

EXHIBIT 1

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Page 116

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

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<p>1 that they are her personal views? 2 A. I wouldn't be surprised and 3 may -- I may have read that, but I would 4 expect that that would be in the first 5 footnote of one or both articles. 6 Q. What did you do to examine the 7 alleged facts that the representatives of 8 plaintiffs stated to you in their 9 conversations with you? 10 MR. FEE: Objection to form. 11 THE WITNESS: I looked at -- 12 MR. FEE: Asked and answered. 13 THE WITNESS: I'm sorry. I 14 looked at the document production and 15 the other materials shown in tab 2. 16 BY MR. BRIDGES: 17 Q. You looked at the document 18 production that the plaintiffs' counsel 19 furnished you? 20 A. In part. There were other 21 things in tab 2 that were not provided to me 22 by plaintiffs' counsel. 23 Q. What other materials in 24 tab 2 -- strike that. 25 Please identify for me in tab 2</p> <p style="text-align: right;">Page 118</p>	<p>1 I believe counsel did not 2 provide the Web site screenshots, but I might 3 be wrong on that. 4 Q. And did you do anything -- 5 what, if anything, did you do to test the 6 validity of the factual assertions that the 7 plaintiffs made to you in your conversations 8 with their employees? 9 MR. FEE: Objection to form. 10 Asked and answered. 11 THE WITNESS: Well, we looked 12 at materials. If we found things that 13 conflicted with what we learned, that 14 would prompt us to investigate 15 further. But I don't recall seeing 16 any documentary evidence that 17 conflicted with facts that were 18 provided by plaintiff personnel, but I 19 might be wrong. 20 BY MR. BRIDGES: 21 Q. Did you investigate 22 independently whether documents existed that 23 contradicted plaintiffs' statements of facts? 24 A. Not with that in mind. We 25 looked at the documents and were mindful of</p> <p style="text-align: right;">Page 120</p>
<p>1 the materials that plaintiffs' counsel 2 furnished you. 3 A. I don't know with absolute 4 certainty, but let me give you my best guess. 5 I believe all the depositions that are shown 6 on page 1. I believe the Bates ranges at the 7 very top of the page were provided by 8 counsel. 9 The deposition transcripts and 10 exhibits were provided by counsel. I believe 11 the financial statements and plans were 12 provided by counsel. I believe the legal 13 documents were provided by counsel. I 14 believe the miscellaneous items were provided 15 by counsel. 16 I don't know about the cases 17 and laws. I just don't remember if we 18 separately gathered those or were provided 19 those. 20 The analyst reports, articles, 21 books, and presentations, I think we gathered 22 all of those, with the possible exception of 23 the two Bremer articles. I don't recall if 24 counsel provided that or we obtained those 25 separately.</p> <p style="text-align: right;">Page 119</p>	<p>1 whether there were conflicts within documents 2 or conflicts between documents and other 3 information, but I don't recall that we saw 4 anything that gave us substantial pause. 5 There were probably some things 6 where there were some uncertainties whether 7 there was a conflict or not and some where 8 there were insignificant conflicts, but I 9 think mostly the information we saw did not 10 conflict with the information we learned from 11 plaintiff personnel. 12 Q. Did you investigate 13 independently whether other documents, apart 14 from the documents plaintiffs furnished you, 15 existed that contradicted plaintiffs' 16 statements of facts -- 17 MR. FEE: Objection to form. 18 BY MR. BRIDGES: 19 Q. -- in conversations with you? 20 A. Yes, in the sense that we 21 gathered some information that we did not 22 receive from plaintiffs' counsel, but all of 23 that is identified in tab 2. 24 Q. Which part of tab 2? 25 A. Well, as I said, I think the</p> <p style="text-align: right;">Page 121</p>

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

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

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

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

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1 answered.
 2 THE WITNESS: Again, I read the
 3 case. I didn't do any analysis beyond
 4 that of that particular case.
 5 BY MR. BRIDGES:
 6 Q. What steps did you take to
 7 ascertain what public harms flowed from the
 8 Court's decision in the Veeck case?
 9 A. Other than reading the case,
 10 the opinion in the case, I didn't do anything
 11 beyond that to understand the implications of
 12 that holding.
 13 Q. You didn't do any investigation
 14 as to the economic consequences to any
 15 entity, industry, or person as a consequence
 16 of the decision in the Veeck case, correct?
 17 MR. FEE: Objection to form.
 18 THE WITNESS: I think that's
 19 correct, yes.
 20 BY MR. BRIDGES:
 21 Q. How has the process of
 22 standards development changed in the last 100
 23 years, to your knowledge?
 24 A. I don't know the specifics, and
 25 I don't know that there is one standards

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1 development process. I think there are a
 2 variety of processes pursued by a number of
 3 SSOs or SDOs. I'm sure that there have been
 4 changes on the margin. There may have been
 5 larger changes. I just don't know. I have
 6 not studied the trend in the standard
 7 development process over time.
 8 Q. What changes are you aware of
 9 in the standards development process of NFPA
 10 over the past 100 years?
 11 A. I don't know. I've not studied
 12 that topic.
 13 Q. What changes are you aware of
 14 in the standards development process of the
 15 ASHRAE 90.1 standard?
 16 A. I don't know. I've not studied
 17 that.
 18 Q. How did ASHRAE come to develop
 19 the 90.1 standard?
 20 A. I think, generally, a need was
 21 identified and a group of constituents
 22 convened to derive a standard, but I don't
 23 know the specifics beyond that.
 24 Q. Do you know who identified the
 25 need?

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1 A. Not sitting here right now, I
 2 don't.
 3 Q. Do you know whether ASHRAE took
 4 over development of what became standard 90.1
 5 from any other group or entity?
 6 A. No, I do not.
 7 Q. Have you ever quantified the
 8 value of the contributions made by the
 9 volunteers of the various organizations to
 10 the standards at issue in this case?
 11 MR. FEE: Objection to form.
 12 THE WITNESS: Not other than
 13 having some sense of hours or a
 14 limited sense of dollars, but not
 15 beyond that, no.
 16 BY MR. BRIDGES:
 17 Q. Can you put a rough dollar
 18 value on the time and expenses of the
 19 volunteers with respect to any of the
 20 standards in this case?
 21 MR. FEE: Objection to form.
 22 THE WITNESS: Not sitting here
 23 right now. That would entail a little
 24 bit of a study. I have not done that.
 25 BY MR. BRIDGES:

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1 Q. What -- what would be required?
 2 A. To understand basically the
 3 out-of-pocket expenses incurred and the
 4 opportunity costs incurred. So among other
 5 things, one would want to look at time
 6 records, have an understanding of
 7 compensation, have an understanding of the
 8 activities of those individuals. Those
 9 are -- would be among the inputs.
 10 Q. What changes are you aware of
 11 in the distribution of standards in the past
 12 100 years by the plaintiffs?
 13 MR. FEE: Objection to form.
 14 THE WITNESS: I haven't
 15 investigated that particular issue,
 16 but I understand that some of the
 17 standards today are distributed
 18 through the Internet that certainly
 19 didn't exist 100 years ago.
 20 Some of the standards are
 21 distributed for free with limitations.
 22 I don't know if that was true 100
 23 years ago, but it might have been.
 24 I would expect some of the
 25 copying and dissemination capabilities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Page 143

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

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

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

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

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

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

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

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

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

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

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

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

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1 that's fine.
 2 A. I want to, but I cannot.
 3 Q. Well --
 4 A. I do not understand the
 5 question.
 6 Q. I'll say it again.
 7 Would a decision by the Court
 8 that the defendant has not infringed upon the
 9 plaintiffs' copyrights result in economic
 10 harm to the plaintiffs?
 11 MR. FEE: Objection. Calls for
 12 a legal conclusion. Asked and
 13 answered.
 14 THE WITNESS: I --
 15 MR. FEE: Vague.
 16 THE WITNESS: I cannot answer
 17 it any differently. I'm sorry.
 18 Is this a good time for a
 19 break, or do you want to keep going?
 20 MR. BRIDGES: Sure. We can
 21 take one if you want.
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 23 record at 1:17.
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 9 please, what steps you took in your
 10 engagement in this case? What are the
 11 different activities you engaged in?
 12 A. Generally, I had a discussion
 13 with counsel about the matter. Then we
 14 examined documents that would -- were
 15 provided to us to give us background. We
 16 then proceeded to gather our own information
 17 from third-party sources, primarily through
 18 Internet searches.
 19 We obtained information that
 20 had been produced as part of discovery. We
 21 had conversations with people at the various
 22 plaintiff organizations.
 23 We outlined the report and
 24 summarized some of the information that you
 25 see in the tabs. We had discussions with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<p>1 information? 2 A. Not with certainty, because I 3 don't know who those persons were, but I 4 would expect one alternative would be to 5 obtain it properly, directly from ASTM. 6 Q. Would that have resulted in 7 more revenue to ASTM? 8 A. It may have. If they're 9 materials that were taken improperly that 10 would have been paid for, then that would 11 represent a loss of revenue to ASTM. 12 Q. Do you know whether any of the 13 persons who obtained this information from 14 defendant would have paid for the information 15 from ASTM? 16 A. No, not with certainty, because 17 I don't know the identity of the downloaders 18 or the reasons for their downloading. 19 Q. Moreover, those persons might 20 have accessed the standards from ASTM's 21 reading room for free and with no revenue to 22 ASTM, correct? 23 A. You mean in a but-for world? 24 Had they not done what they actually did, 25 alternatively they could have gone to the</p> <p style="text-align: right;">Page 214</p>	<p>1 more extended use of that document. 2 Q. Do you have any evidence about 3 wide distribution of plaintiffs' standards as 4 a consequence of defendant's actions? 5 A. I do not. 6 Q. Have you reviewed any studies 7 that would allow you to establish any 8 connection between the number of accesses or 9 downloads that Public Resource made possible 10 and any financial harms to the plaintiffs? 11 MR. FEE: Objection to form. 12 THE WITNESS: I don't think 13 I've seen any study on that, no. 14 BY MR. BRIDGES: 15 Q. Have you conducted any studies 16 that would have allowed you to establish any 17 connection between the number of accesses or 18 downloads that Public Resource made possible 19 and any financial harms to the plaintiffs? 20 MR. FEE: Objection to form. 21 THE WITNESS: Not other than 22 what's contained in my report. 23 BY MR. BRIDGES: 24 Q. Please turn to page 45, 25 paragraph 107, which spills into page 108.</p> <p style="text-align: right;">Page 216</p>
<p>1 free reading room? 2 Q. Right. 3 A. That's a possibility, yes. 4 Q. Do you have an understanding as 5 to why persons would want to download a file 6 of a standard instead of viewing it at one of 7 the plaintiffs' reading rooms? 8 A. Not with absolute certainty, 9 but I would imagine downloading would allow 10 more flexibility in referring to the standard 11 and using it and sharing that information 12 with others, whereas reading it in -- through 13 an Internet site is somewhat less flexible, 14 provides less flexibility for the use of that 15 information. 16 Q. What did -- what do you 17 understand to be the difference in 18 flexibility between possession of a download 19 and access to a standard through a reading 20 room? 21 A. Well, I think that a download 22 typically has a document that's in hard-copy 23 form. Copies can be made -- be made of that and 24 distributed. Reading things just online 25 doesn't allow for the wide distribution and</p> <p style="text-align: right;">Page 215</p>	<p>1 MR. FEE: Page 108? 2 THE WITNESS: I'm sorry. 3 Page 108 or paragraph? 4 BY MR. BRIDGES: 5 Q. I'm sorry. Paragraph -- strike 6 that. 7 Let me ask you to turn 8 paragraph 107 on pages 45 to 46. 9 A. Okay. I'm there. 10 Q. I just want to make sure I 11 understand your language correctly at the 12 bottom of page 45 and the top of page 46. 13 Is it your opinion that the 14 copyright that the plaintiffs assert in their 15 standards drives sales of other publications 16 other than the standards themselves? 17 MR. FEE: Objection. Form. 18 Vague. 19 THE WITNESS: I think they're 20 important for driving sales of 21 publications that embody those 22 standards. I don't know that I've 23 drawn a conclusion that it drives the 24 sale of other products, but that makes 25 some sense.</p> <p style="text-align: right;">Page 217</p>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<%signature%>
Dustin Howard
Dustin Howard, NDR, CRR
Notary Public

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