

EXHIBIT 39

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR
TESTING AND MATERIALS,
d/b/a ASTM INTERNATIONAL;
NATIONAL FIRE PROTECTION
ASSOCIATION, INC.; and
AMERICAN SOCIETY OF
HEATING, REFRIGERATION AND
AIR CONDITIONING ENGINEERS,

Plaintiffs and
Counter-Defendants,

v.

Civil Action No.
1:13-cv-01215-TSC

PUBLIC.RESOURCE.ORG, INC.,

Defendant and
Counter-Plaintiff.

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Videotaped Deposition of: JAMES FRUCHTERMAN

DATE: Friday, July 31, 2015

TIME: 9:34 a.m.

LOCATION: Morgan, Lewis & Brockius, LLP
Two Palo Alto Square, Suite 700
Palo Alto, California

REPORTED BY: Kelli Combs
Certified Shorthand Reporter
License 7705.

CONFIDENTIAL - PURSUANT TO PROTECTIVE ORDER

2	<p>1 APPEARANCES</p> <p>2 FOR THE PLAINTIFF, ASTM:</p> <p>3 By: JORDANA S RUBEL, ESQ</p> <p>4 MORGAN, LEWIS & BOCKIUS, LLP</p> <p>5 1111 Pennsylvania Avenue, NW</p> <p>6 Washington, DC 20004</p> <p>7 202 739 5118</p> <p>8 E-mail: jrubel@morganlewis.com</p> <p>9 FOR PLAINTIFF, ASHRAE:</p> <p>10 BY: KATHERINE MERK, ESQ</p> <p>11 KING & SPALDING</p> <p>12 JOSEPH R WETZEL, ESQ</p> <p>13 101 Second Street, Suite 2300</p> <p>14 San Francisco, California 94105</p> <p>15 415 318 1263</p> <p>16 E-mail: kmerk@kslaw.com</p> <p>17 jwetz@kslaw.com</p> <p>18 For PLAINTIFF, NFPA:</p> <p>19 By: THANE REHN, ESQ</p> <p>20 MUNGER, TOLLES & OLSON, LLP</p> <p>21 560 Mission Street, 27th Floor</p> <p>22 San Francisco, California 94105</p> <p>23 415 512 4073</p> <p>24 E-mail: Thane.rehn@mto.com</p> <p>25 For DEFENDANT PUBLIC RESOURCE ORG, INC :</p> <p>26 By: SEBASTIAN KAPLAN, ESQ</p> <p>27 FENWICK & WEST, LLP</p> <p>28 MATTHEW BECKER, ESQ (Mountain View office)</p> <p>29 555 California Street</p> <p>30 San Francisco, California 94104</p> <p>31 415 875 2300</p> <p>32 E-mail: skaplan@fenwick.com</p> <p>33 ALSO PRESENT:</p> <p>34 Cyril Suszckiewicz, Videographer</p>	4
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2	<p>1 EXHIBITS FOR IDENTIFICATION</p> <p>2 PLAINTIFFS' PAGE</p> <p>3 Exhibit 4000 Journal article authored by 64</p> <p>4 James Fruchterman and</p> <p>5 Allison Lingane published</p> <p>6 in 2003</p> <p>7</p> <p>8 Exhibit 4001 Expert report of James 97</p> <p>9 Fruchterman</p> <p>10</p> <p>11 Exhibit 4002 Printout of the Bookshare 209</p> <p>12 Web page</p> <p>13</p> <p>14 Exhibit 4003 A few pages from the PDF 219</p> <p>15 version of NFPA 101-2012</p> <p>16 edition taken from the</p> <p>17 Public Resource website</p> <p>18</p> <p>19 Exhibit 4004 The first 25 pages of 234</p> <p>20 ASHRAE standard 90 1-2010</p> <p>21 as they appear in the PDF</p> <p>22 version available on</p> <p>23 Public Resource Org's</p> <p>24 website</p> <p>25</p> <p>26 Exhibit 4005 OCR version of ASHRAE 235</p> <p>27 standard 90 1-2010 copied</p> <p>28 into a Word processing</p> <p>29 program</p> <p>30</p> <p>31 Exhibit 4006 E-mail from Rob Turner to 256</p> <p>32 James Fruchterman dated</p> <p>33 April 10, 2015</p> <p>34</p> <p>35 (Exhibits attached to transcript)</p>	4
3	<p>1 PROCEEDINGS</p> <p>2 Friday, July 31, 2015; Palo Alto, California</p> <p>3 ---o0o---</p> <p>4</p> <p>5 THE VIDEOGRAPHER: Good morning. We're on</p> <p>6 video record on July 31st, 2015, and the time is</p> <p>7 9:34 a.m. This is the video-recorded deposition of</p> <p>8 James Fruchterman. My name is Cyril Suszckiewicz.</p> <p>9 I'm here with the court reporter, Kelli Combs.</p> <p>10 We're both here representing Veritext Legal</p> <p>11 Solutions at the request of the Plaintiffs. This</p> <p>12 deposition is being held today at Morgan Lewis in</p> <p>13 Palo Alto, California.</p> <p>14 The caption of the case is ASTM versus</p> <p>15 Public Resource.</p> <p>16 Please note that the audio and the video</p> <p>17 recordings will take place unless all parties agree</p> <p>18 to go off the record. Microphones are very</p> <p>19 sensitive, and they will pick up your private</p> <p>20 whispers, conversations and cellular interference.</p> <p>21 Counsel, would you please identify</p> <p>22 yourself for the record.</p> <p>23 MS. RUBEL: Jordana Rubel for American</p> <p>24 Society for Testing and Materials.</p> <p>25 MR. REHN: Thane Rehn from Munger, Tolles</p>	5

6	<p>1 & Olson for the Plaintiff, National Fire Protection 2 Association. 3 MS. MERK: Katherine Merk for American 4 Society of Heating, Refrigerating and Air 5 Conditioning Engineers, Incorporated. 6 MR. KAPLAN: Sebastian Kaplan for 7 Defendant, Public.Resource.Org, Inc. 8 MR. BECKER: Matthew Becker for Defendant, 9 Public.Resource.Org, Inc. 10 MR. KAPLAN: Two quick things, first I 11 have a cough; I'm sorry, I'll try to minimize any 12 disturbance, and second, I just wanted the record to 13 reflect that we produced to Plaintiffs Fruchterman 14 documents 1 through 5,399 this morning prior to the 15 deposition. 16 17 18 19 20 21 22 23 24 25</p>	8
7	<p>1 JAMES FRUCHTERMAN, 2 after having been duly sworn, testified as follows: 3 ---o0o--- 4 5 EXAMINATION 6 BY MS. RUBEL: 7 Q Good morning. Can you please state your 8 full name. 9 A James Robert Fruchterman, Jr. 10 Q And have you ever been deposed before, 11 Mr. Fruchterman? 12 A No. 13 Q Very first time? 14 A Yes. 15 Q Okay. 16 Are you familiar with the process of a 17 deposition? 18 A Yes. 19 Q I guess I'll just give you some of the 20 basics. I'll be starting off asking you some 21 questions and Mr. Rehn and Ms. Merk may have some 22 additional questions once I'm finished. It's pretty 23 simple. I ask a question and you provide an answer. 24 If you don't understand a question, just let me know 25 and I'll try to clarify that for you.</p>	9

1 If you do answer the question, then I'm
 2 going to assume that you understood it and you're
 3 answering based on your understanding of the
 4 question.
 5 A Yes.
 6 Q The court reporter is going to be
 7 capturing everything that anybody says while we're
 8 on the record. So it's important for you to respond
 9 with audible responses as opposed to shaking your
 10 head or nodding your head.
 11 Is that okay?
 12 A Yes.
 13 Q And please try to let me finish my
 14 questions before you begin your answers so that she
 15 can get a clean record.
 16 A Okay.
 17 Q I'll do the same; I'll give you a chance
 18 to finish your answers before I ask an additional
 19 question.
 20 Is there any reason why you can't give
 21 truthful and accurate testimony today?
 22 A No.
 23 Q Are you taking any medications that could
 24 impact your ability to give truthful and accurate
 25 testimony today?

1 A No.
 2 Q Great.
 3 Are you represented by counsel?
 4 A I think so.
 5 Q When did you retain that counsel?
 6 A I'm not sure I understand the question.
 7 So I mean, I believe I signed an agreement to be an
 8 expert witness and so -- with Defendant's attorneys.
 9 Q And did they actually indicate in that
 10 agreement that they would be representing you?
 11 A I believe so.
 12 Q And who is that counsel?
 13 A Fenwick & West.
 14 Q Okay.
 15 And that's the two attorneys who are here
 16 with you today?
 17 A That's my understanding.
 18 Q What steps did you take to prepare for
 19 today's deposition?
 20 A I reread my expert report, referred to
 21 some of the standards, both accessibility standards
 22 and the standards in question in my expert report.
 23 I think that's...
 24 Q Did you talk with anybody?
 25 MR. KAPLAN: I'm going to object to the

10	<p>1 extent that it calls for privileged communications. 2 I just advise and instruct the witness not to 3 respond. But anything else is fair game. 4 THE WITNESS: No, I didn't consult with 5 anybody else beyond the qualification just 6 expressed. 7 BY MS. RUBEL: 8 Q So did you speak with your counsel prior 9 to today's deposition? 10 MR. KAPLAN: You can answer that. 11 THE WITNESS: Yes. 12 BY MS. RUBEL: 13 Q And when did those discussions take place? 14 A Last week and this week. 15 Q Approximately how long did you discuss the 16 deposition with them for? 17 A Less than a total of eight hours. 18 Q And your counsel indicated that you 19 produced a number of documents this morning just 20 prior to the start of the deposition; is that 21 correct? 22 A I produced documents to counsel and they 23 produced them to you guys. 24 Q Okay. 25 And are those documents that you searched</p>	12
11	<p>1 for? 2 A Yes. 3 Q What did you do to search for those 4 documents? 5 A My computer has an index program, and so I 6 typed in keywords that were relevant to my expert 7 work for the Defendants. 8 Q Did you review the subpoena that you 9 received in this case? 10 A I did. 11 Q And did you search for documents related 12 to the topics that were listed in that subpoena? 13 A Yes. 14 Q Do you recall what words -- what keywords 15 you used in your searches? 16 A The Plaintiffs, the attorneys in the case, 17 Public Resource, Carl Malamud certainly would have 18 been the primary keywords. 19 Q Did you search for paper documents? 20 A I maintain notebooks using a digital pen, 21 and I did go through my notebooks during the periods 22 and provided those in electronic form to counsel. I 23 think those are the only things that resemble paper 24 documents. 25 Q Okay.</p>	13

<p style="text-align: right;">14</p> <p>1 Q Can you explain what you mean by that?</p> <p>2 A Is the question about what Arkenstone did?</p> <p>3 Q No. About how does scanning materials to</p> <p>4 allow -- scanning documents and books into</p> <p>5 accessible formats, how does that work?</p> <p>6 A So --</p> <p>7 MR. KAPLAN: Objection; vague.</p> <p>8 THE WITNESS: Okay. I just keep going,</p> <p>9 right?</p> <p>10 MR. KAPLAN: Yes.</p> <p>11 THE WITNESS: So if you have a printed</p> <p>12 document or a book and, let's say, a blind person</p> <p>13 wants to have access to it, one option is to scan</p> <p>14 that using a -- generally a desktop scanner which</p> <p>15 takes the picture of each page of interest. Then</p> <p>16 you use optical character recognition software to</p> <p>17 convert the image into a text equivalent.</p> <p>18 Once the contents of a page or a longer</p> <p>19 document is in a text file, it can then be accessed</p> <p>20 by a blind person through Braille technology and</p> <p>21 large mirror, large print technology or audio</p> <p>22 technology such as synthetic text to speech.</p> <p>23 BY MS. RUBEL:</p> <p>24 Q So you just described three ways -- three</p> <p>25 different ways that a person with a print disability</p>	<p style="text-align: right;">16</p> <p>1 you can create a large print document. For example,</p> <p>2 you can take Microsoft Word, select all of the text</p> <p>3 and put it in 24-point or 72-point -- whatever you</p> <p>4 need for your particular disability -- hit "print"</p> <p>5 and then you have a large-print version of that</p> <p>6 document where all the characters are larger.</p> <p>7 More commonly today, visually impaired</p> <p>8 people, because large print is really aimed at</p> <p>9 people who can see a little bit, are not completely</p> <p>10 blind, would have a v-screen, a digital screen.</p> <p>11 That could be a tablet, like an iPad, even a</p> <p>12 smartphone or PC or a Mac, and then they will</p> <p>13 enlarge the print.</p> <p>14 And beyond enlarging the print, there's</p> <p>15 other things that you might do with it. For</p> <p>16 example, you might reverse the contrast. That's</p> <p>17 good for some visual impairments. If you have white</p> <p>18 characters on a black background, they can see that</p> <p>19 better than black characters on a white background.</p> <p>20 And there's a variety of programs and</p> <p>21 built-in tools and these devices to see text</p> <p>22 enlarged.</p> <p>23 Q And is the size of the characters, does</p> <p>24 that vary by individual what -- what size characters</p> <p>25 the person will be able to read?</p>
<p style="text-align: right;">15</p> <p>1 may be able to access the text equivalent, Braille,</p> <p>2 enlargement and text to speech.</p> <p>3 A Uh-huh.</p> <p>4 Q Can you explain how the Braille system</p> <p>5 works; how converting it to the Braille would work?</p> <p>6 A So if you have a document in text form,</p> <p>7 there are two primary ways that you can create</p> <p>8 Braille from that. One is you can have a Braille</p> <p>9 embosser, which is the equivalent of a printer, so</p> <p>10 you send the file to the embosser and the Braille</p> <p>11 dots are pressed into the paper, and so it comes</p> <p>12 out. So it's the equivalent of a desktop printer</p> <p>13 except it creates tactile versions of the document.</p> <p>14 And then the other way is that many blind</p> <p>15 people have Braille displays that pop up the Braille</p> <p>16 characters with plastic pins, say, with 20 Braille</p> <p>17 characters. The blind person runs their finger</p> <p>18 along the 20 characters, gets to the end, hits the</p> <p>19 advance bar and the next 20 characters pop up.</p> <p>20 So those are the two ways that blind</p> <p>21 people access Braille from a digital form.</p> <p>22 Q Okay.</p> <p>23 And how does the enlargement process work?</p> <p>24 A Similar to Braille, there are two ways of</p> <p>25 doing that. One is you take the text document and</p>	<p style="text-align: right;">17</p> <p>1 A Yes. As your vision progressively gets</p> <p>2 worse, the -- you might need larger and larger</p> <p>3 characters to actually be able to read the document.</p> <p>4 And it's also possible that people become fatigued</p> <p>5 and might want to enlarge the characters or switch</p> <p>6 to another way if they get tired.</p> <p>7 Q Is there any way to generalize what's a</p> <p>8 common character size that people with print</p> <p>9 disabilities would be able to read?</p> <p>10 MR. KAPLAN: Objection; vague.</p> <p>11 THE WITNESS: The -- there is a small</p> <p>12 segment of the publishing industry that produces</p> <p>13 large-print books, and they tend to pick a single</p> <p>14 standard point size as meeting the needs of a</p> <p>15 significant slice of visually impaired people. It's</p> <p>16 not practical to produce 10 different sizes in text,</p> <p>17 so...</p> <p>18 BY MS. RUBEL:</p> <p>19 Q Do you know what size characters those</p> <p>20 publishers use when they're printing large-print</p> <p>21 text?</p> <p>22 A I don't have the exact knowledge.</p> <p>23 Q And the third method you described earlier</p> <p>24 was use of a screen reader. Can you explain how</p> <p>25 that works?</p>

18	<p>1 A Actually, I described using synthetic 2 speech, and the screen reader is just one of the 3 ways that you use synthetic speech. 4 Would you like me to talk about synthetic 5 speech or screen readers? 6 Q Let's talk about synthetic speech 7 generally first, and I appreciate the -- the 8 clarification. 9 A So synthetic speech is a technology that 10 will take a text stream and turn it into an audio 11 stream, and it can be done sort of on the fly, and 12 it can also be done in a separate process. 13 So, for example, a separate process would 14 be I could take a chapter from a book and create an 15 MP3 of that book where a synthetic voice is 16 narrating that -- that chapter. And then I could 17 hand a person an MP3 file of that chapter or the 18 entire book. 19 It's also possible to have a program that 20 does synthetic speech reading. There are dedicated 21 reading programs. Its primary goal is to help you 22 read a digital book, and you can turn on the 23 text-to-speech, and it will read the text aloud. 24 There are screen readers for blind people that are 25 generally how blind people and people with other</p>	20	<p>1 Recognition Systems, Inc.? 2 A A for-profit developer of optical 3 character recognition technology. 4 Q And what was your position there? 5 A At the time when I separated, Vice 6 President of Marketing. 7 Q How long were you employed at Calera? 8 A Seven years. 9 Q What other positions did you hold, other 10 than Vice President of Marketing? 11 A I was also the Vice President of Finance, 12 Chief Financial Officer. 13 Q Any others? 14 A I think I was briefly Executive Vice 15 President. 16 Q And prior to your work at Calera, where 17 did you work? 18 A I was a co-founder of a startup that never 19 got funded, so I worked there without significant 20 compensation, named Phoenix Engineering, Inc. 21 Q And what was your position there? 22 A I -- Vice President, but I don't remember 23 more details than that. 24 Q And I know we're stretching back many 25 years at this point. Approximately what was the</p>
19	<p>1 print disabilities access whatever information shows 2 up on a screen that they can access. 3 So, for example, if I am a blind person 4 using Microsoft Word, I have an ability to say, 5 "Read me the text that's on the screen," or "Say 6 each word after I type it" as it's typed. 7 And there's-- there's a wide variety of 8 different programs that use text-to-speech. I could 9 go on at length, but I'll let you ask follow-ups. 10 Q Okay. 11 So you've -- you've described several 12 different types of synthetic speech processes, I 13 guess we could call them. 14 And I believe the last one that you were 15 discussing specifically was screen readers? 16 A Uh-huh. 17 Q Okay. 18 Let's go back to your employment history. 19 We've talked about Benetech and then Arkenstone. 20 A Uh-huh. 21 Q Where did you work before that? 22 A Quite a number of places. Immediately 23 before Arkenstone, I had full-time employment at 24 Calera Recognition Systems, Inc. 25 Q And what kind of company was Calera</p>	21	<p>1 time frame that you worked there? 2 A 1981. 1981. 3 Q And I think we'll do just maybe one job 4 before then; if you recall, what was your position 5 before that? 6 A I was at GCH Incorporated as an electrical 7 engineer. 8 Q And what type of work did you do there? 9 A I worked on a private rocket project. 10 Q What is your educational background? 11 A I have degrees from the California 12 Institute of Technology, also known as Caltech, in 13 engineering and applied physics. 14 Q What type of degree do you have in 15 engineering? 16 A My concentration was in electrical 17 engineering. 18 Q And is that a master's degree? 19 A It's a bachelor's. 20 Q And applied physics? 21 A A master's degree. 22 Q Have you ever taken a legal class? 23 A No. 24 Q So you're not a lawyer? 25 A I am not a lawyer.</p>

22	<p>1 Q Do you claim any expertise on any legal</p> <p>2 issues?</p> <p>3 MR. KAPLAN: Objection; vague.</p> <p>4 THE WITNESS: Not beyond being the Chief</p> <p>5 Financial Officer or Chief Executive Officer of</p> <p>6 corporations where part of my job was to engage</p> <p>7 attorneys to represent our organizations.</p> <p>8 BY MS. RUBEL:</p> <p>9 Q Do you have any expertise in any legal</p> <p>10 issues that relate to copyright?</p> <p>11 MR. KAPLAN: Objection; vague.</p> <p>12 THE WITNESS: I am not a lawyer, but as a</p> <p>13 leading practitioner creating a library for the</p> <p>14 blind and dyslexic, I need to be familiar with</p> <p>15 copyright law to the extent to operate our</p> <p>16 institution.</p> <p>17 BY MS. RUBEL:</p> <p>18 Q So you would describe yourself as familiar</p> <p>19 with some legal issues related to copyright?</p> <p>20 MR. KAPLAN: Objection; misstates</p> <p>21 testimony, vague.</p> <p>22 THE WITNESS: I seek advice from counsel</p> <p>23 on issues that I believe touch on copyright law.</p> <p>24 MR. KAPLAN: I'll remind the witness that</p> <p>25 you don't have to get into the content of your</p>	24	<p>1 as advised by legal experts.</p> <p>2 BY MS. RUBEL:</p> <p>3 Q I'm not trying to ask a tricky question.</p> <p>4 I'm trying to understand if you're -- if you're</p> <p>5 representing that you have expertise on copyright</p> <p>6 law. So I think it should be a simple answer.</p> <p>7 MR. KAPLAN: Objection; vague, calls for a</p> <p>8 legal conclusion, and I'm not sure that counsel's</p> <p>9 testimony regarding the nature of her question is an</p> <p>10 appropriate part of a question.</p> <p>11 THE WITNESS: I go to some lengths to say</p> <p>12 that I'm not a lawyer when people ask me about legal</p> <p>13 matters. I'm happy to tell my peers, "If you're</p> <p>14 talking to your lawyer, be sure to ask these</p> <p>15 questions." So -- but I don't think I represent</p> <p>16 myself as a legal expert. I think I'd be very</p> <p>17 careful about that.</p> <p>18 BY MS. RUBEL:</p> <p>19 Q In connection with this case --</p> <p>20 A This case, yes.</p> <p>21 Q -- are you representing yourself as</p> <p>22 someone who has expertise in copyright law?</p> <p>23 A No --</p> <p>24 MR. KAPLAN: Objection; vague, calls for a</p> <p>25 legal conclusion, but go ahead and answer.</p>
23	<p>1 privileged communications with counsel.</p> <p>2 THE WITNESS: Thank you.</p> <p>3 BY MS. RUBEL:</p> <p>4 Q You stated just a moment ago that you need</p> <p>5 to be familiar with copyright law to the extent</p> <p>6 necessary to operate your institution.</p> <p>7 A Correct.</p> <p>8 Q So you have some familiarity with legal</p> <p>9 issues related to copyright; is that right?</p> <p>10 MR. KAPLAN: Objection; vague.</p> <p>11 THE WITNESS: I am an engineer that builds</p> <p>12 tools and services that operate in the copyright</p> <p>13 regime, and I try to familiarize myself with</p> <p>14 requirements so that I can build the products so</p> <p>15 that our organization is compliant as advised by our</p> <p>16 counsel.</p> <p>17 BY MS. RUBEL:</p> <p>18 Q But you don't claim to be an expert on</p> <p>19 copyright law?</p> <p>20 MR. KAPLAN: Objection; calls for a legal</p> <p>21 conclusion, vague.</p> <p>22 THE WITNESS: I operate one of the leading</p> <p>23 libraries for the blind and dyslexic, and we operate</p> <p>24 in the copyright regime, and I consider myself</p> <p>25 familiar with the constraints that we operate under</p>	25	<p>1 THE WITNESS: No. Apologies for jumping</p> <p>2 to an answer.</p> <p>3 No. In this case, I'm expressing</p> <p>4 accessibility conclusions and not legal conclusions,</p> <p>5 and I'm not representing myself as a legal expert in</p> <p>6 the matters in this case.</p> <p>7 BY MS. RUBEL:</p> <p>8 Q Are you representing yourself in this case</p> <p>9 as an expert on licensing issues?</p> <p>10 MR. KAPLAN: Objection; calls for a legal</p> <p>11 conclusion, vague.</p> <p>12 THE WITNESS: No.</p> <p>13 BY MS. RUBEL:</p> <p>14 Q Are you an expert on the development of</p> <p>15 standards?</p> <p>16 MR. KAPLAN: Objection; vague, calls for a</p> <p>17 legal conclusion.</p> <p>18 THE WITNESS: My organization is actively</p> <p>19 involved in standards development, and so I oversee</p> <p>20 people who have been involved in standards efforts.</p> <p>21 BY MS. RUBEL:</p> <p>22 Q What standards is your organization</p> <p>23 involved in developing standard -- in developing?</p> <p>24 Excuse me.</p> <p>25 A We have been involved in standards that</p>

26	<p>1 involve accessibility, specifically the DAISY 2 standard, the EPUB standard and the Accessibility 3 Metadata standard. 4 Q Are those three standards that you just 5 mentioned all developed by the same entity or under 6 the auspices of the same entity? 7 A No. 8 Q Okay. 9 Then let's take them one at a time. The 10 DAISY Standard, how is that standard developed? 11 A The DAISY Consortium is the consortium of 12 most of the libraries for the blind and dyslexic in 13 the world, and they create a standard for accessible 14 content that our libraries create. 15 Q So is there an entity that convenes the 16 participants in the development process? 17 MR. KAPLAN: Objection; foundation, vague, 18 relevance. 19 THE WITNESS: The DAISY Consortium is a 20 nonprofit with members, with working groups, and I 21 believe that there's a working group that focuses on 22 the standard as opposed to other elements of the 23 DAISY Consortium's work. 24 BY MS. RUBEL: 25 Q And the DAISY Consortium convenes groups</p>	28
27	<p>1 of volunteers to work on developing their standards? 2 MR. KAPLAN: Objection; lacks foundation, 3 vague, relevance. 4 THE WITNESS: Generally, the people 5 working on the standards are employed by member 6 libraries, so I wouldn't characterize them as 7 volunteers. 8 BY MS. RUBEL: 9 Q They don't work for the DAISY Consortium? 10 A No. They work for the member libraries, 11 though there are a few people who work for the DAISY 12 Consortium that are involved in the standards 13 practice, like the Chief Technology Officer of the 14 Consortium. 15 Q Does the DAISY Consortium own the 16 standards that the employees of the member libraries 17 help to develop? 18 MR. KAPLAN: Objection; lacks foundation, 19 calls for a legal conclusion, vague. 20 THE WITNESS: I'm not certain, but I would 21 expect the DAISY Consortium owns the copyright but 22 makes the standard freely available. 23 BY MS. RUBEL: 24 Q Do you know how the DAISY Consortium is 25 funded?</p>	29

30	<p>1 A So if a publisher creates a book today in 2 the United States, it's highly likely that they will 3 sell it in eBook form. It's likely that at some 4 point during the production process, they will 5 create an EPUB version of that title, and there are 6 automated conversion technologies to turn that EPUB 7 book into an Apple format eBook or an Amazon Kindle 8 format eBook or many other formats. So it's a 9 common format for eBooks that a lot of proprietary 10 formats are designed to incorporate. 11 Q Okay. 12 I think we'll come back to this general 13 topic a little bit later, but can you describe how 14 the International Digital Publishing Forum develops 15 the EPUB standard? 16 A They have a standards effort, again, where 17 members of the IDPF play a leading role. I'm less 18 familiar with the details of how that works, but, 19 you know, please ask more questions and I can try to 20 help. 21 Q The third standard you mentioned before 22 was the Accessibility Metadata standard. Can you 23 explain what that is? 24 A The goal of this standard is to make it 25 easier for disabled people when using search engines</p>	32	<p>1 little more clarification. 2 You said, "I assume it's open because 3 we're closely involved." Do you mean you assume 4 that it's open because Benetech is closely involved? 5 A I -- I think the -- our goal in being 6 involved in proposing the standard was to encourage 7 all publishers, especially of educational material, 8 to label their books or educational videos on 9 whether it was accessible, and so I'm 90 percent -- 10 99 percent certain that the standard is openly 11 available so that we can encourage maximum adoption 12 of this standard so that as many works are made 13 accessible to our disabled community as possible. 14 Q Do you know if any of the three entities 15 that you mentioned develops voluntary consensus 16 standards? 17 MR. KAPLAN: Objection; vague. 18 THE WITNESS: I'm not familiar with the 19 meaning of that as a term of art. 20 BY MS. RUBEL: 21 Q Do you have any understanding of what that 22 phrase means? 23 A Well, the common understanding is, is it 24 voluntary and is it developed through consensus? I 25 think that certainly the standards process we are</p>
31	<p>1 to find content that will be accessible to them. 2 Q And how do they do that? 3 A I'm going to try to remember. There is -- 4 the name is eluding me at the moment, but there is a 5 standards body that is dominated by the major search 6 engine vendors, and they come up with standards for 7 metadata for search engines, and my organization 8 proposed this particular metadata standard around 9 accessibility, and it was accepted by this body. 10 Let's see, trying to remember what the 11 name is, but... 12 Q Does that body own the copyright in the 13 Accessibility Metadata standard? 14 MR. KAPLAN: Objection; calls for a legal 15 conclusion, lacks foundation, vague. 16 THE WITNESS: I'm not familiar with the 17 ownership or licensing provisions, other than I 18 assume it's open because we're closely involved. 19 BY MS. RUBEL: 20 Q What do you mean by that? 21 A I -- I believe that anyone can get a copy 22 of this standard and implement it, and certainly 23 we're encouraging people to make accessible 24 material. 25 Q I guess it would be helpful to get a</p>	33	<p>1 involved with has a process of, you know, presenting 2 a standard, getting feedback on the standard, 3 responding to the comments on the standard. There's 4 processes in that that involve engaging the 5 community. I'm familiar with those processes and 6 certainly they characterize the process that my team 7 has been involved with. 8 Q I'll represent to you that voluntary 9 consensus standards as a term of art also includes a 10 requirement that there be a balance of membership in 11 the committees that are developing the standards so 12 that many different groups are represented: 13 Manufacturers, consumers, government regulators, 14 academics. 15 Do you know if any of the organizations 16 that develop the three standards you mentioned focus 17 on that type of balance of membership making up the 18 committees? 19 A I'm not familiar -- 20 MR. KAPLAN: Objection; vague. 21 THE WITNESS: Sorry. I'm not familiar 22 with their membership constituency policies. 23 BY MS. RUBEL: 24 Q So you're not -- 25 You don't know that that's something that</p>

34	<p>1 they prioritize? 2 MR. KAPLAN: Objection; asked and 3 answered, vague. 4 THE WITNESS: I'm not aware of it. 5 BY MS. RUBEL: 6 Q In your experience on the committees, did 7 you notice any sort of balance? 8 MR. KAPLAN: Objection; assumes facts not 9 in evidence, vague. 10 THE WITNESS: I'm not actually on the 11 committees, so please ask the question again. 12 BY MS. RUBEL: 13 Q From what you've heard from others at 14 Benetech who have participated in the development of 15 the standards, are you able to -- do you have any 16 information about whether they've observed any kind 17 of balance of membership? 18 MR. KAPLAN: Objection; assumes facts not 19 in evidence, vague. 20 THE WITNESS: I guess I'm familiar with 21 the fact that members -- that people involved in the 22 standards process do represent different interests. 23 I mean, I'm aware of sort of who's at the -- around 24 the table at the different standards bodies, so I'm 25 aware that not all of them are the same.</p>	36
35	<p>1 BY MS. RUBEL: 2 Q For the DAISY Consortium, you mentioned 3 that a full member pays 15 to \$30,000 per year. Do 4 you think that might be a barrier to participation 5 for any -- for anybody? 6 MR. KAPLAN: Objection; argumentative, 7 calls for speculation, misstates testimony. 8 THE WITNESS: I'm aware that developing 9 world libraries get a special deal so that it's more 10 accessible for them. 11 BY MS. RUBEL: 12 Q Do you know how much they have to pay? 13 A No. 14 Q Are you familiar with the process through 15 which any of the Plaintiffs' standards are 16 developed? 17 MR. KAPLAN: Objection; vague. 18 THE WITNESS: I'm not actively involved 19 with the fields where they are active, so I'm not 20 familiar with their particular standards development 21 processes. 22 BY MS. RUBEL: 23 Q Do you consider yourself an expert on 24 blindness? 25 MR. KAPLAN: Objection; vague, calls for a</p>	37

38	<p>1 Can we take a brief break so I can have a 2 little bit of liquid? 3 MS. RUBEL: Sure. I meant to actually 4 instruct you at the beginning that you can ask for a 5 break at any time. If it's just to take a sip of 6 water, we don't need to go off the record. 7 THE WITNESS: Okay. That's good. Thank 8 you. 9 MR. KAPLAN: Counsel, do you intend to 10 take a break, like, at the hour mark or do you have 11 a -- 12 MS. RUBEL: Yeah, that's fine. How long 13 have we been going? 14 THE VIDEOGRAPHER: 44 minutes. 15 MS. RUBEL: Okay. Let's try to go another 16 15 minutes. If at any time you need a break, just 17 let me know and I'll try to get to the end of a 18 series of questions to allow you to have a break. 19 THE WITNESS: I'm good with another 15, 20 20 minutes, no problem. 21 MS. RUBEL: Great. 22 BY MS. RUBEL: 23 Q Have you ever served as an expert in a 24 litigation matter before? 25 A I'm not an expert in the technical term,</p>	40
39	<p>1 but I don't believe that I've served as an expert 2 witness in a legal matter. 3 Q Have you ever provided a declaration in a 4 legal matter? 5 A I understand that I have provided a 6 declaration. 7 Q And what matter was that? 8 A HathiTrust, H-A-T-H-I-T-R-U-S-T. I think 9 actually it's -- I think it's Authors Guild v. 10 HathiTrust or HathiTrust (pronounced differently). 11 Q But you were not deposed in connection 12 with that matter? 13 A Correct. 14 Q Was your declaration cited in any court 15 decision in that case? 16 MR. KAPLAN: Objection; argumentative, 17 lacks foundation. 18 THE WITNESS: I believe that materials I 19 provided in that case were cited in -- by the Court. 20 That's my understanding. 21 BY MS. RUBEL: 22 Q And is it your belief that they were cited 23 in the district court opinion related to that case? 24 MR. KAPLAN: Objection; argumentative, 25 lacks foundation.</p>	41

42	<p>1 THE WITNESS: Yes.</p> <p>2 BY MS. RUBEL:</p> <p>3 Q Have there been issues with technology</p> <p>4 providers disabling access to eBooks for people with</p> <p>5 print disabilities?</p> <p>6 MR. KAPLAN: Objection; vague, calls for</p> <p>7 speculation.</p> <p>8 THE WITNESS: There have been issues with</p> <p>9 technology providers providing the ability to</p> <p>10 disable access and that capability being utilized.</p> <p>11 Yes.</p> <p>12 BY MS. RUBEL:</p> <p>13 Q What's your understanding of why the</p> <p>14 technology providers were making it possible to</p> <p>15 disable access to the eBooks for people with print</p> <p>16 disabilities?</p> <p>17 A Public statements by different</p> <p>18 stakeholders have mentioned concerns over rights.</p> <p>19 Did they have the right to provide that, piracy, as</p> <p>20 it's labeled by some, making of unauthorized copies?</p> <p>21 Probably the top two issues that I've heard</p> <p>22 discussed.</p> <p>23 Q Who do you mean by the "making of</p> <p>24 unauthorized copies"?</p> <p>25 A I guess that's kind of a legal conclusion</p>	44	<p>1 MR. KAPLAN: Objection; vague.</p> <p>2 THE WITNESS: In my opinion, I think it's</p> <p>3 not a -- I don't think it's in their interests.</p> <p>4 BY MS. RUBEL:</p> <p>5 Q You don't think what is in their</p> <p>6 interests?</p> <p>7 A I think that the technical protection</p> <p>8 mechanisms make their product less attractive to</p> <p>9 consumers.</p> <p>10 Q Well, let me take a step back.</p> <p>11 A Uh-huh.</p> <p>12 Q My question was: Do you think it's a</p> <p>13 valid concern for publishers to be worried that</p> <p>14 consumers may make copies to give away to other</p> <p>15 people? So I want to understand how your response</p> <p>16 is responsive to my question.</p> <p>17 MR. KAPLAN: Is there a question, Counsel?</p> <p>18 BY MS. RUBEL:</p> <p>19 Q Do you think it's a valid concern for</p> <p>20 publishers that -- to want to prevent consumers from</p> <p>21 making copies to give away?</p> <p>22 MR. KAPLAN: Objection; vague.</p> <p>23 THE WITNESS: I think that the way that</p> <p>24 publishers try to prevent making of copies is not in</p> <p>25 their interest; so no, I don't think it's a valid</p>
43	<p>1 whether it's authorized or not, but the Authors</p> <p>2 Guild, for example, or authors would like to get</p> <p>3 control of the making of copies. That's, I think,</p> <p>4 my understanding of what copyright is; the ability</p> <p>5 to control who makes copies.</p> <p>6 Q So was there some concern that providing</p> <p>7 access to eBooks for people with print disabilities</p> <p>8 was somehow letting go of control over who was going</p> <p>9 to be able to make copies of the material?</p> <p>10 MR. KAPLAN: Objection; vague, lacks</p> <p>11 foundation and calls for speculation, argumentative.</p> <p>12 THE WITNESS: I would say that the</p> <p>13 interests of people with disabilities was not the</p> <p>14 primary reason for disabling or making it hard to</p> <p>15 make copies of material. I think the interests of</p> <p>16 disabled people was a secondary issue or...</p> <p>17 BY MS. RUBEL:</p> <p>18 Q So what were the primary issues?</p> <p>19 MR. KAPLAN: Objection; lacks foundation,</p> <p>20 calls for speculation, vague.</p> <p>21 THE WITNESS: I think that authors and</p> <p>22 publishers want to make it difficult for a consumer</p> <p>23 to make copies to give away to other people.</p> <p>24 BY MS. RUBEL:</p> <p>25 Q Do you think that's a valid concern?</p>	45	<p>1 concern because I think they -- their interests</p> <p>2 would be better served if they didn't use those</p> <p>3 technologies.</p> <p>4 BY MS. RUBEL:</p> <p>5 Q Why do you think the use of those</p> <p>6 technology -- technological mechanisms is not in</p> <p>7 their interests?</p> <p>8 MR. KAPLAN: Objection; vague.</p> <p>9 THE WITNESS: To pick one particular</p> <p>10 example, publishers who have taken off technical</p> <p>11 protection mechanisms on titles sold more copies of</p> <p>12 the books that didn't have those mechanisms on them</p> <p>13 than the ones that did. So the interpretation in</p> <p>14 the industry is from people who advocate TPM-free</p> <p>15 books is that it's in their interest because they</p> <p>16 will sell more books.</p> <p>17 BY MS. RUBEL:</p> <p>18 Q What publisher took off the technical</p> <p>19 protections and sold more copies of the books after</p> <p>20 making -- after taking that step?</p> <p>21 MR. KAPLAN: Objection; argumentative.</p> <p>22 THE WITNESS: I'm familiar that O'Reilly</p> <p>23 Media, Baen, B-A-E-N, Books, and I'm also familiar</p> <p>24 that this year all but one of Germany's major</p> <p>25 publishers have all gone technical protection</p>

46	<p>1 mechanism free, as reported in industry 2 publications. 3 BY MS. RUBEL: 4 Q It's your understanding that when those -- 5 Let's focus on just the American 6 publishers for now. 7 When those -- when O'Reilley Media and 8 Baen Books removed the technical protections, they 9 actually sold more copies of the materials? 10 A That was their expressed experience as 11 communicated to the publishing industry. 12 Q And how did they communicate that to the 13 publishing industry? 14 A I don't know. Writing blog posts on their 15 experience. 16 Q Any other way? 17 A It gets discussed at conferences. It gets 18 discussed in the industry media. It's a major topic 19 in the field. 20 Q Are you aware of any other publishers who 21 have removed those technical protection mechanisms 22 who have then reported that they've not sold more 23 copies? 24 MR. KAPLAN: Objection; vague. 25 THE WITNESS: I haven't read those</p>	48	<p>1 BY MS. RUBEL: 2 Q So it's your belief that the technical 3 protection mechanisms that publishers use are not 4 actually in their self-interest economically? 5 MR. KAPLAN: Objection; vague, 6 argumentative. 7 THE WITNESS: I've certainly made that 8 case to them. 9 BY MS. RUBEL: 10 Q Have you had any resistance when you've 11 tried to make that case to them? 12 MR. KAPLAN: Objection; vague. 13 THE WITNESS: Publishers don't tend to 14 resist my organization. 15 BY MS. RUBEL: 16 Q Why is that? 17 A Because we're the leading library for 18 blind and dyslexic people in the country, and most 19 publishers find that a worthwhile endeavor. 20 Q But my understanding of your responses 21 before was that you're encouraging the publishers to 22 remove their technical protection mechanisms not 23 only for people who have print disabilities but 24 generally; is that correct? 25 MR. KAPLAN: Objection; vague, misleading.</p>
47	<p>1 articles, if they do exist. 2 BY MS. RUBEL: 3 Q Do publishers generally agree that if they 4 remove the protection mechanisms, they will sell 5 more copies? 6 MR. KAPLAN: Objection; calls for 7 speculation, vague, lacks foundation, relevance. 8 THE WITNESS: My sense is that more and 9 more publishers have shifted their position over 10 time. I can't characterize the precise percentages. 11 BY MS. RUBEL: 12 Q Are you aware of any publishers, other 13 than O'Reilley Media and Baen Books, in the United 14 States who have removed the technical protection 15 mechanisms from their publications? 16 A I'm certain they exist. I don't have 17 precise names. 18 Q Would you describe O'Reilley Media and 19 Baen Books as major publishers? 20 MR. KAPLAN: Objection; vague. 21 THE WITNESS: In the technical field, I'd 22 consider O'Reilley one of the top publishers and 23 Baen Books one of the top publishers of science 24 fiction. 25</p>	49	<p>1 THE WITNESS: That's correct. 2 BY MS. RUBEL: 3 Q Are you aware of any publisher to whom 4 you've made that recommendation who has followed 5 your advice? 6 MR. KAPLAN: Objection; vague. 7 THE WITNESS: Yes. We believe that we 8 have made good progress with publishers around our 9 advice to make their works more accessible to people 10 with disabilities. 11 BY MS. RUBEL: 12 Q Let me clarify my question a little bit. 13 My understanding is that what you've 14 recommended to publishers is to remove their -- 15 their technical protections for the public in 16 general; is that correct? 17 MR. KAPLAN: Objection; vague, misstates 18 testimony. 19 THE WITNESS: That's correct. 20 BY MS. RUBEL: 21 Q And are you aware of any publisher who, 22 after receiving that advice from you, removed the 23 technical protections for the public in general? 24 MR. KAPLAN: Objection; vague, asked and 25 answered.</p>

50	<p>1 THE WITNESS: My primary role at Benetech 2 is as a public spokesman. We have other people who 3 deal directly with the publishing industry, and I am 4 aware that we have a handful of major publishers 5 working to make their works more -- their mainstream 6 works more accessible, and -- which includes getting 7 rid of technical protection mechanisms that prohibit 8 the access by people with disabilities and making 9 the materials they create more accessible to people 10 with disabilities. 11 That's a area of effort for my team. 12 BY MS. RUBEL: 13 Q And -- and I understand that piece. I 14 guess what I'm trying to understand is, are you 15 aware of any publishing company that has removed the 16 technical protections as to the public in general, 17 not just people with print disabilities? 18 MR. KAPLAN: Objection; vague, lacks 19 foundation. 20 THE WITNESS: I'm certain if I research 21 that, I'd come up with more names. I don't have the 22 names here today. 23 BY MS. RUBEL: 24 Q Is it the general practice in the 25 publishing industry to use technical protection</p>	52
51	<p>1 mechanisms in connection with eBooks? 2 MR. KAPLAN: Objection; competence, lacks 3 foundation, vague. 4 THE WITNESS: As I've noted, I believe 5 more and more publishers are getting rid of them, so 6 it has gone from being a general practice to being 7 one where there are significant publishers on both 8 sides, and the trends are in favor of getting rid of 9 technical protection mechanisms. 10 MS. RUBEL: This, I think, might be a good 11 time for us to take our first break. 12 THE VIDEOGRAPHER: We're going off the 13 record. The time is 10:37. 14 (Recess taken.) 15 THE VIDEOGRAPHER: Okay. We're back on 16 the record at 10:55. 17 BY MS. RUBEL: 18 Q Are you familiar with the Chafee 19 Amendment? 20 A I am. 21 Q Can you tell me what your understanding of 22 the Chafee Amendment is? 23 A It's a copyright exception in U.S. law. 24 Q And who does it provide an exception for? 25 A Authorized entities.</p>	53

54	<p>1 to ensure that we only distribute them to people who 2 have qualifying disabilities. Yes. 3 BY MS. RUBEL: 4 Q Why is that? 5 A Because -- 6 MR. KAPLAN: Objection; calls for a legal 7 conclusion, calls for speculation, vague. 8 THE WITNESS: I -- I believe that's the 9 language of the statute, that it's -- that it's 10 making the materials available for people with 11 disabilities. 12 BY MS. RUBEL: 13 Q And I think you mentioned that Benetech 14 operates as a nonprofit that you would consider an 15 authorized entity under the Chafee Amendment? 16 MR. KAPLAN: Objection; misstates 17 testimony, calls for a legal conclusion, vague. 18 THE WITNESS: Yes. 19 BY MS. RUBEL: 20 Q Are there any other requirements that 21 Benetech must meet in order to provide copies of 22 literary works to people with print disabilities 23 under the Chafee Amendment? 24 MR. KAPLAN: Objection; calls for a legal 25 conclusion, vague.</p>	56	<p>1 goal of serving people with disabilities; is that 2 right? 3 MR. KAPLAN: Objection; misstates the 4 testimony. 5 THE WITNESS: I don't think the word 6 "goal" appears in the statute, but that's the sense 7 of it, yes. 8 BY MS. RUBEL: 9 Q And how -- do you advise people on whether 10 they would qualify as an authorized entity under the 11 Chafee Amendment? 12 MR. KAPLAN: Objection; vague. 13 THE WITNESS: Are you done? 14 MR. KAPLAN: No. 15 Counsel, I need to take a break to discuss 16 privilege issues with my client. Is that okay? 17 MS. RUBEL: Sure. 18 THE VIDEOGRAPHER: Off the record at 19 11:01. 20 (Whereupon, the witness and counsel 21 left the conference room and 22 returned.) 23 THE VIDEOGRAPHER: We're back on the 24 record at 11:04. 25</p>
55	<p>1 THE WITNESS: As stated earlier, I believe 2 the two primary requirements is that we be a 3 nonprofit or a government agency and that we have a 4 primary mission to serve people with disabilities. 5 Those -- those are the ones that stick in my mind 6 from the statute. 7 BY MS. RUBEL: 8 Q Are there any notices that Benetech places 9 on the material that it copies? 10 MR. KAPLAN: Objection; argumentative, 11 vague. 12 THE WITNESS: Yes, we place a notice. 13 BY MS. RUBEL: 14 Q What does the notice say? 15 A Our notice says that this is copyrighted 16 material being made available under copyright 17 exceptions and other provisions, should only be 18 available to people with print disabilities, and I 19 believe the Chafee Amendment stipulates that we have 20 to specify the title, the author and the copyright 21 date. 22 Q And you indicated that one of the 23 requirements under the Chafee Amendment is that the 24 entity who seeks to make copies of the works 25 available must have as one of its primary missions a</p>	57	<p>1 BY MS. RUBEL: 2 Q The question that was pending was: Do you 3 advise people on whether they would qualify as an 4 authorized entity under the Chafee Amendment? 5 MR. KAPLAN: Objection; vague, calls for a 6 legal conclusion. 7 THE WITNESS: I don't provide legal advice 8 to people on these topics. I'm not a lawyer. 9 BY MS. RUBEL: 10 Q Has anybody ever -- 11 Has any entity ever asked you your 12 nonlegal opinion on whether they could be considered 13 an authorized entity under the Chafee Amendment? 14 MR. KAPLAN: Objection; vague, calls for a 15 legal conclusion. 16 If you understand the question, you can 17 answer. 18 THE WITNESS: I have discussed with people 19 the Chafee Amendment and advised them to consult a 20 lawyer but discussed how we implement the Chafee 21 Amendment as a library for the blind. 22 BY MS. RUBEL: 23 Q Have you discussed your thoughts on how an 24 entity would determine if one of its primary 25 missions was to serve people with disabilities?</p>

58	<p>1 MR. KAPLAN: Objection; vague, calls for a 2 legal conclusion. 3 And I'll instruct the witness not to 4 discuss any privileged communications. 5 THE WITNESS: I mentioned the 6 qualifications, much as I have in my earlier 7 testimony, and suggest they consult with a lawyer. 8 I do not advise them on whether or not they have 9 done the things that trigger that provision or not. 10 That's just not something I can do for them. 11 BY MS. RUBEL: 12 Q What is your understanding of how it would 13 be determined whether an entity -- one of an 14 entity's primary missions is to serve people with 15 disabilities? 16 MR. KAPLAN: Objection; calls for a legal 17 conclusion, competence, vague. 18 THE WITNESS: Yeah. That really seems 19 like a legal question. 20 BY MS. RUBEL: 21 Q Do you have an understanding of how that 22 determination would be made? 23 MR. KAPLAN: Objection; vague. 24 THE WITNESS: If the question is whether 25 there's a formal process for applying to become an</p>	60
59	<p>1 authorized entity in the United States, my 2 understanding is the answer is no. 3 BY MS. RUBEL: 4 Q So what is your understanding of how that 5 would be determined? 6 MR. KAPLAN: Objection; vague. 7 THE WITNESS: I think that's privileged, 8 talking to our lawyer. 9 BY MS. RUBEL: 10 Q So your understanding is based on 11 conversations with your lawyer? 12 A Yes. 13 Q Do you have any independent understanding 14 of how it would be determined if an entity had a 15 primary mission of serving people with disabilities? 16 MR. KAPLAN: Objection; vague. 17 THE WITNESS: I'm not sure I understand 18 the question. 19 BY MS. RUBEL: 20 Q Prior to your discussions with counsel, 21 did you have any understanding of how that 22 determination would be made? 23 MR. KAPLAN: Objection; very vague. 24 THE WITNESS: No. 25</p>	61
60	<p>1 BY MS. RUBEL: 2 Q Did Carl Malamud ever discuss with you 3 whether Public Resource could qualify as an 4 authorized entity under the Chafee Amendment? 5 MR. KAPLAN: Objection; vague and calls 6 for a legal conclusion. 7 THE WITNESS: No. 8 BY MS. RUBEL: 9 Q Have you ever had any discussions with 10 Carl Malamud about the Chafee Amendment? 11 A No. 12 Q Do you believe that Public Resource would 13 qualify as an authorized entity under the Chafee 14 Amendment? 15 MR. KAPLAN: Objection; you're asking my 16 witness to provide a legal opinion? 17 MS. RUBEL: I'm asking whether he has an 18 opinion about whether Public Resource would qualify 19 as an authorized entity. 20 MR. KAPLAN: I'll object as lacks 21 foundation, competence, calls for speculation, 22 vague, calls for various legal conclusion. 23 Say it again. 24 THE WITNESS: I haven't thought about 25 evaluating them on -- on those bases.</p>	61
61	<p>1 BY MS. RUBEL: 2 Q Well, I'm asking you to think about it 3 right now. 4 Do you have an opinion on whether they 5 would qualify as an authorized entity under the 6 Chafee Amendment? 7 MR. KAPLAN: Objection; lacks foundation, 8 incomplete hypothetical, calls for a legal 9 conclusion. 10 Counsel, this seems like a really 11 inappropriate question. 12 THE WITNESS: I don't know enough about 13 how Public Resource operates to know whether or not 14 they qualify. I'm not aware of those facts. All I 15 believe is that they're a nonprofit. 16 BY MS. RUBEL: 17 Q Do you know whether they have a primary 18 mission of serving people with disabilities? 19 MR. KAPLAN: Objection; calls for a legal 20 conclusion, calls for speculation, lacks foundation. 21 THE WITNESS: I'm not aware. 22 BY MS. RUBEL: 23 Q Do you know the history of the Chafee 24 Amendment? 25 MR. KAPLAN: Objection; vague.</p>	62

62	<p>1 THE WITNESS: Yes.</p> <p>2 BY MS. RUBEL:</p> <p>3 Q Can you describe it?</p> <p>4 A In 1996 Senator Chafee of Rhode Island</p> <p>5 proposed an amendment in copyright that would create</p> <p>6 this exception.</p> <p>7 Q And that was subsequently passed by</p> <p>8 Congress?</p> <p>9 A My understanding is in 1996 they did.</p> <p>10 Q Okay.</p> <p>11 And is it your understanding that is now</p> <p>12 part of the Copyright Act?</p> <p>13 A Yes.</p> <p>14 Q Would you describe the Chafee Amendment as</p> <p>15 a social bargain between publishers and the</p> <p>16 disability community?</p> <p>17 A Yes.</p> <p>18 Q How -- how -- what makes it a social</p> <p>19 bargain?</p> <p>20 A I wasn't part of the negotiations around</p> <p>21 the Chafee Amendment, but my understanding was that</p> <p>22 prior to the Chafee Amendment, organizations helping</p> <p>23 the disabled had to get permission from a publisher</p> <p>24 to make an accessible copy and that many of those</p> <p>25 permissions requests were not responded to, and it's</p>	64	<p>1 essentially royalty-free permissions that -- they</p> <p>2 didn't have -- they didn't have to incur that</p> <p>3 transaction cost, which many of them did out of</p> <p>4 social responsibility. So if they had a copyright</p> <p>5 exception, you didn't have to bother with the</p> <p>6 permissions department and take their time.</p> <p>7 BY MS. RUBEL:</p> <p>8 Q Are there any other ways that -- that</p> <p>9 economic interests of publishers were served by the</p> <p>10 Chafee Amendment?</p> <p>11 MR. KAPLAN: Objection; vague, calls for</p> <p>12 speculation, lacks foundation.</p> <p>13 THE WITNESS: People with disabilities</p> <p>14 couldn't use print books, so the publishers didn't</p> <p>15 have a product for them. So I believe that it</p> <p>16 wasn't so much economics -- because a blind person</p> <p>17 couldn't use a print book -- it was more about</p> <p>18 helping the blind person actually get the book at</p> <p>19 the time in Braille, audio or -- or digital formats.</p> <p>20 So that's my best answer on that.</p> <p>21 MS. RUBEL: I'm going to mark an article.</p> <p>22 We're going to start with Exhibit 4000.</p> <p>23 (Plaintiffs' Exhibit 4000 marked</p> <p>24 for identification.)</p> <p>25</p>
63	<p>1 my understanding that the publishing industry and</p> <p>2 the disability community participated in the</p> <p>3 drafting of the Chafee Amendment; that it was</p> <p>4 supported by both publishers and the disability</p> <p>5 community, the terms of the -- well, I don't know.</p> <p>6 I wasn't there.</p> <p>7 Q And how does the Chafee Amendment protect</p> <p>8 the economic interests of the publishers?</p> <p>9 MR. KAPLAN: Objection; lacks foundation,</p> <p>10 calls for speculation, vague.</p> <p>11 THE WITNESS: I don't think Chafee talks</p> <p>12 about economics. I think it's more about helping</p> <p>13 disabled people.</p> <p>14 BY MS. RUBEL:</p> <p>15 Q But in -- in categorizing it or</p> <p>16 characterizing it as a social bargain, that suggests</p> <p>17 that each side got something.</p> <p>18 So I guess my question is: What did the</p> <p>19 publishers get?</p> <p>20 MR. KAPLAN: Objection; argumentative,</p> <p>21 vague, calls for speculation, lacks foundation.</p> <p>22 THE WITNESS: I think that the publishing</p> <p>23 industry had a tradition of helping disabled people</p> <p>24 and that the benefit they got -- one of the major</p> <p>25 benefits is that they didn't have to deal with</p>	65	<p>1 BY MS. RUBEL:</p> <p>2 Q Do you recognize what I have just had</p> <p>3 marked as Exhibit 1 -- sorry, Exhibit 4000?</p> <p>4 A Yes, I do.</p> <p>5 Q What is it?</p> <p>6 A It's an article from a journal that I was</p> <p>7 a co-author on.</p> <p>8 Q When was this written?</p> <p>9 A 2003, according to the caption.</p> <p>10 Q You mentioned you were a co-author; who</p> <p>11 was your co-author?</p> <p>12 A Allison Lingane.</p> <p>13 Q Did you actually do any of the drafting of</p> <p>14 this article?</p> <p>15 A I don't recall, but I would assume that I</p> <p>16 read it and edited it as part of the publication.</p> <p>17 Q So the final product represents your</p> <p>18 thoughts and understanding at the time?</p> <p>19 MR. KAPLAN: Objection; argumentative.</p> <p>20 THE WITNESS: Yes.</p> <p>21 BY MS. RUBEL:</p> <p>22 Q On the first page, the last paragraph of</p> <p>23 that first page --</p> <p>24 A Yep.</p> <p>25 Q -- the very first sentence, can you read</p>

66	<p>1 that out loud, please.</p> <p>2 A (Reading):</p> <p>3 "The essence of the social</p> <p>4 bargain between the publishers and</p> <p>5 the disability community was to</p> <p>6 provide easier access to people</p> <p>7 with disabilities while protecting</p> <p>8 the economic interests of</p> <p>9 publishers. Chafee was drawn</p> <p>10 narrowly to seal this bargain."</p> <p>11 Q That was the first two sentences of that</p> <p>12 third paragraph. So in that paragraph, you did</p> <p>13 mention the economic interests of publishers; is</p> <p>14 that right?</p> <p>15 A That is correct.</p> <p>16 Q What do you mean by providing easier</p> <p>17 access to people with disabilities while protecting</p> <p>18 the economic interests of publishers?</p> <p>19 MR. KAPLAN: Lacks foundation.</p> <p>20 If you recall.</p> <p>21 THE WITNESS: So at this point in time,</p> <p>22 we, in starting Bookshare, had had conversations</p> <p>23 with the publishers where they had asserted that</p> <p>24 concern.</p> <p>25</p>	68	
67	<p>1 BY MS. RUBEL:</p> <p>2 Q What concern were they asserting?</p> <p>3 A The economic interests, the concern about</p> <p>4 illegal copies or unauthorized copies.</p> <p>5 Q And what was the concern that they were</p> <p>6 articulating about illegal copies?</p> <p>7 A The publishing industry is very disparate,</p> <p>8 so different parts of the publishing industry had</p> <p>9 different opinions. I'd say the post-secondary</p> <p>10 textbook providers expressed a concern about</p> <p>11 unauthorized copies having an impact on their</p> <p>12 revenues in higher education.</p> <p>13 Q And how does that interact with the goal</p> <p>14 of providing easier access to people with</p> <p>15 disabilities?</p> <p>16 MR. KAPLAN: Objection; vague.</p> <p>17 THE WITNESS: Trying to figure out if I</p> <p>18 can -- so -- can you repeat the question so I make</p> <p>19 sure I'm on point.</p> <p>20 BY MS. RUBEL:</p> <p>21 Q How does that interact with the goal of</p> <p>22 providing easier access to people with disabilities?</p> <p>23 MR. KAPLAN: Objection; vague.</p> <p>24 THE WITNESS: When we spoke with the</p> <p>25 publishers, we were initially, I'd say, threatened</p>	<p>1 by the textbook publishers, and though they admitted</p> <p>2 there was no exception for textbooks in Chafee, they</p> <p>3 would prefer that we didn't focus on textbooks.</p> <p>4 And so in order to actually help blind</p> <p>5 people in the initial days of Bookshare, initial</p> <p>6 years, we focused on trade books rather than</p> <p>7 textbooks.</p> <p>8 I can talk about that because they</p> <p>9 threatened me even though they didn't talk to my</p> <p>10 counsel, right?</p> <p>11 MR. KAPLAN: Yeah. I mean --</p> <p>12 THE WITNESS: Okay. Okay. I can talk</p> <p>13 about those threats. Okay. I just want to make</p> <p>14 sure, because they did threaten us.</p> <p>15 MR. KAPLAN: Yeah. But generally if you</p> <p>16 aren't certain about whether or not something</p> <p>17 intrudes into privileged communications, you can</p> <p>18 always ask for a break and we can go discuss that.</p> <p>19 THE WITNESS: Okay. Thanks. Okay.</p> <p>20 BY MS. RUBEL:</p> <p>21 Q This article that was marked as</p> <p>22 Exhibit 4000, is that discussing the experiences of</p> <p>23 Benetech and Bookshare?</p> <p>24 A It certainly was --</p> <p>25 MR. KAPLAN: Objection; vague.</p>	69

70	<p>1 the two sentences at the bottom of the first page of 2 this exhibit? 3 MR. KAPLAN: Objection; vague, 4 argumentative. 5 THE WITNESS: Yes. Earlier you asked me 6 about when Chafee was passed and what the 7 motivations were, and in the prior paragraph to the 8 one that you're citing in this exhibit, I talk about 9 a lot of the issues that I recall were part of it, 10 which was a few publishers objecting conceptually to 11 providing permission, making it easier, moving 12 paperwork and legal work, and so the connection that 13 I'm making is subsequent to the Chafee Amendment 14 being passed, I created a library that was going to 15 utilize the Chafee Amendment, and the publishers put 16 express pressure on us citing economic interests, 17 which at the time in this article would have been 18 quite fresh in my mind. 19 BY MS. RUBEL: 20 Q Okay. 21 So they were citing economic interests 22 related to the publishing of post-secondary 23 textbooks? 24 A Correct. 25 Q And they were maintaining that providing</p>	72	<p>1 place might be removed and, therefore, would also 2 become easier to make copies for people who didn't 3 have print disabilities? 4 MR. KAPLAN: Objection; misstates 5 testimony -- 6 Well, sorry, were you finished with your 7 question? 8 MS. RUBEL: Yes. 9 MR. KAPLAN: Okay. Objection; misstates 10 testimony, vague. 11 THE WITNESS: I think their concerns were 12 incorrect, but they were expressed to us that way. 13 BY MS. RUBEL: 14 Q Okay. 15 And you say in the last sentence that you 16 also read aloud that Chafee was drawn narrowly to 17 seal this bargain. 18 What do you mean by it having been drawn 19 narrowly? 20 MR. KAPLAN: Objection; argumentative. 21 THE WITNESS: Chafee is pretty specific in 22 its provisions. 23 BY MS. RUBEL: 24 Q What do you mean by that? 25 A I think there's-- Chafee has a list of</p>
71	<p>1 easier access to people with disabilities would harm 2 their economic interests in the textbook industry; 3 is that correct? 4 MR. KAPLAN: Objection; lacks foundation, 5 vague. 6 THE WITNESS: They wouldn't have expressed 7 it that way. 8 BY MS. RUBEL: 9 Q But that's how you understood it? 10 MR. KAPLAN: Objection; argumentative, 11 vague. 12 THE WITNESS: I -- I -- I think the higher 13 ed publishers expressed concerns that copies created 14 for students with disabilities might be provided to 15 students without disabilities, and cited their 16 economic interests. 17 I don't think they expressed an objection, 18 per se, to people with disabilities getting access. 19 They just created a hypothetical that said, We're 20 worried about that. 21 BY MS. RUBEL: 22 Q I understand. So I think I understand. 23 So they were concerned that in the process 24 of making it easier for people with disabilities to 25 have access, some of the safeguards that were in</p>	73	<p>1 things that you need to do that's relatively 2 specific, and so -- and I'm not a legal expert, but 3 I got the impression that it was more narrowly drawn 4 than most copyright exceptions, but I don't know if 5 I really have studied other copyright exceptions. 6 Q If you turn to the next page of that 7 exhibit, can you read the very next sentence at the 8 top of page 2? 9 A (Reading): 10 "It is, of course, extremely 11 important that organizations 12 operating under Chafee do so with 13 the utmost integrity and within the 14 strict letter of the law to protect 15 this important amendment that has 16 provided such a big leap forward 17 for access." 18 Q What do you mean by that sentence? 19 MR. KAPLAN: Objection; argumentative. 20 THE WITNESS: I think it's an expression 21 that Chafee is a great thing for people with 22 disabilities and that organizations that use it 23 should respect its provisions. 24 BY MS. RUBEL: 25 Q What do you mean by "operating with the</p>

74	<p>1 utmost integrity"?</p> <p>2 MR. KAPLAN: Objection; argumentative.</p> <p>3 THE WITNESS: My organization is committed</p> <p>4 to ethical operation, and we try to do the right</p> <p>5 things right.</p> <p>6 BY MS. RUBEL:</p> <p>7 Q Can you think of an example of somebody</p> <p>8 who would not be operating with the utmost integrity</p> <p>9 as they're trying to act under the Chafee Amendment?</p> <p>10 MR. KAPLAN: Objection; vague, calls for</p> <p>11 speculation.</p> <p>12 THE WITNESS: I'm trying to parse all of</p> <p>13 the parts of that question. Is the question, do I</p> <p>14 know of an organization --</p> <p>15 BY MS. RUBEL:</p> <p>16 Q I can try to rephrase.</p> <p>17 A Okay.</p> <p>18 Q So I see that you're recommending that</p> <p>19 organizations operating under Chafee should operate</p> <p>20 with the utmost integrity.</p> <p>21 A Uh-huh.</p> <p>22 MR. KAPLAN: Objections; misstates the</p> <p>23 document, misleading.</p> <p>24 THE WITNESS: Okay.</p> <p>25</p>	76
75	<p>1 lacks foundation, calls for speculation.</p> <p>2 THE WITNESS: Yeah. I'm -- I'm having a</p> <p>3 hard time understanding. Are you asking about</p> <p>4 organizations that cite Chafee and don't follow it?</p> <p>5 BY MS. RUBEL:</p> <p>6 Q I can ask a new question.</p> <p>7 A Okay.</p> <p>8 Q When Benetech makes copies of materials</p> <p>9 for the purpose of providing access to people with</p> <p>10 print disabilities, does it make those copies</p> <p>11 available to the public generally, or does it</p> <p>12 somehow make them available only to people with</p> <p>13 print disabilities?</p> <p>14 MR. KAPLAN: Objection; vague, incomplete</p> <p>15 hypothetical, calls for speculation.</p> <p>16 THE WITNESS: Let -- let me give this a</p> <p>17 try. If we are --</p> <p>18 MR. KAPLAN: Jim, if you don't understand</p> <p>19 the question, you should say you don't understand</p> <p>20 the question. But if you think you can answer it</p> <p>21 fairly, then please go ahead, but you don't have to</p> <p>22 give it a try.</p> <p>23 THE WITNESS: Bookshare provides</p> <p>24 accessible books. The basis that we provide those</p> <p>25 books varies by the title. If it's public domain,</p>	77

78	<p>1 we make it available to everybody. If it's creative 2 comments, we make it available to everybody but let 3 people know that it's creative comments licensed. 4 If it's under a license, we try to follow 5 the terms of the license. And if we're making it 6 available under the Chafee Amendment, there has to 7 be a person who's on record as having a qualifying 8 disability or a group that is serving that person to 9 download that particular title. 10 BY MS. RUBEL: 11 Q Do you keep records of people who have a 12 qualifying disability who want to access materials 13 through Bookshare? 14 MR. KAPLAN: Objection; vague. 15 THE WITNESS: Bookshare has a membership 16 database, and different people have different roles 17 in that database, including individuals with 18 disabilities being labeled as people with qualifying 19 print-disabled disabilities. 20 BY MS. RUBEL: 21 Q Do they have to submit any kind of 22 paperwork to support their claim that they're 23 somebody with a print disability? 24 MR. KAPLAN: Objection; vague. 25 THE WITNESS: Do you have more?</p>	80
79	<p>1 MR. KAPLAN: Lacks foundation. 2 THE WITNESS: There are multiple 3 mechanisms for people to provide proof of 4 disability. 5 BY MS. RUBEL: 6 Q What are those methods? 7 A If they've already submitted proof of 8 disability to another one of the major libraries for 9 the blind and dyslexic, we have cooperative 10 agreements to accept that proof of disability. 11 That's one mechanism. 12 Q What else? 13 A If the person is enrolled in special 14 education, the school can assert that they have 15 proof of disability on file as part of the special 16 education services they're providing the student. 17 Q Any special education services? 18 A Special education systems that -- services 19 that align with the Chafee Amendment. 20 Q Okay. 21 Any other methods of showing disability? 22 A It's possible to submit a form from a 23 competent authority, I believe is the term, 24 indicating that this person has a qualifying 25 disability.</p>	81

82	<p>1 BY MS. RUBEL: 2 Q You mentioned the Authors Guild versus 3 HathiTrust case that you were involved in that you 4 submitted a declaration for previously, correct? 5 MR. KAPLAN: Objection; misstates 6 testimony. 7 THE WITNESS: I -- we did talk about that 8 case earlier, and I do believe I submitted a 9 declaration. 10 BY MS. RUBEL: 11 Q And what was your understanding of the 12 issues in that case as they related to people with 13 print disabilities? 14 MR. KAPLAN: Objection; vague and 15 privileged. 16 I'll instruct you not to divulge the 17 contents of attorney/client communications or expert 18 privileged communications. 19 THE WITNESS: I was asked by the National 20 Federation of the Blind to submit a declaration as 21 they were -- my understanding is that they legally 22 became involved in the case alongside the 23 HathiTrust. 24 BY MS. RUBEL: 25 Q And do you have an understanding of what</p>	84	<p>1 MR. KAPLAN: Objection; calls for 2 speculation, lacks foundation, vague. 3 THE WITNESS: My understanding was that 4 one of the uses of the scanned books was to make 5 books accessible to people with disabilities. 6 BY MS. RUBEL: 7 Q Do you know if that consortium had any 8 safeguards in place that ensured that only people 9 with print disabilities would be able to access the 10 copies of those books? 11 MR. KAPLAN: Objection; vague, lacks 12 foundation, calls for speculation. 13 THE WITNESS: I believe that only faculty, 14 students and staff of the research universities were 15 able to access information about the books so that 16 that access control was the primary access control. 17 I know less about the details of 18 disability-specific access, but I do believe that 19 there was some difference between regular, 20 nondisabled faculty, staff and students and disabled 21 faculty, staff and students. 22 BY MS. RUBEL: 23 Q Do you believe there was some sort of 24 certification required to show that the person had a 25 print disability to get access to certain of the --</p>
83	<p>1 the dispute was between the Plaintiff and the 2 Defendant in that case that related to print 3 disabilities? 4 MR. KAPLAN: Objection; vague. 5 THE WITNESS: Separating privileged 6 conversations, I have certainly read articles about 7 the HathiTrust case that talk about the issues that 8 were involved in the case and the decisions that 9 were made as they were done, because they were 10 covered widely in the publishing industry press. 11 BY MS. RUBEL: 12 Q And what is your understanding of what the 13 issues were that related to people with print 14 disabilities? 15 A The overall circumstances of the case were 16 that the Authors Guild sued a consortium of research 17 libraries that had cooperated with Google to scan 18 their libraries, and the blind community felt this 19 benefited them because now there were 10 or 15 books 20 that have been scanned that previously weren't 21 accessible to blind people, and so that's, I think, 22 why they were interested in the case. 23 Q And is it correct that the consortium of 24 libraries was making copies of certain books 25 accessible to people with print disabilities?</p>	85	<p>1 of the books? 2 MR. KAPLAN: Objection; vague. 3 THE WITNESS: There are a lot of research 4 libraries that were involved in the case, and I 5 don't know what their process was beyond saying 6 these people have print disabilities so they'll get 7 more extensive access to the works than regular 8 faculty and staff and students. 9 BY MS. RUBEL: 10 Q Are you familiar with -- 11 Aside from the consortium and the 12 HathiTrust and Benetech, are you familiar with other 13 organizations that provide access to copies of 14 copyrighted works under the Chafee Amendment? 15 MR. KAPLAN: Objection; vague. 16 THE WITNESS: There are some national 17 organizations that are well-known in the field: The 18 National Library Service for the Blind, Visually 19 Impaired and Physically Disabled of the Library of 20 Congress; NLS is the largest, Learning Ally, 21 formerly known as Recording for the Blind and 22 Dyslexic; the American Printing House for the Blind, 23 National Braille Press. 24 Those would probably be the four 25 organizations most often cited, along with -- sorry,</p>

86	<p>1 including Bookshare, which is the library that my 2 nonprofit, Benetech, operates. 3 But there are other organizations, many 4 other organizations, that I believe would assert 5 that they operate under the Chafee Amendment. 6 BY MS. RUBEL: 7 Q NLS, do they have some sort of requirement 8 that an individual provide proof of disability 9 before being able to access copyrighted materials 10 under the Chafee Amendment? 11 A Yes. 12 MR. KAPLAN: Objection; lacks foundation. 13 BY MS. RUBEL: 14 Q What are their requirements? 15 A They are stated on the NLS website, and 16 they're similar to those that we use, and we have a 17 agreement with NLS that if someone has submitted NLS 18 their qualifications, we accept that as proof of 19 disability for Bookshare services. 20 Q What about Learning Ally; do they have a 21 requirement that the person certify that they have a 22 print disability before being able to access the 23 materials? 24 MR. KAPLAN: Objection; vague, lacks 25 foundation.</p>	88
87	<p>1 THE WITNESS: Yes. 2 BY MS. RUBEL: 3 Q How about the American Printing House for 4 the Blind; do they have the same requirement? 5 MR. KAPLAN: Objection; vague, lacks 6 foundation. 7 THE WITNESS: Their requirement is 8 different because they're more narrowly focused on 9 blind and visually impaired students, and I'm not 10 sure that if they're providing a Braille copy of a 11 book, that they require people to prove that they're 12 disabled, because Braille is not -- hard copy 13 Braille is not easy to make copies of. 14 BY MS. RUBEL: 15 Q So they're not providing something, for 16 example, that could be read by a screen reader? 17 MR. KAPLAN: Objection; misstates the 18 testimony, argumentative, lacks foundation, vague. 19 THE WITNESS: They do. They have some 20 kind of registration system for students who have 21 the visual impairments that their organization 22 serves, and I believe that the visually impaired 23 students they serve would generally be understood as 24 qualifying under Chafee. 25</p>	89

90	<p>1 accessible in a broader sense than just disability. 2 Q Since being retained as an expert, have 3 you met Mr. Malamud? 4 A No. 5 Q So you're not sure if you've ever met him, 6 but you know you haven't met him since you were 7 retained? 8 A Correct. 9 Q Have you ever discussed this litigation 10 with Mr. Malamud? 11 A Yes. 12 Q On more than one occasion? 13 A I think it was primarily on one occasion 14 that we talked about this litigation specifically. 15 Q And when was that? 16 A Early this year. I'd say somewhere in the 17 February to April zone, but it might have been a 18 little earlier. 19 Q And what did you discuss? 20 A He asked me if I would help as an expert 21 witness in a case that Public Resource was a 22 Defendant in. 23 Q What else did he say? 24 A I think he may have mentioned either the 25 Plaintiffs or the fact that the Plaintiffs were</p>	92	<p>1 A As outlined in my expert report, I was 2 asked to assess the accessibility of accessing and 3 using certain standards documents. 4 Q How much time did you spend working on the 5 report? 6 A I've tracked my time even though I'm 7 serving pro bono, but I haven't added up the hours. 8 Less than 100, more than 20 or 40, but I -- I have 9 the records. I just don't have them with me. 10 Q And you mentioned that you're serving as 11 an expert on a pro bono basis. Why are you serving 12 on a pro bono basis? 13 A Because I'm an accessibility expert, and 14 that's my goal is to promote accessibility. 15 MS. RUBEL: I know we're running out of 16 time on this tape, so why don't we go ahead and take 17 another break. 18 THE VIDEOGRAPHER: This is the end of Disk 19 1. We're off the record at 11:55. 20 (Recess taken.) 21 THE VIDEOGRAPHER: This is the beginning 22 of Disk 2. We're back on the record at 12:09. 23 BY MS. RUBEL: 24 Q Prior to this case, were you familiar with 25 ASTM?</p>
91	<p>1 standards organizations. And after I agreed to be 2 helpful, he said that I should then talk to counsel 3 instead of continue to speak with him. 4 Q Did you discuss what your expert report -- 5 what the topic of your expert report would be? 6 MR. KAPLAN: Objection; vague. 7 THE WITNESS: I don't recall, but probably 8 he asked if I'd be an expert around accessibility 9 for people with disabilities. 10 BY MS. RUBEL: 11 Q Do you know why he identified you as a 12 potential expert witness in this case? 13 MR. KAPLAN: Objection; argumentative. 14 You can answer, if you know. 15 THE WITNESS: Probably because -- 16 MR. KAPLAN: It's a "yes" or "no" 17 question. 18 THE WITNESS: Okay. Yes. 19 BY MS. RUBEL: 20 Q Why do you think he identified you as a 21 possible expert for this litigation? 22 A Because I'm a nationally known 23 technologist working in the field of accessibility. 24 Q What specifically was your assignment in 25 this case?</p>	93	<p>1 A I had heard of it. 2 Q In your background as an engineer, did you 3 ever have the occasion to use an ASTM standard? 4 A Not that I recall. 5 Q Prior to this case, were you familiar with 6 the NFPA? 7 A Yes. 8 Q How were you familiar with them? 9 A I was familiar that they had something to 10 do with fire standards, and I probably have 11 talked -- I probably talked once to an NFPA person. 12 Q Do you recall about what the substance of 13 that conversation was? 14 A I think we talked about accessibility. 15 Because I probably -- I don't go to NFPA events, so 16 it was probably going to be an accessibility event, 17 so... 18 Q Do you recall what you talked about 19 accessibility of? 20 A I don't think so. This was a couple of 21 years ago at least, so... 22 Q Do you remember who you spoke with? 23 A No. 24 Q Prior to this case, were you familiar with 25 ASHRAE?</p>

94	<p>1 A No.</p> <p>2 Q Do you have an understanding of the claims</p> <p>3 that have been brought by the Plaintiffs against</p> <p>4 Public Resource in this case?</p> <p>5 MR. KAPLAN: Objection; vague, calls for a</p> <p>6 legal conclusion.</p> <p>7 THE WITNESS: I am familiar with the broad</p> <p>8 outlines of what the case is about.</p> <p>9 BY MS. RUBEL:</p> <p>10 Q What is your understanding of what the</p> <p>11 case is about?</p> <p>12 A I believe it's a copyright infringement</p> <p>13 case.</p> <p>14 Q Do you have any additional understanding</p> <p>15 of the issues in the case?</p> <p>16 MR. KAPLAN: Objection; vague, calls for a</p> <p>17 legal conclusion.</p> <p>18 THE WITNESS: Not beyond privileged</p> <p>19 conversations.</p> <p>20 BY MS. RUBEL:</p> <p>21 Q Have you reviewed the Complaint?</p> <p>22 A Probably, but -- or maybe. I don't know.</p> <p>23 I don't recall anything about the Complaint.</p> <p>24 Q Have you reviewed Public Resource's answer</p> <p>25 and counterclaims?</p>	96	<p>1 the case and reading something about the case when</p> <p>2 Carl asked me to serve -- I don't remember if that</p> <p>3 was the Complaint or a Web article -- I didn't</p> <p>4 consult any other material about this case beyond</p> <p>5 those excluded as directed by counsel.</p> <p>6 BY MS. RUBEL:</p> <p>7 Q You mentioned that it is your</p> <p>8 understanding that this is a copyright infringement</p> <p>9 case; is that right?</p> <p>10 A Correct.</p> <p>11 Q Do you have an understanding of what</p> <p>12 copyrights Plaintiffs have alleged that Public</p> <p>13 Resource has infringed?</p> <p>14 MR. KAPLAN: Objection; vague, calls for a</p> <p>15 legal conclusion.</p> <p>16 THE WITNESS: In my expert report, I was</p> <p>17 directed to look at some standards by counsel, and</p> <p>18 so I assume that those standards were at issue in</p> <p>19 the case.</p> <p>20 BY MS. RUBEL:</p> <p>21 Q How many specific standards did you look</p> <p>22 at?</p> <p>23 A Counsel --</p> <p>24 MR. KAPLAN: Objection; vague.</p> <p>25 THE WITNESS: Okay. Counsel directed me</p>
95	<p>1 A Don't think so.</p> <p>2 Q Is the entirety of your understanding of</p> <p>3 this litigation based on discussions that you've had</p> <p>4 with Public Resource's counsel?</p> <p>5 MR. KAPLAN: Objection; vague.</p> <p>6 THE WITNESS: I have a privilege question.</p> <p>7 MR. KAPLAN: Let's take a break.</p> <p>8 THE WITNESS: Okay. Great.</p> <p>9 THE VIDEOGRAPHER: Going off the record at</p> <p>10 12:12.</p> <p>11 (Whereupon, the witness and counsel</p> <p>12 left the conference room and</p> <p>13 returned.)</p> <p>14 THE VIDEOGRAPHER: We're back on the</p> <p>15 record at 12:16.</p> <p>16 BY MS. RUBEL:</p> <p>17 Q The question that was pending was: Is the</p> <p>18 entirety of your understanding of this litigation</p> <p>19 based on discussions that you've had with Public</p> <p>20 Resource's counsel?</p> <p>21 MR. KAPLAN: And I'm going to object as</p> <p>22 vague and instruct the witness not to disclose any</p> <p>23 privileged communications.</p> <p>24 THE WITNESS: Beyond the things I've</p> <p>25 listed in my expert report as having consulted about</p>	97	<p>1 to --</p> <p>2 MR. KAPLAN: And I'm going to instruct --</p> <p>3 THE WITNESS: Okay.</p> <p>4 MR. KAPLAN: -- not to get into privileged</p> <p>5 communications.</p> <p>6 THE WITNESS: Okay. But I think if it's</p> <p>7 in my expert report --</p> <p>8 MR. KAPLAN: Yeah.</p> <p>9 THE WITNESS: Okay. So as I outlined in</p> <p>10 my expert report, I looked at three specific</p> <p>11 standards: One from each of the Plaintiffs'</p> <p>12 standards organizations, plus I looked at additional</p> <p>13 ones but not in the same depth.</p> <p>14 BY MS. RUBEL:</p> <p>15 Q How many additional standards did you look</p> <p>16 at?</p> <p>17 A I'd consult my expert report, and the</p> <p>18 number is -- can be added up by what's in the expert</p> <p>19 report. I don't know the number.</p> <p>20 MS. RUBEL: I'm going to ask that we now</p> <p>21 mark as Exhibit 4001 the expert report that you</p> <p>22 submitted in this case.</p> <p>23 (Plaintiffs' Exhibit 4001 marked</p> <p>24 for identification.)</p> <p>25</p>

98	<p>1 BY MS. RUBEL: 2 Q I'll give you an opportunity to take a 3 look at this and see if that refreshes your 4 recollection of how many total standards you 5 reviewed in the process of drafting your report. 6 A NFPA 101-2000, ASHRAE 90.1-2010, five 7 other ASHRAE standards as outlined on page 12 of my 8 expert report, ASTM standard B57-84e1 of that 9 standard, as in Edward 1, ASTM A20, like Apple, 20A, 10 like Apple, 20M, like Mary, -93a, like Apple. And I 11 also -- 12 MR. KAPLAN: I believe, for the court 13 reporter, the ASTM standard is B557, not B57. 14 THE WITNESS: Correct. I misread the 15 number. In addition, I accessed the 2012 version of 16 the NPFA standards -- or NFPA standards. It's NFPA, 17 right? 18 MR. REHN: NFPA. 19 THE WITNESS: Yeah. So there's an error 20 where I flipped the letters there. Now I'm 21 cross-referenced whether the ASHRAE standard is the 22 same one that I looked at here. Let's see. Yeah, 23 that looks like the same one. So I wasn't keeping a 24 running count, but I think that's the complete list. 25 So it's in -- three, plus five, plus one, plus</p>	100	
99	<p>1 another version of the same thing, so on the order 2 of 10. 3 BY MS. RUBEL: 4 Q Do you know how many standards the 5 Plaintiffs have alleged that Public Resource has 6 infringed in this litigation? 7 A No. 8 Q If you'd turn to page 5 of your report, 9 the beginning of the last paragraph on page 5, you 10 indicated that: 11 "...approaches for 'free 12 access' that make it impossible to 13 copy text generally make it 14 impossible for the assistive 15 technology used by people with 16 print disabilities, especially 17 blind people, to read the text 18 aloud." 19 Is that correct? 20 A Yes. 21 Q You included the word "generally" there. 22 So I'd like to understand, are there ways to make it 23 impossible to copy text that do not make it 24 impossible for the assistive technology used by 25 people with print disabilities to operate?</p>	<p>1 MR. KAPLAN: Objection; vague. 2 THE WITNESS: Not in practice. 3 BY MS. RUBEL: 4 Q Can you explain what you mean by that? 5 A I could imagine a blind person trying to 6 take a picture of the screen, uploading that picture 7 into an OCR device and trying to see the text they 8 can't see on the screen. That's really difficult to 9 do, but it's imaginable. 10 Q So theoretically it could be possible for 11 a copyright owner to protect the text against 12 copying while also making it possible for someone 13 with a print disability to review the material; is 14 that what you were explaining? 15 MR. KAPLAN: Objection; misstates the 16 testimony, incomplete hypothetical, vague, 17 argumentative. 18 THE WITNESS: I believe that technology 19 that makes it impossible to access text as text but 20 instead presents a picture of the text is, for all 21 intents and purposes, inaccessible to a blind 22 person. 23 BY MS. RUBEL: 24 Q Is there another way, other than 25 presenting the material as a picture, that a</p>	101

102	<p>1 to blind people is generally the hardest because 2 they can't see at all. It is possible that a 3 low-vision person, for example, would be able to -- 4 some low-vision people would be able to pull out a 5 magnifying glass and look at the screen and find it 6 accessible. 7 So I tend to focus on blind people because 8 they have the biggest challenge when it comes to 9 accessibility, and then depending on certain subsets 10 of print-disabled people, might find certain things 11 accessible whereas the blind would not. 12 BY MS. RUBEL: 13 Q Is it fair to say that there are certain 14 tools that people with low vision can use that a 15 blind person can't use that make additional 16 materials accessible? 17 A Yes. 18 Q And what about people with learning 19 disabilities; are there additional tools that people 20 with learning disabilities can use that make 21 materials more accessible to them than to people who 22 are blind? 23 MR. KAPLAN: Objection; vague. 24 THE WITNESS: People with learning 25 disabilities have a wide array of problems when it</p>	104
103	<p>1 comes to accessing text, and so it's difficult to 2 generalize, but there are tools that dyslexic people 3 use that some dyslexic people find especially 4 useful. 5 An example of that is what I call 6 karaoke-style presentation where the word is 7 highlighted visually and spoken aloud at the same 8 time. That tends to be a very useful feature for 9 dyslexic people. 10 BY MS. RUBEL: 11 Q What other kinds of tools do dyslexic 12 people use? 13 MR. KAPLAN: Objection; vague. 14 THE WITNESS: Many people with learning 15 disabilities, including dyslexia, get benefits from 16 a wide array of visual presentation options, audio, 17 aloud reading options and other reading supports, a 18 talking dictionary. 19 BY MS. RUBEL: 20 Q Does the size of the text impact the 21 ability of a dyslexic person to read the material? 22 A Many people with dyslexia find text 23 enlargement and other visual presentation options 24 helpful. 25 Q What about -- I think you mentioned before</p>	105

106	<p>1 speculation.</p> <p>2 THE WITNESS: I'm having a hard time</p> <p>3 parsing where we're going. I don't really</p> <p>4 understand the difference.</p> <p>5 BY MS. RUBEL:</p> <p>6 Q I can ask again.</p> <p>7 A Okay.</p> <p>8 Q You mentioned a few different types of</p> <p>9 tools that might be useful for someone with</p> <p>10 dyslexia.</p> <p>11 A Right.</p> <p>12 Q And my question is: If we're talking</p> <p>13 about someone with a different type of learning</p> <p>14 disability, are there any additional tools that you</p> <p>15 can think of that might be helpful for those people?</p> <p>16 A Yes.</p> <p>17 MR. KAPLAN: Objection; incomplete</p> <p>18 hypothetical, vague.</p> <p>19 THE WITNESS: Yes.</p> <p>20 BY MS. RUBEL:</p> <p>21 Q What -- what other tools?</p> <p>22 A People who serve people with disabilities</p> <p>23 or their parents or people with disabilities</p> <p>24 themselves will try a lot of things. I have heard</p> <p>25 of people with learning disabilities saying that</p>	108
107	<p>1 Braille helped them. If it does, great. I find</p> <p>2 that unusual, but I have no objection to it.</p> <p>3 Q Can you think of any other --</p> <p>4 Have you heard of any other tools that</p> <p>5 have been useful for people with learning</p> <p>6 disabilities?</p> <p>7 A I think the great majority of tools that</p> <p>8 help people with learning disabilities resemble the</p> <p>9 same set of technologies that we've already covered.</p> <p>10 Q Okay.</p> <p>11 You mention in your report several other</p> <p>12 categories of people who might have -- who might be</p> <p>13 described as having print disabilities. Can you</p> <p>14 think of any other categories of people, other than</p> <p>15 the ones we've already discussed that -- the blind</p> <p>16 and people with learning disabilities?</p> <p>17 A Yes. People --</p> <p>18 MR. KAPLAN: Objection; vague, misstates</p> <p>19 testimony.</p> <p>20 THE WITNESS: Yes. People with physical</p> <p>21 disabilities that interfere with reading print is</p> <p>22 another class of disability that is relevant to our</p> <p>23 work.</p> <p>24 BY MS. RUBEL:</p> <p>25 Q And can you give me an example of someone</p>	109

1 with that type of physical disability?

2 A Someone with cerebral palsy, someone with

3 a fine motor control disease where they can't hold a

4 book or turn a page, person with a brain injury,

5 like many of our returning veterans, quadraplegic

6 and variations on those sort of themes where there

7 is a physical limitation or an injury that

8 interferes with the reading process.

9 Q With people with that type -- and I

10 understand it's hard to generalize.

11 People with those types of physical

12 disabilities, do they have difficulty reading text

13 from a screen, or is the problem with holding the

14 book to be able to see the text?

15 A It varies.

16 MR. KAPLAN: Objection.

17 THE WITNESS: It varies by the disability.

18 All of the above.

19 BY MS. RUBEL:

20 Q So in what --

21 So if there's some category of people that

22 the issue might be that they can't hold the book but

23 they can see the screen; is that correct?

24 A There are some people in that category

25 that fit that, yes.

1 Q Are there any other categories --

2 So we've talked about the learning

3 disabilities, physical disabilities, people who are

4 blind.

5 Are there any other categories of people

6 you would describe as print disabled?

7 A There are people whose primary disability

8 or medical problem would not by itself qualify under

9 the print disability, but they also have a print

10 disability; someone who is deaf and blind, someone

11 who has Down syndrome and dyslexia or a vision

12 impairment.

13 Q And in that type of scenario, it may be

14 the combination of different impairments that are

15 making it difficult for the person to read?

16 MR. KAPLAN: Objection; incomplete

17 hypothetical, calls for speculation.

18 THE WITNESS: It can be. I mean, some

19 professional has assessed this person's disability

20 and said that they have a disability that gets in

21 the way of print --

22 (Reporter clarification)

23 THE WITNESS: -- that affects reading

24 print, and so my organization actually doesn't

25 certify people ourselves. We rely on professionals

110	<p>1 to certify the people and then represent that to us. 2 And so if a physician looks at someone's disability 3 and says, "I think they meet the standards of the 4 Chafee Amendment," we take that. 5 BY MS. RUBEL: 6 Q You focus in your report on whether the 7 standards that you considered were accessible 8 specifically through use of a screen reader; is that 9 right? 10 A Yes. That was the primary mechanism I 11 used. 12 Q Why did you select that as the primary 13 mechanism? 14 A Because I outlined in my report, I looked 15 at the disability challenges of a blind person as 16 the most difficult to solve, and a screen reader is 17 the number one technology a blind person uses to 18 access online content, content on their personal 19 computer. 20 Q What other types of tools do they use? 21 MR. KAPLAN: Objection; vague. 22 THE WITNESS: Common tools used by blind 23 people around accessibility include Braille 24 displays, as I mentioned before, screen readers, 25 screen enlargers for people with low vision, eBook</p>	112
111	<p>1 readers, audio cassette tape players, apps that 2 operate on tablets and smartphones. I think most 3 other software applications that take inaccessible 4 material or digital material and make it talk or 5 larger or tactile. Those are pretty much the ways 6 people do it. 7 BY MS. RUBEL: 8 Q And did you consider for the purpose of 9 this -- of your report whether the Plaintiffs' 10 standards were accessible by blind people using any 11 of those other tools, other than the screen reader? 12 MR. KAPLAN: Objection; vague. 13 THE WITNESS: I believe that the problems 14 that they would run into with a screen reader were 15 similar to those that they would run into with other 16 technologies, if they could get the material. I 17 think that's an accurate answer. 18 BY MS. RUBEL: 19 Q So it's your belief that if they wouldn't 20 be able to access it through a screen reader, they 21 also wouldn't be able to access it through a Braille 22 display? 23 MR. KAPLAN: Objection; misstates the 24 testimony. 25 THE WITNESS: Yes. A screen reader can</p>	113

114	<p>1 MR. KAPLAN: Objection; argumentative, 2 misstates testimony, vague. 3 THE WITNESS: In addition to having a 4 sighted person read it aloud, they could have a 5 sighted person type the standard out into a 6 accessible document. They could have a sighted 7 person obtain a copy of the printed standard and 8 type it in from that or try to scan it in from that, 9 and then all the other things you would do to 10 produce a successful version. 11 Once you have an accessible digital copy, 12 you could then do -- you could produce a Braille 13 copy, a large-print copy, an audio copy. The whole 14 idea would be to try to create a text file that you 15 could then turn into these other formats. 16 BY MS. RUBEL: 17 Q So if somebody assisted them with creating 18 the text version, they would then have many options? 19 MR. KAPLAN: Objection; incomplete 20 hypothetical, vague. 21 THE WITNESS: Yes. 22 BY MS. RUBEL: 23 Q Do you recall how long each of the 24 standards that you reviewed -- each of the 25 Plaintiffs' standards that you reviewed is?</p>	116
115	<p>1 MR. KAPLAN: Objection; vague. 2 THE WITNESS: Some were short and some 3 were long. 4 BY MS. RUBEL: 5 Q How short was the shortest standard that 6 you reviewed? 7 A I didn't measure precisely. A few pages. 8 Q And the longest standard? 9 A Hundreds of pages. 10 Q The standards on the websites that you 11 reviewed of the Plaintiffs, were they accessible to 12 any person who has access to a computer and an 13 Internet connection, other than persons who have 14 print disabilities? 15 MR. KAPLAN: Objection; vague. 16 THE WITNESS: My understanding was if you 17 signed up for a free reading account, you would then 18 be able to view the standards through this viewing 19 window. 20 BY MS. RUBEL: 21 Q And when you say "you," does that refer to 22 any person who can access a computer with an 23 Internet connection? 24 A I was able to do so. 25 Q Did you have any difficulty accessing any</p>	117

1 of the standards?
 2 A It wasn't always easy to find where to go
 3 to get that, but I eventually was able or was told
 4 by counsel where to find the free access.
 5 Q Where you have --
 6 Can you explain what you were -- what part
 7 of the website you were having difficulty finding?
 8 MR. KAPLAN: Objection; misstates
 9 testimony.
 10 THE WITNESS: Yeah. I was engaged to look
 11 at the accessibility of the process of getting a
 12 standard and the standard itself. And the first
 13 thing you have to do is find how to get a standard
 14 on that website. And I believe that in one of the
 15 three standards bodies, I spent 10 minutes without
 16 being able to find out where you got a free copy,
 17 and so later on, counsel gave me a link. I'm sure I
 18 would have found it eventually. But it was just
 19 hard to locate by navigating around the website
 20 where that spot was. I think that may have been the
 21 ASHRAE site, but I'm not -- I'm not sure which one
 22 of the three it was.
 23 BY MS. RUBEL:
 24 Q Okay.
 25 Were you able to eventually access all of

1 the standards from the Plaintiffs' website that you
 2 tried to access?
 3 MR. KAPLAN: Objection; vague.
 4 THE WITNESS: Yes. The ones that I listed
 5 in my report, I was able to look at the standard on
 6 their website.
 7 BY MS. RUBEL:
 8 Q And did you have to make any sort of
 9 payment to get access?
 10 A No.
 11 Q Did you review any standards that are
 12 offered for sale on any of the Plaintiffs' websites?
 13 A No. I did not buy any standards and
 14 assess them.
 15 Q Did you review any standards that are
 16 posted on any website, other than the websites of
 17 the Plaintiffs and Public Resource?
 18 MR. KAPLAN: Objection; vague.
 19 THE WITNESS: I didn't find any others.
 20 BY MS. RUBEL:
 21 Q Did you look for Plaintiffs' standards
 22 posted on any other websites?
 23 A I did Web searches.
 24 Q What did you do Web searches for?
 25 A Say the -- the name of the standard.

118	<p>1 Q Why did you do that?</p> <p>2 A I was interested in finding the -- for</p> <p>3 example, the Public.Resource.Org version of that</p> <p>4 standard --</p> <p>5 Q So in --</p> <p>6 A -- because in my expert report, I talk</p> <p>7 about actually searching for them on Google, so...</p> <p>8 Q So you did Google searches for the names</p> <p>9 of the standards to see if you could find them on</p> <p>10 Public Resource's website; is that right?</p> <p>11 MR. KAPLAN: Objection; mischaracterizes</p> <p>12 testimony.</p> <p>13 THE WITNESS: I searched for the --</p> <p>14 basically the numbers of the standards, yes. If you</p> <p>15 give me a minute to actually take a quick look at</p> <p>16 my --</p> <p>17 BY MS. RUBEL:</p> <p>18 Q Sure.</p> <p>19 A -- expert report just to make sure.</p> <p>20 Yes. So, for example, in my expert report</p> <p>21 I noted that I had searched the term "NFPA 101</p> <p>22 Resource.Org" and it showed, for example, Public</p> <p>23 Resource's standard on that list, and I didn't see</p> <p>24 any other place beyond where I could go get the</p> <p>25 standard. If I had, I probably would have clicked</p>	120
119	<p>1 on it and said -- but I don't recall seeing it</p> <p>2 available anywhere else.</p> <p>3 Q Did you review standards that are posted</p> <p>4 on Internet Archive?</p> <p>5 MR. KAPLAN: Objection; vague.</p> <p>6 THE WITNESS: Not in connection with this</p> <p>7 case.</p> <p>8 BY MS. RUBEL:</p> <p>9 Q Did you review the standards posted on the</p> <p>10 Internet Archive for any other reason?</p> <p>11 MR. KAPLAN: Objection; relevance.</p> <p>12 Go ahead.</p> <p>13 THE WITNESS: I was asked to by counsel</p> <p>14 for another case --</p> <p>15 MR. KAPLAN: Don't get into privileged</p> <p>16 communications.</p> <p>17 THE WITNESS: Okay. Sorry. Sorry. I</p> <p>18 thought --</p> <p>19 MR. KAPLAN: If it raises a privileged</p> <p>20 concern --</p> <p>21 THE WITNESS: I can't talk about that</p> <p>22 because it's privileged.</p> <p>23 But in the preparation of my report, I did</p> <p>24 not look at the Internet Archive for these</p> <p>25 standards.</p>	121

122	<p>1 usage, only their accessibility. 2 Q Do you know of any person who has ever 3 used any of the 10 standards that you reviewed? 4 MR. KAPLAN: Objection; vague. 5 THE WITNESS: I don't personally know of a 6 person who has shared with me that they've used 7 these standards. 8 BY MS. RUBEL: 9 Q What percentage of people in the United 10 States are completely blind? 11 A Less than 1 percent. 12 Q What percentage of the population in the 13 United States has print disability? 14 A We do not have a precise number, but our 15 estimate is in the 2 to 3 percent range that would 16 meet our qualifications. 17 Q And that's including the 1 percent that's 18 blind? 19 A Yeah. All people with print disabilities 20 are in that range. 21 Q Are you -- excuse me. 22 Are you aware of any individual who works 23 in the field of fire protection who's blind? 24 MR. KAPLAN: Objection; vague. 25 THE WITNESS: No.</p>	124	<p>1 professions. 2 Q Do any of the standards from Plaintiffs 3 that you reviewed relate to computer software 4 engineering? 5 A No. 6 Q Has anyone ever informed you that they 7 wanted to be able to access a standard that was 8 available on one of Plaintiffs' websites, but they 9 were unable to do so because of a print disability? 10 A Nobody has personally asked me about the 11 accessibility of a document on one of the 12 Plaintiffs' sites. 13 Q Are you aware that anyone with a print 14 disability has asked anyone else about the ability 15 to access a standard from one of the Plaintiffs' 16 websites? 17 A Yes. 18 MR. KAPLAN: You got to let me object. 19 THE WITNESS: Sorry. 20 MR. KAPLAN: It's okay. 21 BY MS. RUBEL: 22 Q How many people are you aware of who have 23 indicated that they were unable to access a standard 24 from one of the Plaintiffs' websites because of a 25 print disability?</p>
123	<p>1 BY MS. RUBEL: 2 Q Are you aware of anyone who works in the 3 field of heating, air conditioning or refrigeration 4 who's blind? 5 MR. KAPLAN: Objection; vague. 6 THE WITNESS: No. 7 BY MS. RUBEL: 8 Q Are you aware of any mechanical engineer 9 who is blind? 10 MR. KAPLAN: Objection; vague. 11 THE WITNESS: I don't think so. 12 BY MS. RUBEL: 13 Q How about a civil engineer who's blind? 14 MR. KAPLAN: Objection; vague. 15 THE WITNESS: Nope. 16 BY MS. RUBEL: 17 Q Are you aware of any other type of 18 engineer who's blind? 19 A Yes. 20 MR. KAPLAN: Objection; vague. 21 BY MS. RUBEL: 22 Q What type of engineer? 23 A Computer software engineers is one 24 professional category that I'm aware of personally, 25 knowing people who are blind who are in those</p>	125	<p>1 MR. KAPLAN: Objection; misstates 2 testimony, misleading, vague. 3 THE WITNESS: I don't know the number of 4 people who have requested the standards. I simply 5 know that some of the standards have been requested 6 by print-disabled people. 7 BY MS. RUBEL: 8 Q What standards have been requested by 9 print-disabled people? 10 A I don't know the precise numbers, but at 11 least a couple from NFPA. 12 Q And how do you know that? 13 A They are in the Bookshare collection, and 14 the metadata associated with them is correlated with 15 a student request for that title. 16 Q What NF -- do you know -- 17 MR. KAPLAN: Before we go any farther, 18 just in case, I'm going to designate the transcript 19 as provisionally confidential under the protective 20 order. 21 THE WITNESS: Okay. 22 BY MS. RUBEL: 23 Q Do you know what NFPA standards are 24 included in the Bookshare collection? 25 A Not the one that I examined in this expert</p>

126	<p>1 report, but I don't have the standard number. Less 2 than 10 standards, at least 1. 3 Q How do you know it's not the one you 4 examined in this report? 5 A Because I looked at the list and 101 6 wasn't on the -- in the list. 7 Q So -- 8 A I can search our website. 9 Q Did you produce documents that relate to 10 which NFPA standards are included in the Bookshare 11 collection today? 12 A I have no such document. 13 Q So you -- did you review the Bookshare 14 website to determine which NFPA standards are 15 included in the Bookshare collection? 16 A Not in preparation of my expert report. 17 Q In what context did you review the 18 Bookshare website to determine if there are any NFPA 19 standards in the Bookshare collection? 20 A I did a search this week but did not 21 create any document, notes as a result of that Web 22 search. 23 Q Would it be possible to recreate your 24 search? 25 A Yes.</p>	128	
127	<p>1 Q How would an NFPA standard have come to be 2 a part of the Bookshare collection? 3 MR. KAPLAN: Objection; calls for 4 speculation, lacks foundation, vague -- 5 THE WITNESS: As mentioned earlier -- 6 MR. KAPLAN: -- and incomplete 7 hypothetical. 8 THE WITNESS: Okay. As mentioned earlier, 9 I looked at the details on one standard, and it 10 listed it as "adult ed" and also listed which one of 11 our scanning and proofreading partners had converted 12 the work, which were indicative to me that an adult 13 ed student had requested that title. That would be 14 the likely explanation of why it would be in our 15 collection. It would be in reaction to a request 16 for a print-disabled person for an accessible copy 17 of that specific title. 18 BY MS. RUBEL: 19 Q Do you know if that individual who made 20 that request to Bookshare contacted NFPA to request 21 access of the standard? 22 A I wouldn't know that. 23 Q So it's possible that they did contact 24 NFPA? 25 MR. KAPLAN: Objection; calls for</p>	<p>1 speculation. 2 THE WITNESS: Perhaps. 3 BY MS. RUBEL: 4 Q And it's also possible that they never 5 contacted NFPA? 6 A All I know is they asked us to do it. 7 Q Is it your understanding that NFPA's 8 standards are protected by copyright? 9 MR. KAPLAN: Objection; calls for a legal 10 conclusion, vague. 11 THE WITNESS: As far as I'm aware, any 12 document created since a certain date is probably 13 copyrighted. I'm sort of vaguely aware that that's 14 the case in the U.S. 15 BY MS. RUBEL: 16 Q So if you -- 17 If Bookshare made a copy of an NFPA 18 standard available on Bookshare, would that be 19 pursuant to the Chafee Amendment? 20 MR. KAPLAN: Objection; incomplete 21 hypothetical, calls for speculation, lacks 22 foundation and vague. 23 THE WITNESS: That would be the most 24 probable conclusion I'd draw. 25</p>	129

130	<p>1 priority based on our funding structure of which 2 titles we will do. If it's for an educational 3 purpose by an American student, we're funded by the 4 Department Of Education to produce those. 5 If someone didn't have a school reason, we 6 could put it on a -- what we call a wish list, and 7 volunteers could produce the book or the person with 8 disability could cause it to be created themselves 9 and submit it to us to add to our library. 10 BY MS. RUBEL: 11 Q Other than those several NFPA standards on 12 the Bookshare collection, are you aware of any other 13 standards of the Plaintiffs that anyone with a print 14 disability has indicated they were not able to 15 access because of their print disability? 16 MR. KAPLAN: Objection; vague. 17 THE WITNESS: I have no knowledge of that. 18 BY MS. RUBEL: 19 Q The 10 specific standards that you 20 reviewed, are you aware of any person with a print 21 disability who attempted to access those standards 22 on the Plaintiffs' websites and was unable to do so? 23 MR. KAPLAN: Objection; vague. 24 THE WITNESS: No. Sorry, I thought you 25 were finished.</p>	132
131	<p>1 MR. KAPLAN: Yeah. No. No. 2 BY MS. RUBEL: 3 Q Do you have any reason to believe that if 4 an individual approached any of the Plaintiffs to 5 request access of a standard due to their print 6 disability, that the Plaintiffs would not have 7 provided them access? 8 A I'm having a hard time parsing the 9 question. Can you ask it just a little bit more 10 simply. 11 Q Sure. 12 Do you have any reason to believe that the 13 Plaintiffs would have said "no" if anybody said, "I 14 want to access one of your standards, but I can't 15 because I have a print disability"? 16 MR. KAPLAN: Objection; incomplete 17 hypothetical, vague. 18 THE WITNESS: I'm not aware either way. 19 BY MS. RUBEL: 20 Q Did you ever investigate this? 21 A The scope of my expert report was to 22 investigate the accessibility of the documents on 23 the Plaintiffs' site and not to investigate other 24 aspects of those questions. 25 Q So you didn't investigate whether somebody</p>	133

134	<p>1 testimony, argumentative, vague. 2 THE WITNESS: I believe that some people, 3 as I think I mentioned earlier, could pull out a 4 magnifying glass and be able to use the standards. 5 They may prefer to have a better technical solution, 6 but they would find it somewhat usable. 7 BY MS. RUBEL: 8 Q You said the great majority of people you 9 do not think would find them accessible. Can you 10 quantify that? 11 A Well, there's a list of people with 12 disabilities that I tend to track: Blind, visual 13 impairment, dyslexia, brain injury and physical 14 disabilities. And I consider some subset of people 15 who are low vision but not blind to be much less 16 than half of that combined population. 17 Q Much less than half? Is that a quarter? 18 A I don't have a precise number, but less 19 than a quarter, potentially less than 10 percent. 20 But these aren't numbers that I have a precise 21 number. I just think of what size these different 22 groups are, and then I take a subset of that, and I 23 can kind of do the math, that a great majority is 24 something that I can stand behind. 25 Q Do you know what portion of people who</p>	136	<p>1 THE WITNESS: I'm sorry. Okay. 2 BY MS. RUBEL: 3 Q You need to just answer my questions. 4 MR. KAPLAN: But I will object to the 5 question as misstating testimony. 6 THE WITNESS: Okay. We believe that 2 to 7 3 percent of the general population is likely to 8 qualify for Bookshare. 9 BY MS. RUBEL: 10 Q And is that based on your understanding 11 that 2 to 3 percent of the general population has a 12 print disability as you define it? 13 A That would be my assumption, but the 14 source of my number is primarily what percentage of 15 general student populations, say, in K-12 or in 16 higher ed, get signed up for Bookshare and so -- and 17 we see numbers in the 2 to 3 percent range of, say, 18 a school district in Palo Alto might be signed up 19 for us, so that's kind of the basis of that number. 20 Q And then you said that less than half of 21 that 2 to 3 percent use -- has ever used a screen 22 reader; is that correct? 23 MR. KAPLAN: Objection; misstates 24 testimony. 25 THE WITNESS: I estimated that -- I would</p>
135	<p>1 have dyslexia in the United States use screen 2 readers? 3 A I do not have a precise number for that. 4 Q Do you have a general sense of what 5 percentage of people with dyslexia use screen 6 readers in the United States? 7 A Like other disabilities, it's a matter of 8 degree. So few people with mild dyslexia would use 9 a screen reader, but some would. 10 Q I'm sorry, I just want to make sure I 11 heard. You said "few people"? 12 A Few people with mild dyslexia would do 13 that. Those people generally wouldn't qualify for 14 Bookshare. If we're talking about what percentage 15 of the people, the 2 or 3 percent of the population, 16 that we think qualify for our services use or have 17 used a screen reader, less than half, more than 10 18 or 20 percent. 19 Q Let me make sure I'm following. 20 You estimated before that 2 to 3 percent 21 of the general population would qualify as having a 22 print disability? 23 A Correct. 24 MR. KAPLAN: No. That misstates 25 testimony.</p>	137	<p>1 probably say less than half of that general 2 population is using a screen reader, and because 3 dyslexia is more commonly diagnosed in people who 4 went through school in the last 20 years in the 5 general population, that's why it's a small number. 6 Numbers would be different if I was talking about 7 current students. 8 BY MS. RUBEL: 9 Q I want to just make sure I understand, 10 because I'm still a little unclear. 11 You're referring to the general 12 population. Is that the 2 to 3 percent? 13 MR. KAPLAN: Objection; vague. 14 THE WITNESS: We're talking about the 15 proportion of the 2 to 3 percent that might be using 16 this kind of technology, and I estimated that less 17 than half of the 2 to 3 percent of the general 18 population is currently using these technologies, 19 and probably since we're talking about seniors and 20 people who grew up a long time ago, it's probably 21 also less than half of that population has probably 22 ever used a screen reader. 23 So I'm comfortable with saying I believe 24 that less than 1 percent of Americans have ever used 25 a screen reader.</p>

138	<p>1 MS. RUBEL: I think this is a good time to 2 take our lunch break. 3 THE VIDEOGRAPHER: We're going off the 4 record at 1:20. 5 (Lunch recess taken.) 6 THE VIDEOGRAPHER: We're back on the 7 record at 2:42. 8 BY MS. RUBEL: 9 Q There were four aspects of each of the 10 Plaintiffs' websites that you evaluated; is that 11 correct? 12 MR. KAPLAN: Objection; vague. 13 THE WITNESS: There were four factors that 14 I investigated in terms of the websites and the 15 standards content. 16 BY MS. RUBEL: 17 Q And what were those four factors or 18 aspects? 19 A Well, I -- I focused on functional aspects 20 such as could a person with a disability access the 21 actual standard? Could they read it in its 22 entirety? Could they go to a specific spot in the 23 standard and could they do a keyword search on the 24 standard? 25 I think those are the four factors that I</p>	140	<p>1 would be able to do? 2 MR. KAPLAN: Objection; misstates 3 testimony, argumentative, vague. 4 THE WITNESS: I was -- I chose the 5 functional tests based on accessibility standards 6 and the ability for a person with a disability to do 7 similar things to people without disabilities, but I 8 didn't evaluate the general usability of the website 9 for people without disabilities. I chose to focus 10 on those elements. 11 BY MS. RUBEL: 12 Q So maybe I'll give you an example. 13 Did you -- did you evaluate whether a 14 person without a print disability using the 15 Plaintiffs' websites would be able to do a full-text 16 search of the standards? 17 MR. KAPLAN: Objection; vague. 18 THE WITNESS: I did not evaluate that. I 19 did evaluate, for example -- actually, no, I think I 20 did do some checks on full-text searches. My expert 21 report mentions where I did those checks. 22 BY MS. RUBEL: 23 Q When you were doing the searches for 24 full-text searches, was that -- I'm sorry. I guess 25 we'll get to that when we discuss that portion of</p>
139	<p>1 used. 2 Q How did you come up with those four 3 factors? 4 A Through a functional analysis on what 5 people generally do when they're reading information 6 for content. It's like -- it's sort of a functional 7 description of can I do what other people would do 8 with that? And if you can do those four things, the 9 assumption is you can probably do most other things 10 that people would do with some content. 11 Q Did you determine whether the general 12 population accessing the standards through the 13 Plaintiffs' websites would be able to form -- would 14 be able to perform each of those four functions? 15 MR. KAPLAN: Objection; vague. 16 THE WITNESS: I viewed this through 17 accessibility standards rather than, say, assessing 18 how well designed the websites were for sighted 19 people. I didn't focus on that. I based it on sort 20 of accessibility standards rather than evaluating it 21 for the general public. 22 BY MS. RUBEL: 23 Q So you weren't comparing whether a person 24 with a print disability would be able to do the same 25 things that a person without a print disability</p>	141	<p>1 your report. 2 A Uh-huh. 3 Q Were you assisted by anybody else in the 4 drafting of your report? 5 MR. KAPLAN: Objection; vague. 6 THE WITNESS: Excluding privileged answers 7 to that question, nobody else helped me draft the 8 text of the report. 9 BY MS. RUBEL: 10 Q Did anybody else assist you in evaluating 11 the accessibility of Plaintiffs' websites? 12 A One person, Rob Turner. 13 Q What did Rob Turner do to assist you? 14 A He reproduced a couple problems that I had 15 encountered during my investigation; that was what I 16 asked him to focus on. 17 Q What do you mean by "reproduced a couple 18 problems"? 19 A So in doing my functional evaluation, I 20 ran into difficulties with a blind person being able 21 to do the things that I listed, and I asked Rob 22 whether he ran into the same difficulties that I 23 did, and he did. 24 Q Do you know which standards Rob Turner 25 tried to access?</p>

142	<p>1 A I think we focused on the website that 2 didn't have an accessible sign-up process, and I'm 3 happy to find out which one of the three standards 4 bodies had that problem, just so I correctly testify 5 to that. 6 Q Sure. 7 A So I'm looking at my expert report. So we 8 focused our efforts on NFPA when we did our 9 in-person evaluation. 10 Q Is Rob Turner blind? 11 A Yes. 12 Q What is his background? 13 MR. KAPLAN: Objection; vague. 14 THE WITNESS: He's a blind engineer for my 15 nonprofit organization. 16 BY MS. RUBEL: 17 Q What -- what is his role -- 18 Is he employed by Benetech? 19 A Yes, he's employed by Benetech as a -- as 20 a Quality Assurance Engineer. 21 Q So what does he do in that role? 22 A He tests the quality of our products, 23 including our websites, evaluates accessibility, but 24 his focus is on our products. 25 Q Why did you seek Rob Turner's assistance?</p>	144
143	<p>1 guidelines? 2 A They're the primary Web accessibility 3 standard promulgated by the World Wide Web 4 Consortium, which is the main standards body in Web 5 technology. 6 Q Does Benetech participate in the World 7 Wide Web Consortium's standards development process? 8 MR. KAPLAN: Objection; vague. 9 THE WITNESS: Benetech staff have 10 participated in W3C standards efforts. 11 BY MS. RUBEL: 12 Q In what capacity? 13 A As a stakeholder with technical expertise 14 in the area. So our focus is on accessibility 15 aspects of W3C standards. 16 Q During what time period did Benetech 17 participate in the standards development process for 18 this organization? 19 A In one form or another, we have 20 participated in the W3C standards process for 21 roughly 20 years. 22 Q And does Benetech currently participate in 23 the standards development process? 24 A I'm not aware of a current process that 25 we're actively involved with today, but we might</p>	145
143	<p>1 A He's one of our blind employees who 2 happens to be in the office regularly as opposed to 3 being located in other locations; so I could go down 4 and talk to him. 5 Q So you asked -- 6 You asked Rob to try to access standards 7 from NFPA's website and see if he was able to do so? 8 MR. KAPLAN: Objection; vague. 9 Go ahead. 10 THE WITNESS: Correct. First, I asked him 11 to look at the sign-up process to see if he could 12 sign up for a free reading account without needing 13 assistance from a sighted person, and he wasn't able 14 to do that. 15 BY MS. RUBEL: 16 Q Was there anything else you asked him to 17 do? 18 A After I pushed the "I Agree" button and 19 got him through that, that roadblock, I also asked 20 him to try to read the standard in question. 21 Q Did you ask Rob to try to access any of 22 the Plaintiffs' standards that are posted on Public 23 Resource's website? 24 A No, I did not. 25 Q What are the Web content accessibility</p>	<p>1 be -- we've been involved in the last couple of 2 years on an issue that may still be open. 3 Q Did participants pay fees in order to 4 participate in the standard development process with 5 this Consortium? 6 A I believe that there are people who are 7 members of the W3C and pay fees and people who do 8 not. 9 Q How much do members pay? 10 A I am not aware of that number. 11 Q Do you have a ballpark? 12 A No. I wouldn't speculate. 13 Q Are you familiar with the license that the 14 Consortium uses with respect to the standards that 15 it develops? 16 MR. KAPLAN: Objection; argumentative, 17 vague, calls for a legal conclusion. 18 THE WITNESS: Is the question about the 19 W3C? I don't recall having read their license in 20 many years, if I ever have. 21 BY MS. RUBEL: 22 Q Did you attach a copy of their license as 23 an exhibit to your report? 24 A I specified the W3C standard that I used 25 and counsel attached the actual standard.</p>

146	<p>1 Q So it was counsel's decision to make 2 reference to the license? 3 MR. KAPLAN: Objection; misstates 4 testimony and calls for privileged communications. 5 THE WITNESS: Okay. So I'm going to go 6 back to my expert report and try and find the 7 mention that you're referring to and -- 8 BY MS. RUBEL: 9 Q Sure. I can refer you to page 7 of your 10 report. 11 A Okay. Great. 12 Yes. I guess -- yes, that was 13 counsel's -- it was based on privileged 14 conversations about the license. 15 Q And you don't recall having read that 16 license for many years; is that correct? 17 A I think I'm aware that the W3C licensed 18 their standards freely. I was aware of that. 19 Q When you say license it freely, do you 20 mean at no cost? 21 A Yes. 22 Q And so they're -- they're referred to as 23 WC3 [sic]; is that correct? 24 A W3C is the most common designation. 25 Q W3C?</p>	148	
147	<p>1 A Yep. And WCAG is the Web Content 2 Accessibility Guidelines. 3 Q WCAG? 4 A Yeah. W-C-A-G, Web Content Accessibility 5 Guidelines. 6 W-C-A-G for short, WCAG. 7 BY MS. RUBEL: 8 Q Are the WCAG guidelines mandatory? 9 MR. KAPLAN: Objection; vague. 10 THE WITNESS: They're complex standards. 11 I'm sure there are places where meeting a certain 12 level of that standard is a requirement, but they're 13 not -- they don't have the force of law worldwide or 14 anything like that. 15 BY MS. RUBEL: 16 Q Would you describe them as 17 recommendations? 18 MR. KAPLAN: Objection; vague, 19 argumentative. 20 THE WITNESS: They are accessibility 21 standards. They incorporate functional goals, 22 measures of accessibility, how to abide by them, 23 different levels of compliance with accessibility. 24 There are generally three levels of 25 accessibility in the standards. I know that there</p>	<p>1 are government agencies that specify that vendors 2 have to meet a certain level of compliance with the 3 WCAG standards. They're commonly referenced when 4 accessibility requirements are -- are raised. 5 BY MS. RUBEL: 6 Q What are the three levels of 7 accessibility? 8 A They're generally designated as A, AA and 9 AAA. 10 Q What does -- what does level A signify? 11 A In common understanding in the field, 12 "should" or no, "must." A is "must" or the 13 equivalent of must. 14 Q What do you mean by that? 15 A If you're accessible, you must do this; 16 otherwise, you're not accessible. 17 Q And what about a double A; what does that 18 signify? 19 A "Should." If you're accessible, you 20 should do these as well as the must requirements. 21 Q And a triple A? 22 A "Could," "might" if it's easy. It would 23 be overkill to require people to do everything in 24 AAA, and it also varies on what your functional 25 objective is, and so, you know, certain things just</p>	149

150	<p>1 A Yes. Uh-huh.</p> <p>2 Q Does everyone who posts content on the</p> <p>3 Internet comply with all of the level A</p> <p>4 recommendations?</p> <p>5 A No.</p> <p>6 Q Do you have any estimate of what</p> <p>7 percentage of the content on the Internet complies</p> <p>8 with those level A recommendations?</p> <p>9 A No.</p> <p>10 Q Any ballpark range?</p> <p>11 MR. KAPLAN: Objection; asked and</p> <p>12 answered.</p> <p>13 THE WITNESS: The Web's a really big place</p> <p>14 and I don't know all about it.</p> <p>15 BY MS. RUBEL:</p> <p>16 Q Is there a lot of content on the Internet</p> <p>17 that does not comply with the level A</p> <p>18 recommendations?</p> <p>19 MR. KAPLAN: Objection; vague.</p> <p>20 THE WITNESS: If you got more specific, it</p> <p>21 would be easier for me to answer questions. But</p> <p>22 anything like, tell me about what World Wide Web is</p> <p>23 like is like tell me about every human being on the</p> <p>24 planet and generally the characteristics of them.</p> <p>25 I -- I -- it's really hard to be specific.</p>	152
151	<p>1 BY MS. RUBEL:</p> <p>2 Q Are you familiar with any content, any</p> <p>3 specific content, on the Internet that does not</p> <p>4 follow the level A recommendations?</p> <p>5 A Sure. I bet there are a bunch of videos</p> <p>6 on the Internet that don't have captioning for the</p> <p>7 deaf, which would be a level A requirement of video</p> <p>8 content.</p> <p>9 Q What about the specific recommendation</p> <p>10 that relates to providing text alternatives for any</p> <p>11 non-text content; are you familiar with any content</p> <p>12 on the Internet that does not comply with that</p> <p>13 recommendation?</p> <p>14 MR. KAPLAN: Objection; argumentative,</p> <p>15 vague.</p> <p>16 THE WITNESS: The NFPA sign-up process is</p> <p>17 an example I use in my report. That's one example.</p> <p>18 BY MS. RUBEL:</p> <p>19 Q Other than the Plaintiffs' websites, is it</p> <p>20 a common issue that there -- that there are websites</p> <p>21 that do not provide text alternatives for non-text</p> <p>22 content?</p> <p>23 MR. KAPLAN: Objection; vague.</p> <p>24 THE WITNESS: I'm aware of a number of</p> <p>25 lawsuits over the accessibility of websites where</p>	153

154	<p>1 THE WITNESS: I think we've gotten very</p> <p>2 narrow as opposed to very broad, so up to this</p> <p>3 moment we've been talking about websites in general.</p> <p>4 And I think websites in general, when they are</p> <p>5 inaccessible to the disabled, it generally doesn't</p> <p>6 have anything to do with copyright or any copyright</p> <p>7 concerns. It's an incredibly narrow group of people</p> <p>8 who are publishing content where copyright issues</p> <p>9 might be brought up, but that's kind of more</p> <p>10 hypothetical.</p> <p>11 BY MS. RUBEL:</p> <p>12 Q I want to ask some questions about ASTM's</p> <p>13 public website, which it refers to as the Reading</p> <p>14 Room.</p> <p>15 A Right.</p> <p>16 Q Did you see that notations of it being</p> <p>17 referred to as the Reading Room when you were</p> <p>18 reviewing ASTM's website?</p> <p>19 A That rings a bell. As a matter of fact,</p> <p>20 yes.</p> <p>21 Q What ASTM standard did you evaluate the</p> <p>22 accessibility of, specifically?</p> <p>23 A ASTM B557-84e, like Edward, 1.</p> <p>24 Q Was that counsel that suggested that you</p> <p>25 investigate and evaluate that specific standard?</p>	156
155	<p>1 A Counsel suggested that I evaluate ASTM</p> <p>2 B557-84, and I found e1, which, I guess, is probably</p> <p>3 a specific version under that standard.</p> <p>4 Q Do you have any understanding of why they</p> <p>5 suggested that specific ASTM standard?</p> <p>6 MR. KAPLAN: Objection; calls for</p> <p>7 privileged communications.</p> <p>8 THE WITNESS: Not other than I've already</p> <p>9 said.</p> <p>10 BY MS. RUBEL:</p> <p>11 Q Do you know what the ASTM standard</p> <p>12 B557-84e1 is? What is it a standard for?</p> <p>13 A Metal products.</p> <p>14 Q Anything specific about metal products?</p> <p>15 A Well, the title of the standard is</p> <p>16 "Wrought and Cast Aluminum- and Magnesium-Alloy</p> <p>17 Products."</p> <p>18 Q The title is actually "Standard Methods of</p> <p>19 Tension Testing Wrought and Case Aluminum- and</p> <p>20 Magnesium-Alloy Products."</p> <p>21 A Okay. So I grabbed a subset of the full</p> <p>22 formal title, but I think it deals with metal</p> <p>23 products.</p> <p>24 Q Based on that title, do you have any</p> <p>25 understanding of what this test method is used for?</p>	157

158	<p>1 or in the rare cases where I become personally 2 acquainted with a particular person or issue, which 3 is a tiny fraction of both our members and our 4 content. 5 Q You're not aware of any person with a 6 print disability asking anyone at Benetech to 7 provide them access with ASTM Standard B557-84, are 8 you? 9 A I am not. 10 Q Would a blind person be able to perform 11 the tension testing that is described in ASTM 12 Standard B557-84? 13 MR. KAPLAN: Objection; lacks foundation, 14 calls for speculation, vague. 15 THE WITNESS: I am not personally aware of 16 the requirements to utilize this standard 17 technically, but in general, when someone says, "Can 18 a blind person do this technical task?" I see the 19 answer as quite likely. Let's try to figure out how 20 to do that as opposed to assuming that they can't do 21 it. 22 BY MS. RUBEL: 23 Q If -- if the method of testing tension of 24 certain materials requires precise measurement, is 25 that -- is that something that a blind person can</p>	160
159	<p>1 typically do without assistance? 2 MR. KAPLAN: Objection; vague, 3 argumentative, lacks foundation, calls for 4 speculation. 5 THE WITNESS: I am aware of blind 6 machinists and blind engineers and blind scientists 7 who conduct measurement tasks frequently, and so it 8 seems quite possible to me, not having read the 9 detailed provisions of the standard with an eye to 10 evaluating whether a blind person could conduct 11 those measurements. 12 BY MS. RUBEL: 13 Q Let me be clear, I am not casting 14 aspersions on anyone's abilities. I'm simply asking 15 the question whether it is possible for somebody to 16 do that without assistance. 17 MR. KAPLAN: Seems like that's exactly 18 what you're doing, but you get to ask your 19 questions. 20 THE WITNESS: Yeah. I'm trying to answer 21 them as well as I can. 22 BY MS. RUBEL: 23 Q How -- how can a blind -- 24 How can a person who is blind perform 25 precise measurements without assistance?</p>	161

162	<p>1 right?</p> <p>2 A Yes.</p> <p>3 Q Was this the entire screen that you saw or</p> <p>4 just a portion of the screen?</p> <p>5 A A portion, but I'd say that, you know, you</p> <p>6 can see the scroll bar, that there are multiple</p> <p>7 scroll bars that I could access to scan down and see</p> <p>8 more of it or to go forward.</p> <p>9 Q So you were able to scroll down to see</p> <p>10 what was the entire page 1 on the screen of the</p> <p>11 ASTM's Reading Room?</p> <p>12 A As a sighted person, I believe that I</p> <p>13 could see all of page 1, yes.</p> <p>14 Q And you could click through -- and the</p> <p>15 arrows, using the arrows to see page 2; is that</p> <p>16 correct?</p> <p>17 A As a sighted person, yes, I believe I can.</p> <p>18 Q And all the way through up to page 11; is</p> <p>19 that right?</p> <p>20 A I believe that I doubt that I actually</p> <p>21 went page by page all the way to page 11.</p> <p>22 Q Was there an option on the ASTM's Reading</p> <p>23 Room to make the text larger?</p> <p>24 A I didn't look for that feature.</p> <p>25 Q Did you believe that was relevant; that an</p>	164
163	<p>1 option to make the text larger would be relevant to</p> <p>2 evaluating whether the standard is accessible to</p> <p>3 people with print disabilities?</p> <p>4 MR. KAPLAN: Objection; argumentative,</p> <p>5 vague.</p> <p>6 THE WITNESS: As we discussed before,</p> <p>7 low-vision people, a chunk of low-vision people,</p> <p>8 would be able to access a visually-presented</p> <p>9 standard, and they could be using their own screen</p> <p>10 magnifier, they could be using built-in browser</p> <p>11 controls to make the text larger, they can --</p> <p>12 sometimes people in the websites implement an</p> <p>13 enlargement button to make the text larger, which is</p> <p>14 an alternate way of accomplishing the same thing.</p> <p>15 And so on the base website, I just assumed</p> <p>16 those things would work because I don't feel like on</p> <p>17 a text-based website I need to test them; they work.</p> <p>18 The image-based window, I am less certain</p> <p>19 about how easy it would be to make larger, because I</p> <p>20 did not actually test it directly with a screen</p> <p>21 magnifier.</p> <p>22 BY MS. RUBEL:</p> <p>23 Q And, in fact, you didn't see if ASTM</p> <p>24 actually provided any options within the Reading</p> <p>25 Room that would help somebody make the text larger;</p>	165

166	<p>1 text searching function, that's because it isn't 2 there unless it's well hidden. Also, the page looks 3 like a picture of a standards page as opposed to a 4 text version. So the fact that it was a picture of 5 the page, generally that means that text searching 6 tends to be unavailable unless they've done 7 something extra. 8 Q In addition to ASTM standard B557, you 9 also evaluated one other ASTM standard. What 10 standard was that? 11 A ASTM A20/A20M, like Mary, -93a, like 12 Apple. 13 Q Why did you evaluate that standard? Why 14 did you choose that standard? 15 A Because it was the first one listed, and I 16 just wanted to see, gee, the other standard's 17 presenting the same image-based interface. Yes, 18 looks like it, and I think I had tested five of them 19 on another standards website, and so after you've 20 tested them, you got to say, "Well, gee, looks like 21 they're all presenting this image-based interface," 22 but obviously I did not comprehensively go through 23 every standard to confirm that they all presented 24 the same inaccessible interface. 25 Q Do you know if ASTM standard A20 is at</p>	168	<p>1 didn't have to sign up for anything. 2 BY MS. RUBEL: 3 Q So Public Resource is not providing access 4 to Plaintiffs' standards exclusively to people with 5 print disabilities, correct? 6 MR. KAPLAN: Objection; vague, calls for a 7 legal conclusion. 8 THE WITNESS: Yes. 9 BY MS. RUBEL: 10 Q Does the material that Public Resource 11 posted on its website bear any notice that further 12 reproduction of the material could be an 13 infringement? 14 MR. KAPLAN: Objection; vague, lacks 15 foundation. 16 THE WITNESS: No. At least it's been long 17 enough that -- let me reread the question. 18 MR. KAPLAN: Can you restate the question. 19 (Record read as follows: 20 "Q Does the material that 21 Public Resource posted on its 22 website bear any notice that 23 further reproduction of the 24 material could be an 25 infringement?")</p>
167	<p>1 issue in this litigation? 2 A No, I do not. 3 Q Did you review Public Resource's website 4 in connection with this expert report? 5 A Yes. 6 Q Is the general public able to access 7 Public Resource's website? 8 A Yes. Sorry. 9 Q Is there any mechanism within Public 10 Resource's website that allows only people with 11 print impairments to view copies of any of the 12 material on that website? 13 MR. KAPLAN: Objection; vague. 14 THE WITNESS: Not that I'm aware of. 15 BY MS. RUBEL: 16 Q So Public Resource has not published the 17 standard -- the Plaintiffs' standards in a manner 18 that is exclusively available to people with print 19 disabilities, correct? 20 MR. KAPLAN: Objection; misstates 21 testimony, calls for speculation. 22 THE WITNESS: The standards that are on 23 the Public Resource website seem to work for people 24 with disabilities, and as a member of the general 25 public, I was able to look at the same standards. I</p>	169	<p>1 MR. KAPLAN: And I'll make the same 2 objections. 3 THE WITNESS: Yeah. No, not to my 4 knowledge, based on the parts that I examined. 5 BY MS. RUBEL: 6 Q In what formats does Public Resource's 7 website provide Plaintiffs' standards in? 8 MR. KAPLAN: Objection; lacks foundation. 9 THE WITNESS: I believe multiple 10 standards. The two formats that I particularly 11 examined were HTML and PDF. 12 BY MS. RUBEL: 13 Q Do you know how many of Plaintiffs' 14 standards Public Resource has posted in HTML format? 15 A No. 16 Q Do you have a ballpark estimate? 17 A No. 18 Q Do you know how many standards that are at 19 issue in this case Public Resource has posted in 20 HTML format? 21 A No. 22 Q How can a screen reader -- 23 How does a screen reader read the text of 24 content that is in HTML format? 25 MR. KAPLAN: Objection; incomplete</p>

170	<p>1 hypothetical, vague. 2 THE WITNESS: So screen readers tend to 3 optimize for the most common formats and 4 applications that blind people are likely to use. 5 Web browsers, Microsoft Word are very common 6 formats, so they do extra things to make them 7 accessible. And so the screen reader is looking at 8 the operation of the software itself; its controls, 9 its commands and the content that the software is 10 presenting. 11 Focusing on a Web browser using a screen 12 reader with a Web browser is viewing a Web page, 13 there's multiple kinds of content that the blind 14 person is trying to access, and it's kind of like 15 textual content, plus structure and sometimes 16 multimedia content like videos or audio or pictures. 17 So what the screen reader is trying to do 18 is help the blind person access the information on 19 the Web page and reproduce as much of the 20 functionality that's available to a sighted person 21 as technically possible by analyzing that page and 22 then offering the blind person a bunch of different 23 ways to interact with that content. 24 I can go into more depth on different 25 parts of that.</p>	172
171	<p>1 BY MS. RUBEL: 2 Q So, for example, if there's a graphic -- 3 let's start with a table first. 4 A Okay. 5 Q Let's say there's a table that's included 6 in the -- on the Web page. 7 A Right. 8 Q How would the screen reader read that 9 table? 10 MR. KAPLAN: Objection; incomplete 11 hypothetical. 12 THE WITNESS: So in HTML there are tags 13 for building a table. So let's say it's a 14 two-by-two table. The screen reader could probably 15 tell you that it's a two-by-two table and what the 16 labels are on the top and what the labels are on the 17 side, much like a screen reader operating in a 18 spreadsheet. It can tell you what information about 19 a particular place in the table, if I were to search 20 for it so -- and, you know, it would probably -- if 21 you just said, "Read it to me," it would probably 22 pick a logical order to read it in. 23 BY MS. RUBEL: 24 Q So it might tell you Column Header A is 25 size, Column Header B is --</p>	173

174	<p>1 incomplete hypothetical, vague, calls for 2 speculation. 3 THE WITNESS: Yes, and there's an 4 additional standard for a longer description if it 5 doesn't fit into the length of an Alt Text tag. 6 BY MS. RUBEL: 7 Q And in that case, what would you do if it 8 doesn't fit into the Alt Text tag? 9 MR. KAPLAN: Objection; incomplete 10 hypothetical, vague, calls for speculation. 11 THE WITNESS: There are a number of 12 different other standards, but the most common one 13 is Long Desc, just short for long description, and 14 you can attach a long description to that -- that 15 table that's longer. 16 For example, if you're looking at a pie 17 chart, you might have a link to the underlying data, 18 spreadsheet that created that; that might be a 19 common way of providing an alternate way of seeing 20 the same information. 21 BY MS. RUBEL: 22 Q Did you analyze whether the HTML versions 23 that Public Resource provides of Plaintiffs' 24 standards are accessible to blind people? 25 A Yes. Sorry.</p>	176
175	<p>1 MR. KAPLAN: It's okay. Got to give me a 2 breath here. 3 THE WITNESS: Okay. I will. I'll try. 4 BY MS. RUBEL: 5 Q As part of your analysis, did you analyze 6 whether the tables in the HTML were accessible -- 7 the tables in HTML from Public Resource's website 8 were accessible to blind people? 9 A I don't recall evaluating tables in 10 detail. 11 Q Did you evaluate whether the graphics in 12 the standards -- in Plaintiffs' standards were 13 accessible to blind people from Public Resource's 14 website? 15 A No. 16 THE VIDEOGRAPHER: Is this a good place? 17 MS. RUBEL: Sure. We can take a break. 18 We ran out of tape. 19 THE VIDEOGRAPHER: This is end of Disk 2. 20 We're off the record at 3:37. 21 (Recess taken.) 22 THE VIDEOGRAPHER: This is beginning of 23 Disk 3. We're back on the record at 3:48. 24 BY MS. RUBEL: 25 Q Based on your analysis of the Plaintiffs'</p>	177

178	<p>1 accessible might be -- have a lock on it so you 2 can't look at it, the technical protection 3 mechanism, that doesn't let you get into it. 4 The next step up might be just the image. 5 The next step up might be a text version of the 6 document where Adobe's document reads the text aloud 7 as part of its function. 8 I found at least -- well, the standard I 9 particularly recall had the image and had the 10 underlying text, but Adobe's normal functionality 11 didn't read the text even though it was there, and 12 that I was able to access that by doing a Control A 13 and pasting that into Microsoft Word and reading it 14 there. 15 BY MS. RUBEL: 16 Q You were able to access the underlying 17 text from the PDF; is that right? 18 A That's right. 19 Q And you just hit Control A and then copied 20 that content into a Word document; is that right? 21 A Right. 22 Q Did you save a copy of the Word document 23 that you created? 24 A I don't -- I'm not sure. 25 Q Did you create --</p>	180	<p>1 PDF format from Public Resource's website? 2 A No. 3 Q You indicated in your report that a blind 4 person probably would not use the process that you 5 used for converting the PDF versions of Plaintiffs' 6 standards; is that right? 7 MR. KAPLAN: Objection; vague. 8 THE WITNESS: Yes. 9 BY MS. RUBEL: 10 Q Why is that? 11 A It's kind of a technical trick that isn't 12 documented in Adobe that you would try that, but 13 there's something that made me feel like the text 14 was there. I always try to highlight stuff with the 15 mouse, and I said, "The text is there, and Adobe's 16 not finding it. What's going on?" So I tried that 17 and it worked, but I didn't think that I could 18 accurately state that that would occur to the 19 average blind person. 20 Q And when you copied the text into a Word 21 document, were there any errors in the transcription 22 in the text in the Word document? 23 A Yes. 24 Q What were those errors? 25 A They were errors that are typical of</p>
179	<p>1 We've discussed that -- that you reviewed 2 approximately 10 of Plaintiffs' standards. Did you 3 create a different Word document for each one of 4 those standards that you obtained from Public 5 Resource's website? 6 MR. KAPLAN: Objection; misleading, vague. 7 THE WITNESS: I didn't say I did those 8 things. 9 BY MS. RUBEL: 10 Q Okay. Let's take a step back, then. 11 How many of Plaintiffs' standards that you 12 reviewed from Public Resource's website did you copy 13 the text and paste into a Word document? 14 A One. 15 Q Which standard was that? 16 A NPFA [sic] 101, the more recent date. I 17 think it's 2010. 18 MR. KAPLAN: You can review your expert 19 report, if you want. 20 THE WITNESS: Okay. 21 MR. REHN: I think it says 2012. 22 THE WITNESS: Okay. Thank you. Yes, that 23 was the 2012 version of NPFA [sic] 101. 24 BY MS. RUBEL: 25 Q Did you access any of ASTM's standards in</p>	181	<p>1 optical character recognition processes. 2 Q Can you give me some examples? 3 A I worked in the OCR field for 30 years, 4 and so the kinds of mistakes that OCR makes, I don't 5 remember the specific ones but, you know, if you 6 have a stylized font on the title page, it's far 7 more likely the OCR will mash up the title, that it 8 will say the copyright statement that's in normal 9 point size. Words that have a dash in the middle of 10 them that in Microsoft Word would be reassembled as 11 complete words, show up as the first half of the 12 word, a dash, a line feed and then the beginning -- 13 the rest of the word. 14 And, you know -- and then just character 15 recognition errors; you know, r and N next to each 16 other showing up as an M. I don't remember seeing 17 that particular one, but that's a signature OCR 18 error. 19 Q What about issues with numbers? Are there 20 any common OCR errors that have to do with numbers? 21 A It depends on the context. So if 22 something is like 10, is it capital I, capital O or 23 is it 10? So that's a common OCR error because it 24 does have a context, whereas if it had 107, the OCR 25 would probably go, Oh, it's a 7 in there, and it's</p>

182	<p>1 probably 1 and zero and not I and O. 2 And, you know, OCR also misrecognizes 3 symbols, might occasionally drop a small dot or 4 specialized characters. 5 Q Do you know if Plaintiffs' standards use 6 specialized symbols? 7 A I don't recall. I would not be surprised 8 if they did. 9 Q You described -- you used the phrase 10 before "mashing up the title." What do you mean by 11 that? 12 A Usually when you're looking at, let's say, 13 a paragraph and the OCR makes an error, it's usually 14 pretty limited. You can probably figure out from 15 context what it is. A stand-alone title, what if -- 16 I don't know -- only 6 of the 10 letters actually 17 showed up and they're spaced apart from each other 18 because it expanded an entire area. That's the sort 19 of thing I think of as mashing up. 20 Q So the entire title in that example 21 wouldn't be -- wouldn't be legible or 22 understandable? 23 A Yeah. I mean, often books have -- or 24 documents have a stylized or a logo or a fancy 25 title, and the OCR tends to choke on that, but then</p>	184	<p>1 a writing? 2 MR. KAPLAN: Objection; vague, incomplete 3 hypothetical. 4 THE WITNESS: There are -- there is 5 content where the OCR does not do a great job. 6 That's very unusual but it happens. 7 BY MS. RUBEL: 8 Q Does it happen in the context of technical 9 writings frequently? 10 MR. KAPLAN: Objection; vague, incomplete 11 hypothetical. 12 THE WITNESS: It can. You might have a 13 very detailed graphic that has text that overlays a 14 picture. It's hard for the OCR to separate. 15 BY MS. RUBEL: 16 Q Are the Plaintiffs' standards technical 17 documents? 18 MR. KAPLAN: Objection; vague. 19 THE WITNESS: Generally, yes. 20 BY MS. RUBEL: 21 Q Would you anticipate that there might be 22 problems with the OCR of Plaintiffs' standards? 23 MR. KAPLAN: Objection; vague, incomplete 24 hypothetical. 25 THE WITNESS: OCR usually makes errors in</p>
183	<p>1 when you get to the copyright notice, it's got it 2 right. It's just because this fancy, big, you know, 3 one word span the entire page, and it thought maybe 4 this is a picture or -- I don't know. These -- 5 these things happen. 6 Q And it could be important content, 7 actually, where there's an OCR error about, right? 8 MR. KAPLAN: Objection; vague, incomplete 9 hypothetical, argumentative. 10 THE WITNESS: OCR errors aren't connected 11 to semantic meaning. They just happen in the 12 transcription process, so it could be important, it 13 could be not important. 14 BY MS. RUBEL: 15 Q The more complex the content of a written 16 work is -- strike that. 17 When the content of a written record is 18 very complex, does that make character recognition 19 more difficult? 20 MR. KAPLAN: Objection; vague, incomplete 21 hypothetical. 22 THE WITNESS: Yes. 23 BY MS. RUBEL: 24 Q Is character recognition technology 25 sometimes unusable because of the complex content of</p>	185	<p>1 scanning documents generally, so I'm sure that a raw 2 OCR scan of those documents would also have errors. 3 BY MS. RUBEL: 4 Q And, in particular, because they're 5 technical documents, do you think the likelihood of 6 errors is greater? 7 MR. KAPLAN: Objection; incomplete 8 hypothetical, vague. 9 THE WITNESS: Yes, because of diagrams; 10 diagrams and tables are more difficult than 11 paragraphs or text. 12 BY MS. RUBEL: 13 Q And, in particular, with diagrams and 14 tables, would you anticipate that some of the 15 character recognition might actually create content 16 that's incomprehensible? 17 MR. KAPLAN: Objection; vague, incomplete 18 hypothetical. 19 THE WITNESS: Yes. I could imagine a 20 table that was constructed visually in such a way to 21 make the OCR not be successful on it. 22 BY MS. RUBEL: 23 Q You indicated in your report that there 24 was an additional way, other than the process that 25 you used, to extract the text from the PDFs, that</p>

186	<p>1 there was an additional way that some users may be 2 able to make PDF standards accessible. 3 Can you explain what that method is? 4 A To do optical character recognition on the 5 page images. 6 Q And how would they do that? 7 A Well, blind people often own an OCR 8 product that primarily is used to take images from a 9 scanner that might scan a document and turn it into 10 a Word processor document but can also be used to do 11 OCR and images that come from a -- from an already 12 scanned document like a PDF, and also some screen 13 readers have some of that OCR capability built into 14 them. And those tend to focus on online or document 15 content that show up as pictures that you might want 16 to OCR. 17 Q And you described that as a process that 18 advanced computer users might be willing to use; is 19 that right? 20 A Let's see, did I use the term "advanced"? 21 Q Page 17. 22 A Yeah. I would say, you know, a capable, 23 you know, blind computer user would be aware of the 24 ability to do image-based OCR on a PDF that was 25 otherwise accessible.</p>	188
187	<p>1 Q What is an advanced computer user? 2 A Well, an eight-year-old blind student 3 would probably not know how to do this. A college 4 student or employed blind person who is using screen 5 readers on a day-to-day basis, a great majority of 6 them would know how to use this. So a senior 7 citizen who's trying to read the Web and e-mail from 8 their kids may not use -- so it's a -- sort of it's 9 the -- how experienced are they using their 10 accessibility technology. 11 MS. RUBEL: I don't believe I have any 12 more questions. I do want to just say on the record 13 we've been unable to access in any meaningful way 14 the thousands of pages of documents that you 15 produced today, so we want to leave this -- I want 16 to give my co-counsel a chance to ask additional 17 questions, but we also want to leave the record open 18 in case there are additional questions that we feel 19 like we need to have answered based on those 20 documents once we have a chance to review them. 21 MR. KAPLAN: Obviously we object. We told 22 you that we'd be producing those documents today. 23 If you needed them earlier, you could have asked for 24 it; you didn't. And I don't know what it means that 25 you can't access them in any meaningful way, but I'm</p>	189

190	<p>1 MR. REHN: We asked for an additional way 2 to get them a while ago this morning. I asked Matt 3 this morning if he had any other way of getting us 4 the documents. 5 MR. BECKER: I have no recollection of 6 that. 7 THE WITNESS: I think he asked you if you 8 had a thumb drive, and you said no. 9 MR. BECKER: The question was, do I have a 10 thumb drive to get the files, and I said no. You 11 didn't ask me -- 12 MR. REHN: Well, I also said we didn't 13 have access -- we didn't have the ability to get 14 that CD back. 15 MR. BECKER: You said you had one computer 16 that had -- that had a CD drive and that you had 17 brought thumb drives to remedy the situation. This 18 is the first that we've heard since this morning 19 that there was any complication in that matter. 20 MS. RUBEL: If you guys prefer to sit here 21 and wait after we're off the record and give us a 22 chance to review the documents, we will be off the 23 record, and it won't count towards our seven hours, 24 but we can do that. 25 MR. KAPLAN: No. Counsel, we're obligated</p>	192	<p>1 EXAMINATION 2 BY MR. REHN: 3 Q Good afternoon, Mr. Fruchterman. 4 A Thane -- I'm sorry, I don't remember your 5 last name. 6 Q I'm Thane Rehn and I represent the NFPA in 7 this matter. 8 A Good to meet you, Mr. Rehn. 9 Q And you understand you're still under 10 oath? 11 A Yes. 12 Q And nothing has changed since this morning 13 that would make you unable to render truthful 14 testimony in response to my questions? 15 A No. 16 Q So I would like to start with your expert 17 report, Exhibit -- I believe it's 4001. 18 MR. REHN: Is that right? 19 THE REPORTER: Yes. 20 BY MR. REHN: 21 Q If you could turn to pages 16 and 17 of 22 that report. 23 A Okay. I'm there. 24 Q And on page 16 you say that you accessed 25 the 2012 version of the NFPA 101 standard and found</p>
191	<p>1 to make our witness available for a full day of 2 deposition, and we are prepared to do that, and if 3 you have technical difficulties on your side that 4 are preventing you from accessing documents you knew 5 you were going to be receiving today, that's not our 6 responsibility, and we don't think that it's fair or 7 necessary to reproduce our witness because you're 8 experiencing technical difficulties that were 9 certainly reasonably foreseeable and should have 10 been foreseeable. 11 MS. RUBEL: All I suggested is that you 12 guys sit here and wait while we spend time reviewing 13 them later. 14 MR. KAPLAN: And I'm saying that I'm not 15 going to wait until late in the evening when you 16 have a full day to review documents. 17 THE WITNESS: You don't have an IT guy who 18 can copy files off a PC? 19 MS. RUBEL: We have just tried -- 20 THE REPORTER: I can't get all of you at 21 the same time writing. 22 THE WITNESS: We probably shouldn't be on 23 the record arguing about tech problems. But I'm 24 amazed. Okay. 25 Let's -- let's move on to your questions.</p>	193	<p>1 that it was an imaged-based PDF. 2 Do you see that? 3 A Correct. Yes. 4 Q What is the difference between an 5 imaged-based PDF and a text-based PDF? 6 A If it was a text-based PDF and I press the 7 "Read" button in Adobe, it would read or my screen 8 reader would be able to read it, if I was a blind 9 person. 10 Q So you have a screen reader; that's a 11 separate software program that you would -- that 12 plugs into Adobe in some way? 13 A Yes. In the second case, a screen reader 14 would be able to get the text from Adobe and read it 15 aloud. 16 Q And is there a way for a user without a 17 screen reader to determine whether a PDF is an 18 image-based or text-based PDF? 19 A Yes. A sighted user, like me, who knows a 20 lot about Adobe PDF can inspect the document and 21 tell in the Adobe PDF whether it's got -- it's text 22 based or image based. 23 Q And how do you do that? 24 A I blow it up really big and see if the 25 characters are pixelated; that's a usual give-away</p>

194	<p>1 that it's an image. I try to select some text, and</p> <p>2 if it doesn't allow me, that's a give-away that it's</p> <p>3 an image and it's not text. I do a Control A and</p> <p>4 try to paste the results into Microsoft Word and I</p> <p>5 get nothing. Those would all be indicators that it</p> <p>6 was an image-based PDF instead of text-based PDF.</p> <p>7 Q Well, for these documents you were able to</p> <p>8 do Control A and paste into Microsoft.</p> <p>9 A Yes, but that's, like, the third technique</p> <p>10 I would have used to get there.</p> <p>11 Q If you blow a PDF up to a very large size</p> <p>12 and the letters maintain their resolution, is that a</p> <p>13 pretty strong indicator that it's a text-based PDF?</p> <p>14 MR. KAPLAN: Objection; incomplete</p> <p>15 hypothetical.</p> <p>16 THE WITNESS: Generally, that would mean</p> <p>17 that the program is scaling it up inside itself as</p> <p>18 opposed to just magnifying a picture of a letter,</p> <p>19 and because OCR tends to scan at 300 dots per inch,</p> <p>20 that's most typical resolution. If you blow it up</p> <p>21 large, you'll see the jaggies as it were on that --</p> <p>22 (Reporter clarification)</p> <p>23 THE WITNESS: Jaggies, J-A-G-G-I-E-S, one</p> <p>24 of those great technical terms.</p> <p>25</p>	196
195	<p>1 BY MR. REHN:</p> <p>2 Q And in your experience, if it is a</p> <p>3 text-based PDF, in your experience, a screen reader</p> <p>4 will be able to read that document?</p> <p>5 A That's right.</p> <p>6 Q Now, you said a couple of things that I</p> <p>7 didn't fully understand when you were talking about</p> <p>8 the PDF at issue here. You said -- and I believe</p> <p>9 this is a quote. You testified earlier that</p> <p>10 "Adobe's normal functionality did not read the</p> <p>11 text"?</p> <p>12 A Correct.</p> <p>13 MR. KAPLAN: Objection.</p> <p>14 BY MR. REHN:</p> <p>15 Q What did that mean?</p> <p>16 MR. KAPLAN: Objection; misstates</p> <p>17 testimony.</p> <p>18 You can continue.</p> <p>19 THE WITNESS: Okay. Adobe Reader has a</p> <p>20 Read Aloud button that you can press, and it should</p> <p>21 read the text aloud. It's not as good as a screen</p> <p>22 reader, but it's a built-in function of the Adobe</p> <p>23 product, and it didn't think that there was text in</p> <p>24 there even though there sort of was.</p> <p>25</p>	197

1 BY MR. REHN:

2 Q And you subsequently said, "The text was

3 there and Adobe did not find it." Were you

4 referring to the same problem there?

5 A Yeah. Yeah.

6 Q But in some documents, the Adobe function

7 may not be able to read the text, but a screen

8 reader would be able to? Is that what I understand

9 you to be saying?

10 MR. KAPLAN: Objection; incomplete

11 hypothetical.

12 THE WITNESS: Generally, if Adobe can't

13 find it, the screen reader can't find it because the

14 screen reader is asking Adobe to give it to it to

15 speak. That's how the -- technically, it says,

16 Adobe, what's here?

17 And if Adobe says, Uh-huh, the screen

18 reader is going to go Uh, so...

19 BY MR. REHN:

20 Q Have you ever had a situation where the

21 Adobe function would not read the document but a

22 screen reader was able to read the document?

23 A No, but it's not a functionality I've done

24 a lot of extensive testing on.

25 Q How much time have you spent attempting to

1 read text on PDFs with screen readers or with Adobe?

2 MR. KAPLAN: Objection; compound and

3 vague.

4 THE WITNESS: The challenge of Adobe

5 accessibility is a longstanding one in the field,

6 and so I've been involved in many conversations

7 around this accessibility issue, many conversations.

8 BY MR. REHN:

9 Q Now, you say later in your report that you

10 were able to copy the text in that NFPA 101 and then

11 paste it into Microsoft Word.

12 A Yes.

13 Q And then a screen reader was able to read

14 that.

15 A Correct.

16 Q In your experience, if one can copy text

17 from a PDF and paste it into a Word document, a

18 screen reader would generally be able to read that

19 text?

20 MR. KAPLAN: Objection; incomplete

21 hypothetical.

22 THE WITNESS: Yes.

23 BY MR. REHN:

24 Q Have you ever experienced a situation

25 where you were able to copy text from a PDF, paste

198	<p>1 that text into a Word document and then unable to</p> <p>2 read the resulting Word document with a screen</p> <p>3 reader?</p> <p>4 A Yes.</p> <p>5 Q Do you remember why that was the case?</p> <p>6 A It was an earlier version of Adobe's</p> <p>7 product that Adobe tried to make their own optical</p> <p>8 character recognition solution, and when they were</p> <p>9 uncertain of a character, they inserted a picture of</p> <p>10 the character rather than the actual letter, and so</p> <p>11 when you did a Select, you got the letters that were</p> <p>12 represented as letters but not the ones represented</p> <p>13 as pictures, so you're, like, sometimes missing</p> <p>14 letters in the middle of words that visually look</p> <p>15 like they were there in the Adobe product, but when</p> <p>16 you did a search, a Control A and pasted it, it</p> <p>17 didn't work. This is something that I observed</p> <p>18 years ago, many years ago, and it's not -- I don't</p> <p>19 believe this is currently a problem.</p> <p>20 Q More than 10 years ago, would you say?</p> <p>21 A Probably.</p> <p>22 Q And you haven't seen that problem since</p> <p>23 that time --</p> <p>24 A Correct.</p> <p>25 Q -- with current versions of Adobe?</p>	200
199	<p>1 A Correct.</p> <p>2 Q What happens with current versions of</p> <p>3 Adobe if they can't read a particular letter through</p> <p>4 the OCR system and then you try to paste that</p> <p>5 letter? Would that work?</p> <p>6 MR. KAPLAN: Objection; incomplete</p> <p>7 hypothetical.</p> <p>8 THE WITNESS: Yeah. That's -- that's not</p> <p>9 quite the way it works. So maybe ask the question a</p> <p>10 different way. Maybe I'll get -- I'll figure out</p> <p>11 what --</p> <p>12 BY MR. REHN:</p> <p>13 Q Well, I understood you to say that in the</p> <p>14 past there were times where Adobe couldn't recognize</p> <p>15 a character, and so it would instead copy a picture</p> <p>16 of that character; is that correct?</p> <p>17 A Okay. This more-than-10-year-ago product</p> <p>18 tried to recognize -- has an optical character</p> <p>19 recognition feature. I think that's -- you asked me</p> <p>20 a question of have I ever, and I gave you an</p> <p>21 example. I don't think that particular example is</p> <p>22 at all relevant to the things we're talking about</p> <p>23 because I think you wanted to switch to more modern</p> <p>24 Adobe products.</p> <p>25 Q Right.</p>	201

202	<p>1 documents, which is a different Adobe product 2 that -- yes. 3 Q Are you aware that NFPA sells PDF versions 4 of its standards on its website? 5 A Let's see if it has a Buy Now button on my 6 screenshot. I see a cart on there, so I assume that 7 you guys sell things. I -- I probably didn't check 8 to see whether you sell PDF versions of the 9 standard. 10 Q Did anybody ask you to check whether any 11 of the Plaintiffs in this case sold PDF standards? 12 MR. KAPLAN: Objection; calls for 13 privileged communications. 14 You can answer to the extent that you 15 don't divulge privileged communications. 16 THE WITNESS: No. 17 BY MR. REHN: 18 Q When you were asked to render an opinion 19 about the accessibility of Plaintiffs' standards, 20 did it occur to you to check whether those standards 21 were available in a PDF version or any other 22 electronic version? 23 MR. KAPLAN: Objection; misleading, 24 misstates testimony, vague, argumentative. 25 THE WITNESS: Privileged conversation.</p>	204
203	<p>1 BY MR. REHN: 2 Q I'm asking what occurred to you, outside 3 of conversations you had with attorneys about this 4 project. 5 Did it ever occur to you that that was 6 something that might be necessary to check? 7 MR. KAPLAN: Objection; vague. 8 THE WITNESS: Go ahead. I -- I -- I think 9 I stated my opinion. I was asked to evaluate the 10 accessibility -- 11 MR. KAPLAN: Let's not get into privileged 12 communications. 13 THE WITNESS: Okay. All right. 14 BY MR. REHN: 15 Q If you would turn to page 1 of your expert 16 report -- 17 A Yes. 18 Q -- it says: 19 "I have been retained by 20 Public.Resource.Org to evaluate the 21 accessibility of certain online 22 content available on the websites 23 of the Plaintiffs and the Defendant 24 in this case." 25 Is that correct?</p>	205

1 A Yes.
 2 Q When you were retained to evaluate the
 3 accessibility of content available on the websites
 4 of the Plaintiffs, did you consider whether you
 5 should check to see if there were PDF versions
 6 available from the Plaintiffs?
 7 MR. KAPLAN: You can go ahead and answer.
 8 THE WITNESS: No.
 9 BY MR. REHN:
 10 Q You just didn't think --
 11 That didn't occur to you that that might
 12 be a possibility?
 13 MR. KAPLAN: Objection; asked and
 14 answered, argumentative.
 15 THE WITNESS: I'll just go back to my
 16 expert report and that sentence. I was asked to
 17 evaluate the accessibility of certain online
 18 content.
 19 BY MR. REHN:
 20 Q Now, if I can ask you to turn to page 5 of
 21 your report, where you say -- it says "Overview and
 22 Summary of Opinions."
 23 A Uh-huh.
 24 Q If you could just read the first sentence
 25 there, the first full sentence under that heading.

1 A (Reading):
 2 "Having reviewed the
 3 accessibility of the same standards
 4 content rendered by
 5 Public.Resource.Org and those of
 6 the free access options provided by
 7 the NFPA, ASHRAE and ASTM, it is my
 8 opinion that Public.Resource.Org
 9 currently provides the only
 10 accessible option for
 11 people/citizens with print
 12 disabilities to access these
 13 standards."
 14 Q And in forming that opinion, you compared
 15 the standards that were available on
 16 Public.Resource.Org's website with the free access
 17 options provided by Plaintiffs in forming that
 18 opinion; is that correct?
 19 A Correct.
 20 Q Did you evaluate any PDFs being sold by
 21 NFPA in forming that opinion?
 22 A No.
 23 Q Did you evaluate any PDFs being sold by
 24 ASHRAE in forming that opinion?
 25 A No.

206	<p>1 Q Did you evaluate any PDFs sold by ASTM in</p> <p>2 forming that opinion?</p> <p>3 A No.</p> <p>4 Q So when you say that Public.Resource.Org</p> <p>5 currently provides the only accessible option for</p> <p>6 people/citizens with print disabilities to access</p> <p>7 these standards, you're excluding from that opinion</p> <p>8 any PDFs that are being offered by the Plaintiffs?</p> <p>9 MR. KAPLAN: Objection; misstates the</p> <p>10 document and testimony, misleading and vague.</p> <p>11 THE WITNESS: In that sentence I refer to</p> <p>12 "free access options."</p> <p>13 BY MR. REHN:</p> <p>14 Q So when you said the only accessible</p> <p>15 options, what you actually meant to say was the only</p> <p>16 freely accessible options without charge?</p> <p>17 MR. KAPLAN: Objection. Thane, you're</p> <p>18 getting a little badgering here, but you can answer</p> <p>19 the question.</p> <p>20 THE WITNESS: Yes.</p> <p>21 BY MR. REHN:</p> <p>22 Q Is it possible that documents being sold</p> <p>23 can be described as accessible to people with print</p> <p>24 disabilities?</p> <p>25 MR. KAPLAN: Objection; vague.</p>	208	
207	<p>1 THE WITNESS: Yes.</p> <p>2 BY MR. REHN:</p> <p>3 Q Have you ever described a PDF for sale as</p> <p>4 being accessible to someone with print disabilities?</p> <p>5 A Let's see. I'm not sure I've described --</p> <p>6 I'm sure I've described paid products in other</p> <p>7 formats as accessible, and I'm sure that I've</p> <p>8 described PDFs as accessible. I'm not sure I've</p> <p>9 described a paid PDF product as accessible.</p> <p>10 Q But it's fair to say that if the PDFs</p> <p>11 being sold by Plaintiffs are accessible to people</p> <p>12 with print disabilities, this sentence would be</p> <p>13 potentially inaccurate?</p> <p>14 MR. KAPLAN: Objection; misleading, vague,</p> <p>15 argumentative.</p> <p>16 THE WITNESS: I think it's accurate as I</p> <p>17 wrote it, but I'm happy, as we have, to clarify what</p> <p>18 I meant by that sentence.</p> <p>19 BY MR. REHN:</p> <p>20 Q Sure.</p> <p>21 And to clarify what you meant was you were</p> <p>22 comparing just the free access options provided by</p> <p>23 the Plaintiffs on their websites with the content</p> <p>24 rendered by Public.Resource.Org?</p> <p>25 A Those were the content that I evaluated,</p>	<p>1 yes.</p> <p>2 Q Are you aware that NFPA sells eBook</p> <p>3 versions of some of its standards?</p> <p>4 A I'm -- I'm not sure I'm aware of that.</p> <p>5 Q And did you evaluate any eBook versions of</p> <p>6 standards sold by NFPA or the other two Plaintiffs</p> <p>7 in this case?</p> <p>8 A No. I was not asked to.</p> <p>9 Q So do you have an opinion on whether the</p> <p>10 eBook versions sold by NFPA and the other two</p> <p>11 Plaintiffs are accessible to persons with print</p> <p>12 disabilities?</p> <p>13 A I can't express an opinion without looking</p> <p>14 at them.</p> <p>15 Q Do you have opinion on whether the PDFs</p> <p>16 being sold by NFPA and the other two Plaintiffs in</p> <p>17 this case are accessible to persons with print</p> <p>18 disabilities?</p> <p>19 A No. But in my experience, most PDFs are</p> <p>20 not accessible or are not -- let me correct that.</p> <p>21 Not as accessible as, say, HTML versions of those</p> <p>22 would be since accessibility is on a spectrum.</p> <p>23 Q But you don't have an opinion as to these</p> <p>24 specific PDFs that are sold by NFPA?</p> <p>25 A I haven't examined them.</p>	209

210	<p>1 submitted this to Bookshare? 2 A Correct. 3 Q Is that on the second page of this 4 exhibit, you see it says "Submitted by Daproim 5 Africa"?" 6 A Yes. 7 Q Is that who you understand submitted this 8 document? 9 A Yes. 10 Q How does Bookshare enable certain persons 11 to share documents with Bookshare? 12 A So we're talking about essentially the 13 content intake mechanisms at Benetech, and you'd 14 like me to enumerate those different mechanisms? 15 Q Well, let's start with this Daproim 16 Africa. They're an adult educator; is that what you 17 said earlier? 18 A No. 19 Q What's your understanding -- 20 Do you know who this submitter is? 21 A Yes. 22 Q And who are they? 23 A They're a subcontractor to Benetech for 24 books -- they do the proofreading services on books 25 we've been asked for by a student.</p>	212	<p>1 errors, looking for swear words, looking for length; 2 it's supposed to be 100-page document and it's a 3 1-page document that's submitted or a thousand-page 4 document. 5 And we also have a human being take a 6 brief look at the document, kind of just do a check 7 also to make sure that it makes -- that it makes 8 sense. 9 Q Are those documents that are submitted 10 generally PDFs or Word documents or HTML? What 11 format do they usually come in? 12 MR. KAPLAN: Objection; lacks foundation, 13 calls for speculation, vague. 14 THE WITNESS: Bookshare has a detailed 15 description of how we want documents submitted to 16 us. In general, we prefer documents that are -- 17 when they're coming from volunteers that are 18 scanning that are more Microsoft Word or RTF, which 19 is a related format. For those books that are 20 scanned, that's our preferred format, and we 21 wouldn't accept a PDF. 22 BY MR. REHN: 23 Q So you accept documents or books that are 24 scanned by volunteers? 25 MR. KAPLAN: Objection; misstates</p>
211	<p>1 Q So a student would have submitted a 2 request and because it was educational, you would 3 have approved that request; is that what you 4 testified to earlier? 5 MR. KAPLAN: Objection; misstates 6 testimony, calls for speculation. 7 THE WITNESS: Yes. 8 BY MR. REHN: 9 Q And after you approved that request, you 10 would have had a subcontractor proofread the 11 document and then upload it to Bookshare? 12 MR. KAPLAN: Objection; vague, calls for 13 speculation. 14 THE WITNESS: Yes. 15 BY MR. REHN: 16 Q Do you allow anybody to submit documents, 17 other than subcontractors? 18 A Yes. 19 Q Do you engage in any quality control on 20 documents that persons, other than subcontractors, 21 submit? 22 A Yes. 23 Q And what is that quality control process? 24 A We run an automated quality evaluator that 25 scores the document on, for example, looking for OCR</p>	213	<p>1 testimony. 2 THE WITNESS: We accept books from quite a 3 number of sources of which volunteers is one source. 4 BY MR. REHN: 5 Q Can anybody sign up to be a volunteer to 6 submit books or documents? 7 A I think right now you have to be a U.S. 8 resident or organization. 9 Q So any U.S. resident could sign up to 10 submit books or documents to Bookshare? 11 A Yes, and they must agree to our volunteer 12 agreement that specifies the limitations on what 13 they can do and what they can't do. 14 Q So if a concerned citizen wanted to get 15 books or documents accessible to the visually 16 impaired, they could volunteer to scan those 17 documents, proofread them, ensure that they're free 18 of errors and then submit them to Bookshare, and if 19 they passed your quality control process, you would 20 make them available on your website? 21 MR. KAPLAN: Objection; incomplete 22 hypothetical, vague. 23 THE WITNESS: Yes. 24 BY MR. REHN: 25 Q Do you try to encourage volunteers to</p>

214	<p>1 submit such documents? 2 MR. KAPLAN: Objection; vague. 3 THE WITNESS: Yes. 4 BY MR. REHN: 5 Q Have you ever encouraged Carl Malamud to 6 submit any documents? 7 A No. 8 Q Have you ever discussed that topic with 9 him? 10 A No. 11 Q Have you ever told somebody that instead 12 of volunteering and submitting a document to 13 Bookshare, they should post it on the Internet where 14 it can be accessed by anybody in the public? 15 MR. KAPLAN: Objection; vague. 16 THE WITNESS: Not that I recall. 17 BY MR. REHN: 18 Q Now, your expert report says that you 19 considered the accessibility of NFPA 101; is that 20 right? 21 A I think that's underspecified, but yes. I 22 was asked to evaluate NPFA -- sorry, NFPA 101-2000. 23 Q And then you were asked to evaluate that 24 specific standard? 25 A Correct.</p>	216
215	<p>1 Q Did anybody tell you why you should focus 2 on that standard and not some other standard? 3 MR. KAPLAN: Objection to the extent it 4 calls for privileged communications, I instruct the 5 witness not to answer. 6 THE WITNESS: I can't answer. 7 BY MR. REHN: 8 Q Do you have any understanding of why that 9 was a especially important document to check? 10 MR. KAPLAN: Objection; argumentative and 11 calls for -- to the extent it calls for privileged 12 communications, I instruct the witness not to 13 answer. 14 THE WITNESS: I cannot answer. 15 BY MR. REHN: 16 Q And if you look at page 9 of your expert 17 report, there is a screenshot from the free access 18 portion of the NFPA website. 19 A Yes. 20 Q Do you remember how many pages you 21 evaluated on that code, that Life Safety Code? 22 A No, but I remember it as being longer than 23 some of the other standards I looked at. 24 Q Do you think you evaluated more than 10 25 pages?</p>	217

1 A No.
 2 Q Do you think you evaluated more than 5
 3 pages?
 4 A Probably in that range.
 5 Q Do you have any familiarity with the
 6 purpose of the Life Safety Code?
 7 MR. KAPLAN: Objection; vague.
 8 THE WITNESS: No, other than some of the
 9 content that I read.
 10 BY MR. REHN:
 11 Q Do you know what the average user of the
 12 Life Safety Code uses it for?
 13 MR. KAPLAN: Objection; vague.
 14 THE WITNESS: No.
 15 BY MR. REHN:
 16 Q And then in addition to the NFPA free
 17 access version, you looked at a PDF of this code
 18 that was available on Public Resource's website; is
 19 that right?
 20 MR. KAPLAN: Objection; misleading.
 21 THE WITNESS: I looked at the 2000 version
 22 on the NFPA site and the 2000 version on
 23 Public.Resource.Org's site, I looked at the 2012
 24 version as well on the Public.Resource.Org website.
 25

1 BY MR. REHN:
 2 Q For the 2000 version, your report says
 3 that you looked at the HTML version of that on
 4 Public Resource's website?
 5 A Yes.
 6 Q Did you notice any tabular or graphical
 7 material when you were reviewing that?
 8 A I believe so.
 9 Q And did you evaluate whether a screen
 10 reader would accurately convey that tabular material
 11 from the HTML version on the Public Resource
 12 website?
 13 A I saw tabular material in the HTML, but I
 14 didn't sample "View Source" --
 15 (Reporter clarification)
 16 THE WITNESS: I saw tabular material in
 17 the HTML, but I didn't "View Source." Quotes on
 18 "View Source."
 19 BY MR. REHN:
 20 Q Did you use a screen reader to read that
 21 tabular material?
 22 A I'm not sure I actually read the tabular
 23 material out loud with my screen reader.
 24 Q So do you have an assessment of the
 25 importance of that tabular material to understanding

218	<p>1 and implementing the standard? 2 A No. 3 Q Did you see any graphical material in that 4 standard? 5 A I recall seeing graphical material in the 6 standards I evaluated. 7 Q Did you assess whether that graphical 8 material was accessible via a screen reader in the 9 HTML version of the Public Resource website? 10 MR. KAPLAN: Objection; vague. 11 THE WITNESS: I didn't check for 12 additional accessible metadata on the images. 13 BY MR. REHN: 14 Q So do you have an opinion on -- 15 Do you have enough information to know 16 whether a visually impaired fire safety professional 17 could use the HTML version of NFPA 101 that is 18 available on Public Resource's website and safely 19 rely on that for professional purposes? 20 MR. KAPLAN: Objection; vague. 21 THE WITNESS: I am not a fire professional 22 expert, so I can't evaluate how this applies 23 specifically to that profession. 24 BY MR. REHN: 25 Q So the answer to my question is "no"?</p>	220
219	<p>1 MR. KAPLAN: I think he gave you an answer 2 to your question. 3 BY MR. REHN: 4 Q And did you also look at the PDF version 5 of the 2012 edition of the NFPA Life Safety Code 6 that is available on the Public Resource website? 7 A I did look at that version, yes. 8 MR. REHN: I'm going to mark as 9 Exhibit 4003 just a few pages of this. 10 (Plaintiffs' Exhibit 4003 marked 11 for identification.) 12 THE WITNESS: Am I supposed to look at 13 this? 14 MR. REHN: Sure. I can represent to you 15 that this is a few pages -- 16 MR. KAPLAN: Courtesy copy? 17 MR. REHN: Oh, yeah, sorry. 18 BY MS. RUBEL: 19 Q -- a few pages from the PDF version of 20 NFPA 101-2012 edition taken from the Public Resource 21 website. 22 Does that look like an accurate 23 description? 24 A So this is the PDF version from the Public 25 Resource website?</p>	221

222	<p>1 BY MR. REHN: 2 Q Do you have any information to know 3 whether a visually impaired architect could access 4 the PDF version of the NFPA 101 that's on Public 5 Resource's website and safely rely on that for 6 professional purposes? 7 MR. KAPLAN: Objection; incomplete 8 hypothetical, vague. 9 THE WITNESS: I do know of an awful lot of 10 professionals that are delighted to get the kind of 11 content that is available there, whether it's from 12 my organization or other places, and so -- but I 13 don't know about architects in particular. 14 BY MR. REHN: 15 Q And, in particular, whether they could 16 safely rely on the standard as it's available on 17 Public Resource's website? 18 MR. KAPLAN: Objection; asked and 19 answered, vague, incomplete hypothetical. 20 THE WITNESS: I believe that any person 21 with a disability who gets a after-the-fact -- well, 22 actually I would say if it gets any content, needs 23 to blend their professional judgment if they don't 24 feel like they can rely on a document, to ask for 25 help from a sighted person if they need it. And,</p>	224
223	<p>1 you know, accessibility is on a spectrum, and 2 perfection is normally not something that people can 3 expect today. 4 BY MR. REHN: 5 Q And your report says that it's your 6 opinion that the text that you were able to copy 7 from this PDF was rendered by an OCR of some sort. 8 A Uh-huh. 9 Q Is it your opinion that technical 10 documents are generally unusable when they're 11 rendered with an OCR mechanism? 12 MR. KAPLAN: Objection; vague. 13 THE WITNESS: No. 14 BY MR. REHN: 15 Q Is it your opinion that technical books 16 are often unusable when scanned with an OCR 17 technology? 18 MR. KAPLAN: Objection -- sorry, go ahead. 19 Objection; vague. 20 THE WITNESS: You know, it's a -- it 21 depends on where on the accessibility spectrum it 22 falls. So we've discussed a raw OCR is not as good 23 as a proofread OCR, which is not as good as getting 24 the original publisher document digitally, and as 25 you march through those things, they are often at</p>	225

1 some level usable and they become more useful the
 2 more -- the higher the quality is.
 3 BY MR. REHN:
 4 Q So the -- the higher quality is generally
 5 content available from the publisher?
 6 A Generally, publisher supply content is the
 7 highest quality you can get unless you have invested
 8 significant additional time, say, in doing image
 9 descriptions or other additional markup beyond what
 10 the publisher would do.
 11 Q And I think you testified earlier you
 12 didn't consider whether any of the Plaintiffs makes
 13 the original publisher content available to visually
 14 impaired people in any way, aside from the free
 15 access sections of their website?
 16 MR. KAPLAN: Objection; misstates
 17 testimony.
 18 THE WITNESS: Correct.
 19 BY MR. REHN:
 20 Q Do you know whether any of the Plaintiffs,
 21 for example, responds to requests from visually
 22 impaired persons for the publisher version of their
 23 standards?
 24 A No.
 25 Q Did you analyze whether the content of the

1 standard that you obtained on Public Resource's
 2 website in HTML format accurately reflected the
 3 content of the standard that originated from the
 4 publisher or whether there was inaccurate or missing
 5 content?
 6 MR. KAPLAN: Objection; compound and
 7 vague.
 8 THE WITNESS: So, for example, when I
 9 searched for a certain section, I then read the
 10 section and didn't see OCR errors in the section
 11 that I read.
 12 BY MR. REHN:
 13 Q And did you compare that to the publisher
 14 content version?
 15 A I did not.
 16 Q So there may have been additional errors
 17 beyond the OCR errors that you didn't capture by
 18 this analysis?
 19 MR. KAPLAN: Objection; vague, incomplete
 20 hypothetical.
 21 THE WITNESS: It -- if there were
 22 errors -- well, actually, I don't know how the HTML
 23 version of the standard on the Public.Resource.Org
 24 website was generated, so I can't give you an
 25 opinion on whether OCR errors were missed because

226	<p>1 they might not have produced it using optical 2 character recognition. 3 BY MR. REHN: 4 Q And did you analyze whether the content of 5 the standard obtained through the PDF version on 6 Public Resource's website was accurate? 7 MR. KAPLAN: Objection; vague. 8 THE WITNESS: I've previously observed 9 that it had OCR errors in it that I spotted. 10 BY MR. REHN: 11 Q Did you look for any other errors that it 12 may have had? 13 A No. I kind of felt like once -- I kind 14 of -- well, when you see a document that's obviously 15 an OCR document that hasn't been proofread, I don't 16 think it occurs to you to look for additional errors 17 that might have been, say, in the original 18 manuscript. 19 When you see a certain kind of error 20 that's been introduced, that's probably far more 21 likely to have occurred than errors in the original 22 manuscript since almost all published documents have 23 some errors in them at some point, but I think the 24 OCR process introduces a lot more by comparison. 25 Q And you additionally did not go back to</p>	228	<p>1 will clarify. If you need a break, please let me 2 know. 3 A Sounds good. 4 Q Are you prepared to proceed? 5 A I am. 6 Q Counsel suggested that you investigate the 7 accessibility of ASHRAE standard 90.1-2010, correct? 8 A Correct. 9 Q Do you know why they suggested that 10 standard? 11 MR. KAPLAN: Objection; calls for 12 privileged communications, and I will instruct the 13 witness not to answer. 14 THE WITNESS: Can't answer. 15 BY MS. MERK: 16 Q Do you have any separate understanding 17 outside of what was communicated to you by counsel 18 of why you were to look into Standard 90.1-2010? 19 A No. 20 Q Did you have to register on the ASHRAE 21 website to access Standard 90.1-2010? 22 A Let me check to confirm that I'm 23 remembering which standards body is which. No, I 24 didn't have to sign up to view the standards in 25 the -- whatever you guys call that, on your website.</p>
227	<p>1 the original document on the NFPA website to 2 evaluate the accuracy of the version you obtained 3 from the Public Resource website? 4 MR. KAPLAN: Objection; vague. 5 THE WITNESS: Correct. That was not part 6 of my evaluation. 7 MR. REHN: I have no further questions. 8 MS. MERK: Would you like to take a break 9 or continue? 10 THE WITNESS: What do you think? 11 MR. KAPLAN: Why don't we take five 12 minutes. 13 THE WITNESS: Okay. Sounds good. 14 THE VIDEOGRAPHER: We're off the record at 15 4:55. 16 (Recess taken.) 17 THE VIDEOGRAPHER: We're back on the 18 record at 5:09. 19 EXAMINATION 20 BY MS. MERK: 21 Q Good afternoon, Mr. Fruchterman. My name 22 is Katie Merk, and I represent ASHRAE in this 23 matter. 24 As Ms. Rubel explained earlier, if any of 25 my questions are unclear, please just ask me and I</p>	229	<p>1 Q And you were able to navigate to the 2 specific standard on the ASHRAE website? 3 A Correct. 4 Q Was there an option on the ASHRAE website 5 to make the text of Standard 90.1-2010 larger? 6 A Looks like there is. Yes. 7 Q Did you test this option? 8 A No. 9 Q Why not? 10 A As I discussed in earlier testimony, I 11 believe that certain low-vision people would find 12 this accessible, and so I didn't test that 13 particular functionality. I was more focused on 14 screen reader accessibility for the blind. 15 Q And you tested other ASHRAE standards as 16 well, correct? 17 A Briefly, yes. 18 Q Which other standards? 19 A The five listed in my report. Would you 20 like me to read their numbers and names, or their 21 numbers? 22 Q Yes. 23 A So I also tested five other ASHRAE 24 standards, ASHRAE 62.1-2013, 62.2-2013, 90.1-2013 25 (I-P), 90.2-2007 and 189.1-2014.</p>

230	<p>1 Q How did you select these additional five 2 standards? 3 MR. KAPLAN: And I will object to the 4 extent that it calls for divulging privileged 5 communications with counsel and instruct you not to 6 answer to that extent. 7 THE WITNESS: As far as I recall, at 8 random from a list that I saw on the website, but 9 there is some small chance it might have been five 10 in a row, but I think it was at random. 11 BY MS. MERK: 12 Q Did you test any other ASHRAE standards 13 that are not listed in your report? 14 A No. 15 Q Did you test the 2004 version of 90.1? 16 A No. 17 Q The 2007 version of 90.1? 18 A No. 19 Q Or any version of the ASHRAE handbook? 20 A No. 21 Q Are you aware of which ASHRAE works are at 22 issue in this case? 23 A No. 24 Q Why did you test only one of the ASHRAE 25 works at issue in this case?</p>	232
231	<p>1 MR. KAPLAN: I'll object to the extent it 2 calls for privileged communications. 3 THE WITNESS: Can't answer, other than 4 what I've stated that I was directed to test that 5 one. 6 BY MS. MERK: 7 Q You searched for the ASHRAE standard 8 90.1-2010 on Public.Resource.Org, correct? 9 A Correct. I'm going to confirm that that's 10 what -- yes. Correct. 11 Q And you found it in PDF format, correct? 12 A Correct. 13 Q You did not find the 90.1-2010 standard in 14 HTML format? 15 A I don't believe so. 16 Q Earlier Ms. Rubel asked for which of 17 Plaintiffs' standards you copied the text into a 18 Word document, and you responded that you did this 19 for NFPA 101-2012. 20 Did you also employ this method to test 21 the ASHRAE 90.1-2010 PDF version? 22 MR. KAPLAN: Objection; misstates 23 testimony. 24 THE WITNESS: Yes. 25</p>	233

234	<p>1 read the entire standard till the end because in my 2 professional opinion, once you've read the first 3 page, it tends to work the same for the rest of the 4 document. 5 Q So your conclusion that generally the 6 accuracy was sufficient to perform the functional 7 tasks, reading the entire standard, navigating to a 8 specific place in the standard or searching on key 9 terms, you did not actually read the entire 10 standard? 11 A Correct. 12 Q I am going to hand you an excerpt of the 13 first 25 pages of ASHRAE standard 90.1-2010 as they 14 appear in the PDF version available on 15 Public.Resource.Org's website. And over the break 16 the court reporter marked this as Exhibit 4004. 17 (Plaintiffs' Exhibit 4004 marked 18 for identification.) 19 THE WITNESS: Okay. 20 BY MS. MERK: 21 Q I'll represent to you that I've utilized 22 precisely the steps outlined in your report. I 23 selected all of the text in this PDF, and I copied 24 it into a Word processing program, and this 25 document, which has been marked 4005, is the result</p>	236	<p>1 A Yes. 2 Q Are you satisfied that the Word version 3 and PDF version here are expressing the same portion 4 of the 90.1-2010 standard? 5 MR. KAPLAN: Objection; vague. 6 THE WITNESS: Seems -- seems logical. 7 BY MS. MERK: 8 Q Now please turn to page 8 of Exhibit 4004. 9 A Yep. 10 Q Do you see Figure 3.2 on page 8 of 11 Exhibit 4004? 12 A Yep. 13 Q Do you see how Figure 3.2 was rendered on 14 pages 24 to 25 of Exhibit 4005? 15 A Yep. 16 Q Are there any problems with how Figure 3.2 17 is rendered on pages 24 to 25 of Exhibit 4005? 18 A Yes. The OCR did not do a great job of 19 pulling the text out of the graphic. 20 Q Do you believe that a blind person would 21 be able to understand any of what is communicated in 22 Figure 3.2 as Figure 3.2 is rendered? 23 A Yes. They would read the caption and know 24 what it was about and know there is a picture there, 25 what it was about, and if they wanted to know the</p>
235	<p>1 of that process. 2 (Plaintiffs' Exhibit 4005 marked 3 for identification.) 4 THE WITNESS: Okay. 5 BY MS. MERK: 6 Q For purposes of facilitating the 7 deposition, I have added page numbers to the bottom 8 of the Word document. Those did not appear in the 9 text as it was rendered from the PDF. 10 Please turn to page 7 of Exhibit 4005 and 11 page 24 of Exhibit 4004. 12 A Page 2- -- 13 Q Oh, sorry -- 14 A -- 4 of 2004. 15 Q 7 of the PDF version? 16 A Okay. Great. 17 Q And 24 of the Word version. 18 A 7. All right. And 24. Okay. All right. 19 Q At the bottom of page 7, do you see the 20 words "Design Energy Cost, The Annual Energy Cost 21 Calculated for Proposed Design," and then the number 22 7 at the very base of the page? 23 A Yes. 24 Q And on page 24, do you see that same 25 phrase rendered at the base of the second paragraph?</p>	237	<p>1 information in that picture, they would need a human 2 being to describe it. 3 Q So as expressed through a screen reader, 4 they would be unable to understand Figure 3.2? 5 A I think that's correct. 6 Q Do you have any basis to believe that this 7 standard can be performed without an understanding 8 of the figures utilized in the standard? 9 A You're asking -- okay. 10 MR. KAPLAN: Hold on. Objection; vague. 11 Go ahead. 12 THE WITNESS: You're asking me for an 13 opinion that has to do with the technical subject 14 matter that I'm not familiar with. I'm happy to 15 talk about the accessibility issues surrounding this 16 document. 17 BY MS. MERK: 18 Q If someone needed an accessible form of 19 this standard in order to perform the standard, 20 would this be an accessible form? 21 MR. KAPLAN: Objection; vague, 22 argumentative. 23 THE WITNESS: Your question assumes that 24 the information in this graphic is only available in 25 this graphic and isn't redundant in the standard. I</p>

238	<p>1 don't know that. So I can't actually give you a 2 accessibility opinion until I actually sort of 3 assess that because often graphical elements 4 recapture something that's in other parts of the 5 document; that's quite common in technical 6 documents, but I don't know that because I haven't 7 been able to read the detailed content. 8 BY MS. MERK: 9 Q I'm sorry, I'm going to ask my question 10 again. 11 A Okay. 12 Q If someone needed an accessible form of 13 this standard -- 14 A Yes. 15 Q -- in order to perform this standard, 16 would this be an accessible form? 17 MR. KAPLAN: Objection; vague, 18 argumentative, asked and answered. 19 THE WITNESS: If this graphic is the only 20 expression of the information in this graphic and 21 that information is not contained in the textual 22 information of the standard, then a blind person 23 would need the help of a sighted person to look at 24 this graphic and get that information that's not 25 located elsewhere. So I'm not sure. I can't give a</p>	240	<p>1 BY MS. MERK: 2 Q Would you please turn to page 20 of 3 Exhibit 4004 and page 67 of Exhibit 4005. 4 A 20 of the PDF and 67. Okay. 5 Q Do you agree that these both represent 6 Section 3.3 which lists abbreviations and acronyms 7 utilized in the 90.1-2010 standard? 8 A Sure. 9 MR. KAPLAN: Wait. You're going to give 10 him time to read it, right? 11 MS. MERK: Certainly. 12 THE WITNESS: So I'm just looking at this 13 one page. Do you want me to look at the entirety of 14 the page? 15 BY MS. MERK: 16 Q At the base of 67, 3.3, "Abbreviations and 17 Acronyms" and then on to the next several pages -- 18 A Okay. 19 Q -- and page 20 at the top where it says 20 "3.3, Abbreviations and Acronyms" and that complete 21 page. 22 A Okay. I'm ready to discuss the document, 23 I think. 24 Q Do you agree that these both represent 25 Section 3.3, which lists abbreviations and acronyms</p>
239	<p>1 yes/no answer to your question based on my 2 knowledge. 3 BY MS. MERK: 4 Q I understand your clarification. 5 Assuming that that figure is the only 6 place that that information is conveyed in the 7 standard, is there any way that a blind person would 8 be able to comprehend the entire standard simply 9 using a screen reader? 10 MR. KAPLAN: Objection; incomplete 11 hypothetical, vague. 12 THE WITNESS: If they needed the 13 information in an inaccessible graphic, they would 14 need a human being to help them with that unless a 15 detailed textual description of that graphic was 16 available. It certainly wasn't in the document that 17 you handed me. 18 BY MS. MERK: 19 Q Is it your opinion that a version of the 20 standard without comprehensible figures is a 21 complete version of the standard? 22 MR. KAPLAN: Objection; argumentative, 23 vague. 24 THE WITNESS: Not for a blind person 25 without help.</p>	241	<p>1 utilized in the 90.1-2010 standard? 2 MR. KAPLAN: Objection; vague. 3 THE WITNESS: Page 20 in the PDF looks 4 like an image of that page, and pages 68 through -- 5 I don't know -- about 73, look like an OCR version 6 of that same table. 7 BY MS. MERK: 8 Q Are there any problems with the rendition 9 of Section 3.3 in Exhibit 4005? 10 A Yes. There are OCR errors of both content 11 and structure. 12 Q Would you expect that errors rendering 13 abbreviations and acronyms would propagate 14 throughout the entire standard? 15 MR. KAPLAN: Objection; incomplete 16 hypothetical. 17 We're just talking about this one? 18 MS. MERK: I'm asking him generally first. 19 THE WITNESS: Seems like really overbroad. 20 For example, acronyms that are just letters tend not 21 to have errors. Acronyms that have specialized 22 symbols, like degree or squared, tend to be wrong. 23 Pretty common OCR error. 24 BY MS. MERK: 25 Q Is that the only error that you observe?</p>

242	<p>1 A You want me to catalog --</p> <p>2 MR. KAPLAN: Objection; misleading.</p> <p>3 THE WITNESS: -- OCR errors on the page,</p> <p>4 or do you have specific kinds of errors that you</p> <p>5 want to hear about?</p> <p>6 BY MS. MERK:</p> <p>7 Q I would like you to explain to me what is</p> <p>8 different about 3.3 in Exhibits 4004 and 4005.</p> <p>9 A So I'm going to give you --</p> <p>10 MR. KAPLAN: Objection; vague.</p> <p>11 THE WITNESS: I'm going to give you the</p> <p>12 top errors that leap out to me. I'm not</p> <p>13 representing they are a comprehensive list because I</p> <p>14 didn't do a line-by-line compare on everything in</p> <p>15 here. But things that I noticed on my initial</p> <p>16 reading was specialized symbols being</p> <p>17 mis-recognized, as I mentioned, degrees, squared,</p> <p>18 and then there was structural errors where the OCR</p> <p>19 grouped some content together that should stay</p> <p>20 together and broke other content that should stay</p> <p>21 together apart.</p> <p>22 I haven't looked to see how it does with</p> <p>23 superscripts and subscripts. I could go and look at</p> <p>24 that if you want me to. That would be another area</p> <p>25 I would look for.</p>	244	<p>1 BY MS. MERK:</p> <p>2 Q Do you find that this is a comprehensible</p> <p>3 rendition of this text?</p> <p>4 MR. KAPLAN: Objection; vague.</p> <p>5 THE WITNESS: As I've said before, the OCR</p> <p>6 is making errors, so this is not a perfect,</p> <p>7 well-structured rendition of the document. It has</p> <p>8 many of the words in it, but they don't get paired</p> <p>9 up, so it is not a publisher-quality rendition of</p> <p>10 the document in accessible form. It's an OCR</p> <p>11 version of the document, which is full of errors,</p> <p>12 which is what OCR does.</p> <p>13 BY MS. MERK:</p> <p>14 Q And would the errors that you see on</p> <p>15 Exhibit 4005 affect a blind person's ability to</p> <p>16 understand a text reader's rendition of other parts</p> <p>17 of the standard that rely on the abbreviations and</p> <p>18 acronyms that are defined here?</p> <p>19 MR. KAPLAN: Objection; incomplete</p> <p>20 hypothetical, vague.</p> <p>21 THE WITNESS: So I'm kind of --</p> <p>22 MR. KAPLAN: Why don't you answer this one</p> <p>23 and we'll take a break.</p> <p>24 THE WITNESS: I'm just trying to --</p> <p>25 there's a spectrum of accessibility, and if I was a</p>
243	<p>1 Do you want me to take more time on the</p> <p>2 document and analyze it further?</p> <p>3 BY MS. MERK:</p> <p>4 Q No. We can -- we can look at an example</p> <p>5 of a superscript and subscript issue.</p> <p>6 A Okay.</p> <p>7 Q On page 71 --</p> <p>8 A Okay.</p> <p>9 Q -- about two-thirds down, there's TDB and</p> <p>10 TWB.</p> <p>11 A Okay.</p> <p>12 Q Which, if you look at the abbreviations</p> <p>13 and acronyms chart, stands for dry bulb temperature</p> <p>14 and wet bulb temperature.</p> <p>15 Given how this text is rendered, do you</p> <p>16 anticipate that a blind person would know what TDB</p> <p>17 and TWB mean when utilized throughout the standard?</p> <p>18 A Well -- go ahead.</p> <p>19 MR. KAPLAN: Object as incomplete</p> <p>20 hypothetical.</p> <p>21 THE WITNESS: So I think this is an</p> <p>22 example of where the OCR took two things that should</p> <p>23 be together and broke them apart, but it recognized</p> <p>24 all the letters correctly.</p> <p>25</p>	245	<p>1 blind person trying to understand the contents of</p> <p>2 this standard and I read all of the content,</p> <p>3 including the OCR errors, I would walk away with a</p> <p>4 pretty good idea of what the standard covers, the</p> <p>5 kind of topics it covers. And if I didn't know</p> <p>6 abbreviations from context or from searching on</p> <p>7 Wikipedia, I might be lost, but most people reading</p> <p>8 a technical document are lost on their first</p> <p>9 reading. Anyway...</p> <p>10 MR. KAPLAN: Why don't we take a couple</p> <p>11 minutes.</p> <p>12 THE VIDEOGRAPHER: We're off the record at</p> <p>13 5:34.</p> <p>14 (Recess taken.)</p> <p>15 THE VIDEOGRAPHER: Back on the record at</p> <p>16 5:42 p m.</p> <p>17 BY MS. MERK:</p> <p>18 Q Did you investigate whether</p> <p>19 Public.Resource.Org offers any of the other ASHRAE</p> <p>20 standards at issue in this case?</p> <p>21 A No.</p> <p>22 Q So you did not test any of the other</p> <p>23 standards at issue in this case on</p> <p>24 Public.Resource.Org?</p> <p>25 MR. KAPLAN: Objection; argumentative.</p>

246	<p>1 THE WITNESS: I didn't test any other 2 standards from ASHRAE on the Public.Resource.Org 3 website. 4 BY MS. MERK: 5 Q You answered some questions earlier about 6 paid PDFs on NFPA's site. Did your testing of 7 ASHRAE's standards focus solely on free access 8 through the website portion? 9 MR. KAPLAN: Objection; vague. 10 THE WITNESS: Yes. 11 BY MS. MERK: 12 Q You did not test any ASHRAE standards 13 provided to customers who purchased electronic 14 copies of the standards from the ASHRAE bookstore? 15 A Yes. I'm sorry, I thought you said you 16 did not test. Okay. 17 Q So, yes, you did not? 18 A Yes, I did not test. 19 Q Why not? 20 A Privileged conversation. 21 MR. KAPLAN: Yeah. If you can answer it 22 without divulging communications. 23 THE WITNESS: I mean, I already said I was 24 directed to test that one. Beyond that, I don't 25 want to elaborate.</p>	248	<p>1 want to limit your question to that, I have no 2 objection. But your question is objectionable on 3 the basis of privilege. So let's see if we can 4 resolve it. 5 THE WITNESS: Okay. And on the portion 6 about asking ASHRAE, I did not ask anyone at ASHRAE 7 about anything. 8 BY MS. MERK: 9 Q Did you ask counsel at all? If there was 10 no communication, there cannot be a privilege. 11 MR. KAPLAN: But you can't get at 12 privileged communications by asking the negative. 13 MS. MERK: Are you instructing him not to 14 answer whether or not you had a conversation that 15 stated the fact of what format ASHRAE's standards 16 are available in? 17 MR. KAPLAN: A conversation that stated 18 the fact? And the rule says that if counsel 19 identifies facts or data, so is that going to get at 20 what you want to ask? 21 MS. MERK: Sure. 22 MR. KAPLAN: Then please go ahead. 23 BY MS. MERK: 24 Q Did you ask counsel the fact of what 25 format ASHRAE's standard available for sale is made</p>
247	<p>1 BY MS. MERK: 2 Q Do you know what format purchased copies 3 of ASHRAE standards are provided in? 4 A No. 5 Q Did you ever ask this? 6 MR. KAPLAN: Objection; vague. 7 THE WITNESS: Of who? 8 BY MS. MERK: 9 Q Of counsel. 10 A Privileged. 11 MR. KAPLAN: Yeah. Objection. That's 12 privileged. 13 MS. MERK: Communications of fact between 14 counsel and yourself are not privileged. 15 MR. KAPLAN: If you want to ask him about 16 what facts counsel identified for his consideration, 17 you can do that. 18 BY MS. MERK: 19 Q I'm asking if you asked either counsel or 20 ASHRAE what format their standards that are made 21 available for sale are provided in? 22 MR. KAPLAN: And you are permitted to 23 inquire as to communications in which counsel 24 identifies facts that the expert considered in 25 forming the opinions to be expressed. So if you</p>	249	<p>1 in? 2 MR. KAPLAN: We're going in circles here. 3 The rule says that counsel -- that communications 4 where counsel identifies facts or data are not -- do 5 not fall within the privilege. So if the question 6 is, did counsel identify facts or data relevant to 7 this topic, then that's fine. But you keep asking 8 him about the communications where he asked things 9 or other things that would fall outside of that 10 exception to the privilege. So I thought we were 11 simpatico on this, and I want to make sure that we 12 work it out so you can ask the question you want to 13 ask, but -- 14 MS. MERK: Frankly, I don't -- I don't 15 even think it's worth it. 16 MR. KAPLAN: Okay. 17 BY MS. MERK: 18 Q Do you offer an opinion regarding any 19 other means besides the public website for accessing 20 the same ASHRAE standards? 21 MR. KAPLAN: Objection; vague. 22 THE WITNESS: I didn't evaluate anything 23 beyond the free version of the standard on the 24 ASHRAE site, so I don't offer an opinion on anything 25 else, other than the standard I observed and wrote</p>

250	<p>1 about in my expert report. 2 BY MS. MERK: 3 Q Why not? 4 A Because I performed the task I was 5 assigned to do. 6 THE WITNESS: Is that okay to say? 7 MR. KAPLAN: (Nods head.) 8 BY MS. MERK: 9 Q Do you know what ASHRAE or any other 10 Plaintiffs' policy is regarding providing free 11 access to the ASHRAE standards at issue to 12 vision-impaired people? 13 MR. KAPLAN: Objection; vague. 14 THE WITNESS: No. 15 BY MS. MERK: 16 Q Did you seek out this information? 17 A No. 18 Q Did you ask counsel to seek this 19 information in discovery? 20 MR. KAPLAN: Objection; it calls for 21 privileged communications. 22 BY MS. MERK: 23 Q When you said you did not seek out this 24 information, why not? 25 A I answered that question a second ago, I</p>	252
251	<p>1 thought. I was asked to evaluate a specific 2 standard and the accessibility around getting to 3 that standard and trying to access that standard; I 4 did that. So I did what I was asked to do as an 5 expert. I'm volunteering my time. I don't make 6 extra work for myself if I don't need to. I'm 7 sorry; I shouldn't be flippant, but... 8 Q Do you have any understanding of how 9 ASHRAE or any of the other Plaintiffs might respond 10 if presented with a request for access to one of 11 their standards by a vision-impaired person? 12 MR. KAPLAN: Objection; vague, compound, 13 incomplete hypothetical. 14 THE WITNESS: I don't know about those 15 three organizations in particular. 16 BY MS. MERK: 17 Q Do you have any understanding whether a 18 vision-impaired person has ever requested that 19 ASHRAE or any of the other Plaintiffs provide access 20 to any of their standards? 21 MR. KAPLAN: Objection; vague. 22 THE WITNESS: No. 23 BY MS. MERK: 24 Q Did you seek out this information? 25 A No.</p>	253

254	<p>1 MR. KAPLAN: Objection; vague, incomplete 2 hypothetical. 3 THE WITNESS: I have to start looking 4 through some of my conclusions to see what I might 5 change, if anything. I don't believe so. 6 BY MS. MERK: 7 Q Why not? 8 MR. KAPLAN: Objection; vague. 9 THE WITNESS: Because I believe that the 10 things that I've said in my document continue to be 11 true. 12 MS. MERK: I have no other questions. 13 Oh, I would, however, like to state on the 14 record that we would like to keep this deposition 15 open until the document issue has been resolved. 16 We received over 5,000 pages of documents 17 which we have still not had access to because they 18 were provided in a load file that is not -- that 19 could not be read on our computers in this sort of 20 context, and we will maintain the right to question 21 Mr. Fruchterman on anything that is raised in those 22 documents provided today. 23 MR. KAPLAN: So are you keeping the 24 deposition open? 25 MS. MERK: Yes.</p>	256
255	<p>1 FURTHER EXAMINATION 2 BY MR. REHN: 3 Q Good evening, Mr. Fruchterman. 4 A Hello. 5 Q And do you understand that you're still 6 under oath? 7 A Yes. 8 Q Has anything happened between now and the 9 last time we spoke that would affect your ability to 10 answer my questions fully and truthfully? 11 A No. 12 Q So I'd like to direct your attention to an 13 exhibit that we are marking as Exhibit Number 4006. 14 A Yes. 15 (Plaintiffs' Exhibit 4006 to be 16 marked for identification.) 17 BY MR. REHN: 18 Q Do you recognize this as an e-mail to 19 yourself from Rob Turner that was sent on April 10th 20 of this year at 10:56 a.m.? 21 A Yes. 22 Q And the subject line is "OCR Document"? 23 A Yes. 24 Q Do you recall receiving this e-mail? 25 A Yes.</p>	257
255	<p>1 MR. KAPLAN: Okay. So we will continue to 2 sit here until the tape runs out -- seven hours run 3 out. 4 MS. MERK: No. We're going off the 5 record. 6 MR. KAPLAN: Well, I don't want to go off 7 the record. I mean, you have a full day to depose 8 Mr. Fruchterman. 9 MS. MERK: You have not provided the 10 documents. 11 MR. KAPLAN: Yes, we have. 12 MS. RUBEL: We're working on getting a set 13 of them. We want to go off the record. 14 MR. KAPLAN: We'll take a break for a 15 second. 16 THE VIDEOGRAPHER: We're going off the 17 record at 5:55. 18 (Recess taken.) 19 THE VIDEOGRAPHER: We're back on the 20 record at 7:04. 21 22 23 24 25</p>	<p>1 Q And do you know what OCR document 2 Mr. Turner is referring to in the subject line? 3 A Is there, like, an immediately prior 4 document that actually mentions this? Sorry. 5 Sorry. I mean, can I look through the list of 6 produced documents? 7 MR. KAPLAN: You just got to answer his 8 question. 9 BY MR. REHN: 10 Q Based on this e-mail, do you know which 11 document he's referring to? 12 A I don't remember which one of the 13 image-based standards I shared with him, no. But it 14 was one of the image-based PDFs that I asked him to 15 look at. 16 Q So the image-based PDFs that you sent 17 Mr. Turner were -- those were PDFs you had taken 18 from Public Resource's website; is that correct? 19 MR. KAPLAN: Objection; argumentative, 20 misleading and vague. 21 THE WITNESS: It probably was an 22 image-based PDF from the Public.Resource.Org 23 website, and that's my -- that's my recollection. 24 Yes. 25</p>

258	<p>1 BY MR. REHN: 2 Q Did you make any image-based PDFs of 3 documents from any of Plaintiffs' websites? 4 A I didn't make any documents from 5 Plaintiffs' websites. I downloaded whatever 6 document -- no, I downloaded -- I viewed the 7 document, yes. So, no. 8 Q After you sent him a document, it would 9 have been one from Public Resource's website? 10 A That's correct. Thank you. 11 Q And if I could direct you to the last 12 sentence of the first paragraph of his e-mail, would 13 you read that sentence, please? 14 A The one "I don't think..."? 15 Q Yes. 16 A Yes. 17 "I don't think this type of 18 document can be considered to be 19 accessible." 20 Q So based on your prior testimony, is it 21 your understanding that he is saying that the 22 image-based PDF from Public Resource's website that 23 you sent to Mr. Turner, in his opinion, cannot be 24 considered to be accessible? 25 MR. KAPLAN: Objection; misleading,</p>	260
259	<p>1 argumentative, vague. 2 THE WITNESS: I think Rob Turner doesn't 3 believe it meets our accessibility standards, which 4 is what his job is to primarily work on our library 5 for the blind. We would not post an image-based PDF 6 and call it accessible. 7 BY MR. REHN: 8 Q And do you agree with Mr. Turner's 9 assessment that this type of document cannot be 10 considered to be accessible? 11 A I think it's less accessible than many of 12 the other documents and more than others, as I wrote 13 in my expert report. I can probably quote from the 14 report. 15 Q There's no question pending. So... 16 A Okay. I would direct you to my last 17 sentence of my report -- 18 MR. KAPLAN: Jim, there's no question 19 pending. 20 THE WITNESS: All right. 21 MR. REHN: I have no further questions. 22 And I believe that concludes Plaintiffs' questioning 23 of this witness. 24 MR. KAPLAN: I have no questions at this 25 time.</p>	261

1 THE VIDEOGRAPHER: This concludes today's
 2 deposition. We're going off the record at 7:09.
 3 (Time noted: 7:09 p m.)
 4 (Signature waived.)
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1 CERTIFICATION OF DEPOSITION OFFICER
 2 I, the undersigned, a Certified Shorthand
 3 Reporter of the State of California, do hereby certify:
 4 That the foregoing proceedings were taken
 5 before me at the time and place herein set forth; that
 6 any witnesses in the foregoing proceedings, prior to
 7 testifying, were administered an oath; that a record of
 8 the proceedings was made by me using machine shorthand
 9 which was thereafter transcribed under my direction;
 10 that the foregoing transcript is a true record of the
 11 testimony given.
 12 Further, that the foregoing pertains to the
 13 original transcript of a deposition in a Federal Case,
 14 before completion of the proceedings, a review of the
 15 transcript [] was [X] was not requested.
 16 I further certify I am neither financially
 17 interested in the action nor a relative or employee of
 18 any attorney or any party to this action.
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 KELLI COMBS
 CSR No. 7705

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