

EXHIBIT 36

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN EDUCATIONAL) Case No.
RESEARCH ASSOCIATION, INC.) 1:14-cv-00857
) TSC-DAR
AMERICAN PSYCHOLOGICAL)
ASSOCIATION, INC.; and)
)
NATIONAL COUNCIL ON)
MEASUREMENT IN EDUCATION,)
INC.;)
)
Plaintiffs-Counterdefendants)
)
vs.)
)
PUBLIC.RESOURCE.ORG, INC.,)
Defendant-Counterclaimant)

Videotaped 30(b)(6) Deposition of

AERA, APA and NCME
through the testimony of
Felice J. Levine, Ph.D.
Washington, D.C.
August 16, 2019

9:51 a.m.

Reported by:

Bonnie L. Russo

Job No. 3475330

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Videotaped 30(b)(6) Deposition of AERA, APA and
NCME through the testimony of Felice J. Levine,
Ph.D. held at:

Spaces
1441 L Street, N.W.
Washington, D.C.

Pursuant to Notice, when were present on behalf
of the respective parties:

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27 Daniel Russo, Videographer

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1 P R O C E E D I N G S

2
3 THE VIDEOGRAPHER: Good morning. We
4 are going on the record at 9:51 a.m. on August
5 16, 2019.

6 Please note that the microphones are
7 sensitive and may pick up whispering, private
8 conversations and cellular interference.
9 Please turn off all cell phones or place them
10 away from the microphones as they can interfere
11 with the deposition audio. Audio and video
12 recording will continue to take place unless
13 all parties agree to go off the record.

14 This is Media Unit 1 of the 30(b)(6)
15 video-recorded deposition of APA, NCME, AERA,
16 through the testimony of Felice Levine taken by
17 counsel for defendant in the matter of American
18 Educational Research Association, Incorporated,
19 American Psychological Association,
20 Incorporated, and National Council on
21 Measurement and Education, Incorporated,
22 plaintiffs-counterdefendants versus

1 Public.Resource.Org, Incorporated,
2 defendant-counterplaintiff, filed in the United
3 States District Court for the District of
4 Columbia, Civil Action No.
5 1:14-cv-00857-TSC-DAR.

6 This deposition is being held at
7 Spaces, located at 1441 L Street, Northwest,
8 Washington, D.C.

9 My name is Daniel Russo from the
10 firm Veritext Legal Solutions and I'm your
11 videographer today. The court reporter is
12 Bonnie Russo from the firm Veritext Legal
13 Solutions.

14 Counsel and all present in the room
15 and everyone attending remotely will now state
16 their appearances and affiliations for the
17 record, please.

18 MS. TURNER: Shannon Turner from
19 Fenwick & West on behalf of
20 Public.Resource.org. With me today is also
21 Matthew Becker from Fenwick & West.

22 MR. ELGARTEN: Cliff Elgarten,

1 Crowell & Moring.

2 MS. OTTAVIANO: Deanne Ottaviano,
3 APA.

4 THE WITNESS: Felice Levine on
5 behalf of the American Educational Research
6 Association, the American Psychological
7 Association and the National Council of
8 Measurement and Education.

9 THE VIDEOGRAPHER: Will the court
10 reporter please swear in the witness.

11
12 FELICE LEVINE,
13 being first duly sworn, to tell the truth, the
14 whole truth and nothing but the truth,
15 testified as follows:

16 EXAMINATION BY COUNSEL FOR DEFENDANT

17 BY MS. TURNER:

18 Q. Good morning.

19 A. Hi.

20 Q. Will you please state your name and
21 spell it for the record.

22 A. Sure. Felice, F-E-L-I-C-E, middle

1 initial is J, Levine, L-E-V-I-N-E.

2 Q. My name is Shannon Turner and I will
3 be taking your deposition today.

4 Have you ever been deposed before?

5 A. Yes.

6 Q. And how many times?

7 A. Once.

8 Q. What case was that?

9 A. This case.

10 Q. Great. So are you the same Felice
11 Levine who has given testimony in this case?

12 A. To the best of my knowledge.

13 Q. Great. And have you ever testified
14 at trial?

15 A. No.

16 Q. And have you ever testified for
17 anyone other than AERA?

18 A. No.

19 Q. I'm going to ask you a series of
20 questions today and the court reporter is going
21 to record your answer.

22 Do you understand?

1 A. Yes.

2 Q. And your answers are under oath and
3 under penalty of perjury so it's the same as
4 though you're in front of a court and a judge
5 and a jury.

6 Do you understand?

7 A. Uh-huh.

8 Q. If I ask a question and anything is
9 unclear or ambiguous, please ask me to rephrase
10 the question.

11 A. Okay.

12 Q. If you don't ask me to clarify, then
13 I'm going to assume that you understand the
14 question.

15 If you need a break at any time,
16 please let me know and as long as a question is
17 not pending, we can break.

18 A. Okay.

19 Q. And please verbalize your answer so
20 that the court reporter can write them down.
21 Let me finish a question before you answer,
22 that way we are not talking over each other.

1 A. Okay.

2 Q. So, you know, no head nods, uh-uhs,
3 uh-huhs, because that can be hard for the court
4 reporter to write down.

5 Is there any reason you cannot
6 provide truthful and accurate testimony today?

7 A. No reason at all.

8 Q. Are you taking any medication that
9 would affect your ability to give truthful
10 answers?

11 A. No.

12 Q. Great. Are you employed?

13 A. Yes.

14 Q. By whom?

15 A. American Educational Research
16 Association.

17 Q. Great. And what is your title
18 there?

19 A. Executive director.

20 Q. Can you please state your work
21 address for the record.

22 A. Yes. 1430 K Street, Northwest,

1 Washington, D.C. 20005, Suite 1200.

2 Q. Thank you. What did you do to
3 prepare for today's deposition?

4 A. I essentially reread my filings. I
5 thought I might read my prior deposition.

6 Q. Did you review your prior deposition
7 testimony?

8 A. Really only a few pages. A little
9 discussion that Mark and I had, it was a little
10 joke I made. You laughed. You just laughed.
11 That's good.

12 Q. Did you review any documents to help
13 refresh your recollection?

14 A. Just the fillings that I submitted.

15 MS. TURNER: I'll ask the court
16 reporter to mark this as Exhibit 1300.

17 (Deposition Exhibit 1300 was marked
18 for identification.)

19 BY MS. TURNER:

20 Q. Do you recognize this document?

21 A. I do.

22 Q. And what is it?

1 A. This was the filing that set forth,
2 I suppose, primarily focused on the topics of
3 examination but the issues that we might
4 discuss today.

5 Q. Is this a 30(b)6) notice to American
6 Educational Research, Inc.?

7 MR. ELGARTEN: We agree it is.

8 THE WITNESS: Yes.

9 BY MS. TURNER:

10 Q. And you understand you are produced
11 as a witness designated to answer questions on
12 behalf of AERA today?

13 A. Correct, yes.

14 MS. TURNER: If I could have the
15 court reporter mark as Exhibit 1301.

16 (Deposition Exhibit 1301 was marked
17 for identification.)

18 BY MS. TURNER:

19 Q. Do you recognize this document?

20 MR. ELGARTEN: You can put the other
21 one in front of her and we will agree that she
22 is testifying on behalf of all three

1 organizations.

2 THE WITNESS: I see.

3 MR. ELGARTEN: We will agree that
4 she's testifying on behalf of all three
5 organizations and this was per agreement with
6 Mr. Becker.

7 MS. TURNER: Great. So if you could
8 mark this as Exhibit 1302.

9 (Deposition Exhibit 1302 was marked
10 for identification.)

11 MR. ELGARTEN: The deposition is
12 half over already.

13 MS. TURNER: If we can have the
14 court reporter mark this as 1303.

15 (Deposition Exhibit 1303 was marked
16 for identification.)

17 BY MS. TURNER:

18 Q. Are you familiar with this document?

19 A. Yes.

20 Q. What is this document?

21 A. These were the questions that you
22 all posed and that I responded to.

1 Q. Great. And you understand that
2 these are plaintiff's written responses to
3 Public.Resource.Org's request for documents?

4 A. Correct.

5 Q. Did AERA search for documents in
6 response to these requests?

7 A. I did.

8 Q. And how did AERA go about searching
9 for documents?

10 A. I looked through our files that were
11 saved information in our share drive where we
12 have information on this and through e-mails,
13 as did two other colleagues.

14 Q. Did you look for any hard copy
15 documents?

16 A. I suppose I did. I mean, I went
17 through the stack of our material.

18 Q. And did AERA produce documents in
19 response to these requests?

20 A. Yes.

21 Q. And did AERA withhold any documents
22 it otherwise found in its search?

1 A. No.

2 Q. And did APA search for documents in
3 response to these requests?

4 A. To the best of my knowledge, they
5 did.

6 Q. And how did APA go about searching
7 for documents?

8 A. I am assuming a similar mechanism,
9 hard copy files, to the extent -- to the extent
10 we have them and electronic.

11 Q. Okay. And did APA produce documents
12 in response to these requests?

13 MR. ELGARTEN: I will tell you all
14 documents were produced by all three parties.

15 THE WITNESS: Although I think the
16 ones I had are the ones that were responsive.
17 Everybody responded.

18 BY MS. TURNER:

19 Q. Do you know if the APA withheld any
20 documents it otherwise found in its search?

21 A. I am sure as a long-standing member
22 of APA, they withheld nothing.

1 Q. Thank you. And for NCME as well?

2 A. I'm less of a long-standing -- I'm
3 sure they withheld nothing.

4 MR. ELGARTEN: The nature of the
5 NCME --

6 THE WITNESS: I was going to say,
7 NCME is a smaller organization of the three of
8 us and they don't really -- they have a
9 management company managing the association so
10 there is nothing really they would have that I
11 wouldn't have.

12 BY MS. TURNER:

13 Q. Do you know if NCME searched for
14 documents?

15 A. Yeah, I'm sure they did across
16 e-mails, but they are more likely to have
17 things that I sent them as attachments by
18 virtue of being part of the management
19 committee of the testing standards project.

20 Q. And do you know if NCME withheld any
21 documents?

22 A. I am -- I'm sure they didn't.

1 Q. Okay.

2 A. As sure as one could be who is not
3 the executive director of NCME.

4 MS. TURNER: We will mark as Exhibit
5 1304, please.

6 (Deposition Exhibit 1304 was marked
7 for identification.)

8 BY MS. TURNER:

9 Q. And are you familiar with this
10 document?

11 A. Yes.

12 Q. And you understand that these are
13 plaintiff's written responses to
14 Public.Resource.Org's third request for
15 documents?

16 A. Uh-huh.

17 Q. Did AERA search for documents in
18 response to these requests?

19 A. Yes.

20 Q. How did AERA go about searching?

21 A. Essentially have testing standards
22 material and this case material in my office.

1 I went through the hard copies, but most things
2 I know I have electronically even if a hard
3 copy doesn't exist.

4 Q. Did AERA produce documents --

5 A. Yes.

6 Q. -- in response?

7 A. Yes.

8 Q. Did AERA withhold any documents in
9 response?

10 A. No.

11 Q. What about APA? Did APA search for
12 documents in response to these requests?

13 A. Yes.

14 Q. And how did they go about searching?

15 A. I am assuming the same way.

16 Q. Okay. Did APA produce documents in
17 response to these requests?

18 A. Yeah.

19 Q. Did APA withhold any documents?

20 A. Not to my knowledge. Same response.

21 Q. Great. And for NCME, did NCME
22 search for any documents responsive to these

1 requests?

2 A. Yes. They all -- we all received
3 this and searched and provided anything we had.

4 Q. Okay. And how did NCME go about
5 searching?

6 A. There's probably less of a stack
7 anywhere because there isn't someone who is
8 staffing NCME on this, but went through e-mails
9 and whatever someone might have had in print.

10 Q. Did NCME withhold any documents in
11 response to these requests?

12 A. No, not to my knowledge.

13 Q. If you could turn to Page 2, please.

14 A. Of the last one?

15 Q. Yes, of the last one.

16 A. Okay.

17 Q. If you look at the bottom of the
18 page, you see Request for Production No. 44?

19 A. Uh-huh.

20 Q. The requests asks for all documents
21 not previously produced on which you intend to
22 rely in this litigation.

1 Do you see that request?

2 A. Uh-huh.

3 Q. Okay. If you turn the page, the

4 plaintiffs' response, it states that:

5 "Plaintiffs have already produced or are

6 producing all documents on which they intend to

7 rely on this litigation, but note they have not

8 made any final determination."

9 Do you see that response?

10 A. Yes.

11 Q. When the plaintiffs respond "or are

12 producing," what does that mean?

13 MR. ELGARTEN: This is my language

14 because this asked what we're going to rely on

15 as a legal matter in the case, so you could ask

16 that question of me.

17 MS. TURNER: Well, these are also

18 plaintiffs' responses to the document request.

19 MR. ELGARTEN: That's right, and I

20 answered this question because I make the

21 determination of what we're going to rely on

22 ultimately in the case, and I do this in

1 consultation with Ms. Levine in connection with
2 this, and so if you want to pose this question
3 to me, you can, but you can't make the judgment
4 about what we legally -- the documents to rely
5 on.

6 MS. TURNER: I understand that's a
7 legal question but what I wanted to ask Dr.
8 Levine is the language "or are producing."

9 BY MS. TURNER:

10 Q. So are plaintiffs withholding any
11 documents?

12 A. No. No.

13 Q. Okay.

14 MR. ELGARTEN: Sorry.

15 THE WITNESS: Really, you got
16 everything the first time around, folks. It
17 was -- this was a no-brainer to give you
18 whatever was left because there was nothing
19 left.

20 BY MS. TURNER:

21 Q. Great. Thank you.

22 A. I mean, there were some things left

1 which we gave you, but unless you asked for new
2 forms of information.

3 MS. TURNER: If the court reporter
4 could please mark this as Exhibit 1305.

5 (Deposition Exhibit 1305 was marked
6 for identification.)

7 BY MS. TURNER:

8 Q. Are you familiar with this document?

9 A. Yes.

10 Q. What is this document?

11 A. These were additional sets of
12 requests or questions that you asked and our
13 responses.

14 Q. So you understand these are
15 plaintiffs' written responses to
16 Public.Resource.Org's interrogatories?

17 A. Yes.

18 Q. If you could just let me finish the
19 question.

20 A. Sorry.

21 Q. It's a little tough for the court
22 reporter to get it when we are talking over

1 each other.

2 A. Okay.

3 Q. If you could turn to Page 10,
4 please, which is the last page of the document.

5 A. Uh-huh.

6 Q. Is this your signature?

7 A. Yes.

8 Q. And it's verifying that the
9 statements in plaintiffs' responses are true
10 and correct?

11 A. Correct.

12 Q. Do you have any reason to believe
13 that any of the statements in here are
14 incomplete or incorrect?

15 A. No, I have no reason to believe
16 that.

17 Q. Okay. Did plaintiffs withhold any
18 information responsive to these
19 interrogatories?

20 A. No.

21 Q. Thank you.

22 MS. TURNER: The court reporter can

1 please mark this as Exhibit 1306.

2 (Deposition Exhibit 1306 was marked
3 for identification.)

4 MS. TURNER: For the record, this is
5 a document produced by plaintiffs that is
6 identified as Bates No.

7 AERA_APA_NCME_RFP2_0000027.

8 BY MS. TURNER:

9 Q. Dr. Levine, do you recognize this
10 document?

11 MR. ELGARTEN: Well, we have two
12 different questions here. I produced this
13 document from my files because I felt I had
14 told Mr. Becker -- I think it was Mr. Becker
15 that we looked for certain documents. This
16 document was not present in the files of the
17 client, but it was present in my law firm files
18 and since I had said something to Mr. Becker
19 that I would try to find something, and he
20 asked, I said, I didn't think I could find real
21 old information but he asked and I really
22 didn't object to it. I decided to produce this

1 to him.

2 So Ms. Levine had no role in this
3 because it followed the prior production, it
4 was pursuant to a discussion I had with Mr.
5 Becker. I think it was you, Matt.

6 MS. TURNER: Was this document
7 produced by plaintiffs on behalf of plaintiffs?

8 MR. ELGARTEN: It is produced on
9 behalf of all plaintiffs, yes, and she may know
10 what it is because --

11 THE WITNESS: I know what it is.

12 MR. ELGARTEN: -- the original
13 source of the document was the client files, so
14 you can ask those questions but she doesn't
15 know that it was produced.

16 MS. TURNER: Understood.

17 BY MS. TURNER:

18 Q. Are you familiar with this document?

19 A. Yeah. I mean, I know what it is, I
20 can tell you what it is.

21 Q. Do you believe this document is
22 authentic?

1 A. Yes.

2 Q. What is this document?

3 A. This document is a sales report of
4 the 1999 edition of the testing standards and
5 the preceding edition before the 1999 edition.

6 Q. Okay. What was the preceding
7 edition?

8 A. I think it was '85. I don't
9 remember exactly the year without looking at
10 the -- I think it was '85.

11 Q. Is this a document that is kept in
12 the ordinary course of business?

13 A. This or something equivalent.

14 Q. How is this document created?

15 A. I'm going to not exactly guess, but
16 I'm going to extrapolate from my knowledge,
17 how's that, because I did not -- I didn't
18 become executive director until 2002.

19 Q. Okay.

20 A. And I had no contact with the prior
21 edition, so when I came in 19 -- 2002, the 1999
22 edition was already published.

1 Q. Okay.

2 A. The prior edition was published by
3 -- on behalf of the three organizations by the
4 American Psychological Association. So this
5 was -- I'm going to assume a running tab, as it
6 were, of each year's sales for the years
7 preceding the 1999 edition.

8 Q. Okay. When say, "preceding the 1999
9 edition" --

10 A. The 1999 edition picks up with
11 probably the 1768 as my -- this will be my
12 guess, as the partial year sales of the 1999
13 edition.

14 Q. Okay.

15 A. Because that's what we did similarly
16 in triangulating to the new edition.

17 So this is the sales report then of
18 the 1999 edition through 2013, which was the
19 end of December 2013 when this issue arose in
20 2014.

21 Q. Okay. If you look at the line where
22 it says: "1999 through 8-99," is it just --

1 can you tell what the time period is there?

2 A. I'm going to allow -- again, infer
3 that this is the sales from -- from January
4 through -- January through August 1999, and
5 depending upon when it was literally published,
6 I suspect it might be the old edition. I don't
7 -- there is usually kind of a crossover.

8 Q. Okay. Were there any sales between
9 August and December of 1999?

10 A. I literally don't know but I can
11 only assume so.

12 Q. Okay. Is that --

13 A. Although it may be crumped in the
14 2000 -- in other words, it might have been --
15 the new edition -- I don't know when the new
16 edition literally came out, so let's say it
17 came out in September, so it might have been
18 incorporated in to what you are seeing as 2000.
19 I don't believe there is a gap. It's just a
20 matter of when the cutoff of one edition
21 happened and when the new edition happened.

22 Q. So when calculating a sales number,

1 if a new edition comes out mid-year, let's say,
2 would that -- those numbers for the new
3 edition, the sales numbers be encompassed in
4 the following year's sales?

5 A. Well, I can tell you about 2014.
6 You have that report. 2014, we continued to
7 monitor 1999 in 2014, and you will see
8 something that looks like July or August 2014
9 to the end of the year. That is under my
10 watch. I don't know exactly what happened
11 under somebody else's watch.

12 MR. ELGARTEN: I believe Ms. Levine
13 is referring to the additional documents
14 showing sales figures that were provided to
15 you.

16 THE WITNESS: Yeah. Exactly. So
17 that's how we do it now. That's why I
18 extrapolated but logically, there is a little
19 bit of a hiatus so that side of the -- and I
20 don't know when it came out, so I suppose it
21 was either incorporated in or maybe it came out
22 at the end of the year. Maybe it came out in

1 November 1999. I just don't know.

2 It may have been so de minimis at
3 that point that it was really a 2000 -- the
4 beginning of the reported sales might have been
5 in 2000 depending upon when the release of that
6 edition happened.

7 I could go a step further. It could
8 also be there is a little hiatus that they were
9 taking orders but then not selling because
10 maybe it didn't come out until November.

11 BY MS. TURNER:

12 Q. Dr. Levine, do you want to take a
13 quick break?

14 A. No, I'm fine.

15 Q. I think we will take a quick break
16 right now if that's okay with you.

17 A. Sure.

18 THE VIDEOGRAPHER: We are going off
19 the record. The time is 10:14.

20 (A short recess was taken.)

21 THE VIDEOGRAPHER: We are going back
22 on the record. The time is 10:20.

1 MS. TURNER: Thank you.

2 BY MS. TURNER:

3 Q. Dr. Levine, during the break, did
4 you have an opportunity to review your prior
5 testimony in this case?

6 A. I did.

7 Q. Okay. And I will introduce to you
8 previously marked Exhibit 1207.

9 A. Thank you.

10 Q. And I will represent that this was
11 marked during your previous deposition in this
12 matter.

13 And, Dr. Levine, if you could state
14 whether or not the Exhibit 1207 and Exhibit
15 1306, the numbers between 1999 and 2013 are the
16 same?

17 A. Well, 1207 and 1306 are not
18 identical insofar as 1207 is reporting on the
19 1999 edition and 12 -- 1306 has information
20 about the prior edition which I believe is '85
21 but I would need to verify that by looking.

22 Q. Thank you. And if you can clear up

1 for the record, 1999 in 1306, what standard is
2 that -- are those sales for?

3 A. In 1306, I believe they are the 1999
4 edition.

5 Q. Okay. Thank you. And, Dr. Levine,
6 if you could turn back to 1306, Exhibit 1306.

7 A. Uh-huh.

8 Q. For the 19 -- if you see 1989 there
9 at the top through 1998.

10 A. Uh-huh.

11 Q. What versions of the standard are
12 encompassed in these sales units?

13 A. I am going to -- I am going to --
14 1989 shows a number of 21,920, so therefore, in
15 my -- I am inferring therefore that that
16 encompasses -- it could encompass a prior
17 edition, four years of sales at 21,000, seems
18 to me like that 21,000 might aggregate a prior
19 edition.

20 Q. Thank you, Dr. Levine. Let's --

21 A. But I don't know. I mean, you know,
22 it's roughly -- you could see roughly 5,000 a

1 year times four years, it could be -- it could
2 be just '85 to '89. That's what I guess I'd
3 estimate, within our set of typical rate of
4 production of sales in the early -- in the
5 early years of publication.

6 Q. Thank you, Dr. Levine. Just to
7 clarify for the record, are you speaking about
8 the entry for pre-1989?

9 A. Yes, right, which says -- which is a
10 summated, pre-1989 is summated from '85 --
11 well, I don't know when it starts, but let's
12 say '85, '86, '87, '88, four years times X,
13 let's say four years times 4500 would give you
14 roughly this 21,000.

15 Q. Thank you. And so your testimony is
16 that this is the 1985 standard?

17 A. If -- yeah.

18 MR. ELGARTEN: I believe it's her
19 assumption or inference.

20 THE WITNESS: Yes. If we looked --
21 if we opened it up, it would say the last
22 edition was, and I think it's '85 but I didn't

1 go back and review that detail.

2 BY MS. TURNER:

3 Q. Thank you. And then for the 1989
4 through 1998, those numbers there --

5 A. Uh-huh.

6 Q. -- which standard is that for?

7 A. '99.

8 Q. So 1989 --

9 A. I'm sorry. '85 -- that continues
10 with the '85 through, let's say, the
11 presumptive '85 through 1998, so -- and not
12 atypically as the scientific and research and
13 practice community are anticipating a new -- an
14 updated revision like all of us, you know, want
15 the I10 and not the I8 so people are waiting
16 for the new edition of the -- the sales
17 declines not because of the lack of value of
18 the product but because the communities are
19 aware that a new edition is under preparation.

20 Q. Thank you.

21 A. Or new standards that will be
22 published in the new edition are under

1 preparation.

2 MS. TURNER: And if the court
3 reporter can please mark as Exhibit 1307.

4 (Deposition Exhibit 1307 was marked
5 for identification.)

6 MS. TURNER: And for the record,
7 this is a document produced by plaintiffs
8 identified as Bates
9 No. AERA_APA_NCME_RFP2_000001 through 26.

10 BY MS. TURNER:

11 Q. Dr. Levine, do you recognize this
12 document?

13 A. Yes.

14 Q. What is this document?

15 A. This document is aggregation of our
16 various sales reports from the 2014 edition
17 through -- what we've had in our files that you
18 asked us to produce, through 2018.

19 Q. Do you believe this document
20 produced by plaintiffs is authentic?

21 A. All of the pieces are authentic.

22 Q. Thank you.

1 A. What I mean by that is, doesn't --
2 it wasn't prepared initially as one document.
3 It's several different pieces of documents for
4 different purposes, so as you see, additive
5 documents so they were not all produced at
6 once.

7 Q. Thank you. And as the aggregate,
8 this is authentic?

9 A. Correct.

10 Q. And is this --

11 A. And it's everything we have.

12 Q. Thank you. And are these documents
13 that are in the aggregate, this document, is it
14 something that's kept in the ordinary course of
15 business?

16 A. Yes.

17 Q. And how was it created?

18 A. It's created through our inventory
19 sales report, through our association
20 management system and through our financial
21 accounting system.

22 Q. And do you know what association

1 management system that is? Is that
2 proprietary?

3 A. It's NOAH and I believe it's through
4 NOAH although we may keep the standards on a
5 separate spreadsheet, that are -- but it is
6 definitely through our own financial reporting
7 system.

8 Q. Okay. Thank you. And if you could
9 please turn to what is identified as Page 7,
10 and can you tell me what this page is?

11 A. Are these numbered?

12 Q. If you look at the bottom, there is
13 a number.

14 A. There are numbers. Okay.

15 So this is our reporting of the
16 standards development fund from the end of --
17 for fiscal years 2014, '15, '16, '17, '18, at
18 that point unaudited and projected through
19 April 30, 2019.

20 Q. And if you look under "Profit and
21 Loss," there is an entry for "Publication
22 Income."

1 Do you see that?

2 A. Yes, I do, uh-huh.

3 Q. And what does that mean?

4 A. I would say -- I believe it's the
5 sales of the 1999 edition.

6 Q. And if you look under "Actuals," the
7 column "Actuals, December 31, 2014," do you see
8 that 42,219.40?

9 A. Isn't that what you were asking me
10 about?

11 Q. Yes.

12 A. -- before, previously. Did I
13 misinterpret your prior question?

14 Q. No. I was asking about what the
15 publication income was. We will walk through
16 the numbers.

17 A. Okay. Fine.

18 Q. Do you see the numbers in
19 December --

20 A. Yes.

21 Q. -- are those for sales of the 1999
22 standards?

1 A. Yes. It could have something else
2 in it, but I don't think so. I mean, I can't
3 think of what it would be.

4 Q. Okay. And if we turn to the next
5 column, which is December 31, 2015.

6 Do you see that 6995?

7 A. Uh-huh.

8 Q. How many sales -- again, is this for
9 sales of the 1999 standard?

10 A. It -- yes, it should be. Net of
11 expenses.

12 Q. Okay.

13 A. And that's true of 42,219.40, net of
14 expenses.

15 Q. And how many sales would that be for
16 6995?

17 A. Depending upon who purchased it, it
18 could be two.

19 Q. If we go to the next column under
20 December 31, 2016, you see it says: "Zero
21 Dollars?"

22 A. Uh-huh.

1 Q. Is it accurate to say that there
2 were no sales of the 1999 standard in 2015 --
3 I'm sorry, in 2016?

4 A. Yes.

5 Q. And the next column under December
6 31, 2017, it says: "Zero dollars."

7 A. Uh-huh.

8 Q. Is it accurate to say that there
9 were no sales of the 1999 standard in 2017?

10 A. Correct.

11 Q. And moving to the next column for
12 December 31, 2018, it says: "137.85."

13 A. Uh-huh.

14 Q. And about how many sales is this of
15 the 1999 standard?

16 A. Could be -- depending upon who
17 purchased it, it could be four or five I
18 suppose.

19 Q. And when you say, "depending on who
20 purchased it," what do you mean?

21 A. Whether it was a member or nonmember
22 of one of our associations. I don't quite

1 remember the selling price at that point or if
2 it was an institutional sale, a library sale.

3 Q. Are there different prices?

4 A. Yeah, for members and -- members get
5 a discount in all three organizations. It's
6 the same amount, whatever that might be.

7 Q. And you mentioned institutions, do
8 they get any kind of discount?

9 A. Only for book sales, because it
10 would be much higher than 137. I think it's
11 more than ten but it's bulk.

12 Q. And moving to the next column, it
13 says: "Projection as of April 30, 2019."

14 You see it says: "Zero dollars"
15 there?

16 A. Yes.

17 Q. Is it accurate to say that there are
18 no projected sales numbers for the 1999
19 standards in 2019?

20 A. Up through that point, yeah.

21 Q. Looking at these numbers across the
22 board from 2014 to 2019, is it accurate to say

1 that sales declined of the 1999 standard
2 between 2014 and 2019?

3 A. Uh-huh.

4 Q. And why is that?

5 A. Because the 2014 edition was
6 released in mid-year.

7 Q. And why would the release of the
8 2014 standard affect the sales?

9 A. It's updated and expanded guidance
10 about best practices and testing, and our user
11 community of scientists and students and
12 faculty and teachers and test administrators
13 and test developers would turn to the new
14 standard.

15 Q. Thank you. If we could turn to the
16 next item, it says: "Book royalty revenues,"
17 that's right below the publication income.

18 A. Correct.

19 Q. What does that mean?

20 A. That's the -- that's income from the
21 new -- from the 2014 edition.

22 Q. And if you look under "actual," the

1 next column "actuals as of December 31, 2014,"
2 it is "119,113.49."

3 Do you see that?

4 A. Yes.

5 Q. And what does that represent?

6 A. That represents the standard
7 development fund's royalty from the sales of X
8 number which we can see from the sales report
9 edition.

10 Q. When you say, "edition," do you
11 mean --

12 A. 2014.

13 Q. Okay. And moving to the next column
14 where it has "actuals as of December 31, 2015,"
15 do you see the number "130,425.40?"

16 A. Uh-huh.

17 Q. Is that for sales of the 2014
18 standard as well?

19 A. Correct. The royalty.

20 Q. Royalty. Thank you.

21 And moving to the next column for
22 "actuals as of December 31, 2016," do you see

1 that number, "110,046.35?"

2 A. Uh-huh.

3 Q. Is that for sales of the 2014
4 standard during 2016?

5 A. It's the fund's royalty from that
6 period.

7 Q. And moving to the next column where
8 it says: "Actuals as of December 31, 2017,"
9 the number "97,407.50."

10 Accurate to say that is also for the
11 royalty for the sale of the 2014 standard?

12 A. Correct.

13 Q. And moving to the next column,
14 "unaudited as of December 31, 2018," see that
15 number, "\$98,994.98?"

16 A. Uh-huh.

17 Q. Accurate to say that that's for
18 royalties from the sale of the 2014 standard?

19 A. Correct.

20 Q. And then the last column there is
21 "projection of April 30, 2019," it says: "Zero
22 dollars."

1 A. It didn't tank.

2 Q. So is it accurate to say that there
3 were no sales projected of the 2014 standard in
4 2019?

5 A. It -- this reflects when the royalty
6 payments are made. It's a different -- it's a
7 different process for the 2014 edition than for
8 the 1999 edition.

9 Q. Can you tell me a little bit about
10 that process?

11 A. In 2019 -- the 1999 edition, AERA as
12 publisher underwrote -- AERA as publisher was
13 reimbursed for all expenses, so this is the --
14 you will see -- you will see printing and other
15 items -- well, you would see if you looked at
16 your prior report, printing and other items.

17 If you went through those documents
18 that you got, so this is the -- with the 2014
19 edition, the AERA underwrites all costs and so
20 this is the royalty. We have a royalty
21 arrangement to reimburse us for costs.
22 Functionally, it's the same.

1 Q. And what does royalty mean here?

2 A. Royalty is a percent of the gross
3 sales.

4 Q. Do you know what that percent is?

5 A. I would need to -- I would need to
6 refresh my memory. I think it is now 50/50.

7 Q. And are you certain that the numbers
8 here under book royalty revenues are royalties
9 according to that split rather than gross
10 revenues?

11 A. Under book royalty revenue?

12 Q. Yes.

13 A. Yes, I am. That's why it is called
14 something different.

15 Q. Thank you. If you could please turn
16 to Page 19 of the document in front of you.

17 A. Yes.

18 Q. Do you recognize this chart?

19 A. Yes, I do.

20 Q. What is it?

21 A. This is the sales report of the 2014
22 edition starting in July when it was released

1 through -- at that point, it was the report
2 through end of September or almost the end of
3 September 2016.

4 Q. Okay. And looking at the total sold
5 number, is it accurate to say that the total
6 number of units sold had declined between 2014
7 and 2016?

8 A. Between 2014 and 2016?

9 Q. Yes.

10 A. Without looking at the end of the
11 year report, I'm not sure it is accurate to say
12 that.

13 Q. I'm sorry, you --

14 A. Because you are comparing ---well,
15 you are clearly comparing the 3242 and asking
16 that question to the 2474, but sales come in,
17 I'm going to say unanticipated ways, so there
18 could be a bookstore ordering X number of
19 copies for a university bookstore or a college
20 bookstore for costs for January, February,
21 March and sometimes we get very large sales
22 orders in November preparing for the next

1 semester, and so it might have bumped up, so
2 this could have been 3242 for a fall semester
3 cost, so I can't infer that without looking at
4 the final, you know, set of -- the final end of
5 year because -- in particular, because for
6 training and academic purposes, sales don't
7 just come linearly by month and it really
8 depends upon -- kind of in the aggregate, who
9 is teaching what, when, or who is having a
10 workshop when, and I know it seems sort of
11 weird, but we have been getting a lot of orders
12 in the past couple of years in that November
13 and even December period for the new semester,
14 and it seemed like in the beginning, it was
15 happening in the summer for the fall semester
16 and who's to explain what the academic
17 workplace is like, so the best way of looking
18 at it is the, you know, the stable end of 12
19 months particularly because -- because this is
20 used for training and workshop and course
21 purposes.

22 Q. And is there any reason why, for

1 this chart, there are cutoffs through September
2 of 20 --

3 A. Yes, because we tend to prepare this
4 report that you are looking at for a meeting of
5 our management committee. Management committee
6 is a joint committee of the three organizations
7 and so whenever the management committee has
8 its meetings typically twice a year, we will
9 produce them, and since you asked us to produce
10 anything we had, you'll see some unusual
11 reports, like, we are going to have a meeting
12 in November and so there will be the equivalent
13 one in November and we had one in -- we had a
14 phone call this past July. We probably have an
15 equivalent one up through July just to kind of
16 keep everybody updated.

17 Q. Okay. If you could please turn to
18 the next page, Page 20. So I think it's the
19 one -- right there.

20 A. Yes. This one.

21 Q. Do you recognize this chart?

22 A. Yes.

1 Q. And can you tell me what the dates
2 are, the sales comparison is for?

3 A. This is comparing 2015 through -- it
4 was prepared undoubtedly for the same
5 management committee meeting and it's comparing
6 January through September 28, 2015, to '16 in
7 the same period.

8 Q. Okay. And why is it comparing on a
9 ten-month basis here between 2015 and 2016?

10 A. The same reason, because of it being
11 an interim report before this committee met, or
12 I had a conference call or something, but there
13 is always an end of year report and you could
14 see, this report gives more nuanced information
15 as I was saying in my earlier statement about
16 member and nonmember purchases and about E-book
17 purchases and print purchases and bundled
18 purchases.

19 Q. What is a bundle?

20 A. Bundle is, you could buy -- and a
21 further discount, the E-book edition and get a
22 hard copy.

1 Q. And looking at these numbers for the
2 ten-month period of January 1, 2015 through
3 September 28, 2015, and the same period for
4 2016, is it accurate to say that sales
5 declined?

6 A. It is only accurate to say it
7 declined in comparing the same ten-month period
8 which could have the same distortion I
9 previously spoke to.

10 Q. And turning back, you had mentioned
11 the print E-book bundle?

12 A. Uh-huh.

13 Q. Why would someone want both an
14 E-book and a print copy?

15 A. Well, I can tell you why I would
16 want it and then we could -- you could deduce
17 why others would want it. I suppose those of
18 us trained and reared in the nonelectronic
19 world, like to touch print, but yet most of us
20 are also technologically savvy as around this
21 room so you might want for reading purposes the
22 electronic version, to be able to skim, remind

1 yourself of what you are doing, you might want
2 it for a lecture, like, I would bring an iPad
3 into a lecture or seminar or discussion or
4 workshop, but when I am really planning what I
5 am going to say, I might want to be able to
6 have hard copy to line and take notes or, you
7 know, to do a deeper reading.

8 And I think that's an extrapolatable
9 experience, though I can't speak for every user
10 that if for a modest amount extra, you can get
11 the print, I suppose 50 years from now, nobody
12 will know what the word print means, but if you
13 can have both, you know, for a modest amount,
14 then you could have your cake and eat it.

15 Q. Any other reasons?

16 A. It's good enough that I can think
17 of. And other forms of users similarly. I
18 suppose having one on their shelf if you -- if
19 your briefing staff, let's say, you are
20 developing new tests and you run a test company
21 or revising tests and you can project it on a
22 screen, but if you had a print edition, you

1 know, you could say, hey, look, look, look.
2 Similar. I'm not saying it's only used for,
3 you know, courses, lectures and workshops.
4 It's for the deeper, I suppose the deeper
5 reader and maybe more particularly for those of
6 us who have at least had more print experience.

7 Though there is some -- I think
8 there is some degree of research that you might
9 find it even with your own e-mailing, you know,
10 kind of out of sight, out of mind a bit, so
11 that if you only have it electronically, you
12 might not recall things as easily as being able
13 to just pull it off a shelf and remind
14 yourself, get up to speed quickly, even for
15 those who read electronically.

16 Q. So for someone to purchase the 2014
17 standard, how do they go about doing that?

18 A. They can do it in a range of ways.
19 The most immediate, I suppose, would be through
20 the AERA website because we are the publisher.

21 Of course, there are some bookstores
22 that carry it, so there's other ways of buying

1 it, but that's what I'd recommend somebody do.

2 MS. TURNER: If the court reporter
3 can please mark this as Exhibit 1308.

4 (Deposition Exhibit 1308 was marked
5 for identification.)

6 THE WITNESS: Meaning we do have
7 some distributor sales.

8 BY MS. TURNER:

9 Q. Do you recognize this document?

10 A. Yes. And would this represent, if I
11 can ask, would this 8-14 be when you downloaded
12 this?

13 Q. Correct, yes.

14 A. Okay. Okay.

15 Q. So what is this document then?

16 A. This is from AERA website and it is
17 the publications part of our portal, and this
18 is the -- the access to ordering the 2014
19 edition.

20 Q. Does this appear to be an accurate
21 capture of the AERA website?

22 A. Yes.

1 Q. Great. So you had spoken about
2 ordering the 2014 standard.

3 A. I suppose we could update our
4 website and take the word "now" out, since it
5 has been available for a while. Got to get
6 that staff to it.

7 Q. You had said that one way that
8 someone can order a copy of the 2014 standard
9 is through the online store, and would they --
10 on this website, how would they go about doing
11 that?

12 A. Well, there is a hypertext link --
13 well, including ordering the 1999 edition.
14 Read more. I would have to scroll down and
15 remind myself since I don't order it but there
16 is a hypertext link to the online book store.

17 Q. I can represent, I think it's at the
18 top, right above the --

19 A. You are right. Order now. Right.

20 Q. Great. So do you offer electronic
21 copies of the 2014 standard for sale through
22 the website?

1 A. I believe there is -- yes, I believe
2 there is a hypertext link to the provider who
3 -- whose platform doesn't sit on our own
4 platform. It needs a particular kind of
5 platform and protection of the PDF in such a
6 way that it is -- only purchasable.

7 Q. So is it accurate to say that to
8 order online a copy of the -- an electronic
9 copy of the 2014 standard, it's done through
10 some kind of third-party platform?

11 A. Correct. I am blocking on the name
12 of the company we use. I should have refreshed
13 my memory, but it's a platform that both does
14 its own publishing, it's own E-publishing, it's
15 storage and works for any number of publishers.

16 Q. Thank you. If someone wanted to go
17 about purchasing a copy of the 1999 standard,
18 how would they do that?

19 A. Right here. I think it's that
20 hypertext link to order previous edition of the
21 standard. It's in the store.

22 Q. Can someone order it online?

1 A. Yes.

2 Q. Okay. So --

3 A. I believe.

4 Q. So if I could --

5 A. Yeah.

6 Q. If I could turn your attention to
7 order -- to order a previous edition of the
8 standard, 1999, there's a hypertext link, and
9 it says: "Please use the mail fax order form
10 available on the left-hand side of the page
11 under the books tab."

12 A. Then I may be wrong. Good reading.

13 Q. Thank you. What I went to law
14 school for.

15 A. Sure. I almost went.

16 MS. TURNER: If you could please
17 mark this as Exhibit 1309.

18 (Deposition Exhibit 1309 was marked
19 for identification.)

20 THE WITNESS: I hope you don't think
21 AERA is old style. I don't even have a fax
22 machine.

1 MR. ELGARTEN: I think this is
2 actually beyond the scope of your deposition
3 notice, but I am not trying to overly restrict
4 you but just keep that in mind.

5 MR. BECKER: We just want to --

6 MR. ELGARTEN: I am trying not to --
7 I am just noting that I believe it is, but you
8 want to ask a few questions, that's fine. I
9 just don't want to spend a lot of time.

10 MR. BECKER: We are not. We are
11 just considering it on your sales, but just
12 want to make sure that the method of sales is
13 updated to the present.

14 MR. ELGARTEN: Okay.

15 MS. TURNER: Thank you.

16 MR. ELGARTEN: That's fair, or I
17 think it's fair for the moment.

18 MS. TURNER: The questioning will
19 not be long.

20 BY MS. TURNER:

21 Q. Dr. Levine, do you recognize this
22 document?

1 A. Yes.

2 Q. What is it?

3 A. This is the -- the website specimen
4 information on the 1999 edition informing
5 potential users that there is also a 2014
6 edition.

7 Q. Does this appear to be an accurate
8 capture of the AERA website?

9 A. Yes.

10 Q. And can you purchase -- if you are
11 looking on this website, can you purchase the
12 1999 standards in the online store for AERA?

13 A. Well, you've just updated me on the
14 fact that it looks like we did not include
15 that, I suppose as can happen with prior
16 editions of works, that it looks like a mail
17 and fax order.

18 Q. Can a person e-mail the form to AERA
19 to purchase the 1999 standard?

20 A. E-mail it with an attachment?

21 Q. Correct.

22 A. Sure.

1 Q. Do you know how to do that from
2 here?

3 A. Let's see. From this particular
4 page, from this particular page, no, but there
5 is any number of pages that have a pubs e-mail
6 and -- or in this case, one could, I suppose,
7 call and learn how they could e-mail the -- the
8 form completed without faxing it.

9 Q. Okay. Are you certain that you can
10 e-mail the form to order a copy of the 1999
11 standard?

12 A. Am I certain? I am certain that we
13 would take a sale for anything any way it came,
14 we are pretty small. You might think of old
15 AERA, 25,000 members, an annual meeting of 15
16 or 16,000, but our staff is under 30 people,
17 you know, so anything that comes in, we are
18 really pretty user friendly. If somebody
19 answers the phone, it won't be me, but it even
20 could be me and everybody helps everybody out,
21 so if anybody calls and wants to get something
22 done, they'll get to somebody on the

1 publication staff or they'll get to our
2 customer service or a membership director, if
3 not, a publications director and somebody will
4 say -- might even say fax it to me and I'll get
5 it done.

6 Q. Are there any instances that you
7 know of where someone had e-mailed an order
8 form for the 1999 standard?

9 A. Any instances where they e-mailed
10 it?

11 Q. Correct.

12 A. Not without my checking with our
13 publications director or membership, customer
14 service person.

15 Q. Is the 1999 standard available in an
16 E-book format?

17 A. No.

18 Q. Is it available in any electronic
19 format?

20 A. No. We think of ourselves as quite
21 a progressive, however, publisher, insofar as
22 many -- for many of our products and you can

1 look on our website, many publishers are eager
2 to sell the print edition and then delay E-book
3 editions, so we are trying to reach everyone in
4 the modality that they work in and -- which
5 includes with some of our major volumes being
6 able to purchase pieces.

7 Q. Any plans to make it available in an
8 electronic format?

9 A. Which?

10 Q. The 1999 standard.

11 A. It hasn't come up, I suppose. I
12 mean, it hasn't come up with any of our
13 classics, and I think it is not likely, and we
14 have many other classics that were -- Complete
15 Research on Teaching, something that is a major
16 classic methodology book called Methods, and we
17 have 2005 editions and we are not even thinking
18 that there would be enough of an interest in
19 getting old pieces that way. People can buy
20 it, you know, or use it from the university
21 libraries.

22 MS. TURNER: If the court reporter

1 can please mark this as Exhibit 1310.

2 (Deposition Exhibit 1310 was marked
3 for identification.)

4 MR. ELGARTEN: Same question. We
5 are wandering from your list of subjects.

6 MS. TURNER: Almost done. Just a
7 few more questions.

8 THE WITNESS: As long as you fill
9 out one of each, I'm okay, when you are done
10 really. I think your law firm should have one
11 of each of these.

12 BY MS. TURNER:

13 Q. Do you recognize this document?

14 A. Definitely. I mean more or less.

15 Q. And what is this document?

16 A. This is an order form for --

17 depending upon when you downloaded it, for our
18 various books, AERA's books that are available.

19 Q. Okay.

20 A. Do you know when you downloaded
21 this?

22 Q. It's the same as the other ones, so

1 that would be August 14.

2 A. Okay. So then it is current.

3 Q. Can someone order the 1999 edition
4 through this order form?

5 MR. ELGARTEN: Want to call her
6 attention to this?

7 BY MS. TURNER:

8 Q. Sure. Yes. If you look down where
9 it says: "Standard for educational and
10 psychological testing," it is the sixth gray
11 bar and at the bottom of that, it says: "1999
12 edition."

13 So if someone wanted to order the
14 1999 edition, would they put in the quantity?

15 A. Yes.

16 Q. The note?

17 A. Yes. Uh-huh.

18 Q. Can you PDF this order form and then
19 send it via e-mail?

20 A. There it is. The answer to your
21 question. Members@AERA.net on the other side.

22 Q. Perfect.

1 A. No heads will roll this afternoon.

2 And just so you know, our -- that

3 e-mail is customer service and membership.

4 It's not membership questions. It's just -- it

5 is -- we see our membership team as customer

6 service.

7 Q. So if someone e-mailed that with the

8 order form, would they be able to place an

9 order through that e-mail address?

10 A. Absolutely, yeah. That's where you

11 put the PDF. We don't -- the order for film,

12 it comes through customer service, the label on

13 the e-mail is membership, but it's really

14 membership customer service department or team.

15 Q. Okay. I'm going to hand you a

16 document that was previously marked 1208,

17 Exhibit 1208.

18 I'll represent this was previously

19 marked in your prior deposition in this matter.

20 A. Uh-huh.

21 Q. Do you recognize this document?

22 A. Yes.

1 Q. And what is it?

2 A. That's the -- I suppose, of course,
3 having seen the other two, it looks like it's
4 the 1999 edition without that 1999 sales
5 estimate.

6 Q. And if you could turn back, please,
7 to what was marked as Exhibit 1306.

8 A. Yes.

9 Q. Is this the same document?

10 MR. ELGARTEN: As I said, I produced
11 this document, the additional document I
12 believe it's the same document.

13 THE WITNESS: Well, I'm assuming.

14 BY MS. TURNER:

15 Q. So is the answer yes then?

16 A. Yes.

17 Q. Okay.

18 MS. TURNER: Why don't we take a
19 quick break.

20 MR. ELGARTEN: Okay. Are we almost
21 done?

22 MS. TURNER: We are.

1 THE VIDEOGRAPHER: We are going off
2 the record. This is the end of Media Unit No.
3 1. The time is 11:04.

4 (A short recess was taken.)

5 THE VIDEOGRAPHER: We are going back
6 on the record. This is the start of Media Unit
7 No. 2. The time is 11:26.

8 MS. TURNER: Thank you.

9 BY MS. TURNER:

10 Q. Dr. Levine, if you could please turn
11 back to what has been marked as Exhibit 1307.

12 A. Yes.

13 Q. And if you could please turn to the
14 bottom of the page, No. 7.

15 A. Yes.

16 Q. And you testified earlier that the
17 publication income entry under profit and loss
18 is for sales of the 1999 standard?

19 A. Yes, publication income.

20 Q. And can you let us know if that is
21 net of expenses or is that a gross number?

22 A. I think that's a -- in that context,

1 I'm going to say it's the gross number.

2 Q. Okay. If you could please turn to
3 Page No. 25 at the bottom.

4 A. Yeah, well, I'm doing it. 25 are
5 you saying?

6 Q. Yes, please.

7 A. Of the same document?

8 Q. Of the same document.

9 A. Okay. Got it. Okay.

10 Q. Great. And the top chart here, can
11 you tell us what this is?

12 A. Okay. So this is total sales by
13 year.

14 Q. Okay.

15 A. For 2014 to 2018.

16 Q. Okay. If I could turn your
17 attention to 2018.

18 A. Uh-huh.

19 Q. Is it accurate to say that sales in
20 2018 were higher than in 2017?

21 A. Correct.

22 Q. And why is that?

1 A. Why did it happen?

2 Q. Yes, if you know.

3 A. More purchases. Sorry. It seemed
4 self-evident. Why it happened. I suppose
5 really links to my prior point. You know, you
6 can't -- you couldn't really necessarily
7 abstract -- extrapolate from September 28th
8 that -- even though with certain forms of
9 quote-unquote publications in the world of
10 publications, one might think of them as having
11 a limited shelf life.

12 This publication is a publication
13 about guidance and wisdom and best practices in
14 the field, and as that is more wide -- of more
15 -- of wider interest, it -- unlike even an
16 academic publications, that might be superseded
17 by -- well, here, it might be superseded by a
18 new edition, but superseded by next, you know,
19 next stages of a research program, that a work
20 that has value can have expanded in during use.

21 So until such point as with other
22 guidance, it needs to be, you know, rethought,

1 reupdated, to take account of new things that
2 didn't exist, so in 1985, for example, there
3 was no real use of technology in the way that
4 there is in 2018. So this, you know, modest
5 increase is probably some number of courses and
6 perhaps brought a worldwide distribution.

7 Q. And to clarify, these are -- for
8 sales of the 2014 standard?

9 A. Correct.

10 Q. And the chart directly below that?

11 A. Uh-huh.

12 Q. What does this chart represent?

13 A. This is total quantities sold
14 through April 30 each year, so building upon my
15 prior point about September 28, this document
16 was created before we had a mini -- the
17 management committee had a mini-meeting in May,
18 so it was April 30, so they could get a
19 snapshot before their meeting which was
20 mid-May, so it is April 30, so then it compares
21 year-to-date, you know, as you'll see in
22 financial statements year-to-date and

1 comparable period, so the -- we were very
2 pleased with the fact that the 2019, you know,
3 performance suggests, you know, this -- the
4 work is -- is considered, you know,
5 increasingly -- is increasingly penetrating new
6 users.

7 Q. And to clarify, this is also for
8 sales of the 2014 standard?

9 A. All, correct, yeah.

10 Q. And this chart shows through 2015
11 through 2019, the total sales just for January
12 through April 30 --

13 A. Correct.

14 Q. -- of each year?

15 A. Correct. It's sort of like a
16 snapshot of how -- recognizing the variation of
17 when it might be audited, which you have no
18 control over, it still gives sort of a
19 comparable snapshot.

20 Q. And is there any reason -- you spoke
21 before about the increase between 2018 and
22 2019, do you know any reason why there was an

1 uptick in sales during that same time period?

2 A. Without looking at who purchased, I
3 might extrapolate that it was used in more
4 courses or maybe more workshops, which could be
5 a university or college sale anticipating a
6 course, maybe even a summer course or courses.

7 The 2015 high is reflecting the fact
8 that this is really the first six months of
9 publication or the availability of the
10 standards, so there was a lot of pent up
11 interest.

12 Q. If you could please turn to Page 2
13 of the same document.

14 A. Uh-huh.

15 Q. It should look like this.

16 A. Yes. Yes.

17 Q. I think the other side.

18 A. Good. Because this one is not made
19 for my eyes. Okay.

20 Q. Can you tell me what this chart is?

21 A. This is new edition -- wow, this is
22 a -- you have to be quaintly interested in

1 data, but this is new edition and the number of
2 copies sold by member group and nonmembers.

3 You see the -- so, for example,
4 NCME, two NCME members bought I suppose nine
5 copies, so nonmember sales which might be book
6 stores or faculty buying for courses but more
7 likely university book stores or agents, in
8 2014, there were, just as an illustration, six
9 purchases of 15 copies. Does that help?

10 Q. Yes. So let me try to rephrase it
11 just to make sure I have it.

12 So, for example, in the column with
13 the number of copies at the top, if you go to
14 the nine?

15 A. Uh-huh.

16 Q. And directly below, there is a two
17 under NCME member, that means that two NCME
18 members bought nine copies each?

19 A. Correct.

20 Q. And this is for the 2014 standard?

21 A. Yes. 2014 standards in 2014.

22 Q. Thank you. And if we go over to the

1 total number of the total sales, it says:

2 "4,227."

3 Do you see that?

4 A. Correct.

5 Q. Okay. And if we could just turn
6 back to the page we were just looking at, Page
7 25.

8 A. Yep.

9 MR. ELGARTEN: Do the numbers match?

10 MS. TURNER: There is a slight
11 discrepancy so we just want to clear it up.

12 MR. ELGARTEN: Okay.

13 THE WITNESS: I was going to say
14 somebody on staff can't add a column. I don't
15 want to say that. Total sales, 4236.

16 BY MS. TURNER:

17 Q. Right. So if you see in the column
18 of 2014, it says: "Total sales 4,236," and on
19 Page 2, it says: 4,227."

20 Any reason for that discrepancy?

21 A. It's human error, really, I suppose
22 one was an effort to do a transfer from an

1 Excel spreadsheet or something of the number of
2 copies. The other one was a higher number,
3 right?

4 Q. Yes.

5 A. So I am assuming something wasn't
6 recorded. It might not have been human error.
7 It was missing data, but it should have been --
8 in my view as a scientist, it should have been
9 recorded as missing data, but it wasn't. So
10 just unknown.

11 Unknown purchases as to the
12 quantity, probably one, you know, just given
13 the dominant mode of -- of us also, you know,
14 being interested in volume sales because that
15 means it penetrates and hits more users and
16 students.

17 Q. So is the number on Page 25, the
18 4236 number, is that the more accurate number?

19 A. Let's see. 25. That's the higher?

20 Q. Correct.

21 A. Yes. At that point, we didn't have
22 E because we were just starting.

1 Q. So if you could please turn to Page
2 3 of the same document.

3 And what's on this page of the
4 document?

5 A. Well, the -- what is the whole
6 document about? Is that what you want to know?

7 Q. This particular page, yes.

8 A. Yeah. So it's -- so it's an effort
9 to depict or report on net sales by number of
10 copies aggregating the copies less than ten and
11 including the nonmembers, so that of the 2,356
12 nonmember sales, less than a third -- probably
13 somewhere in the neighborhood of 28 percent
14 were individual, and you could see that -- if I
15 am not -- I don't know that the 934 were all
16 individual but once you get above ten, you are
17 talking about, you know, persons, merchants or
18 book dealers or book stores.

19 Q. And to clarify, this is for sales of
20 the 2014 standards?

21 A. 2014, that first year, which is the
22 first six months and I hope those numbers tie.

1 The financial I have no doubt tie. And this
2 Sheridan Books I believe is our platform for
3 the E-book. That wasn't reflecting E-book.
4 That was reflecting them serving as the
5 printer. I think they were also the platform.

6 Q. When you say, "serving as the
7 printer," is that for the physical copy?

8 A. Yeah, literal printer. We don't
9 print in-house. So we printed 5,400 -- AERA
10 printed 5,436-ish, I suppose it was probably a
11 run of 5500 initially and then needed to go
12 into a second printing in November.

13 Q. If you could please turn to the next
14 page, Page 4.

15 A. Uh-huh. Yes.

16 Q. And then also on Page 5 as well if
17 you want to take a look.

18 A. You must think research is crazy
19 that we do all these little microlevel tables.
20 Okay. Let's see. Okay.

21 Q. So I can represent to you, I believe
22 these are the same documents but it was just

1 cut off for printing purposes.

2 A. Correct. Definitely.

3 Q. Okay. Can you tell me what this
4 document is or these pages represent?

5 A. These are at the most microlevel
6 number of sales, it looks like somehow we did
7 intervals of five and then above 65, I suppose
8 they are the literal numbers that someone put
9 in, I mean that we were reporting. That's the
10 way we counted, so it's the exact count so you
11 can see it's -- it really isn't in intervals of
12 five. It's under 10. It's 10, 11, 12, so it's
13 the literal count and it jumps from 30 to 35 to
14 40, 47, 50, so it's the literal purchases.

15 With some of these categories, there
16 appears to be more than one of those, but --
17 and then the revenue that it generated and then
18 when you see that discount is for that -- which
19 we saw on another sheet, it's the volume sales
20 discount for above ten.

21 Q. To clarify, this is for the 2014 --

22 A. 2014.

1 Q. -- standard?

2 A. Correct.

3 Q. 2014 standard --

4 A. Yes.

5 Q. -- in the year 2014.

6 A. Correct.

7 Q. Okay.

8 A. And you didn't receive other copies
9 of this because we were really obsessing on
10 what was happening, you know, we wanted to know
11 kind of what was happening as we were
12 launching, so we were running all this stuff,
13 like, you wouldn't want to see this every year
14 at that level.

15 Q. If you could turn to Page 15 of the
16 same document.

17 A. Uh-huh. Uh-huh.

18 Q. At the top, it states that it's the
19 standards royalty calculation.

20 Do you see that?

21 A. Yep.

22 Q. And then just to clarify for the

1 record, you testified earlier about the royalty
2 percentage.

3 A. Yeah.

4 Q. And you believed it was a 50/50
5 split?

6 A. It switched though at the beginning
7 of AERA having underwritten -- all these costs
8 had a little bit higher royalty. If you really
9 want to know, I have to double-check but I
10 think now it's 50/50.

11 Q. Okay. Do you know when that change
12 happened?

13 A. I believe, but I would want to
14 verify that it happened after the first full
15 year, meaning it was -- I would have to look.
16 I don't remember. I think it was the first six
17 months of sales and '15 and then it switched.

18 Q. And if I could just draw your
19 attention --

20 A. But I would really have to look. If
21 that's important to you, I would need to verify
22 it.

1 Q. If I could draw your attention --
2 where it says royalty percentage, it says: "55
3 percent."

4 A. Where are you here?

5 Q. If you look down, it says: "Royalty
6 percentage, total royalty," it's kind of
7 grouping of text right before the last one.

8 A. Correct. So that's what it was
9 originally I suppose, then 45/55 or something
10 like that I suppose.

11 Q. So for the six months ended in 2017,
12 does it refresh your recollection that it was
13 -- 55 percent was the royalty percentage?

14 A. So it may -- it might have ended
15 with '17 I suppose, standards royalty
16 calculation. 1, 2, 16. It could be -- it's
17 not 50/50, it might be 45/55.

18 Q. And how is that split?

19 A. The testing standard is the larger
20 amount.

21 Q. Testing standard is 55 percent?

22 A. Yes.

1 Q. And the publisher is 45 percent?

2 A. Yeah. I will let our attorney know
3 if I am recalling wrong. So it might have been
4 50/50 at the beginning and then 45/55.

5 Q. And then --

6 A. That's what happens when you are
7 part of the same family, you forget how much
8 you make.

9 Q. And If you could just turn to Page
10 16 there.

11 A. 16?

12 Q. Yes, the next page.

13 Again, this is the royalty for the
14 six months ending June 30, 2018?

15 A. Yes.

16 Q. To clarify --

17 A. It says right here, "development
18 fund," so that is prima facie as it were here.

19 Q. And the royalty --

20 A. That's 55 percent of the joint
21 project so that's 45 percent to AERA.

22 Q. Okay. And then on the following

1 page, Page 17.

2 A. Same, yeah.

3 Q. So you are saying 55 percent was the
4 royalty --

5 A. Yeah.

6 Q. -- for the year ending December 31,
7 2018?

8 A. Uh-huh. Yes.

9 MS. TURNER: Okay. Unless your
10 counsel has any questions, we are done.

11 MR. ELGARTEN: I have no questions.
12 Thank you.

13 THE VIDEOGRAPHER: We are going off
14 the record at 11:48 a.m. This concludes
15 today's testimony given by Felice Levine on
16 behalf of APA, NCME, AERA. The total number of
17 media units used was two and will be retained
18 by Veritext Legal Solutions.

19 (Whereupon, the proceeding was
20 concluded at 11:48 a.m.)

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I declare under penalty of perjury
under the laws that the foregoing is
true and correct.

Executed on _____, 20____,
at _____, _____.

FELICE J. LEVINE, PH.D.

SUBSCRIBED AND SWORN TO BEFORE ME

THIS _____ DAY OF _____, 2019.

(NOTARY PUBLIC) MY COMMISSION EXPIRES:

CERTIFICATE OF NOTARY PUBLIC

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I, Bonnie L. Russo, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in shorthand and thereafter reduced to computerized transcription under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.

Notary Public in and for
the District of Columbia
My Commission expires: June 30, 2020

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