter was that was at issue in Veeck?  
24 A. Well, as I said, I think it was  
25 certain municipalities were using certain

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1 standards and using the materials from  
2 certain standards and perhaps disseminating  
3 it. I -- I forget the facts.  
4 Q. Do you recall what kind of  
5 standards they were?  
6 MR. FEE: Objection. Vague.  
7 THE WITNESS: They may  
8 generally have had to deal with  
9 building codes, but I could be wrong  
10 on that.  
11 BY MR. BRIDGES:  
12 Q. What analysis did you do of  
13 harms suffered by the code developers of  
14 those building codes as a consequence of the  
15 Veeck decision?  
16 A. I didn't do any analysis  
17 associated with the facts of that case.  
18 Q. Why not?  
19 A. Because those facts are  
20 different than the facts here, including what  
21 the organization was.  
22 Q. Are the facts -- what -- what  
23 case studies are you familiar of -- are you  
24 familiar with regarding measurements of harms  
25 suffered by entities that develop codes when

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1 a court rules that those codes are not  
2 subject to copyright?  
3 MR. FEE: Objection to form.  
4 Vague. Lack of foundation.  
5 THE WITNESS: What case  
6 studies? Are you talking about  
7 something akin to a business school  
8 case study? I don't know what you  
9 mean by that term.  
10 BY MR. BRIDGES:  
11 Q. I'm just -- what opportunities  
12 do you -- have you identified for finding  
13 comparable circumstances where a court has  
14 made a ruling that building codes are not  
15 subject to copyright in order to study what  
16 the consequences were --  
17 MR. FEE: Objection.  
18 BY MR. BRIDGES:  
19 Q. -- what the economic  
20 consequences were of the Court's decision?  
21 MR. FEE: Objection to form.  
22 Vague as to "comparable." Lack of  
23 foundation.  
24 You can answer.  
25 THE WITNESS: I don't know that

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1 I can answer. I don't -- I don't  
2 under -- I don't know how to answer  
3 your question. I read that court  
4 case.  
5 BY MR. BRIDGES:  
6 Q. And did you stop to say at some  
7 point -- strike that.  
8 Why did you read the court  
9 case?  
10 A. Because I understand that  
11 Public Resource believes it's of some  
12 significance to this case.  
13 Q. Do you believe that that -- do  
14 you have an understanding as to whether the  
15 Veeck case is of any significance to this  
16 case?  
17 MR. FEE: Objection. Calls for  
18 a legal conclusion.  
19 THE WITNESS: I don't know.  
20 I'm not a legal expert.  
21 BY MR. BRIDGES:  
22 Q. What steps did you take to  
23 ascertain what economic harms flowed from the  
24 Court's decision in the Veeck case?  
25 MR. FEE: Objection. Asked and

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1 answered.

2 THE WITNESS: Again, I read the

3 case. I didn't do any analysis beyond

4 that of that particular case.

5 BY MR. BRIDGES:

6 Q. What steps did you take to

7 ascertain what public harms flowed from the

8 Court's decision in the Veeck case?

9 A. Other than reading the case,

10 the opinion in the case, I didn't do anything

11 beyond that to understand the implications of

12 that holding.

13 Q. You didn't do any investigation

14 as to the economic consequences to any

15 entity, industry, or person as a consequence

16 of the decision in the Veeck case, correct?

17 MR. FEE: Objection to form.

18 THE WITNESS: I think that's

19 correct, yes.

20 BY MR. BRIDGES:

21 Q. How has the process of

22 standards development changed in the last 100

23 years, to your knowledge?

24 A. I don't know the specifics, and

25 I don't know that there is one standards

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1 development process. I think there are a

2 variety of processes pursued by a number of

3 SSOs or SDOs. I'm sure that there have been

4 changes on the margin. There may have been

5 larger changes. I just don't know. I have

6 not studied the trend in the standard

7 development process over time.

8 Q. What changes are you aware of

9 in the standards development process of NFPA

10 over the past 100 years?

11 A. I don't know. I've not studied

12 that topic.

13 Q. What changes are you aware of

14 in the standards development process of the

15 ASHRAE 90.1 standard?

16 A. I don't know. I've not studied

17 that.

18 Q. How did ASHRAE come to develop

19 the 90.1 standard?

20 A. I think, generally, a need was

21 identified and a group of constituents

22 convened to derive a standard, but I don't

23 know the specifics beyond that.

24 Q. Do you know who identified the

25 need?

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1 A. Not sitting here right now, I

2 don't.

3 Q. Do you know whether ASHRAE took

4 over development of what became standard 90.1

5 from any other group or entity?

6 A. No, I do not.

7 Q. Have you ever quantified the

8 value of the contributions made by the

9 volunteers of the various organizations to

10 the standards at issue in this case?

11 MR. FEE: Objection to form.

12 THE WITNESS: Not other than

13 having some sense of hours or a

14 limited sense of dollars, but not

15 beyond that, no.

16 BY MR. BRIDGES:

17 Q. Can you put a rough dollar

18 value on the time and expenses of the

19 volunteers with respect to any of the

20 standards in this case?

21 MR. FEE: Objection to form.

22 THE WITNESS: Not sitting here

23 right now. That would entail a little

24 bit of a study. I have not done that.

25 BY MR. BRIDGES:

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1 Q. What -- what would be required?

2 A. To understand basically the

3 out-of-pocket expenses incurred and the

4 opportunity costs incurred. So among other

5 things, one would want to look at time

6 records, have an understanding of

7 compensation, have an understanding of the

8 activities of those individuals. Those

9 are -- would be among the inputs.

10 Q. What changes are you aware of

11 in the distribution of standards in the past

12 100 years by the plaintiffs?

13 MR. FEE: Objection to form.

14 THE WITNESS: I haven't

15 investigated that particular issue,

16 but I understand that some of the

17 standards today are distributed

18 through the Internet that certainly

19 didn't exist 100 years ago.

20 Some of the standards are

21 distributed for free with limitations.

22 I don't know if that was true 100

23 years ago, but it might have been.

24 I would expect some of the

25 copying and dissemination capabilities

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1 are much greater today than they were  
2 in 1915, but I don't know that the  
3 general methods of -- I don't know how  
4 the general methods of distribution  
5 have changed.  
6 BY MR. BRIDGES:  
7 Q. What changes are you aware of  
8 in sales trends over the past 20 years?  
9 MR. FEE: Objection to form.  
10 THE WITNESS: I don't have data  
11 going back as far as 20 years ago. I  
12 have some information on publication  
13 sales, for instance, in tabs 3, 4, and  
14 5. They only -- that information only  
15 goes back a few years, however.  
16 BY MR. BRIDGES:  
17 Q. Did you review any information  
18 earlier than the dates shown in the documents  
19 at tabs 3, 4, and 5?  
20 MR. FEE: Objection. Vague.  
21 THE WITNESS: It's possible  
22 that some of the source documents had  
23 earlier information, but I don't  
24 recall that. I would need to look at  
25 those source documents.

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1 BY MR. BRIDGES:  
2 Q. And those source documents  
3 would be within the Bates ranges identified  
4 in tab 2 of your report?  
5 A. Within the Bates ranges or  
6 identified elsewhere in tab 2. For instance,  
7 the AS team -- ASTM audited -- audited  
8 consolidated financial statements, I think,  
9 may not all be Bates-stamped. I could be  
10 wrong on that. But I would look in that set  
11 of financial documents.  
12 Q. What do you know about what you  
13 said -- strike that.  
14 You said earlier that some  
15 standards are distributed for free with some  
16 limitations; is that correct?  
17 A. Yes, that's my understanding.  
18 Q. What do you know about that?  
19 MR. FEE: Objection. Vague.  
20 THE WITNESS: I've written  
21 about that in my report. I believe  
22 that each one of the plaintiffs has  
23 provided what is sometimes called a  
24 "reading room" so that people can look  
25 at those standards but are not given

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1 the right to reproduce, copy, or  
2 disseminate those standards but can  
3 look at them online.  
4 BY MR. BRIDGES:  
5 Q. Have you used the reading rooms  
6 of any of the plaintiffs?  
7 A. No, I have not.  
8 Q. Have you reviewed the interface  
9 that the -- have you reviewed the interfaces  
10 that the plaintiffs offer to persons wishing  
11 to view materials for free online?  
12 A. No, I don't think so.  
13 Q. Do you know what effect, if  
14 any, the presence of those free materials on  
15 the plaintiffs' Web sites has had on the  
16 plaintiffs' revenues?  
17 MR. FEE: Objection to form.  
18 THE WITNESS: No, I don't.  
19 BY MR. BRIDGES:  
20 Q. Have you -- have you  
21 investigated that?  
22 MR. FEE: Same objection.  
23 THE WITNESS: I've been  
24 opening -- I've been open to learning  
25 about that, but I haven't learned that

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1 there's a direct or indirect effect.  
2 There might be, but I haven't seen  
3 evidence of that.  
4 BY MR. BRIDGES:  
5 Q. My question was, have you  
6 investigated that?  
7 MR. FEE: Same objection.  
8 THE WITNESS: Perhaps you could  
9 read back my answer.  
10 BY MR. BRIDGES:  
11 Q. I've heard the answer. It was  
12 not responsive to my question. The -- you  
13 said you did not know what effect, if any,  
14 the presence of those free materials on the  
15 plaintiffs' Web sites has had on the  
16 plaintiffs' revenues.  
17 And my question is, have you  
18 investigated that?  
19 MR. FEE: Same objection.  
20 THE WITNESS: No, I've not  
21 undertaken a separate investigation.  
22 I've been alert to that topic, but I  
23 haven't assigned myself that  
24 investigation.  
25 BY MR. BRIDGES:

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1 Q. Was something that was --  
2 remained pending at the time you wrote this  
3 report as something that you expected to do  
4 in the future?  
5 A. No.  
6 MR. FEE: Objection. Vague.  
7 THE WITNESS: I'm sorry.  
8 No.  
9 BY MR. BRIDGES:  
10 Q. Did you study the practices of  
11 any standards development organizations,  
12 other than the plaintiffs, for purposes of  
13 your work in this case?  
14 MR. FEE: Objection. Vague.  
15 THE WITNESS: Not that I  
16 recall. I saw reference to other SDOs  
17 in the Bremer articles, for instance,  
18 but I didn't undertake a separate  
19 investigation of the practices of any  
20 other SDOs for purposes of my  
21 assignment here.  
22 BY MR. BRIDGES:  
23 Q. Are you aware of practices or  
24 policies of other SDOs with reference to  
25 either copyright or free availability of

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1 their materials?  
2 MR. FEE: Objection to form.  
3 THE WITNESS: I may have been  
4 aware through other assignments I've  
5 undertaken in the past, but I didn't  
6 undertake any separate investigation  
7 for purposes of this matter.  
8 BY MR. BRIDGES:  
9 Q. What awareness do you have of  
10 the practices or policies of other SDOs  
11 through other assignments you've undertaken  
12 in the past?  
13 MR. FEE: Objection to form.  
14 THE WITNESS: I can only recall  
15 most generally that they view  
16 intellectual property protection as  
17 being very important, but I can't be  
18 any more specific than that.  
19 BY MR. BRIDGES:  
20 Q. Which SDOs you -- do you recall  
21 treating intellectual property protection as  
22 very important?  
23 A. Well, again, I've -- I've dealt  
24 with standards setting organizations. I  
25 don't know if any of those are technically

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1 SDOs, but the standard setting organizations  
2 that are the candidates are the ones that I  
3 identified earlier today.  
4 Q. Which SDOs do you recall  
5 treating copyright protection of their  
6 standards as very important?  
7 A. I just don't recall right now.  
8 I -- I have some vague recollection that  
9 copyright considerations are addressed by  
10 ETSI, but I could be wrong on that.  
11 Q. What do you know about policies  
12 or practices of the Blu-ray organization with  
13 respect to copyright protection?  
14 A. I assume you're talking about  
15 the Blu-ray Association? I may have known  
16 when I was involved in that matter. I do not  
17 remember, sitting here now.  
18 Q. Do you recall that your report  
19 actually refers to the Blu-ray Association?  
20 A. I think I refer to Blu-ray  
21 standards. I don't recall if I refer to the  
22 Blu-ray Association, but perhaps you could  
23 refresh my memory.  
24 Q. I believe you point it out at  
25 the bottom of page 62. "While certain SDOs

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1 (e.g., the Blu-ray disc association) provide  
2 unrestricted access to their standard  
3 publications for free, the Plaintiffs here do  
4 not."  
5 Do you recall that?  
6 A. Now I do. Thank you for  
7 refreshing my memory.  
8 Q. What economic effects are you  
9 aware of the fact that the Blu-ray Disc  
10 Association provides unrestricted access to  
11 its standard publications for free?  
12 A. I have not investigated that  
13 issue, so I don't know.  
14 Q. What other SDOs have you  
15 identified that provide unrestricted access  
16 to their standards for free?  
17 A. I don't think I've identified  
18 any others in my report.  
19 Q. Did you look for any others?  
20 A. Not that I recall.  
21 Q. Why not?  
22 A. I don't know how to answer  
23 that. I was aware of the Blu-ray Disc  
24 Association's policy in this regard, so I  
25 wrote about it here.

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1 Q. Why did you not consider the  
2 economic effects of free distribution of  
3 standards with respect to other  
4 organizations?  
5 A. I didn't quite see the  
6 relevance to this matter.  
7 Q. Why?  
8 A. I don't know how to prove a  
9 negative.  
10 Q. What's the negative you were  
11 thinking of that would need to be proved or  
12 disproved?  
13 A. That something is not relevant.  
14 Q. You just didn't see the  
15 relevance?  
16 A. I don't understand how that  
17 would be helpful in the assignment that I had  
18 here.  
19 Q. And what was the assignment you  
20 had here?  
21 A. Well, I've laid it out --  
22 Q. I can read the report. I'm not  
23 asking you to read -- read the report. I'd  
24 like your own words now, sitting here.  
25 MR. FEE: Objection.

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1 BY MR. BRIDGES:  
2 Q. How do you -- how do you  
3 view --  
4 A. I'd like to answer it by  
5 looking at my report.  
6 Q. No, I'd like for you to give me  
7 a straight answer, because if you're just  
8 going to refer to the report, the report will  
9 speak for itself, and I don't need you to  
10 read it to me.  
11 I'd like for you to tell me  
12 what you understand, sitting here, to have  
13 been your assignment in this case.  
14 MR. FEE: Objection.  
15 You can answer the question  
16 however you deem appropriate.  
17 THE WITNESS: I've aptly laid  
18 it out in my report, so I defer to the  
19 words in my report.  
20 But I've, in essence, looked at  
21 the topic of the impact of copyright  
22 and trademark infringement here, and  
23 asked myself the question whether a  
24 permanent injunction would be  
25 appropriate from an economic

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1 perspective.  
2 BY MR. BRIDGES:  
3 Q. And what is the relevance of  
4 economic analysis to that question, as you  
5 understand it?  
6 MR. FEE: Objection to form.  
7 Vague. Might also be construed to  
8 require a legal conclusion.  
9 THE WITNESS: Economists have a  
10 view and perspective at looking at  
11 issues that some courts have found to  
12 be useful.  
13 BY MR. BRIDGES:  
14 Q. Well, I'm asking, with specific  
15 relevance to this case, what do you  
16 understand the importance of economic  
17 analysis to be in this case --  
18 MR. FEE: Objection. Calls --  
19 BY MR. BRIDGES:  
20 Q. -- as you have purported to  
21 practice it?  
22 MR. FEE: Calls for a legal  
23 conclusion.  
24 Also, to the extent that  
25 responding to that would require you

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1 to disclose communications with  
2 counsel that did not form the basis  
3 for any of your opinions or  
4 conclusions and did not provide any  
5 assumptions that were the basis for  
6 your opinions or conclusions, you  
7 should not answer that portion of the  
8 question.  
9 THE WITNESS: I understand  
10 that, generally, economists like me  
11 are quite helpful in determining  
12 questions of harm, particularly harm  
13 as it relates to infringement of IP  
14 rights.  
15 BY MR. BRIDGES:  
16 Q. How do you distinguish between  
17 harms that are caused by an infringement by  
18 the defendant versus harms that might be  
19 caused by a court decision that plaintiffs  
20 lack copyrights?  
21 MR. FEE: Objection to the  
22 extent it calls for a legal  
23 conclusion.  
24 THE WITNESS: I don't know how  
25 to answer that question. I didn't ask

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1 myself the question of ownership or  
2 impact of ownership. I asked myself  
3 the question here of impact of  
4 infringement.  
5 BY MR. BRIDGES:  
6 Q. If it turns out that the Court  
7 rules that the plaintiff -- sorry. Strike  
8 that.  
9 If it turns out the Court rules  
10 here that the defendant has engaged in fair  
11 use, is it your understanding that none of  
12 your harms analysis is relevant --  
13 MR. FEE: Objection.  
14 BY MR. BRIDGES:  
15 Q. -- because of a finding of  
16 non-infringement?  
17 MR. FEE: Calls for a legal  
18 conclusion.  
19 To the extent answering that  
20 question would require you to disclose  
21 communications you had with counsel  
22 that don't form the basis for any of  
23 your opinions or conclusions and don't  
24 provide any assumptions that you  
25 relied upon, you shouldn't disclose

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1 those communications.  
2 THE WITNESS: You're asking for  
3 a legal conclusion. I'm not an expert  
4 on that.  
5 BY MR. BRIDGES:  
6 Q. I'm understanding your  
7 understanding -- I'm asking for your  
8 understanding of the relevance of your  
9 contributions to this case.  
10 MR. FEE: Objection. Asked and  
11 answered. Plus all the prior  
12 objections and instructions.  
13 THE WITNESS: I believe my  
14 testimony and report are relevant to  
15 the issue of harm and potential harm.  
16 BY MR. BRIDGES:  
17 Q. From what?  
18 A. From continuing -- the  
19 continuing activities and possible expanded  
20 activities of the defendant here.  
21 Q. From activities or from  
22 violations of law?  
23 MR. FEE: Objection. Vague.  
24 Calls for a legal conclusion.  
25 THE WITNESS: I -- I'm working

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1 under the assumption that the  
2 activities violate the law.  
3 BY MR. BRIDGES:  
4 Q. If the activities -- do you  
5 believe -- do you understand that your  
6 analysis is relevant to a determination of  
7 whether the defendant has violated the law?  
8 MR. FEE: Objection. Calls for  
9 a legal conclusion.  
10 To the extent that your  
11 understanding is based upon  
12 communications with counsel, you  
13 shouldn't disclose them, unless they  
14 formed the basis for your opinions or  
15 conclusions or provided assumptions  
16 that you relied upon in reaching your  
17 conclusions.  
18 THE WITNESS: I don't know.  
19 BY MR. BRIDGES:  
20 Q. Do you have any view as to  
21 whether the defendant has violated copyright  
22 law?  
23 MR. FEE: Objection. Calls for  
24 a legal conclusion.  
25 THE WITNESS: No, I've not

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1 taken on that assignment.  
2 BY MR. BRIDGES:  
3 Q. Do you have any view as to  
4 whether the defendant's activities constitute  
5 fair use?  
6 MR. FEE: Objection. Calls for  
7 a legal conclusion.  
8 THE WITNESS: No, I've not  
9 taken on that assignment.  
10 BY MR. BRIDGES:  
11 Q. If a court determines that the  
12 defendant has not infringed upon plaintiffs'  
13 copyrights, do you understand that the  
14 decision would result in economic harm to the  
15 plaintiffs?  
16 MR. FEE: Objection to the  
17 extent it calls for a legal  
18 conclusion.  
19 THE WITNESS: I'm not following  
20 your question. Could you ask it a  
21 little bit differently, please?  
22 BY MR. BRIDGES:  
23 Q. No, I'll restate it if you just  
24 need to rehear it.  
25 A. No, I don't need to rehear it.

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1 If you could recast it, please.  
 2 Q. No. Then please answer my  
 3 question.  
 4 MR. FEE: Objection.  
 5 BY MR. BRIDGES:  
 6 Q. I get to ask the questions.  
 7 MR. FEE: He just said he  
 8 couldn't answer it.  
 9 THE WITNESS: I don't  
 10 understand the question.  
 11 BY MR. BRIDGES:  
 12 Q. What is it you don't  
 13 understand?  
 14 A. I understand each word but not  
 15 how you put them together.  
 16 Q. If a court determines that the  
 17 defendant has not infringed upon the  
 18 plaintiffs' copyrights, do you believe that  
 19 that decision would result in economic harm  
 20 to the plaintiffs?  
 21 MR. FEE: Objection to the  
 22 extent it calls for a legal  
 23 conclusion. Plus asked and answered.  
 24 THE WITNESS: It sounds like  
 25 exactly the same words, so I'm not

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1 sure how to answer that question.  
 2 BY MR. BRIDGES:  
 3 Q. Would a decision that the  
 4 defendant has not infringed upon plaintiffs'  
 5 copyrights result in economic harm to the  
 6 plaintiffs?  
 7 MR. FEE: Objection. Calls for  
 8 a legal conclusion.  
 9 THE WITNESS: I'm just not  
 10 following. I under -- I'm worked --  
 11 I'm working under the assumption that  
 12 the activity here represents a  
 13 copyright infringement. I'm -- and  
 14 I'm being asked and answering the  
 15 question of the impact of that and  
 16 whether there would be harm and what  
 17 kind of harm and whether that's  
 18 reparable harm.  
 19 So I'm focusing on what has  
 20 been done and what may continue to be  
 21 done by the defendant.  
 22 BY MR. BRIDGES:  
 23 Q. That's non-responsive. I'll  
 24 ask you to answer my question. And if you  
 25 just don't want to answer the question,

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1 that's fine.  
 2 A. I want to, but I cannot.  
 3 Q. Well --  
 4 A. I do not understand the  
 5 question.  
 6 Q. I'll say it again.  
 7 Would a decision by the Court  
 8 that the defendant has not infringed upon the  
 9 plaintiffs' copyrights result in economic  
 10 harm to the plaintiffs?  
 11 MR. FEE: Objection. Calls for  
 12 a legal conclusion. Asked and  
 13 answered.  
 14 THE WITNESS: I --  
 15 MR. FEE: Vague.  
 16 THE WITNESS: I cannot answer  
 17 it any differently. I'm sorry.  
 18 Is this a good time for a  
 19 break, or do you want to keep going?  
 20 MR. BRIDGES: Sure. We can  
 21 take one if you want.  
 22 THE VIDEOGRAPHER: Off the  
 23 record at 1:17.  
 24 \* \* \*  
 25 (Recess from 1:17 p.m. to

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1 2:12 p.m.)  
 2 \* \* \*  
 3 THE VIDEOGRAPHER: On the  
 4 record at 2:12.  
 5 BY MR. BRIDGES:  
 6 Q. Good afternoon, Mr. Jarosz.  
 7 A. Good afternoon.  
 8 Q. Could you outline for me,  
 9 please, what steps you took in your  
 10 engagement in this case? What are the  
 11 different activities you engaged in?  
 12 A. Generally, I had a discussion  
 13 with counsel about the matter. Then we  
 14 examined documents that would -- were  
 15 provided to us to give us background. We  
 16 then proceeded to gather our own information  
 17 from third-party sources, primarily through  
 18 Internet searches.  
 19 We obtained information that  
 20 had been produced as part of discovery. We  
 21 had conversations with people at the various  
 22 plaintiff organizations.  
 23 We outlined the report and  
 24 summarized some of the information that you  
 25 see in the tabs. We had discussions with

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1 counsel. And then we finalized the report,  
2 submitting it to counsel on June 5th, 2015.  
3 Q. Do you know how many standards  
4 of each plaintiff are at issue in this case?  
5 A. How many -- I'm sorry --  
6 standards are at issue?  
7 Q. Yes.  
8 A. I have that number written  
9 down. It's in the hundreds, and I forget, as  
10 I sit here right now, precisely the number.  
11 I will look it up. And I was giving you an  
12 answer that was a cumulation across the three  
13 plaintiffs.  
14 I am not seeing that number  
15 right now. I'll keep looking.  
16 Q. Do you know what --  
17 A. You may be able to point me  
18 quicker than I recall where it was.  
19 Q. Do you -- do you know what  
20 proportion of plaintiffs -- of each  
21 plaintiffs' standards is at issue in this  
22 case?  
23 A. Are you asking me the ratio of  
24 the standards at issue versus the total  
25 standards developed by the organizations?

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1 Q. Yes.  
2 A. I think it's less than a  
3 majority for each organization. I'm fairly  
4 certain of that with regard to ASTM. I think  
5 that's true with regard to NFPA. I think  
6 it's true with regard to ASHRAE.  
7 Q. Do you have any better  
8 information than less than a majority --  
9 A. Well, I --  
10 Q. -- for each of them?  
11 A. The precise numbers are in the  
12 report. Let's see here. One can figure that  
13 out. You may remember where I summarized the  
14 number of standards. I just don't remember.  
15 It's easy to determine because the data are  
16 all here.  
17 Q. Have you analyzed differences  
18 in sales trends between standards that are at  
19 issue in this case and plaintiffs' other  
20 standards?  
21 A. No, I don't think I have those  
22 data at my disposal.  
23 Q. Did you ever ask for those  
24 data?  
25 A. I don't recall.

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1 Q. Have you analyzed any  
2 differences in sales trends between those of  
3 plaintiffs' standards that have been  
4 incorporated into law and those of  
5 plaintiffs' standards that have not been  
6 incorporated into law?  
7 A. I don't think so. I don't  
8 think I have those data, and I'm not sure  
9 that each plaintiff knows precisely how many  
10 have been incorporated into law.  
11 Q. Did you ask for any data  
12 regarding the distinction between standards  
13 incorporated by reference and standards not  
14 incorporated by reference in the law?  
15 A. I don't --  
16 MR. FEE: Objection to form.  
17 THE WITNESS: I'm sorry. I  
18 don't recall.  
19 BY MR. BRIDGES:  
20 Q. You made observations about  
21 sales trends earlier in your deposition. I  
22 think you said that there's been a reduction  
23 in sales of certain of plaintiffs' standards;  
24 is that correct?  
25 A. I'm not quite sure what the

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1 earlier testimony was, but I think I was  
2 pointing you to paragraph 133 with regard to  
3 downloads of -- and other measures of  
4 activity, as I had at my disposal.  
5 Q. Well, I'm trying to find out  
6 what changes you have studied in plaintiffs'  
7 economics that you attribute to defendant's  
8 activities.  
9 A. I'm not quite sure what your  
10 question is.  
11 Q. Well, I'm trying to find out  
12 what information you have studied to  
13 determine what changes in the finances of  
14 each of the plaintiffs have occurred as a  
15 consequence of the defendant's activities.  
16 MR. FEE: Objection to form.  
17 THE WITNESS: I'm still not  
18 sure that I'm hearing a question. But  
19 to the extent that I had information  
20 on changes in activity level, I  
21 summarized that in paragraph 133.  
22 BY MR. BRIDGES:  
23 Q. My question is, what  
24 information did you study to determine any  
25 changes in finances of each of the

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1 plaintiffs?  
2 MR. FEE: Same objection.  
3 THE WITNESS: It's reflected in  
4 paragraph 133 and in the tabs,  
5 particularly 3, 4, and 5. But the  
6 tabs are not at the granular level  
7 that I think are of interest to you.  
8 BY MR. BRIDGES:  
9 Q. What do you mean by the  
10 "granular level" that would be of interest to  
11 me?  
12 A. I don't think it breaks out  
13 publications by standard, for instance.  
14 Q. Does it break out publications  
15 by whether a standard has been incorporated  
16 by reference or not?  
17 A. I don't think so.  
18 Q. Does it break out by whether a  
19 standard has been publicly made available by  
20 defendant or not?  
21 A. I don't think so. Not in  
22 tabs 3, 4, and 5.  
23 Q. How do you establish causation  
24 between defendant's activities and any of the  
25 data that you provide in section -- in

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1 paragraph 133?  
2 MR. FEE: Objection. Calls for  
3 a legal conclusion. Form.  
4 THE WITNESS: One can and  
5 should look at all evidence available,  
6 including circumstantial evidence. I  
7 don't have direct information about  
8 the precise impact of defendant's  
9 activities, but I have important  
10 information that bears on that issue,  
11 including information that's in  
12 deposition transcripts.  
13 BY MR. BRIDGES:  
14 Q. So my question is, how do  
15 you -- do you -- strike that.  
16 Are your conclusion -- are you  
17 making conclusions in paragraph 133 about the  
18 cause of changes in sales of the plaintiffs'  
19 products?  
20 MR. FEE: Objection to form.  
21 THE WITNESS: Not definitively.  
22 I have observations about the  
23 magnitude and trend of the downloads  
24 of -- through defendant's sites. I  
25 have some information on the downloads

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1 of certain of the standards. I've  
2 presented that.  
3 I don't have direct evidence of  
4 the precise impact historically of  
5 defendant's activities on plaintiffs'  
6 financials.  
7 BY MR. BRIDGES:  
8 Q. What evidence of any kind do  
9 you have of any kind of impact historically  
10 of the defendant's activities on plaintiffs'  
11 financials?  
12 MR. FEE: Objection to form.  
13 THE WITNESS: That which is  
14 reported in paragraph 133, that of  
15 which is contained in deposition  
16 testimony, and that of which I  
17 summarized in other parts of the  
18 report.  
19 BY MR. BRIDGES:  
20 Q. So when you're referring to  
21 deposition testimony, you're referring to the  
22 citations to the footnotes in paragraph 133?  
23 A. No, I don't think it's just  
24 limited to that. I think there's some other  
25 deposition transcripts that talk about the

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1 impact or potential impact of defendant's  
2 activities on each one of the plaintiffs.  
3 Q. Did you make any independent  
4 assessment of causation of any financial  
5 effects on plaintiffs by the defendant's  
6 activities?  
7 MR. FEE: Objection to form.  
8 Calls for a legal conclusion.  
9 THE WITNESS: What do you mean  
10 by the term of "independent assessment  
11 of causation"?  
12 BY MR. BRIDGES:  
13 Q. You, as an expert, not relying  
14 just on what other people have said or  
15 speculated or thought.  
16 MR. FEE: Same objections.  
17 Plus compound.  
18 THE WITNESS: We experts rely  
19 on other information to draw the  
20 conclusions that we do, and then we  
21 bring our training to it. So our  
22 observations shouldn't be in a vacuum.  
23 BY MR. BRIDGES:  
24 Q. But they should be objective,  
25 correct?

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1 A. Yes.  
 2 Q. And that means perhaps not  
 3 relying upon the views of the parties to the  
 4 lawsuit alone, but doing independent analysis  
 5 and research, correct?  
 6 MR. FEE: Objection to form.  
 7 THE WITNESS: I think one can  
 8 and should evaluate and consider the  
 9 views of the parties, but not limited  
 10 investigation to that.  
 11 BY MR. BRIDGES:  
 12 Q. So what independent analysis  
 13 and research did you do other than reviewing  
 14 the views and statements of the parties in  
 15 this case?  
 16 MR. FEE: Objection. Vague.  
 17 THE WITNESS: I reviewed and  
 18 summarized the data, as you see in  
 19 133, that I had at my disposal. I  
 20 reviewed writings about the impacts.  
 21 And I took important  
 22 information from the fact that the  
 23 plaintiffs have brought this lawsuit.  
 24 The plaintiffs don't want this  
 25 activity to continue. That is

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1 revealed preference information that's  
 2 quite important.  
 3 BY MR. BRIDGES:  
 4 Q. Tell me about what you mean by  
 5 repealed -- sorry. Strike that.  
 6 Tell me what you mean by  
 7 "revealed preference."  
 8 A. What people do often provides  
 9 information on what their preferences are.  
 10 Q. And so the fact that plaintiffs  
 11 brought this lawsuit has revealed to you that  
 12 they prefer to bring the lawsuit, correct?  
 13 MR. FEE: Objection. Vague.  
 14 THE WITNESS: Given the cost,  
 15 they prefer to bring the lawsuit  
 16 rather than not bring it, yes.  
 17 BY MR. BRIDGES:  
 18 Q. What else -- strike that.  
 19 What are the data you're  
 20 referring to in page -- strike that.  
 21 What are the data you're  
 22 referring to in paragraph 133 that you took  
 23 into account in discussing or analyzing  
 24 effects of defendant's activities on  
 25 plaintiffs?

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1 A. I took all the data --  
 2 MR. FEE: Objection. Form.  
 3 Objection to form.  
 4 THE WITNESS: I took all this  
 5 data into account. That's why I  
 6 reported it here.  
 7 BY MR. BRIDGES:  
 8 Q. And the data that you  
 9 identified in the footnotes in  
 10 paragraph 134 -- sorry -- 133?  
 11 A. Yes, I considered that  
 12 information.  
 13 Q. Do you know in what year the  
 14 defendant posted the 2008 version of the  
 15 National Electrical Code on its Web site?  
 16 A. I don't know with absolute  
 17 certainty. I do know a number of the alleged  
 18 activities occurred in late 2012. I don't  
 19 know if it's specific to that code or not.  
 20 Q. Does it matter to your analysis  
 21 exactly when the defendant posted the 2008  
 22 National Electrical Code on its Web site or  
 23 to Internet Archive?  
 24 A. I would --  
 25 MR. FEE: Objection to form.

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1 THE WITNESS: I would consider  
 2 that information if I had it, but I  
 3 don't have any reason to think that it  
 4 would change any of the conclusions  
 5 that I drew.  
 6 BY MR. BRIDGES:  
 7 Q. The timing of when the  
 8 defendant posted certain matters wouldn't  
 9 change your conclusions?  
 10 A. Not based on what I know right  
 11 now. My understanding is that much of the  
 12 activity occurred in 2012, the later half of  
 13 2012, and I still have the whole body of  
 14 evidence that I have considered. So I'm not  
 15 sure if the precise timing would change, but  
 16 I certainly would consider that.  
 17 Q. Do you know in what year  
 18 Public.Resource.Org posted the 2011 version  
 19 of the National Electrical Code?  
 20 A. Same answer to the question  
 21 that you had with regard to the 2008 code.  
 22 Q. Can you look at the data in  
 23 your -- the tables attached to your report  
 24 and see if that helps refresh your memory as  
 25 to when the defendant posted NEC 2008 and

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1 NEC -- NEC 2011?  
2 A. I can look, and I will.  
3 No, it doesn't answer that  
4 question, I don't think.  
5 Q. Can you make a prediction as to  
6 when the defendant posted NEC 2008 and  
7 NEC 2011, based on the data attached to your  
8 report in Exhibit 1?  
9 MR. FEE: Objection to form.  
10 THE WITNESS: No, I don't  
11 think, based on just those data.  
12 BY MR. BRIDGES:  
13 Q. Can you make -- give an  
14 estimate as to when the defendant posted  
15 NEC 2008 and NEC 2011, based on the data  
16 attached to your report as Exhibit 1?  
17 MR. FEE: Same objection.  
18 THE WITNESS: No, I don't  
19 think, based on just that information.  
20 BY MR. BRIDGES:  
21 Q. Well, just looking at your  
22 report, can you tell when defendant posted  
23 NEC 2008 and NEC 2011?  
24 A. My answer hasn't changed. I  
25 still don't know precisely when those were

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1 posted.  
2 Q. But that doesn't make a  
3 difference to your economic analysis of the  
4 effects of defendant's activities on the  
5 plaintiffs?  
6 A. Well, I would be curious --  
7 MR. FEE: Objection to form.  
8 THE WITNESS: -- curious about  
9 that information, but I don't have any  
10 reason to think it would change the  
11 conclusions that I drew, and that is  
12 that a permanent injunction is  
13 appropriate here.  
14 BY MR. BRIDGES:  
15 Q. Is it your job to determine  
16 whether a permanent injunction is  
17 appropriate? Is that what you were hired to  
18 do?  
19 A. No.  
20 MR. FEE: Objection. Calls for  
21 a legal conclusion. Form. Compound.  
22 THE WITNESS: I think it's  
23 ultimately the Court's decision to  
24 make, but I've been asked what my  
25 economic view is as to the

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1 appropriateness of a permanent  
2 injunction here.  
3 BY MR. BRIDGES:  
4 Q. Is the appropriate of -- is the  
5 appropriateness of a permanent injunction an  
6 economic question?  
7 A. I think, in part, economic  
8 considerations can be and often are taken  
9 into account in answering that question.  
10 Q. Is it an economic question?  
11 MR. FEE: Objection.  
12 BY MR. BRIDGES:  
13 Q. That was my question.  
14 MR. FEE: Asked and answered.  
15 THE WITNESS: Again, in part.  
16 BY MR. BRIDGES:  
17 Q. The propriety of  
18 a preliminary -- of a -- strike that.  
19 It's your testimony that the  
20 propriety of a permanent injunction is, in  
21 part, an economic question?  
22 MR. FEE: Objection. Asked and  
23 answered. Form. Calls for a legal  
24 conclusion.  
25 THE WITNESS: Yes. As I

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1 understand it, one factor to consider  
2 is the reparability or irreparability  
3 of harm. I believe, at its core,  
4 that's an economic question.  
5 BY MR. BRIDGES:  
6 Q. And what economic theories did  
7 you rely upon to conclude that, as an  
8 economic matter, a preliminary -- strike  
9 that.  
10 What economic theories did you  
11 rely upon to conclude that, as an economic  
12 matter, a permanent injunction is appropriate  
13 in this case?  
14 MR. FEE: Same objections.  
15 THE WITNESS: I don't know what  
16 candidates you have in mind for  
17 economic theories.  
18 BY MR. BRIDGES:  
19 Q. Whichever ones you relied upon.  
20 A. I --  
21 MR. FEE: Same objections.  
22 THE WITNESS: -- used all of my  
23 training and applied it to the facts  
24 of this case and drew the conclusions  
25 that I did.

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1 BY MR. BRIDGES:  
2 Q. And are there any particular  
3 aspects of training that you have beyond what  
4 a first-year college student would have  
5 gotten in a first-year economics course that  
6 you have brought to bear by applying  
7 particular economic theories to this case?  
8 A. I think my training makes me  
9 who I am and has helped me in assignments  
10 like this. I have beyond a first-year-in-  
11 college understanding of basic economics, but  
12 they're very important concepts that are  
13 taught and learned in first-year economics.  
14 Q. Well, I want to know if there  
15 are any economic concepts beyond first-year  
16 economics that you have brought to bear in  
17 rendering your conclusions in this case.  
18 MR. FEE: Objection to form.  
19 Asked and answered.  
20 THE WITNESS: Generally, there  
21 are, yes.  
22 BY MR. BRIDGES:  
23 Q. What economic concepts have you  
24 brought to bear in your report and analysis  
25 in this case?

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1 A. I'm sorry, because I don't know  
2 what you mean by "economic concepts." We get  
3 trained in things like quantitative methods  
4 and intermediate microeconomics, in price  
5 theory, in econometrics, in consumer  
6 behavior. All those things are beyond the  
7 first year. I don't know if you're calling  
8 those economic theories. Your -- your  
9 questioning confuses me.  
10 Q. Well, you referred to the  
11 important concepts in response to my question  
12 to you about particular aspects of training  
13 that you have beyond what a first-year  
14 college student would have gotten in a  
15 first-year economics course that you brought  
16 to bear by applying economic theories to this  
17 case, and your answer refers to very  
18 important concepts that are taught and  
19 learned.  
20 And so I'm asking you, what  
21 very important economic concepts have you  
22 brought to bear in your analysis of this  
23 case?  
24 MR. FEE: Objection to form.  
25 Lack of foundation.

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1 THE WITNESS: We learn about  
2 price theory. We learn about consumer  
3 behavior. We talk -- we learn about  
4 manufacturer and supplier actions. We  
5 learn about game theory. We learn  
6 about econometrics. We learn more  
7 broadly about quantitative methods.  
8 We learn about a variety of aspects of  
9 industrial organization. There are  
10 many things that we learn beyond the  
11 first year of economics training.  
12 BY MR. BRIDGES:  
13 Q. No, I'm asking what you brought  
14 to bear in your analysis in this case.  
15 A. All those.  
16 Q. Okay. What aspect of price  
17 theory did you bring to bear in this case?  
18 A. I don't know how to answer that  
19 question besides I understand basic price  
20 theory and have researched it much and  
21 applied that to the facts here.  
22 Q. What was the specific  
23 application of price theory that you brought  
24 to bear in this case?  
25 A. I can't be any more specific

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1 than that. I don't understand your question.  
2 Q. What aspect of training about  
3 consumer behavior did you bring to bear in  
4 this case?  
5 A. I can't be any more specific  
6 than saying that.  
7 Q. What aspects of your training  
8 about game theory have you brought to bear in  
9 your work on this case?  
10 A. I can't be any more specific  
11 than that.  
12 Q. What aspects of econometrics in  
13 your training have you brought to bear on  
14 this case?  
15 A. I can't be any more specific  
16 than that.  
17 Q. What inform -- what aspects of  
18 training in qualitative methods have you  
19 brought to bear on this case?  
20 A. I didn't say "qualitative  
21 methods," and so it may have been mis-keyed  
22 in. I said "quantitative methods."  
23 Q. All right. What aspects of  
24 quantitative methods of your training did you  
25 bring to bear on this case?

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1 A. I can't be any more specific  
2 than that.  
3 Q. What aspect of your training  
4 regarding aspects of industrial organization  
5 have you brought to bear on this case?  
6 A. I can't be any more specific  
7 than that.  
8 Q. But you did bring the theory of  
9 reveal -- revealed preferences to bear on  
10 this case, correct?  
11 A. Yes.  
12 Q. What other economic theories do  
13 you recall bringing to bear on this case?  
14 MR. FEE: Objection. Asked and  
15 answered.  
16 THE WITNESS: Everything that  
17 I've --  
18 MR. FEE: And vague.  
19 Go ahead.  
20 THE WITNESS: -- I've learned  
21 in my training, both educational  
22 training and career training.  
23 BY MR. BRIDGES:  
24 Q. Can you be more specific than  
25 that?

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1 A. No.  
2 \* \* \*  
3 (Jarosz Exhibit 4 marked for  
4 identification.)  
5 \* \* \*  
6 BY MR. BRIDGES:  
7 Q. Mr. Jarosz, do you recognize  
8 Exhibit 4 as a document that you produced in  
9 response to a subpoena in this case?  
10 A. Yes.  
11 Q. What is this document?  
12 A. It appears to be a summary over  
13 the years 2009 through 2013 of dollars and  
14 quantity of NFPA standards that were sold in  
15 the marketplace.  
16 Q. Based upon the trends that you  
17 see in this exhibit, can you estimate when  
18 you believe it is most likely that the  
19 defendant first published -- strike that.  
20 Based upon the trends that you  
21 see in this Exhibit 4, can you estimate when  
22 you believe it is most likely that the  
23 defendant first posted each of the standards  
24 identified here?  
25 A. I don't think so, not based

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1 just on this information.  
2 Q. What else would you need?  
3 A. I don't know, because I think  
4 it's probably a very easy factual question to  
5 determine when the downloading first  
6 occurred, so I don't know why one would need  
7 to back into it.  
8 Q. Well, when -- would one be able  
9 to use sales trends as a way of identifying  
10 likely effects of a posting of each standard  
11 by the defendant?  
12 MR. FEE: Objection. Vague.  
13 Compound.  
14 THE WITNESS: Maybe; maybe not.  
15 BY MR. BRIDGES:  
16 Q. Why do you say "maybe; maybe  
17 not"?  
18 A. I just wouldn't think to do it  
19 that way, so I don't know what you exactly  
20 have in mind.  
21 Q. Do you associate the posting of  
22 standards by defendant with changes in sales  
23 volume of the standards that the defendant  
24 has posted?  
25 MR. FEE: Objection to form.

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1 THE WITNESS: I don't know what  
2 you mean by that question.  
3 BY MR. BRIDGES:  
4 Q. You don't understand the  
5 question?  
6 A. I do not.  
7 Q. Can you correlate the posting  
8 of standards by defendant with any changes in  
9 sales volumes of the standards that the  
10 defendant has posted?  
11 MR. FEE: Objection to form.  
12 THE WITNESS: I don't think  
13 I've attempted to compute the  
14 correlation coefficient here  
15 associated with postings.  
16 BY MR. BRIDGES:  
17 Q. I'm not asking for a specific  
18 correlation coefficient. I'm just asking,  
19 generally, can you correlate the posting of  
20 standards by defendant with any changes in  
21 sales volumes of the standards that  
22 defendants has -- that the defendant has  
23 posted with reference to Exhibit 4?  
24 A. I don't know --  
25 MR. FEE: Objection. Form.

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1 THE WITNESS: I don't recall  
2 attempting to do that. And I wouldn't  
3 necessarily think that the historical  
4 impact would -- is the end of the  
5 story as to the harm here.  
6 BY MR. BRIDGES:  
7 Q. Is historical impact part of  
8 the story as to the harm here?  
9 A. Yes.  
10 Q. What -- what can you say by  
11 looking at Exhibit 4 about the historical  
12 impact of the posting of the defendant -- of  
13 the plaintiffs' standards by the defendant?  
14 A. I don't know that I can say  
15 much, because I believe the postings largely  
16 occurred in late 2012, and I only have one  
17 period after that.  
18 Q. If it turns out that  
19 defendant's postings were well before 2012,  
20 would that affect your analysis of the trends  
21 in sales data of the plaintiffs'  
22 publications?  
23 MR. FEE: Objection to form.  
24 Compound. Vague.  
25 THE WITNESS: Maybe. I would

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1 consider that information in  
2 conjunction with these data if you  
3 wanted me to.  
4 BY MR. BRIDGES:  
5 Q. How -- what -- what would  
6 change?  
7 A. I don't know. I haven't done  
8 that analysis.  
9 Q. Have you verified the dates on  
10 which plaintiffs -- strike that.  
11 Have you verified the dates at  
12 which defendant posted the various standards  
13 to its Web site or to Internet Archive?  
14 A. I don't --  
15 MR. FEE: Objection. Vague.  
16 THE WITNESS: I don't recall  
17 verifying it.  
18 And are you asking did I  
19 separately go out and determine what  
20 that date is and see if that was the  
21 same as what was represented in the  
22 Complaint, for instance?  
23 BY MR. BRIDGES:  
24 Q. Yes.  
25 A. No, I don't recall doing that.

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1 Q. Have you determined in any way  
2 the dates at which defendant posted various  
3 standards to its Web site or to the Internet  
4 Archive?  
5 A. I don't recall doing a separate  
6 analysis of that, no.  
7 Q. How did you learn about the  
8 dates at which defendant posted various  
9 standards to its Web site or to Internet  
10 Archive?  
11 A. I had conversations with  
12 counsel on that topic, and I may have seen  
13 that information contained in certain  
14 documents like the Complaint, but I don't  
15 recall.  
16 Q. Did you rely upon information  
17 regarding those dates from conversations with  
18 counsel?  
19 MR. FEE: In arriving at his  
20 opinions, you're asking?  
21 MR. BRIDGES: Arriving at his  
22 understanding of the facts.  
23 THE WITNESS: I don't know that  
24 I did, because I don't recall  
25 reporting those specific dates

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1 anywhere in my report.  
2 BY MR. BRIDGES:  
3 Q. Do you recall taking specific  
4 dates into account in analyzing the effect of  
5 defendant's actions?  
6 MR. FEE: Objection to form.  
7 Vague.  
8 THE WITNESS: I don't recall  
9 one way or the other.  
10 BY MR. BRIDGES:  
11 Q. Do you know how -- strike that.  
12 Do you know how much revenue  
13 each plaintiff derives from the standards at  
14 issue in this case?  
15 A. I don't think I know that  
16 precise number.  
17 Q. Did you -- did you ever know  
18 that number?  
19 A. I don't think so.  
20 Q. Did you ever know how much  
21 revenue each plaintiff derives from standards  
22 that have been incorporated into law?  
23 A. As opposed to those that have  
24 not been incorporated? Is that --  
25 Q. Well, I'm -- I'm asking about

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1 those standards that have been incorporated  
2 in the law. I'm asking if you know how much  
3 revenue each plaintiffs derives -- each  
4 plaintiff derives from those standards.  
5 A. I don't --  
6 MR. FEE: Objection. Form.  
7 THE WITNESS: -- think I know  
8 that number, and I'm not sure the  
9 plaintiffs know that number.  
10 BY MR. BRIDGES:  
11 Q. Do you know the percentage of  
12 revenue that each plaintiff derives from  
13 standards that have been incorporated into  
14 law?  
15 MR. FEE: Objection to form.  
16 THE WITNESS: I don't think I  
17 do, and I don't believe the plaintiffs  
18 do.  
19 BY MR. BRIDGES:  
20 Q. Are you aware of any difference  
21 in profitability to plaintiffs between those  
22 standards that have been incorporated into  
23 law and those standards that have not been  
24 incorporated into law?  
25 MR. FEE: Objection to form.

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1 THE WITNESS: I don't believe  
2 so.  
3 BY MR. BRIDGES:  
4 Q. Do you know -- strike that.  
5 Are you aware of any difference  
6 in profitability to plaintiffs between those  
7 standards that defendant has posted to the  
8 Internet and those standards that defendant  
9 has not posted to the Internet?  
10 MR. FEE: Objection to form.  
11 THE WITNESS: I don't believe  
12 so. And as with the previous  
13 question, I don't think the plaintiffs  
14 have that information at their  
15 disposal.  
16 BY MR. BRIDGES:  
17 Q. For each plaintiff, what do you  
18 understand to be the percentage of gross  
19 revenue from the sale of standards?  
20 MR. FEE: Objection to form.  
21 THE WITNESS: I -- I've  
22 reported that in my report. My memory  
23 is that it's something on the order of  
24 66 percent for ASTM and for NFPA. And  
25 if you add in memberships, it's

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1 something just north of 50 percent for  
2 ASHRAE.  
3 BY MR. BRIDGES:  
4 Q. What do you mean by "if you add  
5 in memberships"?  
6 A. I'm not -- I'm not quite sure  
7 what you're asking me to define.  
8 Q. I'm asking you to explain the  
9 phrase that you just used, "if you add in  
10 memberships." What did that mean?  
11 A. I talked about that in my  
12 report. Membership fees are a fairly good  
13 recollect -- a fairly good reflection of  
14 amount that would have been paid for  
15 publications. In other words, publication  
16 fees -- it -- let me start this over again.  
17 It makes about as much sense to  
18 become a member of ASHRAE as it is to buy  
19 some of the individual publications. As a  
20 result, many people choose to become members  
21 rather than just buying the publication, as I  
22 understand it.  
23 Q. How did you learn that?  
24 A. Having knowledge of the -- of  
25 the price difference and through discussions

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1 with people at ASHRAE.  
2 Q. How did you learn about the  
3 price difference?  
4 A. I don't recall how I learned  
5 it, but I report it in my report based on  
6 certain documents I've seen. Perhaps I  
7 learned it from their Web site.  
8 Q. Did you do any surveys of  
9 ASHRAE members to validate that assumption?  
10 A. I'm sorry. Validate what  
11 assumption?  
12 Q. About purchase of a membership  
13 instead of buying the publication.  
14 A. I'm not sure that there's an  
15 assumption in there. My understanding is  
16 that ASHRAE people are of the belief that  
17 many people buy membership rather than  
18 individual publications.  
19 Q. And in your work, did you  
20 assume that?  
21 A. I didn't assume that. I worked  
22 on that -- under that understanding.  
23 Q. Oh, it's an understanding, but  
24 not an assumption?  
25 A. Yes.

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1 Q. Did that understanding make a  
2 difference to your analysis?  
3 A. It was a factual underpinning.  
4 Q. An underpinning, but not an  
5 assumption?  
6 A. It was not an explicit  
7 assumption.  
8 Q. But it was an underpinning, not  
9 an assumption, is your testimony?  
10 MR. FEE: Objection. Asked and  
11 answered.  
12 THE WITNESS: Yes. I don't  
13 know what or why you're arguing with  
14 me on this.  
15 BY MR. BRIDGES:  
16 Q. I'm not arguing.  
17 A. I don't understand.  
18 Q. I'm just trying to understand  
19 your testimony. That's all. So I'm asking  
20 some follow-up questions.  
21 You stated earlier some  
22 percentages of revenue from the sale of  
23 standards. Did you mean to be identifying  
24 what you thought were the percentages of  
25 revenue from the sale of standards or from

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1 the sale of all publications?  
2 A. Let me -- let me double-check  
3 that.  
4 Well, in the case of ASTM, for  
5 instance, I believe it's copyrighted  
6 publications.  
7 Q. What page are you referring to  
8 in your report?  
9 A. Right now I'm looking at  
10 page 36, but I think I talk about it at other  
11 areas.  
12 Q. So page 36, you're talking  
13 about which paragraph?  
14 A. Well, right now I was --  
15 Q. 83?  
16 A. -- I was looking at 83, but I'm  
17 turning back to, for more reliable  
18 information, to paragraph 15, for instance,  
19 which says in 2014, 67.1 percent of the  
20 revenue was generated by the sale of  
21 copyrighted publications. For NFPA, that  
22 information is shown in paragraph 18. And  
23 for ASHRAE, that information is shown in  
24 paragraph 22.  
25 Q. All three of those references

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1 are to copyrighted publications, correct?  
2 A. With the exception of number 3,  
3 which refers to copyrighted publications and  
4 memberships.  
5 Q. Okay. So my question wasn't  
6 about copyrighted publications. My question  
7 is, what percentage do you understand of  
8 plaintiffs' revenues comes from the sale of  
9 standards at issue in this case?  
10 A. Thank you for that reminder of  
11 what the question is.  
12 I don't think I know that  
13 precise percentage.  
14 Q. What percentage of plaintiffs'  
15 revenues, to your knowledge, comes from the  
16 sale of standards incorporated into law?  
17 A. I don't know that number.  
18 Q. What percentage of plaintiffs'  
19 revenues, to your understanding, comes from  
20 the sale of all standards?  
21 A. I'm sorry. I thought you asked  
22 that question. I thought the immediate one  
23 before that was standards.  
24 Q. No. It was standards at issue  
25 in this case. Then --

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1 A. The one before that.  
2 Q. -- standards incorporated into  
3 law. And now it's all standards.  
4 A. Right. Thank you.  
5 I don't know that number  
6 either.  
7 Q. What percentage of  
8 plaintiffs' -- strike that.  
9 What dollar value do you  
10 associate with the investments that each  
11 plaintiff has made in the development of the  
12 standards at issue in this case?  
13 A. I don't think I attributed a  
14 dollar amount to that precise activity,  
15 because I don't know that amount.  
16 Q. What percentage of plaintiffs'  
17 operating expenses do you associate with the  
18 plaintiffs' development of the standards at  
19 issue in this case?  
20 A. I don't think I know that  
21 number.  
22 Q. What percentage of plaintiffs'  
23 operating expenses do you associate with the  
24 plaintiffs' development of standards  
25 incorporated into law?

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1 A. I don't think I know that  
2 number.  
3 Q. What percentage of plaintiffs'  
4 operating expenses do you associate with the  
5 plaintiffs' development of standards  
6 generally?  
7 A. I don't think I know that  
8 number.  
9 Q. Do you have any estimates of  
10 any of those numbers that you just said you  
11 don't think you know?  
12 MR. FEE: Objection to form.  
13 THE WITNESS: Not sitting here  
14 right now.  
15 BY MR. BRIDGES:  
16 Q. Did you at one point ever  
17 determine those numbers?  
18 A. Not that I recall.  
19 Q. Do you know what percentage of  
20 the staff or employees of each plaintiff has  
21 worked on the development of standards at  
22 issue in this case?  
23 MR. FEE: Objection to form.  
24 THE WITNESS: I don't think I  
25 know that number.

1 BY MR. BRIDGES:  
2 Q. Do you know what percentage --  
3 do you have an estimate?  
4 A. No.  
5 MR. FEE: Objection to form.  
6 THE WITNESS: Not as I sit  
7 here, no.  
8 BY MR. BRIDGES:  
9 Q. Do you know what percentage of  
10 the staff or employees of each plaintiff has  
11 worked on the development of standards  
12 incorporated into law?  
13 MR. FEE: Objection to form.  
14 THE WITNESS: Not as I sit here  
15 right now.  
16 BY MR. BRIDGES:  
17 Q. Do you have an estimate?  
18 A. Not as I sit here right now.  
19 Q. Do you know what percentage of  
20 the staff or employees of each plaintiff has  
21 worked on the development of standards in  
22 general?  
23 A. Not as I sit here right now.  
24 Q. Do you have an estimate?  
25 A. Not as I sit here right now.

1 Q. Have you ever had access to any  
2 information that I've asked in the last  
3 several questions?  
4 MR. FEE: Objection to form.  
5 THE WITNESS: I don't believe  
6 so.  
7 BY MR. BRIDGES:  
8 Q. Do you know whether plaintiffs  
9 prepare standards through joint sponsorship  
10 with any other organizations?  
11 MR. FEE: Objection. Vague.  
12 THE WITNESS: I think I may  
13 have seen a reference to that. I  
14 don't know the extent to which it  
15 occurs, but I wouldn't be surprised to  
16 be reminded that it does occur.  
17 BY MR. BRIDGES:  
18 Q. Are you aware of any, as you  
19 sit here?  
20 A. Not as I sit here right now,  
21 but I think I'm aware that it has occurred.  
22 Q. Do you know whether plaintiffs  
23 receive grants, revenue, or stipends from  
24 governments that use, reference, or adopt  
25 their standards?

1 MR. FEE: Objection to form.  
2 THE WITNESS: There are grant  
3 monies that go to NFPA. I don't know  
4 the source of those grants. I don't  
5 see a line for grant revenues for the  
6 other two organizations.  
7 BY MR. BRIDGES:  
8 Q. Did you ask any of the  
9 plaintiffs about the revenues or expenses  
10 they have specifically attributable to the  
11 standards that defendant has posted to the  
12 Internet?  
13 MR. FEE: Objection to form.  
14 THE WITNESS: We generally  
15 talked about that topic with each  
16 plaintiff, and I don't think the  
17 plaintiffs know that amount. They  
18 undertake activities that are  
19 standards oriented. They don't know  
20 which of those standards will be  
21 incorporated by reference.  
22 BY MR. BRIDGES:  
23 Q. Did you --  
24 A. Or which have been. I don't  
25 think they systematically track those.

1 Q. I guess my question didn't have  
2 anything to do with incorporated by  
3 reference. My question is, did you ask any  
4 of the plaintiffs about the revenues or  
5 expenses that they have had that are  
6 specifically attributable to the standards  
7 that the defendant has posted to the  
8 Internet?  
9 MR. FEE: Objection to form.  
10 THE WITNESS: I think we  
11 generally talked about that topic, and  
12 I don't believe they have information  
13 at that level.  
14 BY MR. BRIDGES:  
15 Q. Did you ask the plaintiffs to  
16 estimate revenues or expenses specifically  
17 attributable to the standards at issue in  
18 this case?  
19 MR. FEE: Objection to form.  
20 THE WITNESS: Not that I  
21 recall. We may have asked whether  
22 they are collected, but we didn't ask  
23 for the plaintiffs to separately  
24 estimate those numbers, as I recall.  
25 BY MR. BRIDGES:

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1 Q. In paragraph 49, you state that  
2 ASHRAE standard 90.1 was first published in  
3 1974. What's your basis for that statement?  
4 A. I don't recall. It may have  
5 been in a produced document. It may have  
6 been in conversations. I just don't recall.  
7 Q. Did you attempt to verify that  
8 information independently?  
9 A. Not that I recall.  
10 Q. Do you know if ASHRAE standard  
11 90-75 was first published in 1975?  
12 A. I don't happen to know, sitting  
13 here now.  
14 Q. You cite to an article in  
15 footnotes 73, 74 of your report. Did you  
16 review that article?  
17 A. Yes.  
18 Q. Did you independently verify  
19 the information in it?  
20 A. Not that I recall.  
21 Q. You just took it at face value?  
22 A. I think so. I didn't have  
23 reason to question any of the facts there.  
24 Q. Did you ever have reason to  
25 question any of the facts that anybody from

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1 the plaintiffs told you in this case?  
2 MR. FEE: Objection to form.  
3 THE WITNESS: Well, I kept an  
4 open mind to the facts that I was  
5 given over the phone and sought to  
6 determine if I learned things that  
7 conflicted or not with that  
8 information.  
9 BY MR. BRIDGES:  
10 Q. Where did you --  
11 A. But --  
12 Q. I'm sorry. I didn't realize  
13 you were still --  
14 A. But I didn't separately go out  
15 and write down the facts and attempt to get  
16 separate verification of each fact.  
17 Q. So you were looking for  
18 internal inconsistencies in the  
19 communications that plaintiffs had with you  
20 in order to determine whether to question any  
21 of the facts that the plaintiffs' employees  
22 related to you?  
23 MR. FEE: Objection to form.  
24 BY MR. BRIDGES:  
25 Q. Is that your testimony?

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1 MR. FEE: Mischaracterizes the  
2 testimony.  
3 THE WITNESS: I'm not sure if  
4 it is. Let me try and answer and see  
5 if that's responsive.  
6 I was aware of the information  
7 we received over the telephone, and in  
8 the process of looking through the  
9 documents that we had, I kept an open  
10 eye toward learning things that  
11 conflicted with those oral  
12 conversations.  
13 BY MR. BRIDGES:  
14 Q. And the documents -- what  
15 are -- what were the documents that you're  
16 saying you had?  
17 A. Everything that's in tab 2.  
18 Q. Most of which, apart from the  
19 Web-based resources and the articles other  
20 than Ms. Bremer's law review articles, the  
21 plaintiffs' counsel furnished to you,  
22 correct?  
23 MR. FEE: Objection to form.  
24 THE WITNESS: I think that's  
25 right. They didn't author those

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1 documents, but they provided them as  
 2 part of the discovery process.  
 3 BY MR. BRIDGES:  
 4 Q. Did you ask them for any  
 5 documents that they had not provided?  
 6 A. I think we generally described  
 7 the kinds of information that we find useful  
 8 or typically find useful in matters like  
 9 this.  
 10 Q. After you received documents  
 11 from plaintiffs' counsel, did you ask them  
 12 for any more?  
 13 A. That -- that's possible. I  
 14 don't recall that.  
 15 Q. You don't recall. Did you --  
 16 do you have any understanding as to the  
 17 dollar value of staff time and expenses that  
 18 the plaintiffs have incurred in promoting  
 19 incorporation of their standards into law?  
 20 MR. FEE: Objection to form.  
 21 Lack of foundation.  
 22 THE WITNESS: I don't think I  
 23 have that number, no.  
 24 BY MR. BRIDGES:  
 25 Q. Do you have an estimate?

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1 MR. FEE: Same objections.  
 2 THE WITNESS: Not as I sit here  
 3 now, no.  
 4 BY MR. BRIDGES:  
 5 Q. Did you discuss that issue with  
 6 anyone representing the plaintiffs?  
 7 MR. FEE: Same objections.  
 8 THE WITNESS: It's possible,  
 9 but I don't recall having that  
 10 discussion.  
 11 BY MR. BRIDGES:  
 12 Q. In paragraph 57 of your report,  
 13 you refer to "thousands of private-sector  
 14 standards." Was your sole support for the  
 15 statement in paragraph 57 the Bremer article  
 16 you cited in footnote 88?  
 17 A. No. You see I discuss and  
 18 provide support for that in subsequent  
 19 paragraphs in that section.  
 20 Q. And that includes in  
 21 paragraph 58?  
 22 A. Yes.  
 23 Q. And did you review the  
 24 Standards Incorporated by Reference Database  
 25 that you refer to in paragraph 58?

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1 A. I looked at some parts of it.  
 2 I don't recall that I looked at all aspects  
 3 of the database.  
 4 Q. Did you verify how many  
 5 standards were incorporated by reference  
 6 according to that database?  
 7 A. No, I did not.  
 8 Q. What do you mean by, "This  
 9 database reports nearly 13,000 instances of  
 10 incorporation by reference"?  
 11 A. I don't know what you're asking  
 12 me to define.  
 13 Q. I'm not asking you to define  
 14 anything. I'm asking you to explain what you  
 15 meant by that clause, "This database  
 16 reports" --  
 17 A. I'm sorry. I'm just -- I'm  
 18 going to be just rearranging words a little  
 19 bit. There were 13,000 times that there was  
 20 incorporation by reference of a standard.  
 21 I -- I don't -- I'm sorry. I  
 22 don't understand what your confusion is.  
 23 Q. I'm not confused. I'm just  
 24 asking you questions. Okay? So please don't  
 25 understand -- please don't assume that I'm

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1 confused. I'm trying to understand what you  
 2 meant by that.  
 3 You mean separate instances?  
 4 You mean separate laws? What do you mean?  
 5 A. Yes. Separate instances slash  
 6 separate laws.  
 7 Q. What did you count as an  
 8 instance?  
 9 A. Mention in a particular law of  
 10 a standard.  
 11 Q. Did you or anybody working with  
 12 you attempt to determine the number of  
 13 standards that those 13,000 instances of  
 14 incorporation by reference referred to?  
 15 A. Not entirely. But if you read  
 16 on that -- in that same section, it talks  
 17 about the number of ASTM standards, the  
 18 numbers of -- the number of NFPA standards,  
 19 and the number of ASHRAE standards.  
 20 Q. Well, please tell me where it  
 21 refers to the number of standards.  
 22 A. It says, "Including more than  
 23 2,400 instances involving ASTM standards."  
 24 So you're right. It doesn't  
 25 have the number of standards. It just has

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1 mentions of standard. You're absolutely  
 2 right.  
 3 Q. And the same thing is true of  
 4 the NFPA standards and ASHRAE standards?  
 5 A. You're absolutely right, yes.  
 6 Q. Do you know how many standards  
 7 that database shows as having been  
 8 incorporated by reference?  
 9 A. Not sitting here right now.  
 10 One could perhaps look at what I cited to  
 11 answer that question, but I don't know right  
 12 now.  
 13 Q. Do you know whether anyone  
 14 working for you ever did that work to make  
 15 that determination?  
 16 A. I don't recall that being done.  
 17 Q. Paragraph 59, you say, "At the  
 18 state level, privately-developed standards  
 19 are incorporated by reference as part of the  
 20 exercise of a range of governmental  
 21 functions."  
 22 Do you see that?  
 23 A. Yes.  
 24 Q. What do you mean by  
 25 "governmental functions" in that statement?

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1 A. Things that government agencies  
 2 do.  
 3 Q. And you give a couple of  
 4 examples, but speaking broadly, what are  
 5 governmental functions that involve  
 6 incorporation by reference of privately  
 7 developed standards at the state level?  
 8 MR. FEE: Objection to form.  
 9 THE WITNESS: I can only answer  
 10 generally. Health and human services,  
 11 things that are related to that,  
 12 safety, driving rules and regulation.  
 13 Those are among the things that come  
 14 to mind.  
 15 BY MR. BRIDGES:  
 16 Q. What are the governmental  
 17 functions related to health and human  
 18 services that you have in mind?  
 19 A. I don't have any particular  
 20 ones in mind.  
 21 Q. What are the governmental  
 22 functions relating to safety that you have in  
 23 mind?  
 24 A. I don't have any particular  
 25 ones in mind.

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1 Q. What are the governmental  
 2 functions with respect to driving that you  
 3 have in mind?  
 4 A. I don't have any particular  
 5 ones in mind.  
 6 Q. In paragraph 59, you say, "At  
 7 least 44 states and territories have adopted  
 8 ASHRAE 90.1 as part of the commercial  
 9 building energy code."  
 10 Do you see that?  
 11 A. Yes, I do.  
 12 Q. And that also has footnote 95  
 13 associated with that as well, correct?  
 14 A. Yes, that's correct.  
 15 Q. How do you explain the fact  
 16 that that reference in footnote 95 shows that  
 17 those 44 states, in fact, adopted the  
 18 International Energy Conservation Code that  
 19 merely has a reference to an option to use  
 20 ASHRAE 90.1?  
 21 MR. FEE: Objection. Lack of  
 22 foundation.  
 23 THE WITNESS: I don't have any  
 24 explanation for that.  
 25 BY MR. BRIDGES:

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1 Q. Did you verify that?  
 2 A. I did not, no.  
 3 Q. Who did?  
 4 A. I'm sorry. Who verified what?  
 5 Q. On what -- on what did you rely  
 6 to make that statement with that footnote?  
 7 A. I may not understand your  
 8 question. I relied on what's identified in  
 9 footnote 95.  
 10 Q. But you didn't review foot --  
 11 what's in footnote 95, right?  
 12 MR. FEE: Objection. Lack of  
 13 foundation.  
 14 THE WITNESS: I did.  
 15 BY MR. BRIDGES:  
 16 Q. You -- you reviewed that Web  
 17 site?  
 18 A. Yes.  
 19 Q. Personally?  
 20 A. Yes, I believe so.  
 21 Q. Do you have an explanation as  
 22 to why the resource cited in footnote 95  
 23 actually shows that the 44 states adopted the  
 24 International Energy Conservation Code?  
 25 MR. FEE: Objection. Lack of

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1 foundation.  
2 THE WITNESS: I would like to  
3 understand the facts that you're  
4 positing right now.  
5 BY MR. BRIDGES:  
6 Q. Well, we're not going to take  
7 time to go look at a Web site right now, so  
8 I'm asking you based on what you know.  
9 Do you have an explanation as  
10 to why the resource cited in footnote 95  
11 actually shows that 44 state -- the 44 states  
12 adopted the International Energy Conservation  
13 Code?  
14 MR. FEE: Objection. Lack of  
15 foundation.  
16 THE WITNESS: I don't know if  
17 your factual representation is  
18 accurate or not, and I don't recall  
19 investigating that particular issue.  
20 BY MR. BRIDGES:  
21 Q. Have you made any effort to  
22 determine what resources were expended,  
23 incurred, or contributed by parties other  
24 than ASHRAE in the development of standard  
25 90.1?

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1 MR. FEE: Objection to form.  
2 THE WITNESS: I generally  
3 understand that there were many  
4 members who participated in that. I  
5 think I reported earlier in the report  
6 the number of hours and other  
7 indications of activity undertaken by  
8 members.  
9 BY MR. BRIDGES:  
10 Q. My question is, have you made  
11 any effort to determine what resources were  
12 expended, incurred, or contributed by parties  
13 other than ASHRAE and ASHRAE members in the  
14 development of standard 90.1?  
15 MR. FEE: Same objection.  
16 THE WITNESS: I didn't realize  
17 that you had in your original question  
18 "and other than ASHRAE members."  
19 BY MR. BRIDGES:  
20 Q. I didn't. Now I -- now my  
21 question does.  
22 A. Beyond that, I don't recall  
23 undertaking that investigation, meaning  
24 beyond ASHRAE and its members.  
25 Q. Have -- are you aware of any

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1 change in membership sales by ASHRAE over the  
2 past ten years?  
3 A. I don't think I have data that  
4 goes as far as ten years ago. I do have  
5 information on ASHRAE membership revenue back  
6 to 2012. That's summarized in tab 5.  
7 Q. And that membership figure has  
8 risen each year since 2012, correct?  
9 A. Yes. Slightly each year, it  
10 has risen.  
11 Q. Do you draw any conclusions  
12 with respect to this case from that trend?  
13 A. I don't think so.  
14 Q. Have you calculated the  
15 effects -- the financial effect on the  
16 plaintiffs of the incorporation into law of  
17 their standards?  
18 MR. FEE: Objection to form.  
19 THE WITNESS: No, I don't think  
20 I've independently -- I don't think  
21 I've separately done that.  
22 BY MR. BRIDGES:  
23 Q. Are you aware of any data  
24 regarding the financial effect on the  
25 plaintiffs of the incorporation into law of

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1 their standards?  
2 MR. FEE: Same objection.  
3 THE WITNESS: I'm aware that  
4 the plaintiffs benefit greatly by  
5 incorporation by reference, but I  
6 don't know that I've seen a  
7 quantitative study of that topic.  
8 BY MR. BRIDGES:  
9 Q. What do you understand about  
10 the benefits that accrue to plaintiffs by  
11 incorporation by reference?  
12 A. Some of those are laid out in  
13 my report on pages 19 through 26. I have a  
14 particular section called "Benefits of  
15 Incorporation" that starts at page 20.  
16 Q. Well, I'm asking you, what  
17 benefits accrue to the plaintiffs from  
18 incorporation by reference?  
19 A. Generally, it allows each one  
20 to satisfy its mandate of providing services  
21 to the entirety of the industry that it  
22 focuses its attention on. And so it allows  
23 for the collection and then dissemination of  
24 standards that allow and achieve outcomes  
25 that are good for the industry.

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1 Q. What other benefits do  
2 plaintiffs gain from incorporation by  
3 reference of their standards?  
4 A. I think that generally covers  
5 it. I may be forgetting things that are laid  
6 out in my report, but that's what covers it,  
7 to the best of my memory right now.  
8 Are we at a good point for a  
9 break?  
10 Q. If you want. Sure.  
11 A. Thanks.  
12 THE VIDEOGRAPHER: Off the  
13 record at 3:12. This is the end of  
14 media unit number 2.  
15 \* \* \*  
16 (Recess from 3:12 p.m. to  
17 3:41 p.m.)  
18 \* \* \*  
19 THE VIDEOGRAPHER: On the  
20 record at 3:41. This is the beginning  
21 of media unit number 3 in the  
22 deposition of John Jarosz.  
23 \* \* \*  
24 (Jarosz Exhibit 5 marked for  
25 identification.)

1 \* \* \*  
2 BY MR. BRIDGES:  
3 Q. Mr. Jarosz, I've handed you  
4 Exhibit 5. This is an article that you cited  
5 in your report, correct?  
6 A. Yes, I believe so.  
7 Q. Do you recall how this article  
8 came to your attention?  
9 A. I do not.  
10 Q. Is this an article that you  
11 understand to have been published by  
12 plaintiff ASHRAE in its journal?  
13 A. Yes, that's my understanding.  
14 Q. And this is an article you  
15 relied upon with respect to the development  
16 of standard 90, which became standard 90.1,  
17 correct?  
18 A. Yes.  
19 Q. In paragraph 133 of your  
20 report, you talk about a number of  
21 downloads -- strike that -- you talk about a  
22 number of documents accessed through Public  
23 Resource's Web site. Do you see that?  
24 A. I talk about the number of ASTM  
25 documents that are -- that were accessed over

1 a particular period.  
2 Q. And then you do the same for  
3 NFPA documents, correct?  
4 A. Yes.  
5 Q. What do you calculate as the  
6 dollar value of harm to the -- to ASTM from  
7 the accesses and downloads that you refer to  
8 in paragraph 133?  
9 A. I haven't calculated that harm.  
10 Q. Why not?  
11 A. I'm not sure if I can at this  
12 stage. One estimate would be those number of  
13 downloads times the -- well, actually, no,  
14 let me take that back. I just don't know how  
15 to do it.  
16 Q. Can you be certain that these  
17 accesses or down -- and downloads referred to  
18 in paragraph 133, in fact, resulted in  
19 economic loss to ASTM?  
20 MR. FEE: Objection to form.  
21 THE WITNESS: Not with absolute  
22 certainty, but with reasonable  
23 certainty I can say some -- in some  
24 number of these instances, it's likely  
25 the case that the -- that the

1 information would have been obtained  
2 from ASHRAE in -- or ASTM, rather,  
3 in -- through legal means.  
4 BY MR. BRIDGES:  
5 Q. Would that -- in those  
6 instances where you say that the information  
7 would have been obtained from ASTM through  
8 legal means, can you put a dollar value on --  
9 or even an estimate of the increased revenue  
10 that ASTM would have gotten from those  
11 instances where people obtained the  
12 information from ASHRAE -- sorry -- from  
13 AST --  
14 MR. FEE: Object --  
15 BY MR. BRIDGES:  
16 Q. -- from ASTM?  
17 MR. FEE: Objection to form.  
18 THE WITNESS: No, not based on  
19 the information I have. I don't think  
20 I have any indication of who was doing  
21 the downloading and why.  
22 BY MR. BRIDGES:  
23 Q. And do you know what  
24 alternatives persons who were doing the  
25 downloading may have had for obtaining the

1 information?  
 2 A. Not with certainty, because I  
 3 don't know who those persons were, but I  
 4 would expect one alternative would be to  
 5 obtain it properly, directly from ASTM.  
 6 Q. Would that have resulted in  
 7 more revenue to ASTM?  
 8 A. It may have. If they're  
 9 materials that were taken improperly that  
 10 would have been paid for, then that would  
 11 represent a loss of revenue to ASTM.  
 12 Q. Do you know whether any of the  
 13 persons who obtained this information from  
 14 defendant would have paid for the information  
 15 from ASTM?  
 16 A. No, not with certainty, because  
 17 I don't know the identity of the downloaders  
 18 or the reasons for their downloading.  
 19 Q. Moreover, those persons might  
 20 have accessed the standards from ASTM's  
 21 reading room for free and with no revenue to  
 22 ASTM, correct?  
 23 A. You mean in a but-for world?  
 24 Had they not done what they actually did,  
 25 alternatively they could have gone to the

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1 free reading room?  
 2 Q. Right.  
 3 A. That's a possibility, yes.  
 4 Q. Do you have an understanding as  
 5 to why persons would want to download a file  
 6 of a standard instead of viewing it at one of  
 7 the plaintiffs' reading rooms?  
 8 A. Not with absolute certainty,  
 9 but I would imagine downloading would allow  
 10 more flexibility in referring to the standard  
 11 and using it and sharing that information  
 12 with others, whereas reading it in -- through  
 13 an Internet site is somewhat less flexible,  
 14 provides less flexibility for the use of that  
 15 information.  
 16 Q. What did -- what do you  
 17 understand to be the difference in  
 18 flexibility between possession of a download  
 19 and access to a standard through a reading  
 20 room?  
 21 A. Well, I think that a download  
 22 typically has a document that's in hard-copy  
 23 form. Copies can made -- be made of that and  
 24 distributed. Reading things just online  
 25 doesn't allow for the wide distribution and

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1 more extended use of that document.  
 2 Q. Do you have any evidence about  
 3 wide distribution of plaintiffs' standards as  
 4 a consequence of defendant's actions?  
 5 A. I do not.  
 6 Q. Have you reviewed any studies  
 7 that would allow you to establish any  
 8 connection between the number of accesses or  
 9 downloads that Public Resource made possible  
 10 and any financial harms to the plaintiffs?  
 11 MR. FEE: Objection to form.  
 12 THE WITNESS: I don't think  
 13 I've seen any study on that, no.  
 14 BY MR. BRIDGES:  
 15 Q. Have you conducted any studies  
 16 that would have allowed you to establish any  
 17 connection between the number of accesses or  
 18 downloads that Public Resource made possible  
 19 and any financial harms to the plaintiffs?  
 20 MR. FEE: Objection to form.  
 21 THE WITNESS: Not other than  
 22 what's contained in my report.  
 23 BY MR. BRIDGES:  
 24 Q. Please turn to page 45,  
 25 paragraph 107, which spills into page 108.

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1 MR. FEE: Page 108?  
 2 THE WITNESS: I'm sorry.  
 3 Page 108 or paragraph?  
 4 BY MR. BRIDGES:  
 5 Q. I'm sorry. Paragraph -- strike  
 6 that.  
 7 Let me ask you to turn  
 8 paragraph 107 on pages 45 to 46.  
 9 A. Okay. I'm there.  
 10 Q. I just want to make sure I  
 11 understand your language correctly at the  
 12 bottom of page 45 and the top of page 46.  
 13 Is it your opinion that the  
 14 copyright that the plaintiffs assert in their  
 15 standards drives sales of other publications  
 16 other than the standards themselves?  
 17 MR. FEE: Objection. Form.  
 18 Vague.  
 19 THE WITNESS: I think they're  
 20 important for driving sales of  
 21 publications that embody those  
 22 standards. I don't know that I've  
 23 drawn a conclusion that it drives the  
 24 sale of other products, but that makes  
 25 some sense.

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1 BY MR. BRIDGES:  
2 Q. Well, doesn't that sentence at  
3 the bottom of 45 and going on to 46 say that  
4 copyright on plaintiffs' standards drive  
5 sales of "handbooks that provide commentary  
6 on the standards by referring to them"?  
7 A. You haven't read --  
8 MR. FEE: Objection.  
9 Mischaracterizes the document.  
10 THE WITNESS: You haven't read  
11 the whole sentence. I see that  
12 sentence to which you refer.  
13 BY MR. BRIDGES:  
14 Q. Right. I know I haven't read  
15 the whole sentence, but didn't I fairly  
16 capture one part of it, which is the sales  
17 of -- strike that -- that copyright on  
18 plaintiffs' standards drives sales of, among  
19 other things, "handbooks that provide  
20 commentary on standards by referring to  
21 them"?  
22 MR. FEE: Same objection.  
23 THE WITNESS: I think you have  
24 generally paraphrased it accurately,  
25 yes.

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1 BY MR. BRIDGES:  
2 Q. And that plaintiffs' copyright  
3 protection -- this is the top of -- strike  
4 that.  
5 And turning to the top of  
6 page 46, plaintiffs' copyright protection on  
7 their standards provides plaintiff with a  
8 competitive advantage with respect to what  
9 you call value-added publications, correct?  
10 A. You've read part of a sentence,  
11 but I do see that sentence, yes.  
12 Q. And I've fairly paraphrased it  
13 correctly, correct?  
14 MR. FEE: Objection to form.  
15 THE WITNESS: I think,  
16 generally, yes.  
17 BY MR. BRIDGES:  
18 Q. Do plaintiffs, to your  
19 understanding, have separate copyrights in  
20 those value-added publications, such as  
21 commentaries and handbooks?  
22 A. I don't know.  
23 Q. You don't know?  
24 A. Correct. I do not know.  
25 Q. Is it important to you to know

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1 whether plaintiffs have copyright in --  
2 rights in their value-added publications?  
3 MR. FEE: Objection. Vague.  
4 THE WITNESS: I would be  
5 curious to know that, but I'm not sure  
6 of the significance. I don't think it  
7 would change my conclusions, but I  
8 would be curious to know that.  
9 BY MR. BRIDGES:  
10 Q. Do you know whether  
11 incorporation into law drives -- strike that.  
12 Do you know whether  
13 incorporation into law of plaintiffs'  
14 standards drives sales of plaintiffs'  
15 standards?  
16 MR. FEE: Objection to form.  
17 Vague.  
18 THE WITNESS: I don't know with  
19 absolute certainty, but it would make  
20 some sense to me.  
21 BY MR. BRIDGES:  
22 Q. Is it your understanding that  
23 it does?  
24 MR. FEE: Same objection.  
25 THE WITNESS: It would make

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1 some sense to me, yes.  
2 BY MR. BRIDGES:  
3 Q. Are you aware that, in some  
4 instances, at least one plaintiff uses the  
5 legal status of its code to promote the sale  
6 of handbooks?  
7 MR. FEE: Objection to form.  
8 THE WITNESS: I don't know one  
9 way or the other. I don't have reason  
10 to dispute it, but there's not a  
11 particular instance that comes to mind  
12 right now. Maybe you have something  
13 to refresh my memory.  
14 BY MR. BRIDGES:  
15 Q. Can you provide a dollar value  
16 benefit that plaintiffs receive economically  
17 from the incorporation of their standards by  
18 reference?  
19 MR. FEE: Objection. Vague.  
20 Form.  
21 THE WITNESS: I want to make  
22 sure that I'm understanding. Could  
23 you read that back, please?  
24 BY MR. BRIDGES:  
25 Q. I'll restate it.

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1 Can you provide a -- can you  
2 put a dollar value, even an estimate, on the  
3 economic benefit that plaintiffs receive from  
4 incorporation of their standards into law?  
5 MR. FEE: Objection to form.  
6 THE WITNESS: I have not. And  
7 I'm not sure how one would do that,  
8 subject to thinking more about it.  
9 BY MR. BRIDGES:  
10 Q. At the top of page 46, you say,  
11 "The Plaintiffs' copyright protection on  
12 their privately-developed standards provides  
13 a competitive advantage with regard to the  
14 sale of these value-added publications as the  
15 copyright protection limits the ability of  
16 others to sell those publications unless they  
17 are unwilling [sic] to compensate the  
18 Plaintiffs for such use."  
19 MR. FEE: Objection.  
20 Mischaracterizes the statement.  
21 BY MR. BRIDGES:  
22 Q. Is there something unfair about  
23 my characterization of that statement?  
24 A. I think you read it wrong. You  
25 read "willing" to read "unwilling" for some

Page 222

1 reason.  
2 Q. Oh, I'm sorry. Thank you.  
3 I'll restate the sentence.  
4 "In particular, the Plaintiffs'  
5 copyright protection on their  
6 privately-developed standards provides a  
7 competitive advantage with regard to the sale  
8 of these value-added publications as the  
9 copyright protection limits the ability of  
10 others to sell those publications unless they  
11 are willing to compensate the Plaintiffs for  
12 such use."  
13 Do you see that statement?  
14 A. I do, yes.  
15 Q. And the competitive advantage  
16 you've identified there, whom do you  
17 understand to be the competition?  
18 A. Other potential providers of  
19 these so-called value-added publications.  
20 Q. And what -- when you say  
21 "value-added publications," please give me  
22 more examples of what types of things fall  
23 into that category, as you use the term.  
24 A. Examples would be handbooks  
25 that provide commentary on the standards.

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1 Q. What else?  
2 A. That's what comes to mind.  
3 Q. Anything else?  
4 A. Not this moment, no. I guess,  
5 potentially, when I think some more about it,  
6 training and seminars, for instance.  
7 Q. Providers of training and  
8 seminars?  
9 A. Yes. So that's broader than  
10 value-added publications, but there are  
11 potentially alternative providers of training  
12 and seminars.  
13 Q. In paragraph 109, you say, "In  
14 addition to direct sales of copyrighted  
15 materials, the Plaintiffs' materials  
16 associated with their privately-developed  
17 standards provide a competitive advantage  
18 with regard to the sale of downstream  
19 ancillary/complementary services and  
20 products."  
21 Do you see that?  
22 A. Yes. That's what I had in  
23 mind.  
24 Q. And who are the competitors you  
25 have in mind in paragraph 109?

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1 A. I don't know particular names,  
2 but -- at least I don't recall any sitting  
3 right now -- sitting here right now, but I  
4 think there are other providers of these  
5 downstream services and products.  
6 Q. And please give me examples of  
7 what you're calling "downstream services and  
8 products."  
9 A. Again, seminars and training,  
10 for instance.  
11 Q. Anything else?  
12 A. That's what comes to mind right  
13 now.  
14 Q. Turning to paragraph 110, you  
15 state, "I understand that the ability to  
16 control these downstream products and  
17 services is particularly important to the  
18 Plaintiffs here because the barriers to entry  
19 in the marketplace for downstream products,  
20 such as training and user manuals, are  
21 relatively low. For example, according to  
22 Mr. Comstock of ASHRAE, it is relatively easy  
23 for unauthorized instructors to read a  
24 standard and become (or think that they have  
25 become) qualified to provide training or

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1 guidance on that standard."  
2 Do you see that?  
3 A. I do, yes.  
4 Q. What do you understand -- what  
5 did you mean by "unauthorized instructors"?  
6 A. People that have provided or  
7 trying to provide services to the marketplace  
8 that have not been explicitly approved by,  
9 for instance, ASHRAE.  
10 Q. What do you understand the --  
11 the nature of -- strike that.  
12 You called them "instructors,"  
13 correct?  
14 A. Yes.  
15 Q. Does that mean that you  
16 envision that these persons are providing  
17 some kind of instruction?  
18 A. Yes.  
19 Q. What instruction do you  
20 understand -- what instruction did you have  
21 in mind when you referred to "unauthorized  
22 instructors"?  
23 A. Generally, how best to  
24 implement standards or provisions of certain  
25 standards.

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1 Q. What else?  
2 A. Nothing else comes to mind  
3 right now.  
4 Q. Would your understanding of  
5 "unauthorized instructors" include persons  
6 who were instructing the public as to what  
7 the standards require?  
8 MR. FEE: Objection to form.  
9 Vague.  
10 THE WITNESS: I didn't have  
11 that in mind. I guess that's a  
12 possibility.  
13 BY MR. BRIDGES:  
14 Q. And would it be relatively easy  
15 for unauthorized persons like that to read a  
16 standard and think that they have become  
17 qualified to provide training or guidance on  
18 that standard?  
19 MR. FEE: Objection. Vague.  
20 BY MR. BRIDGES:  
21 Q. Is that your understanding?  
22 A. According to Mr. Comstock, I  
23 believe that's correct.  
24 Q. What do you believe?  
25 A. I have no reason to doubt him.

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1 Q. You're just parroting what  
2 Mr. Comstock said, or did you have an  
3 independent view?  
4 A. No, I heard what he said, and  
5 it made sense to me.  
6 Q. So you put it in your report?  
7 A. Yes.  
8 Q. What independent thought or  
9 investigation did you do before you put that  
10 in your report?  
11 MR. FEE: Objection. Vague.  
12 Compound.  
13 THE WITNESS: I can't point to  
14 anything in particular.  
15 BY MR. BRIDGES:  
16 Q. Would a law-school course on  
17 the law and regulation of building  
18 construction provide instruction to law  
19 students?  
20 MR. FEE: Objection. Vague.  
21 Calls for speculation.  
22 THE WITNESS: I guess it could.  
23 I have a hard time imagining there  
24 would be much demand for such a  
25 course, but I'm in general agreement

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1 that that, in concept, could occur.  
2 BY MR. BRIDGES:  
3 Q. Would it be possible to  
4 envision that, in the course of such  
5 teaching, a teacher may wish to analyze some  
6 of plaintiffs' standards that have been  
7 incorporated into law as law and as  
8 regulation?  
9 MR. FEE: Objection. Calls for  
10 speculation. Vague. Form.  
11 THE WITNESS: I guess that's  
12 possible, but I would expect a law  
13 professor would be talking about legal  
14 implications, not the technical  
15 aspects of a standard. I think they  
16 might talk about the implication in a  
17 business that's different from a  
18 vendor business.  
19 BY MR. BRIDGES:  
20 Q. Well, what about the legal  
21 implications of a code for contractors?  
22 MR. FEE: Objection.  
23 BY MR. BRIDGES:  
24 Q. Is that -- is that fair ground  
25 for a law professor to discuss with law

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1 students?  
2 MR. FEE: Objection. Compound.  
3 Form. Vague.  
4 THE WITNESS: I guess, in -- in  
5 concept. I'm having a hard time  
6 imagining that that would, in fact,  
7 occur at any law school, but it might.  
8 I somehow doubt that the law professor  
9 would be talking about the substance  
10 of the standard as opposed to the  
11 process or implications of a standard.  
12 BY MR. BRIDGES:  
13 Q. You're not familiar with  
14 courses in construction law?  
15 A. I'm generally aware that there  
16 are courses in construction law.  
17 Q. Is it your view that, for a law  
18 professor to provide a copy of, let's say,  
19 the National Electrical Code to students for  
20 their study would require permission of the  
21 National Fire Protection Association?  
22 MR. FEE: Objection. Calls for  
23 a legal conclusion.  
24 THE WITNESS: I don't know.  
25 That seems to be a legal question. I

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1 do not know.  
2 BY MR. BRIDGES:  
3 Q. Is it your view that a law  
4 professor who does not get any permission  
5 from NFPA or who does not purchase a copy of  
6 the National Electrical Code would be an  
7 unauthorized instructor --  
8 MR. FEE: Objection.  
9 BY MR. BRIDGES:  
10 Q. -- by using that code with his  
11 or her students as part of a law-school  
12 course?  
13 MR. FEE: Objection to form.  
14 Compound. Calls for a legal  
15 conclusion.  
16 THE WITNESS: Again, that seems  
17 to be a legal question. I'm not sure  
18 it would be authorized, but I'm also  
19 not sure that it would be improper.  
20 BY MR. BRIDGES:  
21 Q. Well, you've used the term  
22 "unauthorized" in your report, so I'm asking  
23 you, given the term "unauthorized" as used --  
24 you have used it in the report, would the  
25 scenario I have described mean that the law

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1 professor was an unauthorized instructor?  
2 MR. FEE: Objection. Form.  
3 Compound. Calls for a legal  
4 conclusion. Vague.  
5 THE WITNESS: That seems to be  
6 a legal question. Just as an economic  
7 proposition or just as a matter of the  
8 English language, I would think that  
9 they might be an unauthorized user but  
10 not an improper user.  
11 I don't think they've gotten  
12 explicit authorization; therefore,  
13 they're unauthorized. But I'm not  
14 sure if it's illegal for them to refer  
15 to a standard.  
16 BY MR. BRIDGES:  
17 Q. What about making copies of the  
18 standard and furnishing it to students?  
19 MR. FEE: Same objections.  
20 THE WITNESS: Same answer.  
21 BY MR. BRIDGES:  
22 Q. Do you have any opinion about  
23 the economic harms that plaintiffs would  
24 suffer if a law professor were to provide  
25 an -- a copy of the National Electrical Code

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1 to each student in a construction law class  
2 without having purchased those copies?  
3 MR. FEE: Objection.  
4 Incomplete hypothetical. Form.  
5 You can answer, if you know.  
6 THE WITNESS: I don't know. I  
7 have not investigated or even thought  
8 about that issue.  
9 BY MR. BRIDGES:  
10 Q. In paragraphs 117 through 119,  
11 I see no footnotes referencing sources of  
12 your conclusions or referencing facts on  
13 which your conclusions are based.  
14 What studies, if any, did you  
15 rely on for your assertions in paragraphs 117  
16 to 119?  
17 MR. FEE: Objection to form.  
18 Lack of foundation.  
19 THE WITNESS: The study that's  
20 summarized in Exhibit 1.  
21 BY MR. BRIDGES:  
22 Q. I'm referring specifically to  
23 paragraphs 117 to 119.  
24 A. I thought you were. I was  
25 answering that question.

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1 Q. You can't point to any  
2 particular investigation or fact that you're  
3 relying on in paragraphs 117 to 119?  
4 MR. FEE: Objection to form.  
5 Asked and answered.  
6 THE WITNESS: Everything that's  
7 embedded in Exhibit 1 is, in part, a  
8 basis for the observations that I draw  
9 in those paragraphs.  
10 BY MR. BRIDGES:  
11 Q. What probability do you assign  
12 to your prediction in the first sentence of  
13 paragraph 119?  
14 MR. FEE: Objection. Form.  
15 Lack of foundation.  
16 THE WITNESS: I'm not sure that  
17 I've used the term "prediction," but I  
18 wouldn't assign a particular  
19 quantitative probability.  
20 BY MR. BRIDGES:  
21 Q. Can you give an estimate?  
22 A. No.  
23 Q. Why not?  
24 A. I don't have a basis for that  
25 estimate. I have reasoning underlying it,

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1 but I don't have a basis to provide a  
2 quantitative estimate of my level of  
3 confidence.  
4 Q. You refer to "uncertainties" in  
5 the second sentence of paragraph 119,  
6 correct?  
7 A. I do, yes.  
8 Q. What probability do you assign  
9 to the likelihood that you refer to with the  
10 word "likely" in the first sentence of  
11 paragraph 120?  
12 MR. FEE: Objection. Form.  
13 Lack of foundation.  
14 THE WITNESS: I don't have a  
15 particular quantitative measure of  
16 that. And are you referring to my use  
17 of the term "likely"?  
18 BY MR. BRIDGES:  
19 Q. Yes.  
20 A. Yes, I don't have a particular  
21 quantification of that.  
22 Q. What particular facts are you  
23 relying on for that paragraph?  
24 A. Everything that you see  
25 reported in Exhibit 1.

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1 Q. What probability do you assign  
2 to the likelihood that you refer to in the  
3 first sentence of paragraph 121?  
4 MR. FEE: Objection to form.  
5 Lack of foundation.  
6 THE WITNESS: I don't have a  
7 particular quantitative likelihood  
8 measure.  
9 BY MR. BRIDGES:  
10 Q. Can you give an estimate?  
11 MR. FEE: Same objection.  
12 THE WITNESS: No.  
13 BY MR. BRIDGES:  
14 Q. Turning to paragraph 126, you  
15 refer to an "option available to Plaintiffs  
16 to respond to the loss of protection for  
17 incorporated standards."  
18 Is it your belief that, if the  
19 plaintiffs lose this case, they will shut  
20 down their creation of new standards?  
21 A. I think that's a possibility.  
22 Q. What probability do you assign  
23 to that?  
24 MR. FEE: Objection to form.  
25 Lack of foundation.

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1 THE WITNESS: I don't have a  
2 particular quantitative measure of  
3 probability for that.  
4 BY MR. BRIDGES:  
5 Q. What's your best estimate?  
6 MR. FEE: Same objection.  
7 THE WITNESS: I don't have a  
8 quantitative best estimate.  
9 BY MR. BRIDGES:  
10 Q. Is it more or less than  
11 50 percent?  
12 MR. FEE: Same objections.  
13 THE WITNESS: I still don't  
14 have a quantitative estimate.  
15 BY MR. BRIDGES:  
16 Q. Is it more or less than  
17 80 percent?  
18 MR. FEE: Same objections.  
19 THE WITNESS: Still don't have  
20 a quantitative estimate.  
21 BY MR. BRIDGES:  
22 Q. Is it more or less than  
23 5 percent?  
24 MR. FEE: Same objections.  
25 THE WITNESS: Still don't have

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1 a quantitative estimate. I think that  
2 there -- with reasonable probability I  
3 can draw this conclusion, but I can't  
4 be any more precise than that.  
5 BY MR. BRIDGES:  
6 Q. What do you mean, "with  
7 reasonable probability"?"  
8 A. Based on the information that I  
9 have and the training and logic I bring to  
10 it, I think there is a -- I say with some  
11 confidence what I have said here.  
12 Q. And when you say "likely," do  
13 you mean more than 50 percent likely?  
14 A. Not necessarily, no.  
15 Q. Are you aware of other  
16 standards development organizations active in  
17 the same field as the plaintiffs?  
18 MR. FEE: Objection. Vague.  
19 Form.  
20 THE WITNESS: Perhaps you could  
21 tell me what you have in mind with  
22 your use of the term "fields."  
23 BY MR. BRIDGES:  
24 Q. Well, are you familiar with  
25 AHRI?

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1 A. I have perhaps seen reference  
2 to that.  
3 Q. Do you know with which of these  
4 plaintiffs it -- do you -- do you know what  
5 field it's in?  
6 A. I don't recall, sitting here  
7 right now, no.  
8 Q. Are you familiar with NFRC?  
9 A. I may have seen reference to  
10 that acronym.  
11 Q. Do you know what field it's in?  
12 A. Not sitting here right now.  
13 Q. Are you familiar with ICC?  
14 A. I have seen reference to that.  
15 I don't recall what it is, sitting here now.  
16 Q. Do you know whether other  
17 standards developments organizations would be  
18 in a position to step forward and to continue  
19 the maintenance and preservation and further  
20 development of the standards of plaintiffs  
21 here if plaintiffs lose this case?  
22 MR. FEE: Objection to form.  
23 THE WITNESS: I don't know.  
24 BY MR. BRIDGES:  
25 Q. Have you done any investigation

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1 to see what alternatives there are among  
2 standards development organizations currently  
3 in existence to carry forward the work of  
4 plaintiffs if plaintiffs chose to stop  
5 standards development as a result of the loss  
6 of this case?  
7 MR. FEE: Same objection.  
8 THE WITNESS: Not that I  
9 recall, but I am of the understanding  
10 that each SDO has a different charter,  
11 so I don't know that any SDO has an  
12 identical charter to that of any of  
13 the three plaintiffs.  
14 BY MR. BRIDGES:  
15 Q. Are you aware that these  
16 plaintiffs compete with other SDOs in the  
17 creation of standards in particular fields?  
18 MR. FEE: Objection to form.  
19 Vague.  
20 THE WITNESS: What do you mean  
21 by the term "compete with" in this  
22 context?  
23 BY MR. BRIDGES:  
24 Q. That they consider others  
25 rivals for the same market, in part.

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1 MR. FEE: Objection to form.  
2 Vague.  
3 THE WITNESS: I don't recall  
4 seeing reference to that, but my  
5 memory is not perfect.  
6 BY MR. BRIDGES:  
7 Q. The -- in paragraph 131, you  
8 say, "Simply put, freely-distributed,  
9 unrestricted versions of Plaintiffs'  
10 standards that are or could be incorporated  
11 by reference can be expected to adversely  
12 impact the market for Plaintiffs' standards  
13 that are incorporated by reference and to  
14 displace sales of these standards by the  
15 Plaintiffs - which can be expected to have a  
16 material adverse effect on Plaintiffs'  
17 revenues."  
18 Do you see that?  
19 A. Yes.  
20 Q. By "expected," do you mean more  
21 than 50 percent likely?  
22 A. Not necessarily. I don't have  
23 a quantitative assessment of what I mean by  
24 "expected."  
25 Q. Do you mean more than 5 percent

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1 likely?  
2 A. I haven't quantified that, but  
3 I would expect that it's -- more than  
4 5 percent would be a reasonable definition of  
5 "expected."  
6 Q. More than 10 percent?  
7 A. I don't know. I've not  
8 quantified that number.  
9 Q. And what amount of an effect on  
10 plaintiffs' revenues have you identified as  
11 "material"?  
12 A. I haven't --  
13 MR. FEE: Objection to form.  
14 THE WITNESS: -- been able to  
15 quantify the specific effects, so I  
16 don't know the amount.  
17 BY MR. BRIDGES:  
18 Q. Well, what -- I'm not asking  
19 for your quantification of a specific effect,  
20 but how large would an effect have to be for  
21 to you consider it "a material adverse effect  
22 on Plaintiffs' remedies"?  
23 MR. FEE: Objection to form.  
24 THE WITNESS: I don't know that  
25 I have a particular quantitative

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1 guideline in mind.  
2 BY MR. BRIDGES:  
3 Q. Have you ever -- are you  
4 familiar with audit inquiry letters regarding  
5 litigation?  
6 A. Generally, yes.  
7 Q. And you're familiar with the  
8 fact that auditors will often specify to  
9 those they send the letters to what amounts  
10 would be material for purposes of the audit  
11 response?  
12 A. Yes.  
13 Q. So you understand the concept  
14 of certain amounts being material to certain  
15 companies or entities?  
16 A. Yes, for certain purposes.  
17 Q. So I'd like to know what amount  
18 you have identified as being material as an  
19 adverse effect on plaintiffs' revenues for  
20 each of the three plaintiffs, please.  
21 MR. FEE: Objection. Compound.  
22 Asked and answered.  
23 THE WITNESS: I have not  
24 considered a particular amount.  
25 BY MR. BRIDGES:

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1 Q. Do you consider \$100,000 to be  
2 material as an adverse effect on plaintiffs'  
3 revenues?  
4 MR. FEE: Objection to form.  
5 Compound.  
6 THE WITNESS: I haven't  
7 considered that question. I don't  
8 know the answer to it.  
9 BY MR. BRIDGES:  
10 Q. Have you considered whether  
11 50,000 is a material amount as an adverse  
12 effect on plaintiffs' revenues?  
13 MR. FEE: Same objections.  
14 THE WITNESS: Same answer.  
15 BY MR. BRIDGES:  
16 Q. Starting at page -- sorry.  
17 Strike that.  
18 Starting at paragraph 139, you  
19 make several references to Mr. Malamud's  
20 theory.  
21 A. I'm sorry. To -- I missed a  
22 word that you said. References to his what?  
23 Q. To Mr. Malamud's theory --  
24 A. Okay.  
25 Q. -- T-H-E-O-R-Y. You refer to

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1 it in paragraph 139; 140; 144, with the word  
2 "theorized"; 145, "theory"; 146, "theory."  
3 What facts do you have that  
4 have disproved the theory in paragraph 139?  
5 A. Perhaps most important is the  
6 revealed preference information. If the  
7 plaintiffs believed they were better off by  
8 lack of copyright protection, they would have  
9 pursued such a model.  
10 They don't believe they're  
11 better off. Moreover, they're expending  
12 tremendous resources in bringing and pursuing  
13 this litigation to halt the activity at  
14 issue.  
15 Q. What other facts, if any, do  
16 you have that have disproved Mr. Malamud's  
17 theory in paragraph 139?  
18 A. That's what comes to mind right  
19 now.  
20 Q. What facts do you have or are  
21 you aware of that have disproved  
22 Mr. Malamud's theory as you refer to it in  
23 paragraph 140?  
24 A. That's the same theory that's  
25 being referenced in 139, so there's nothing

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1 new in terms of a theory.  
 2 Q. Do you have the same answer  
 3 with respect to -- strike that.  
 4 What facts do you have --  
 5 strike that.  
 6 What facts are you aware of to  
 7 disprove -- to disprove Mr. Malamud's theory  
 8 that you refer to in paragraph 144?  
 9 A. Again, it's the same theory  
 10 that's being referenced, but there's  
 11 additional facts; and that is, the downstream  
 12 products and services aren't particularly  
 13 substantial to these plaintiffs and don't  
 14 appear to be enhanced by a lack of copyright  
 15 protection; that is, the plaintiffs have had  
 16 copyright protection and have said -- had  
 17 some downstream products and services. It's  
 18 hard to imagine that elimination of that  
 19 copyright protection will enhance that  
 20 business.  
 21 Q. It's hard to imagine, but are  
 22 you aware of any studies to disprove  
 23 Mr. Malamud's theory?  
 24 A. No.  
 25 MR. FEE: Objection. Vague.

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1 rest of that paragraph?  
 2 MR. FEE: Objection. Vague.  
 3 THE WITNESS: I looked at the  
 4 financial information, and I talked to  
 5 people at the various plaintiffs.  
 6 BY MR. BRIDGES:  
 7 Q. You talked to people at the  
 8 various plaintiffs?  
 9 A. Yes.  
 10 Q. What did you do to verify the  
 11 truth and accuracy of the things that various  
 12 plaintiffs said to you in their  
 13 conversations?  
 14 MR. FEE: Objection to form.  
 15 THE WITNESS: I looked at the  
 16 financial information, and I kept my  
 17 eyes and mind open to the information  
 18 in the rest of the record to determine  
 19 if it conflicted with what I learned  
 20 from the company personnel.  
 21 BY MR. BRIDGES:  
 22 Q. Whose financial information did  
 23 you look at?  
 24 A. All three of the plaintiffs.  
 25 It's summarized in tabs 3, 4, and 5.

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1 THE WITNESS: I'm sorry.  
 2 BY MR. BRIDGES:  
 3 Q. Have you conducted any studies  
 4 to disprove Mr. Malamud's theory?  
 5 MR. FEE: Same objection.  
 6 THE WITNESS: Not other than  
 7 what's reflected here in Exhibit 1.  
 8 BY MR. BRIDGES:  
 9 Q. What academic literature have  
 10 you relied upon to criticize Mr. Malamud's  
 11 theory in paragraph 144?  
 12 A. Nothing specific comes to mind.  
 13 Q. In paragraph 145, you state  
 14 that, "Mr. Malamud's suggestion that the sale  
 15 of downstream products and services  
 16 represents an untapped and undeveloped  
 17 opportunity for the Plaintiffs is incorrect."  
 18 Do you see that?  
 19 A. Yes, I do.  
 20 Q. And then you go on and make  
 21 some statements for the rest of the  
 22 paragraph, correct?  
 23 A. Yes.  
 24 Q. What studies did you engage in  
 25 to determine the facts that you stated in the

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1 Q. Did you look at the financial  
 2 information of any entities other than the  
 3 plaintiffs?  
 4 A. I looked at Public Resource  
 5 financial information.  
 6 Q. Apart from Public Resource and  
 7 the plaintiffs, did you look at the financial  
 8 information of any other entities in making  
 9 the assertions that you made in  
 10 paragraph 145?  
 11 A. Not in undertaking my  
 12 assignment here.  
 13 Q. Did you consider the business  
 14 models of any entities other than the  
 15 plaintiffs and the defendant in making the  
 16 statements criticizing Mr. Malamud's theory  
 17 in paragraph 145?  
 18 A. Nothing in particular comes to  
 19 mind. I understand that there are  
 20 front-loaded business models, but -- at DIN,  
 21 for instance, but I don't recall undertaking  
 22 an investigation of the downstream activities  
 23 that they have.  
 24 Q. Did you undertake any  
 25 investigation of downstream activities of

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1 other US-based standards development  
2 organizations that make their standards  
3 freely available to the public?  
4 A. Not that I recall.  
5 Q. Would that have been relevant  
6 to your analysis?  
7 A. It wasn't necessary to do my  
8 analysis, but I would be curious if I had  
9 that information. If I -- if I had the  
10 ability to examine that information, I would  
11 be curious as to what that shows.  
12 Q. In paragraph 146, you state,  
13 "The loss of publications here will likely  
14 reduce the Plaintiffs' sales of those  
15 downstream products and services."  
16 Do you see that?  
17 MR. FEE: That's in 146?  
18 THE WITNESS: Is that the last  
19 sentence you were reading from?  
20 BY MR. BRIDGES:  
21 Q. Yes.  
22 A. Yeah.  
23 Q. Paragraph 146.  
24 A. Yes, I do see that.  
25 Q. Did you mean the loss of

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1 copyright in the publications here?  
2 A. Certainly the loss of  
3 publications, but I believe it would probably  
4 be better to put the loss of copyright in the  
5 publications as more reflective of the  
6 assignment that I undertook here.  
7 Q. What probability do you assign  
8 to the likelihood that you refer to in that  
9 sentence?  
10 MR. FEE: Objection to form.  
11 Lack of foundation.  
12 THE WITNESS: I haven't  
13 assigned a quantitative probability to  
14 that.  
15 BY MR. BRIDGES:  
16 Q. Have you any estimate?  
17 MR. FEE: Same objections.  
18 THE WITNESS: I do not.  
19 BY MR. BRIDGES:  
20 Q. Have you any estimate as to the  
21 magnitude of the likely reduction of  
22 plaintiffs' sales of downstream products and  
23 services?  
24 MR. FEE: Same objections.  
25 THE WITNESS: No, I have been

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1 unable to quantify that with great  
2 accuracy.  
3 BY MR. BRIDGES:  
4 Q. Have you considered any  
5 comparable circumstances apart from this case  
6 that would provide guidance for your  
7 prediction in the last sentence of  
8 paragraph 146?  
9 MR. FEE: Objection to form.  
10 Vague.  
11 THE WITNESS: I kept my mind  
12 and eyes open to that, but I didn't  
13 see information of a good comparator.  
14 BY MR. BRIDGES:  
15 Q. Did you research whether there  
16 might be good comparators?  
17 A. I --  
18 MR. FEE: Same objection.  
19 THE WITNESS: I did in the  
20 sense of reading through the  
21 literature and information to see if I  
22 could learn of something that would be  
23 a good comparator, but I didn't learn  
24 of such comparator.  
25 BY MR. BRIDGES:

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1 Q. You looked only at the  
2 information shown in tab 2 to Exhibit 1?  
3 A. Yes, I think that's right.  
4 Q. What economic effect are you  
5 aware of to the Blu-ray Disc Association from  
6 its providing unrestricted access to its  
7 standard publications for free?  
8 A. I don't know. I thought you  
9 had asked that earlier. If not, I apologize.  
10 Nonetheless, I don't recall knowing the  
11 answer to that question or undertaking that  
12 evaluation.  
13 Q. Did Blu-ray Disc Association go  
14 out of business?  
15 A. I don't think it's out of  
16 business, no.  
17 Q. Has it suffered material harm,  
18 to your knowledge, because of unrestricted  
19 access to its standard publications for free?  
20 A. I don't know.  
21 Q. Do you believe that, on the  
22 theory of revealed preference, Blu-ray Disc  
23 Association has determined that unrestricted  
24 access to its standard publications for free  
25 is in its interest?

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1 A. Yes. It's a different entity  
 2 than the SDOs here; but for its purposes, it  
 3 would appear that it's of the belief that  
 4 that's the optimal path to follow.  
 5 MR. BRIDGES: I think -- I  
 6 think we may pause things now and  
 7 reserve the remainder of our time.  
 8 Just a second. Oh, yes.  
 9 BY MR. BRIDGES:  
 10 Q. Do you believe that the  
 11 plaintiffs are harmed when the defendant  
 12 posts a standard that has been incorporated  
 13 by reference -- let me strike that.  
 14 Do you believe that plaintiffs  
 15 suffer harm from defendant posting a standard  
 16 that is not the latest version of the  
 17 standard?  
 18 MR. FEE: Objection. Form.  
 19 Compound.  
 20 THE WITNESS: Potentially, it  
 21 could cause confusion in the  
 22 marketplace as to what's the latest  
 23 standard, and there may be some  
 24 entities out there that are interested  
 25 in obtaining an earlier standard that

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1 would be obtaining it free rather than  
 2 through the legal routes established  
 3 by the plaintiffs.  
 4 BY MR. BRIDGES:  
 5 Q. Have you done any studies to  
 6 determine what confusion may be likely in the  
 7 marketplace in that regard?  
 8 MR. FEE: Objection to form.  
 9 THE WITNESS: I have not done a  
 10 likelihood of confusion study, no.  
 11 BY MR. BRIDGES:  
 12 Q. What research have you done as  
 13 to whether -- strike that.  
 14 What information do you have  
 15 about what market there is for earlier  
 16 versions of standards when there is a newer  
 17 version in the market?  
 18 MR. FEE: Objection to form.  
 19 THE WITNESS: I don't recall  
 20 undertaking specific research on that  
 21 topic.  
 22 BY MR. BRIDGES:  
 23 Q. What harm do you understand  
 24 plaintiffs would suffer if defendants post a  
 25 standard that is out of print?

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1 MR. FEE: Objection. Lack of  
 2 foundation. Vague.  
 3 THE WITNESS: I'm not -- I'm  
 4 not sure that I understand the concept  
 5 of a standard being out of print, so  
 6 maybe you could help me with that.  
 7 BY MR. BRIDGES:  
 8 Q. Do you know the term "out of  
 9 print"?  
 10 A. Generally, I do, yes.  
 11 Q. What do you understand it to  
 12 mean?  
 13 A. That it's no longer provided in  
 14 print form.  
 15 Q. All right. So what harm do you  
 16 understand plaintiffs would suffer if  
 17 defendants posted a standard that is out of  
 18 print?  
 19 MR. FEE: Objection to form.  
 20 THE WITNESS: Potentially, it  
 21 could be the harm similar to outdated  
 22 standards.  
 23 BY MR. BRIDGES:  
 24 Q. In other words, confusion in  
 25 the marketplace?

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1 A. Potential confusion in the  
 2 marketplace and potentially providing -- yes,  
 3 that -- that would be one form of it.  
 4 Q. What other harms do -- would  
 5 you identify from the defendants posting a  
 6 standard that is out of print?  
 7 A. Nothing else comes to mind this  
 8 moment, but there could be other things  
 9 that -- that I'm not thinking of right now.  
 10 Q. What harms do you understand  
 11 plaintiffs would suffer if a condition of a  
 12 standard being incorporated into law is that  
 13 plaintiffs could not forbid other entities  
 14 from making that law available widely and  
 15 freely to the public?  
 16 MR. FEE: Objection to form.  
 17 Incomplete hypothetical. Compound.  
 18 Calls for speculation.  
 19 THE WITNESS: I don't know.  
 20 I've not undertaken that assignment.  
 21 I've not given that particular  
 22 question any thought.  
 23 It seems economically to be  
 24 quite similar to the actions that have  
 25 occurred here, but I don't know. I've

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1 not thought about that particular  
 2 topic.  
 3 MR. BRIDGES: Okay. I think  
 4 we'll pause here and reserve the rest  
 5 of the time for a later visit with  
 6 you, Mr. Jarosz.  
 7 Kevin, this is in reliance on  
 8 an exchange of correspondence between  
 9 Matt and you, I believe. If, for some  
 10 reason -- well, no. I think that's  
 11 all.  
 12 Anything else?  
 13 MR. FEE: Well, I don't have  
 14 any questions.  
 15 Do you guys have any questions?  
 16 MR. REHN: Not at this time.  
 17 MR. CUNNINGHAM: No.  
 18 MR. BRIDGES: Great. Thank  
 19 you.  
 20 THE WITNESS: Thank you.  
 21 THE VIDEOGRAPHER: All right.  
 22 Off the record at 4:31. This ends  
 23 media unit number 3 and ends testimony  
 24 for August 27th, 2015.  
 25 \* \* \*

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1 (Witness excused.)  
 2 \* \* \*  
 3 (Off the record at 4:31 p.m.)  
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1 CERTIFICATE  
 2  
 3 I do hereby certify that I am a Notary  
 4 Public in good standing, that the aforesaid  
 5 testimony was taken before me, pursuant to  
 6 notice, at the time and place indicated; that  
 7 said deponent was by me duly sworn to tell  
 8 the truth, the whole truth, and nothing but  
 9 the truth; that the testimony of said  
 10 deponent was correctly recorded in machine  
 11 shorthand by me and thereafter transcribed  
 12 under my supervision with computer-aided  
 13 transcription; that the deposition is a true  
 14 and correct record of the testimony given by  
 15 the witness; and that I am neither of counsel  
 16 nor kin to any party in said action, nor  
 17 interested in the outcome thereof  
 18  
 19 WITNESS my hand and official seal this  
 20 11th day of September, 2015  
 21  
 22  
 23  
 24  
 25

<%signature%>  
*Debbie Howard*  
 Debbie Howard, NDR, CRR  
 Notary Public

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY. THE ABOVE RULES ARE CURRENT AS OF SEPTEMBER 1, 2014. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.