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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AMERICAN CIVIL LIBERTIES	:	CIVIL ACTION
UNION, ET AL	:	
	:	
PLAINTIFF	:	
	:	
	:	
VS.	:	
	:	
	:	
ALBERTO R. GONZALES,	:	
IN HIS OFFICIAL CAPACITY AS	:	
ATTORNEY GENERAL OF THE	:	
UNITED STATES	:	
	:	
DEFENDANT	:	NO. 98-05591

MONDAY, OCTOBER 30, 2006
COURTROOM 17-A
PHILADELPHIA, PA 19106

BEFORE THE HONORABLE LOWELL A. REED, JR. SJ

NON-JURY TRIAL
DAY 5

APPEARANCES:

CHRISTOPHER A. HANSEN, ESQUIRE
ADEN J. FINE, ESQUIRE
BEN WIZNER, ESQUIRE
CATHERINE CRUMP, ESQUIRE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,
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FOR THE DEFENDANT

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1 (THE CLERK OPENS COURT.)

2 THE COURT: GOOD MORNING, EVERYONE.

3 ALL COUNSEL: GOOD MORNING, YOUR HONOR.

4 THE COURT: GOOD MORNING, MISS WHITE.

5 YOU ARE WELCOME TO BE SEATED. WE ARE
6 PREPARED TO START WITH A NEW WITNESS THIS MORNING, BUT I
7 WANT TO COVER ONE BRIEF ITEM BEFORE WE GET STARTED.
8 WHETHER IT IS WELL TAKEN OR NOT, COUNSEL FOR FLASH
9 NETWORKS INC. WANTS TO GET SOME ASSURANCES THAT SOMEBODY
10 DOES NOT HAVE TO GET ON AN AIRPLANE TO COME FROM ISRAEL.
11 I ASSUME SOMEBODY HAS DEALT WITH THAT. THAT IS ALL I
12 CARE ABOUT RIGHT NOW.

13 MR. FINE: WE HAVE BEEN IN CONTACT WITH
14 THEIR ATTORNEY, AND THE MATTER HAS BEEN DISCUSSED AND
15 DOES NOT NEED TO BE RESOLVED TODAY. WE WILL ADVISE THE
16 COURT AS TO WHAT THE SITUATION IS, BUT WE ARE WORKING
17 WITH COUNSEL.

18 THE COURT: OKAY. WHILE WE ARE ON THAT
19 SUBJECT, WE HAVE VISA U.S.A. THROUGH COUNSEL DAVID
20 SANDAL. HAVE YOU BEEN IN TOUCH WITH HIM?

21 MR. FINE: WE HAVE AS WELL, AND VISA HAS
22 OBJECTIONS TO CERTAIN DOCUMENTS THAT ARE BEING OFFERED
23 BY PLAINTIFFS AND BY THE DEFENDANT AND WE HAVE BEEN IN
24 TOUCH WITH VISA AND WILL HOPEFULLY HAVE AN ANSWER AND
25 HOPEFULLY A RESOLUTION BY LATER TODAY, BUT WE WILL AGAIN

1 KEEP THE COURT ADVISED.

2 THE COURT: A LOT OF DEPOSITION TESTIMONY
3 IN VISA IS EXTREMELY SMALL.

4 MR. FINE: THE DEPOSITION DESIGNATIONS
5 ARE NOT THE REAL ISSUE FOR VISA, I BELIEVE THERE ARE
6 CERTAIN DOCUMENTS.

7 THE COURT: THEY HAVE ALLEGEDLY SEVEN
8 DOCUMENTS. WE WILL COVER THAT NO LATER THAN 4:30 THIS
9 AFTERNOON.

10 THE NEXT WITNESS FOR THE PLAINTIFFS.

11 MR. WIZNER: GOOD MORNING, YOUR HONOR,
12 PLAINTIFFS CALL HENRY REICHMAN.

13 THE COURT: GOOD MORNING, SIR.

14 IF YOU WILL STAND UP NEAR THE CHAIR AND
15 PUT YOUR LEFT HAND ON THE BIBLE AND TAKE THE OATH
16 PLEASE.

17 HENRY REICHMAN, PLAINTIFF'S WITNESS,
18 SWORN.

19 THE CLERK: STATE AND SPELL YOUR FULL NAME
20 FOR THE RECORD, PLEASE.

21 THE WITNESS: HENRY REICHMAN
22 R-E-I-C-H-M-A-N.

23 THE COURT: GOOD MORNING AGAIN.

24 THE WITNESS: GOOD MORNING.

25 DIRECT EXAMINATION

1 BY MR. WIZNER:

2 Q. GOOD MORNING, PROFESSOR REICHMAN.

3 A. GOOD MORNING.

4 Q. HOW ARE YOU EMPLOYED?

5 A. I AM PROFESSOR OF HISTORY AT CALIFORNIA STATE
6 UNIVERSITY, EAST BAY, FORMERLY KNOWN AS CALIFORNIA STATE
7 UNIVERSITY, HAYWARD.

8 Q. WHAT ARE THE PRIMARY THEMES OF YOUR TEACHING AND
9 RESEARCH?

10 A. I AM A SCHOLAR OF 19TH AND 20TH RUSSIAN HISTORY,
11 BUT I ALSO TEACH GENERAL COURSES IN HISTORY AS WELL AS
12 AN UPPER DIVISION COURSE ON THE HISTORY OF AMERICAN
13 BASEBALL.

14 Q. IF YOU WOULD PLEASE REFER TO THE DOCUMENT
15 PREVIOUSLY MARKED AS PLAINTIFFS' EXHIBIT 21. IS THAT AN
16 ACCURATE COPY OF YOUR CURRICULUM VITAE?

17 A. YES, IT IS.

18 Q. BEFORE YOU BEGAN TEACHING AT CSU EAST BAY, DID
19 YOU TEACH ELSEWHERE?

20 A. YES, I DID, I TAUGHT AT THE UNIVERSITY OF
21 CALIFORNIA, DAVIS, SAN DIEGO AND BERKELEY CAMPUSES. I
22 TAUGHT AT MEMPHIS STATE UNIVERSITY, WHICH IS NOW KNOWN
23 AS THE UNIVERSITY OF MEMPHIS, AND I TAUGHT AT MILLS
24 COLLEGE, NORTHWESTERN UNIVERSITY, AND A FEW OTHER
25 PLACES.

1 Q. WHAT'S YOUR EDUCATIONAL BACKGROUND?

2 A. I HAVE A BACHELOR'S DEGREE FROM COLUMBIA
3 UNIVERSITY, WHICH I EARNED IN 1969. PH.D FROM THE
4 UNIVERSITY OF CALIFORNIA AT BERKELEY, WHICH I EARNED IN
5 1977.

6 Q. HAVE YOU PUBLISHED ANY BOOKS?

7 A. YES.

8 Q. WHAT ARE THEY?

9 A. THERE ARE TWO BOOKS. ONE IS IN MY DISCIPLINARY
10 FIELD. IT'S CALLED RAILWAYMEN AND REVOLUTION: RUSSIA
11 1905. IT'S MONOGRAPH ON THE RUSSIAN REVOLUTION OF 1905.
12 THE OTHER ONE, MORE RELEVANT TO MY TESTIMONY TODAY IS A
13 BOOK CALLED CENSORSHIP AND SELECTION: ISSUES AND
14 ANSWERS FOR SCHOOLS.

15 Q. WHAT'S CENSORSHIP AND SELECTION ABOUT?

16 A. WELL, I HAVE A COPY HERE, IF YOUR HONOR WANTS TO
17 SEE IT. IT'S ABOUT ATTEMPTS TO REMOVE LIBRARY AND
18 CLASSROOM MATERIALS AND OTHER MATERIALS FROM SCHOOLS IN
19 THE UNITED STATES. IT HAS BEEN PUBLISHED NOW IN THREE
20 AMERICAN EDITIONS, EACH OF WHICH HAVE I HAVE BEEN
21 RESPONSIBLE FOR. FIRST EDITION IN 1988, THE SECOND IN
22 1993, AND THE THIRD, I BELIEVE 2001, AND IT'S ALSO, I'M
23 TOLD, PUBLISHED IN TWO JAPANESE EDITIONS.

24 Q. WHAT RESEARCH DID YOU CONDUCT IN WRITING
25 CENSORSHIP AND SELECTION?

1 A. WELL, I WORKED FOR THE AMERICAN LIBRARY
2 ASSOCIATION AS ASSOCIATE EDITOR OF THEIR NEWSLETTER ON
3 INTELLECTUAL FREEDOM. I USED MY BACKGROUND IN THE
4 NEWSLETTER AND OTHER MATERIALS I'D ACCUMULATED OVER THE
5 YEARS WORKING FOR THE AMERICAN LIBRARY ASSOCIATION IN
6 PREPARING THE BOOK.

7 Q. TELL THE COURT WHAT THE AMERICAN LIBRARY
8 ASSOCIATION IS.

9 A. THE AMERICAN LIBRARY ASSOCIATION IS THE LARGEST
10 ORGANIZATION IN THE UNITED STATES ADVANCING THE CAUSE OF
11 LIBRARIANSHIP. IT'S AN ORGANIZATION FOR LIBRARIANS,
12 THOSE ACTIVE IN THE LIBRARY AREA INCLUDING LIBRARY
13 TRUSTEES AND LIBRARY SUPPORTERS AS WELL. IT MAINTAINS
14 AN ACTIVE OFFICE FOR INTELLECTUAL FREEDOM WHICH DEFENDS
15 INTELLECTUAL FREEDOM IN LIBRARIES, AND IT ALSO IS
16 INVOLVED WITH SOMETHING CALLED THE FREEDOM TO READ
17 FOUNDATION WHICH IS A LEGAL ARM OF THE ALA IN THESE
18 AREAS.

19 Q. AND WHAT POSITIONS HAVE YOU HELD WITH THE
20 AMERICAN LIBRARY ASSOCIATION?

21 A. I BEGAN THERE IN THE FALL, ACTUALLY I THINK
22 AUGUST OF 1980, WHERE I WAS WORKING AS ASSISTANT
23 DIRECTOR OF THE OFFICE OF INTELLECTUAL FREEDOM. AND
24 THAT IS WHERE I BEGAN BEING ESSENTIALLY THE MAIN WRITER
25 AND ASSISTANT EDITOR OF THE NEWSLETTER. I LEFT THE

1 OFFICE THAT FOLLOWING SPRING TO GO DO RESEARCH. WHEN I
2 CAME BACK TO THIS COUNTRY, I WAS HIRED ON A CONTRACT
3 BASIS TO PREPARE AND WRITE AND EDIT THE NEWSLETTER, TOOK
4 ON THE TITLE OF ASSOCIATE EDITOR AND HAVE BEEN DOING
5 THAT EVER SINCE.

6 Q. IF WE COULD DISPLAY THE FIRST PAGE OF
7 PLAINTIFFS' EXHIBIT 23. YOU MENTIONED THE NEWSLETTER ON
8 INTELLECTUAL FREEDOM. WHAT IS THE NEWSLETTER?

9 A. THE NEWSLETTER COMES OUT SIX TIMES A YEAR. IT
10 IS BIMONTHLY. IT COVERS INCIDENTS OF CHALLENGES TO
11 INTELLECTUAL FREEDOM. IT IS ACTUALLY THE ONLY I THINK
12 REGULARLY APPEARING AMERICAN PUBLICATION DEALING SOLELY
13 WITH THE FIRST AMENDMENT AND NOT -- NO OTHER CIVIL
14 LIBERTIES ISSUES. EACH AVERAGE ISSUE IS ABOUT 36 PAGES.

15 Q. AND WHAT IS THE EDITORIAL MISSION OF THE
16 NEWSLETTER?

17 A. THE EDITORIAL MISSION OF THE NEWSLETTER IS TO
18 SUPPORT THE INTELLECTUAL FREEDOM PROGRAMS OF THE
19 AMERICAN LIBRARY ASSOCIATION.

20 Q. WHO IS THE TARGET AUDIENCE FOR THE NEWSLETTER?

21 A. FIRST AND FOREMOST LIBRARIANS AND LIBRARY
22 SUPPORTERS BUT ALSO CIVIL LIBERTIES ACTIVISTS AND TO
23 SOME DEGREE ATTORNEYS AND OTHERS IN THE LEGAL COMMUNITY
24 INVOLVED IN FIRST AMENDMENT LITIGATION, ALTHOUGH WE DO
25 NOT CLAIM TO BE A LEGAL PUBLICATION.

1 Q. HOW IS THE NEWSLETTER COMPILED?

2 A. WELL, WHEN I FIRST STARTED DOING IT, I COMPILED
3 IT FROM NEWSPAPER CLIP PINGS, MAINLY SENT TO ME BY A
4 NEWS CLIPPING SERVICE, BUT I GO THROUGH THOSE -- WE GAVE
5 THEM A DESCRIPTIVE LIST OF TERMS, THINGS WE WERE LOOKING
6 FOR. I GO THROUGH THOSE CLIPS, SEVERAL THOUSANDS OF
7 THEM FOR EACH ISSUE AS WELL AS OTHER MATERIALS SENT TO
8 ME FROM ALA, AND ON THAT BASIS FIGURE OUT THINGS THAT
9 SHOULD BE REPORTED IN THE NEWSLETTER. IN THE PAST FEW
10 YEARS WE HAVE MOVED AWAY FROM THE CLIPPING SERVICE. IT
11 WAS BECOMING INCREASINGLY UNPRODUCTIVE. WE WERE MOSTLY
12 KILLING TREES, I THINK. AND NOW WE HAVE GONE OVER TO
13 MOSTLY ELECTRONIC THINGS WHERE THE ALA OFFICE SENDS ME
14 MATERIALS ELECTRONICALLY, I ACCUMULATE THEM AND THEN
15 WHEN I PREPARE THE ISSUE I GO THROUGH ALL THE MATERIALS
16 THAT ARE SENT TO ME. IN ADDITION I DO SOME SCANNING OF
17 THE INTERNET MYSELF AND REGULARLY READ ONLINE VERSIONS
18 OF PUBLICATIONS LOOKING FOR ARTICLES THAT WOULD BE OF
19 INTEREST.

20 Q. AND DO YOU HAVE A STAFF THAT ASSISTS YOU IN
21 COMPILING THE NEWSLETTER?

22 A. NO, NOT COMPILING. THE PRODUCTION IS DONE
23 ELSEWHERE, IN ALA?

24 Q. DO YOU CONDUCT ANY INDEPENDENT REPORTING FOR THE
25 NEWSLETTER?

1 A. NO. I SIMPLY USE PUBLISHED MATERIALS. WE HAVE
2 A POLICY FOR THE NEWSLETTER THAT WE ONLY REPORT IN THE
3 NEWSLETTER THINGS THAT HAVE ALREADY BEEN REPORTED IN THE
4 PRESS OR IF ALA INDEPENDENTLY KNOWS ABOUT IT, IF THOSE
5 INVOLVED IN THE INCIDENT HAVE PARTICULARLY GIVEN ALA
6 PERMISSION TO TALK ABOUT IT IN PRINT.

7 Q. WHAT IS THE REASON FOR THAT POLICY?

8 A. WELL, FOR ONE THING, WE DON'T WANT TO NEEDLESSLY
9 FAN THE FLAMES OF A CONTROVERSY THAT MIGHT BE DEVELOPING
10 SOMEWHERE. SOME LIBRARIANS THAT MAY BE INVOLVED, FOR
11 EXAMPLE, IN CHALLENGES TO MATERIALS IN THE LIBRARY, MAY
12 BE CONCERNED ABOUT THEIR EMPLOYMENT SITUATION OR JUST BE
13 PUBLICITY SHY. BUT IN ADDITION THERE IS ALSO A CHILLING
14 EFFECT OF THE VERY REPORTING OF THESE INCIDENTS. WHEN
15 PEOPLE HEAR THAT THIS MATERIAL IS BEING CHALLENGED IN
16 ONE COMMUNITY, THE POSSIBILITY THAT THOSE IN ANOTHER
17 COMMUNITY CAN SAY THAT WE SHOULD CHALLENGE IT IN OURS OR
18 EVEN WORSE, THAT LIBRARIANS OR OTHERS IN SCHOOLS MIGHT
19 FEEL THAT, WELL, LET'S PLAY IT SAFE AND GET RID OF THIS.
20 IN FACT, WE ONCE HEARD A STORY ABOUT ONE LIBRARIAN WHO
21 SUBSCRIBED TO THE NEWSLETTER, AND LOOKED AT EVERY ISSUE
22 IN ORDER TO SAY, WELL, THESE ARE BOOKS I SHOULD NOT
23 PURCHASE OR LET'S PUT THESE ON THE BACK SHELF TYPE
24 THING.

25 Q. HOW LONG HAVE YOU BEEN ASSOCIATE EDITOR OF THE

1 NEWSLETTER?

2 A. ASSOCIATE EDITOR SINCE 1982. WORKING ON IT
3 DOING ESSENTIALLY WHAT I DO NOW SINCE 1980 WITH ONE
4 YEAR'S BREAK WHEN I WAS IN THE SOVIET UNION DOING
5 RESEARCH.

6 Q. I'M GOING TO TEST YOUR SIMPLE ARITHMETIC.
7 APPROXIMATELY HOW MANY NEWSLETTERS HAVE YOU EDITED AND
8 COMPILED IN THAT TIME?

9 A. IT HAS BEEN 25 YEARS, SIX ISSUES A YEAR, I WOULD
10 SAY ABOUT 150 ISSUES.

11 Q. DO YOU EVER WRITE FOR THE NEWSLETTER IN ADDITION
12 TO EDITING THE NEWSLETTER?

13 A. YES. I HAVE WRITTEN SEVERAL BOOK REVIEWS FOR
14 THE NEWSLETTER. I OCCASIONALLY WRITE SOME THINGS THAT
15 ARE NOT JUST REWRITES OF PUBLIC THINGS, BUT ARE MORE
16 ORIGINAL, SHALL I SAY.

17 Q. I'M GOING TO ASK YOU ABOUT THE REGULAR FEATURES
18 OF THE NEWSLETTER, BUT MAYBE WE COULD TURN TO PAGE 8 OF
19 PLAINTIFFS' EXHIBIT 23 ON THE SCREEN. IF YOU COULD BLOW
20 UP THE TOP LEFT CORNER SO WE CAN SEE THAT MAP AND WHAT
21 IT SAYS ABOVE IT.

22 WHAT ARE THE REGULAR FEATURES OF THE
23 NEWSLETTER?

24 A. WELL, WE HAVE THIS SECTION CALLED CENSORSHIP
25 DATELINE IN WHICH WE REPORT INCIDENTS OF CHALLENGES TO

1 MATERIALS USUALLY STARTING WITH LIBRARIES AND WORKING TO
2 SCHOOLS. AND THEN AFTER THAT, IT CAN BE ANYTHING FROM A
3 TELEVISION SHOW, A MOVIE, ART IN A MUSEUM OR GALLERY OR
4 WHAT HAVE YOU. AND WHAT YOU ARE SEEING ON THE SCREEN IS
5 THE SORT OF HEADLINE WE USE FOR THAT SECTION. IN EACH
6 OF THE SECTIONS WE HAVE WE HAVE A LITTLE MAP AND THE
7 STARS ARE PLACED WHERE THERE IS AN INCIDENT REPORTED IN
8 THAT ISSUE.

9 Q. IF WE CAN TURN TO PAGE 16 OF PLAINTIFFS' EXHIBIT
10 23. AGAIN, IF WE COULD BLOW UP THE TOP LEFT SO WE CAN
11 SEE THE HEADLINE.

12 A. THE SECOND SECTION IS FROM THE BENCH. THIS IS
13 WHERE WE REPORT DECISIONS OF COURTS. OBVIOUSLY, THE
14 HIGHER THE COURT, THE MORE SPACE WE GIVE TO THE
15 DECISION, ALTHOUGH SOMETIMES I WILL WRITE ONE WHERE IT
16 IS A PARTICULARLY UNUSUAL OR INTERESTING DECISION EVEN
17 IF IT IS IN A VERY SMALL JURISDICTION. IT ALWAYS BEGINS
18 WITH U.S. SUPREME COURT. SO EXCEPT SOMETIMES FOR THE
19 SEPTEMBER ISSUE, WHICH COMES AFTER THE COURT HAS BEEN IN
20 RECESS, THERE IS PRETTY MUCH ALWAYS A STAR AT
21 WASHINGTON, D.C.

22 Q. IF WE CAN TURN TO PAGE 22 OF PLAINTIFFS' EXHIBIT
23 23. WHAT IS THIS SECTION?

24 A. THIS IS CALLED: IS IT LEGAL? IN THIS SECTION
25 WE REPORT ON ISSUES THAT MAY BE IN TRIAL OR WHERE NEW

1 LAWS HAVE BEEN PASSED THAT RAISE LEGAL QUESTIONS
2 INVOLVING THE FIRST AMENDMENT. AND I FRANKLY ALSO USE
3 IT AS A CATCHALL SECTION FOR SOME THINGS THAT IT IS KIND
4 OF HARD TO FIT IN ANYWHERE ELSE, BUT I THINK WOULD BE
5 INTERESTING TO OUR READERS.

6 Q. FINALLY, LET'S LOOK AT PAGE 28 OF THIS EXHIBIT.
7 WHAT IS THIS SECTION?

8 A. THIS SECTION IS CALLED SUCCESS STORIES.
9 GENERALLY IT'S THE SMALLEST SECTION, AS YOU CAN SEE. IN
10 THIS PARTICULAR ISSUE, THERE ARE ONLY FOUR STARS. THESE
11 REPORT INCIDENTS WHERE THE ATTEMPT TO REMOVE THE
12 MATERIALS OR RESTRICT THE MATERIALS HAS BEEN DEFEATED.
13 ALTHOUGH I MIGHT ADD THAT IN SOME CASES EVEN THESE MAY
14 HAVE A CHILLING EFFECT BECAUSE WE DON'T REPORT ONES
15 WHERE THEY HAVE BEEN DEFEATED BEFORE IT EVER BECAME
16 ANYTHING. SOMEBODY CAME INTO A SCHOOL AND SAID, GET
17 THAT BOOK OUT OF THE LIBRARY AND THE PRINCIPAL JUST
18 SIMPLY SAID NO AND THAT WAS THE END OF IT. IT'S NOT
19 NEWS. BUT THESE ARE CASES WHERE USUALLY SOME KIND OF
20 TO-DO HAS BEEN MADE ABOUT THE ISSUE, AND EVENTUALLY THE
21 SCHOOL BOARD UNDER PRESSURE DECIDED NOT TO REMOVE OR
22 RESTRICT THE MATERIAL.

23 Q. IS THE NEWSLETTER'S COVERAGE OF CHALLENGES TO
24 MATERIALS COMPREHENSIVE?

25 A. NO, NOT REALLY. WE CAN'T CLAIM TO REPORT

1 EVERYTHING. AS I MENTIONED BEFORE, WE ONLY REPORT WHAT
2 IS IN THE PRESS, AND THEN AGAIN, THERE ARE SO MANY
3 PERIODICALS AND SO MANY DIFFERENT SOURCES OF PRESS
4 INFORMATION THAT WE DON'T COVER ALL OF IT.

5 WE DO TRY TO BE AS THOROUGH AS WE CAN,
6 AND I DO BELIEVE OUR COVERAGE IS EXEMPLARY OF THE
7 TRENDS, THAT THE PROPORTIONS ARE PROBABLY FAIRLY
8 ACCURATE TO WHAT IS ACTUALLY GOING ON IN THE COUNTRY,
9 BUT, NO, EVERY SINGLE CHALLENGE TO MATERIAL BY NO MEANS
10 MAKES IT INTO THE NEWSLETTER.

11 Q. DURING THE COURSE OF EDITING THE NEWSLETTER,
12 HAVE YOU DETECTED ANY PATTERNS OF CHALLENGES TO
13 MATERIALS?

14 A. YES, I HAVE.

15 Q. WHAT IF ANY CATEGORIES OF MATERIALS ARE MOST
16 ROUTINELY TARGETED FOR CHALLENGE?

17 A. WELL, I WOULD SAY THE SINGLE LARGEST GROUP OF
18 MATERIALS CHALLENGED HAVE BEEN MATERIALS THAT HAVE
19 SEXUAL CONTENT.

20 Q. AND HOW FREQUENTLY ARE THOSE MATERIALS
21 CHALLENGED?

22 A. QUITE FREQUENTLY.

23 Q. AND CAN YOU ESTIMATE THE NUMBER OF INCIDENTS
24 INVOLVING CHALLENGES TO SEXUAL MATERIALS THAT YOU HAVE
25 DOCUMENTED IN THE NEWSLETTER?

1 A. WELL, AGAIN, THIS IS AN ESTIMATE. MY GUESS
2 WOULD BE THAT IN THE TYPICAL ISSUE OF THE NEWSLETTER
3 THERE WOULD BE MAYBE 10, PROBABLY A MINIMUM OF 10. I
4 WOULD NOT GUARANTEE THAT FOR EVERY ISSUE, BUT MAYBE AS
5 MANY AS 20 INCIDENTS THAT INVOLVE SEXUAL MATERIALS. SO
6 IF YOU FIGURE THAT -- LET'S SAY THE MINIMUM OF 10, AND I
7 DID 150 ISSUES, I PROBABLY DOCUMENTED ABOUT 1,500
8 MINIMUM INCIDENTS.

9 Q. PROFESSOR REICHMAN, HAVE YOU EVER DELIVERED
10 LECTURES ON THE SUBJECT OF CENSORSHIP OR CHALLENGES TO
11 MATERIALS?

12 A. YES, I HAVE.

13 Q. AND CAN YOU DESCRIBE SOME OF THOSE?

14 A. WELL, LOOKING AT MY CV, I WAS A FEATURED SPEAKER
15 AT A LEADERSHIP DEVELOPMENT INSTITUTE, AMERICAN
16 ASSOCIATION OF SCHOOL LIBRARIANS, BACK IN 1987. I HAVE
17 SPOKEN MORE RECENTLY AT THE ASSOCIATION OF COLLEGE AND
18 RESEARCH LIBRARIES. AND WHEN I WORKED AT ALA, I USED TO
19 DO THAT ON AN ALMOST BIWEEKLY BASIS, PARTICULARLY IN THE
20 CHICAGO AREA, BUT I ALSO TRAVELLED AROUND MUCH OF THE
21 COUNTRY GIVING TALKS FOR ALA.

22 Q. PRIOR TO TODAY, HAVE YOU EVER TESTIFIED AS AN
23 EXPERT IN LITIGATION?

24 A. NO. THIS IS A FIRST FOR ME.

25 Q. AND PROFESSOR REICHMAN, DID YOU REVIEW ANY

1 MATERIALS IN PREPARING YOUR EXPERT REPORT IN THIS CASE?

2 A. YES, I DID.

3 Q. WHAT MATERIALS DID YOU REVIEW?

4 A. WELL, I ASKED THE ALA. I DON'T KEEP COPIES OF
5 THE NEWSLETTER. MY HOUSE IS CLUTTERED ENOUGH, AND I
6 ASKED ALA TO SEND ME COPIES OF ALL OF THE NEWSLETTERS
7 THEY HAD SINCE 1985. I DID NOT GET EVERY SINGLE ONE
8 PUBLISHED SINCE 1985 BECAUSE THEIR STOCKPILE WAS NOT
9 FULL. THERE WERE SOME ISSUES, PARTICULARLY OLDER ONES,
10 THEY DID NOT HAVE. I WENT THROUGH THOSE TRYING TO GET A
11 SENSE OF WHAT I COULD FIND, MORE THAN JUST MY MEMORY,
12 AND THEN FOCUSED IN PARTICULAR ON THE ISSUES PUBLISHED
13 SINCE THE PASSAGE OF COPA AND USED THAT MATERIAL AS THE
14 BASIS FOR MOST OF MY REPORT. I ALSO, OF COURSE,
15 REVIEWED MY BOOK, CENSORSHIP AND SELECTION, AND ALSO
16 MADE REFERENCE TO A NUMBER OF MATERIALS THAT HAD COME
17 ACROSS MY DESK THAT EITHER I WAS IN THE PROCESS OF USING
18 FOR PREPARING THE NEWSLETTER AT THAT TIME -- THAT I WAS
19 WORKING ON AT THAT TIME OR WHICH I HAD FOR ONE REASON OR
20 ANOTHER DECIDED NOT TO USE IN THE NEWSLETTER BUT THOUGHT
21 MIGHT BE USEFUL IN THE REPORT.

22 Q. AND PROFESSOR REICHMAN, DID YOU REVIEW ANY
23 MATERIALS RELATED TO THIS LITIGATION?

24 A. YES. I LOOKED AT THE AMENDED COMPLAINT FROM THE
25 PLAINTIFFS, AND THEN I WENT TO A NUMBER OF THE

1 PLAINTIFFS' WEBSITES.

2 Q. AND CAN YOU RECALL WHICH WEBSITES YOU LOOKED AT
3 IN PARTICULAR?

4 A. YES. I WENT TO THE WEBSITES OF SEXUAL HEALTH
5 NETWORK, TO SCARLET LETTERS AND SCARLETEEN. I WENT TO
6 NERVE.COM. I WENT TO PHILADELPHIA GAY NEWS, I WENT TO
7 CONDOMANIA AND I WENT TO URBANDICTIONARY.COM. AND I
8 BELIEVE THOSE ARE THE MAIN ONES I WENT TO. I MAY HAVE
9 LOOKED AT A COUPLE OF OTHERS, BUT THEY ARE THE MAIN
10 ONES.

11 Q. ARE YOU HERE TO PROVIDE A LEGAL OPINION?

12 A. NO, I AM NOT AN ATTORNEY.

13 Q. ARE YOU HERE TO TESTIFY ABOUT WHO WILL OR WILL
14 NOT BE PROSECUTED OR SUED IF COPA IS EVER ENFORCED?

15 A. I AM NOT A FORTUNE TELLER EITHER. I COULD NOT
16 TESTIFY ABOUT THAT, AND TO MY KNOWLEDGE, I HAVE HAD NO
17 ACQUAINTANCE WITH ANY STATEMENTS BY GOVERNMENT OR ANYONE
18 ELSE ABOUT WHO WOULD BE.

19 Q. PROFESSOR REICHMAN, ARE YOU HERE TO TESTIFY
20 ABOUT THE WORDS, ABOUT WHAT THE WORDS "HARMFUL TO
21 MINORS" MEAN IN RELATION TO COPA?

22 A. NO. NO LEGAL OPINION ON THAT. I'M NOT A
23 LAWYER. I CAN ONLY TALK ABOUT WHAT HARM -- THE TERM
24 "HARMFUL TO MINORS" IS UNDERSTOOD BY MANY PEOPLE IN THE
25 COUNTRY WHO USE THAT PHRASE OR PHRASES SIMILAR TO IT IN

1 CHALLENGING MATERIAL.

2 MR. WIZNER: YOUR HONOR, AT THIS TIME
3 PLAINTIFFS WOULD LIKE TO OFFER PROFESSOR REICHMAN AS AN
4 EXPERT IN THE AREA OF CENSORSHIP AND SUPPRESSION OF
5 SPEECH.

6 THE COURT: ANY OBJECTION?

7 MS. ULRICH: YOUR HONOR, DEFENDANT DOES
8 NOT OBJECT TO THE EXTENT THAT HE IS TALKING ABOUT
9 LIBRARY AND CLASSROOM MATERIALS AND DEFENDANT WOULD
10 RESERVE ITS OBJECTIONS TO THE TESTIMONY IN ITS ENTIRETY
11 AFTER CROSS.

12 THE COURT: THE LAST ITEM. WOULD YOU SAY
13 THAT AGAIN, PLEASE.

14 MS. ULRICH: DEFENDANT WOULD LIKE TO
15 RESERVE ITS OBJECTIONS TO THE ADMISSIBILITY OF THE
16 TESTIMONY AFTER CROSS EXAMINATION.

17 THE COURT: OH, I SEE WHAT YOU MEAN. I
18 WILL HEAR THE PROFFERED OPINION OF DR. REICHMAN. IT
19 WILL BE RECEIVED INTO THE RECORD SUBJECT TO MOTION TO
20 STRIKE AFTER CROSS EXAMINATION.

21 BY MR. WIZNER:

22 Q. PROFESSOR REICHMAN, PLEASE REFER TO THE DOCUMENT
23 THAT I HAVE PUT IN FRONT OF YOU THAT HAS BEEN PREVIOUSLY
24 MARKED AS PLAINTIFFS' EXHIBIT 22 IN THIS CASE. IS THAT
25 AN ACCURATE COPY OF YOUR EXPERT REPORT IN THIS

1 LITIGATION?

2 A. YES, IT IS.

3 Q. PLEASE REFER TO THE DOCUMENTS THAT HAVE
4 PREVIOUSLY BEEN MARKED AS PLAINTIFFS' EXHIBIT 23 IN THIS
5 LITIGATION. CAN YOU DESCRIBE THOSE DOCUMENTS? THEY
6 SHOULD BE IN A SECOND BINDER.

7 A. YES, THESE DOCUMENTS, THESE ARE COPIES OF THE
8 NEWSLETTER ON INTELLECTUAL FREEDOM DATING FROM JANUARY
9 2004 UNTIL THE TIME THE REPORT WAS PREPARED.

10 Q. PROFESSOR REICHMAN, YOU HAVE USED THE WORD
11 "CHALLENGE" SEVERAL TIMES THIS MORNING. WHAT DO YOU
12 MEAN WHEN YOU USE THAT WORD?

13 A. I USE THE TERM "CHALLENGE" TO DESCRIBE ANY
14 INCIDENT IN WHICH EITHER SOMEONE IN AUTHORITY OR MEMBER
15 OF THE PUBLIC OR AN ORGANIZED GROUP HAS MADE A FORMAL
16 REQUEST OR AGITATED POLITICALLY FOR THE REMOVAL OR
17 RESTRICTION OF MATERIALS.

18 Q. IN YOUR REPORT, DID YOU INCLUDE CHALLENGES THAT
19 DID NOT INVOLVE ANY GOVERNMENT ACTION?

20 A. YES.

21 Q. WHY DID YOU INCLUDE THOSE?

22 A. WELL, FOR ONE THING, THOSE WHO CHALLENGE
23 MATERIALS CREATE -- EVEN IF THEY ARE NOT GOVERNMENT
24 ACTORS, CREATE AN ATMOSPHERE IN WHICH THE GOVERNMENT MAY
25 WELL WISH TO RESPOND. SCHOOL DISTRICTS AND OTHERS ARE

1 PRESSURED BY THOSE WHO MAKE SUCH CHALLENGES, AND THE
2 CHALLENGES THEMSELVES CAN HAVE A CHILLING EFFECT. FOR
3 ONE THING, THE SIMPLE COST OF DEFENDING AGAINST THEM
4 OFTEN CREATES AN ATMOSPHERE WHICH LEADS THE SCHOOL
5 DISTRICTS AND OTHERS LIKE LIBRARIES TO RESPOND BY
6 PREEMPTIVELY REMOVING MATERIAL THEY THINK MAY CAUSE THEM
7 PROBLEMS. FOR EXAMPLE, IN MY REPORT I BELIEVE IT'S ON
8 PAGES 22 AND 23 I INDICATED --

9 Q. JUST FOR THE COURT WOULD BE PAGES 23 AND 24 OF
10 PLAINTIFFS' EXHIBIT 22. THE PAGES ARE OFF BY ONE, BUT
11 CONTINUE.

12 A. -- THAT IN FAIRFAX, VIRGINIA IN OCTOBER 2002, A
13 CHALLENGE WAS MADE TO 18 DIFFERENT BOOKS, AND THE SCHOOL
14 DISTRICT CALCULATED THAT THE REVIEW WAS GOING TO COST
15 THEM \$50,000. SO THEY WERE CONCERNED ABOUT THAT. AND
16 FINALLY, I INCLUDED IT BECAUSE IT IS MY UNDERSTANDING
17 THAT UNDER COPA THERE IS THE POSSIBILITY OF CIVIL
18 ACTIONS. AND INDEED WERE IT THE CASE THAT PRIVATE
19 INDIVIDUALS COULD TAKE ACTION UNDER COPA, THEN THE
20 ATMOSPHERE OF PRIVATE CHALLENGES AROUND MATERIALS
21 CONSIDERED HARMFUL OR INAPPROPRIATE TO MINORS IN OTHER
22 CONTEXTS BY MEMBERS OF THE PUBLIC WOULD BE RELEVANT.

23 Q. AND I'M GOING TO DIRECT YOUR ATTENTION TO PAGE 7
24 OF YOUR REPORT AND THAT IS PAGE 8 OF THE EXHIBIT,
25 ALTHOUGH NO NEED TO DISPLAY IT. HAS THE ALA COMPILED

1 STATISTICS REGARDING THE NUMBER OF CHALLENGES TO
2 MATERIALS IN SCHOOLS AND LIBRARIES?

3 A. YES. SINCE I BELIEVE AT LEAST 1990, THE OFFICE
4 FOR INTELLECTUAL FREEDOM HAS JUST KEPT A RECORD OF ALL
5 OF THE INCIDENTS AND CHALLENGES THAT COME TO THEIR
6 ATTENTION, MANY OF WHICH APPEAR IN THE NEWSLETTER, SOME
7 OF WHICH DO NOT. THEY HAVE BEEN ANNUALLY MAKING A
8 REPORT OF HOW MANY CHALLENGES THEY FACED. IN 2000, THEY
9 REPORTED THAT FOR THE DECADE 1990 TO 1999, THEY HAD
10 COMPILED A LIST OF 5,718 CHALLENGES TO MATERIALS IN
11 LIBRARIES AND SCHOOLS.

12 Q. WHAT WERE THE MOST FREQUENTLY CITED REASONS FOR
13 CHALLENGES TO MATERIALS IN LIBRARIES AND SCHOOLS?

14 A. WELL, THE MOST FREQUENTLY CITED REASONS WERE
15 THREE: THAT THEY WERE SEXUALLY EXPLICIT, 1,446
16 CHALLENGES; THAT THEY CONTAINED OFFENSIVE LANGUAGE,
17 1,262 CHALLENGES; AND THAT THEY WERE UNSUITED TO AGE
18 GROUP, 1,167 CHALLENGES. NOW I SHOULD NOTE THAT NO
19 DOUBT THERE WERE A NUMBER OF THOSE CHALLENGES HAVE TWO
20 OR EVEN THREE OF THOSE CRITERIA.

21 Q. ARE THOSE STATISTICS CONSISTENT WITH YOUR
22 EXPERIENCE EDITING THE NEWSLETTER?

23 A. ROUGHLY, YES.

24 Q. SPEAKING GENERALLY, ARE THERE COMMON CATEGORIES
25 OF SEXUAL MATERIAL THAT ARE ROUTINELY CHALLENGED IN

1 SCHOOLS AND LIBRARIES?

2 A. YES, THERE ARE. I WOULD SAY THERE ARE BASICALLY
3 THREE MAIN AREAS IN WHICH MATERIALS ARE CHALLENGED FOR
4 THEIR SEXUAL CONTENT. ONE IS SEX EDUCATION MATERIALS;
5 TWO IS SEXUALLY-ORIENTED FICTION, MAINLY TEEN FICTION;
6 AND THREE ARE GAY AND LESBIAN MATERIALS.

7 Q. AND TURNING YOUR ATTENTION TO PAGE 17 OF YOUR
8 REPORT AND PAGE 18 OF PLAINTIFFS' EXHIBIT 22, LET'S
9 BEGIN WITH SEX EDUCATION. IN YOUR REPORT, YOU DESCRIBE
10 AN INCIDENT INVOLVING THE GOVERNOR OF SOUTH DAKOTA.
11 WHAT HAPPENED THERE?

12 A. IN I BELIEVE IT WAS 2004, THE GOVERNOR OF THE
13 STATE, MIKE ROUNDS, DEMANDED THE REMOVAL OF LINKS TO
14 BOTH PLANNED PARENTHOOD AND A SITE CALLED GO ASK ALICE,
15 WHICH IS A TEEN WEBSITE, NOT TOO DISSIMILAR IN SOME
16 RESPECTS FROM SCARLETEEN, ONE OF THE PLAINTIFFS HERE,
17 BUT IT IS MAINTAINED BY COLUMBIA UNIVERSITY. HE
18 DEMANDED THAT THOSE WEB LINKS BE REMOVED FROM A SECTION
19 OF THE STATE LIBRARY'S WEBSITE CALLED THE TEEN CENTER.
20 I UNDERSTAND, IN FACT, EVEN FROM THE NEWSLETTER, I DID
21 NOT REPORT THIS IN MY REPORT, THAT INDEED A LIBRARIAN IN
22 THE STATE LIBRARY LOST HER JOB BECAUSE OF THIS.

23 Q. BY REMOVING THOSE LINKS, DID THE GOVERNOR MAKE
24 IT IMPOSSIBLE FOR SOUTH DAKOTA TEENS TO SEE THOSE
25 WEBSITES?

1 A. NO, CERTAINLY NOT. ANY TEENAGER CAN GO TO A
2 COMPUTER AND GO DIRECTLY TO THE WEBSITES, ASSUMING THE
3 COMPUTER HAD ACCESS TO THOSE WEBSITES AND WAS NOT --
4 THEY FILTERED THEM OUT. BUT IT DID PREVENT ANYONE FROM
5 GOING TO THOSE SITES FROM THE TEEN CENTER. IN MY MIND
6 IT IS ANALOGOUS TO A BOOK REMOVAL FROM A LIBRARY. WHEN
7 A BOOK IS REMOVED FROM THE LIBRARY FOR ITS CONTENT, IT
8 MAY STILL BE AVAILABLE IN A BOOK STORE, MAY STILL BE
9 AVAILABLE IN OTHER LIBRARIES, BUT IT HAS BEEN REMOVED
10 AND CENSORED OUT OF THAT PARTICULAR LIBRARY, SIMILARLY
11 IN THIS CASE.

12 Q. YOU ALSO DESCRIBE AN ACTION TAKEN BY A LIBRARY
13 BOARD IN DYERSVILLE, IOWA. WHAT HAPPENED THERE?

14 A. THERE, IN 2002, THE BOARD VOTED TWICE TO BAN THE
15 BOOK SARI SAYS: THE REAL DIRT ON EVERYTHING FROM SEX TO
16 SCHOOL. THIS BOOK IS -- IT'S AN ADVICE BOOK FOR
17 TEENAGERS, WHICH INCLUDES AT LEAST ONE CHAPTER ON SEXUAL
18 ADVICE TO TEENS. IT WAS ASSEMBLED BY SARI LOCKER, WHO
19 IS THE TEEN PEOPLE MAGAZINE'S ONLINE ADVICE COLUMNIST
20 FOR TEENAGERS, AND MUCH OF THE MATERIAL IN THAT BOOK
21 CAME FROM HER WEB PAGES.

22 Q. YOU ALSO DESCRIBED AN INCIDENT IN ANCHORAGE,
23 ALASKA. TELL US WHAT HAPPENED THERE.

24 A. THERE IN 2001, THE SCHOOL BOARD VOTED BY A SIX
25 TO ONE VOTE TO RESTRICT ACCESS TO THE BOOK CALLED, IT'S

1 PERFECTLY NORMAL, WRITTEN BY ROBIE HARRIS, WHO IS A VERY
2 POPULAR SEX EDUCATION BOOK FOR CHILDREN ENTERING
3 PUBERTY. THAT SAME BOOK HAS BEEN CHALLENGED IN NUMEROUS
4 OTHER PLACES.

5 Q. WHAT DOES IT MEAN TO RESTRICT ACCESS TO A BOOK?

6 A. WHEN I SAY RESTRICT ACCESS, OBVIOUSLY, THE
7 FULLEST RESTRICTION OF ACCESS IS TO REMOVE IT FROM THE
8 LIBRARY OR THE CLASSROOM OR WHEREVER IT IS BEING
9 CHALLENGED. BUT ANOTHER SOMETIMES MORE COMMON SOLUTION
10 IS TO RESHELVE IT FROM THE CHILDREN'S SECTION TO AN
11 ADULT SECTION, OR REQUIRE THAT A STUDENT, A YOUNG PERSON
12 MUST HAVE WRITTEN PERMISSION FROM A PARENT OR GUARDIAN
13 TO ACCESS THE BOOK OR PERIODICAL OR WHATEVER IT IS, OR
14 IN SOME CASES EVEN TO SHELVES THE BOOK BEHIND THE COUNTER
15 IN THE LIBRARY. THE EFFECT OF ALL OF THOSE ACTIONS
16 USUALLY IS TO PREVENT ACCESS TO THE BOOK FOR THE VERY
17 AUDIENCE THAT IT WAS INTENDED FOR. I SHOULD NOTE, BY
18 THE WAY, WE MENTIONED IT'S PERFECTLY NORMAL. ALA LISTED
19 THIS AS THE MOST CHALLENGED BOOK IN THE UNITED STATES IN
20 THE YEAR 2005.

21 Q. ARE THERE ANY OTHER SEX EDUCATION BOOKS ON THE
22 ALA'S LIST OF MOST CHALLENGED BOOKS?

23 A. YES. THE SAME AUTHOR, ROBIE HARRIS, PUBLISHED A
24 BOOK CALLED IT'S SO AMAZING, SUBTITLED A BOOK ABOUT
25 EGGS, SPERM, BIRTH, BABIES AND FAMILIES, AND THIS IS A

1 SIMILAR SEX EDUCATION BOOK, HOWEVER AIMED AT MUCH
2 YOUNGER READERS, MAINLY ELEMENTARY SCHOOL CHILDREN. IT
3 WAS AMONG THE MOST, 10 MOST CHALLENGED TITLES IN 2005.

4 Q. ARE YOU AWARE OF SIMILAR MATERIALS BEING
5 CHALLENGED AROUND THE COUNTRY?

6 A. OH, YES. I MEAN, I MENTIONED SEVERAL OTHERS IN
7 MY REPORT. IN CENSORSHIP AND SELECTION, I TALKED ABOUT
8 A NUMBER THAT WERE CHALLENGED IN THE 1980S AND 1990S
9 INCLUDING WHOLE SEX EDUCATION CURRICULUM PROGRAMS. THE
10 NUMBERS ARE LEGION. I THINK ALMOST EVERY SEX EDUCATION
11 -- POPULAR SEX EDUCATION BOOK FOR YOUNG PEOPLE HAS
12 PROBABLY BEEN CHALLENGED SOMEWHERE.

13 Q. PROFESSOR REICHMAN, YOU TESTIFIED THAT YOU
14 REVIEWED THE WEBSITES OF THE SEXUAL HEALTH NETWORK,
15 SCARLETEEN.COM AND CONDOMANIA. BASED ON YOUR REVIEW OF
16 THOSE WEBSITES AND YOUR EXPERIENCE AS ASSOCIATE EDITOR
17 OF THE NEWSLETTER, DO PLAINTIFFS PUBLISH SEX EDUCATION
18 MATERIAL SIMILAR TO THAT WHICH HAS BEEN CHALLENGED?

19 A. YES, THEY DO. IN FACT, ACTUALLY THEY ALSO
20 PUBLISH MATERIAL THAT IS MORE SEXUALLY EXPLICIT AND MORE
21 -- I THINK WOULD BE MORE SUBJECT TO CHALLENGE BY THE
22 KIND OF PEOPLE WHO CHALLENGED MATERIALS I HAVE DEALT
23 WITH THAN THOSE MATERIALS ARE.

24 Q. THE SECOND CATEGORY YOU MENTIONED WERE SEXUALLY
25 ORIENTED FICTION. I'M GOING TO BE ASKING YOU QUESTIONS

1 FROM PAGE 19 OF YOUR REPORT OR PAGE 20 OF PLAINTIFFS '
2 EXHIBIT 22. IN YOUR REPORT, YOU DESCRIBE A NUMBER OF
3 INCIDENTS IN WHICH SUCH MATERIALS WERE REMOVED FROM
4 SCHOOLS OR LIBRARIES. WHAT HAPPENED LAST YEAR IN
5 MERCED, CALIFORNIA?

6 A. IN MERCED THE SCHOOL DISTRICT REMOVED A NOVEL
7 CALLED LIFE IS FUNNY BECAUSE IT DEPICTED A FIRST SEXUAL
8 EXPERIENCE. WHEN I LOOKED AT THE WEBSITE OF PLAINTIFF
9 HEATHER CORINNA AND HER SCARLETEEN WEBSITE, SHE HAS A
10 WHOLE SECTION ON THAT WEBSITE ABOUT HER FIRST SEXUAL
11 EXPERIENCE MUCH LIKE IN THIS BOOK.

12 Q. WHAT HAPPENED IN MUHLENBERG, PENNSYLVANIA?

13 A. THERE A SCHOOL BOARD BY UNANIMOUS VOTE REMOVED A
14 NOVEL CALLED THE BUFFALO TREE FROM THE CURRICULUM IN THE
15 SCHOOL BECAUSE A STUDENT COMPLAINED ABOUT A SCENE THAT
16 WAS SET IN A COMMUNAL SHOWER WHERE A BOY WAS SEXUALLY
17 AROUSED.

18 Q. YOU DESCRIBED A COMPLAINT MADE TO THE
19 METROPOLITAN LIBRARY COMMISSION IN OKLAHOMA CITY. WHAT
20 HAPPENED THERE?

21 A. THERE THE LIBRARY COMMISSION VOTED TO REMOVE --
22 AND NOW I'M QUOTING WHAT THEY CALLED "EASY, EASY READER,
23 AND TWEEN" BOOKS CONTAINING "SENSITIVE OR CONTROVERSIAL"
24 THEMES TO A SPECIAL COLLECTION AVAILABLE ONLY TO "ADULTS
25 IN AUTHORITY."

1 Q. AND IN BAKERSFIELD, CALIFORNIA?

2 A. IN BAKERSFIELD, CALIFORNIA IN 2003 --

3 MS. ULRICH: OBJECTION, YOUR HONOR, IF
4 THE WITNESS IS GOING TO BE READING, CAN WE SEE THE
5 DOCUMENT HE IS READING FROM?

6 THE WITNESS: I'M ACTUALLY PARAPHRASING
7 WHAT I'M READING FROM.

8 THE COURT: LET'S FIND OUT.

9 BY MR. WIZNER:

10 Q. PROFESSOR REICHMAN, WHEN YOU READ AND PARAPHRASE
11 FROM THE DOCUMENT, WHAT DOCUMENT IS THAT?

12 A. THIS IS MY REPORT.

13 Q. AND FOR THE RECORD, THAT REPORT IS PLAINTIFFS'
14 EXHIBIT 22 AND DEFENDANT HAS A COPY.

15 THE COURT: DR. REICHMAN, IF YOU, WHEN
16 YOU PARAPHRASE OR REFER TO YOUR REPORT, WILL YOU SAY
17 FROM MY REPORT, PAGE 7, OR SOMETHING LIKE THAT SO
18 COUNSEL CAN FOLLOW.

19 MR. WIZNER: YES.

20 THE WITNESS: ON PAGE 20 OF MY REPORT --

21 BY MR. WIZNER:

22 Q. DO YOU HAVE THE BATES STAMPS NUMBERS?

23 A. IF YOU TELL ME TO USE BATE STAMPS, I WILL BE
24 CONSISTENT.

25 THE COURT: YOU HAVE TWO INDICES IN HERE

1 ALREADY. LET'S NOT PUT A THIRD ONE IN.

2 BY MR. WIZNER:

3 Q. WHY DON'T WE USE THE PAGES OF THE EXHIBIT NUMBER
4 RATHER THAN THE PAGES OF THE REPORT?

5 A. ON PAGE 21 OF THE EXHIBIT IN BAKERSFIELD IN
6 2003, A BOOK OF COMING-OF-AGE POETRY, CALLED WHAT MY
7 DAUGHTER DOES NOT KNOW WAS REMOVED FROM A MIDDLE SCHOOL
8 LIBRARY BECAUSE ONE OF THE POEMS CALLED ICE CAPADES
9 OFFERED A TEENAGE GIRL'S DESCRIPTION OF HOW HER BREASTS
10 REACT TO THE COLD.

11 Q. AND ON THE SAME PAGE OF PLAINTIFFS' EXHIBIT 22,
12 YOU DESCRIBE AN INCIDENT LAST YEAR FROM CHARLES COUNTY,
13 MARYLAND. WHAT HAPPENED THERE?

14 A. THERE, AGAIN ON PAGE 21 OF MY REPORT, THE VICE
15 CHAIR OF THE COUNTY BOARD OF EDUCATION CLAIMED THAT
16 REQUIRED READING LISTS IN SCHOOLS WERE, AND THIS IS A
17 DIRECT QUOTE FROM HIM, "TEEMING WITH PROFANITY AND
18 PORNOGRAPHY, FORNICATION AND ADULTERY." AS AN EXAMPLE
19 OF SUCH HE CITED THE CLASSIC NOVEL DUST TRACKS ON THE
20 ROAD BY THE AFRICAN AMERICAN WRITER, ZORA NEALE HURSTON.

21 MS. ULRICH: OBJECTION. I WOULD LIKE TO
22 OBJECT TO THIS LINE OF QUESTIONING. IT APPEARS TO BE
23 ASKING THE EXPERT TO READ HIS REPORT IN AN EFFORT TO GET
24 HEARSAY INTO THE RECORD, RATHER THAN ASKING HIM HIS
25 OPINIONS ABOUT THE MATERIALS UPON WHICH HE RELIED IN

1 THIS REPORT.

2 THE COURT: I WILL SUSTAIN THE OBJECTION
3 IN CONCEPT AND LET COUNSEL MAKE APPROPRIATE EFFORTS TO
4 GET THE INFORMATION IN IN THE PROPER WAY CONSISTENT WITH
5 THE OBJECTION.

6 MR. WIZNER: I'M NOT QUITE SURE IF I
7 UNDERSTAND THE OBJECTION.

8 THE COURT: YOU CAN'T HAVE HIM READ FROM
9 MATERIAL THAT HE WAS NOT A FIRSTHAND RECIPIENT OF. SO
10 IT'S HEARSAY, BUT AN EXPERT CAN REFER TO MATERIALS FOR
11 PURPOSES OF EVALUATION AND RENDERING AN OPINION, AND I
12 CAN'T TELL YOU HOW TO DO THAT BUT YOU OUGHT TO KNOW HOW
13 TO DO IT.

14 BY MR. WIZNER:

15 Q. PROFESSOR REICHMAN, IN YOUR EXPERIENCE, DOES THE
16 LITERARY OR ARTISTIC QUALITY OF SPEECH PREVENT IT FROM
17 BEING TARGETED FOR CHALLENGE?

18 A. NO.

19 Q. CAN YOU EXPAND?

20 A. WELL, I MAKE REFERENCES TO SEVERAL INCIDENTS IN
21 MY REPORT, I BELIEVE ON PAGES 22 AND 23, I CAN JUST
22 SIMPLY SUMMARIZE QUICKLY THAT IN MY EXPERIENCE, MANY
23 CLASSIC NOVELS HAVE BEEN TARGETED FOR ALLEGED SEXUAL
24 CONTENT. JOHN STEINBECK'S NOVELS, IN PARTICULAR, OF
25 MICE AND MEN, BUT ALSO SOMETIMES THE GRAPES OF WRATH,

1 NOVELS BY NOBEL PRIZE WINNER TONI MORRISON, THE BLUEST
2 EYE, BELOVED HAVE BEEN CHALLENGED. THERE WAS CHALLENGE
3 TO BLESS ME, ULTIMA BY RODOLFO ANAYA, WHICH IS ONE OF
4 THE MAJOR WORKS OF MEXICAN AMERICAN FICTION. CHALLENGES
5 TO WILLIAM FAULKNER'S, AS I LAY DYING. THE LIST COULD
6 GO ON AND ON.

7 Q. PROFESSOR REICHMAN, YOU TESTIFIED THAT YOU
8 REVIEWED THE WEBSITES OF SCARLETLETTERS.COM AND
9 NERVE.COM?

10 A. YES, I DID.

11 Q. BASED ON YOUR REVIEW OF THOSE WEBSITES AND YOUR
12 EXPERIENCE AS ASSOCIATE EDITOR OF THE NEWSLETTER, DO
13 THOSE PLAINTIFFS PUBLISH SEXUALLY-ORIENTED FICTION
14 SIMILAR TO THAT WHICH HAS BEEN CHALLENGED?

15 A. YES, THEY DO. IF ANYTHING, AGAIN, THEY
16 PUBLISHED SEXUALLY-ORIENTED FICTION THAT IS A BIT MORE
17 EXPLICIT THAN WHAT HAS BEEN CHALLENGED AS BEING
18 INAPPROPRIATE FOR MINORS IN LIBRARIES, SCHOOLS AND
19 ELSEWHERE.

20 Q. TURNING YOUR ATTENTION TO PAGE 26 OF PLAINTIFFS'
21 EXHIBIT 22, YOU MENTION THAT GAY AND LESBIAN SPEECH IS
22 FREQUENTLY TARGETED FOR CENSORSHIP. IN YOUR REPORT, DID
23 YOU DISCUSS ANY EXAMPLES OF GAY AND LESBIAN SPEECH BEING
24 TARGETED FOR CENSORSHIP OR CHALLENGE?

25 A. YES, I DID. I CAN NAME SEVERAL OF THEM.

1 Q. HOW DID YOU GATHER THE INFORMATION FOR YOUR
2 EXPERT REPORT?

3 A. THESE WERE PRETTY MUCH ALL, IF I RECALL
4 CORRECTLY, GOTTEN FROM ISSUES OF THE NEWSLETTER THAT I
5 PREVIOUSLY REPORTED AND OF COURSE THE NEWSLETTER THERE
6 REPORTED FROM THE PUBLIC PRESS.

7 Q. AND DID YOU RELY ON THOSE INCIDENTS THAT YOU
8 GATHERED FROM THE NEWSLETTER IN FORMING YOUR EXPERT
9 OPINION IN THIS CASE?

10 A. YES, I DID.

11 Q. YOU DISCUSS IN YOUR REPORT AN ACTION THAT WAS
12 TAKEN BY THE OKLAHOMA HOUSE OF REPRESENTATIVES. CAN YOU
13 DESCRIBE THAT?

14 A. YES. THE OKLAHOMA HOUSE OF REPRESENTATIVES HAD
15 BRANDED A BOOK CALLED KING AND KING OBSCENE AND SAID IT
16 SHOULD BE RESERVED FOR ADULTS, LEGISLATIVE OPINION.
17 KING AND KING IS A BOOK ABOUT A YOUNG PRINCE. IT'S FOR
18 SMALL CHILDREN, IT'S A FAIRY TALE, A BOOK ABOUT A YOUNG
19 PRINCE WHO KEEPS BEING SHOWN A LOT OF PRINCESSES TO BE
20 HIS QUEEN, HE DOESN'T LIKE ANY OF THEM. HE EVENTUALLY
21 FINDS A PRINCE WHO HE MARRIES AND THEY BECOME KING AND
22 KING.

23 Q. IS THERE ANY SEXUAL CONTENT IN THAT BOOK?

24 A. OF COURSE NOT. IT IS A BOOK FOR FIRST TO THIRD
25 GRADERS. THE ONLY SEXUAL CONTENT IS THE SEXUAL

1 ORIENTATION OF THE YOUNG PRINCE.

2 Q. IN YOUR REPORT YOU ALSO DISCUSS AN INCIDENT THAT
3 OCCURRED IN WAILUKU, HAWAII IN 2005.

4 A. YES. THERE OFFICIALS -- EXCUSE ME -- RESTRICTED
5 THE SHOWING OF A VIDEO ABOUT DISCRIMINATION AGAINST
6 HOMOSEXUALS.

7 MS. ULRICH: YOUR HONOR, SAME OBJECTION.

8 THE COURT: SUSTAINED. I WILL STRIKE OUT
9 THE ANSWER. YOU ARE ASKING -- IN THE SENSE -- OR HE IS
10 VOLUNTEERING WITHOUT A QUESTION TO GIVE INFORMATION.
11 THAT IS HEARSAY.

12 BY MR. WIZNER:

13 Q. IN PREPARING YOUR EXPERT REPORT, DID YOU DISCUSS
14 AN INCIDENT THAT OCCURRED IN WAILUKU, HAWAII?

15 A. YES, I DID.

16 Q. WHERE DID YOU OBTAIN THE INFORMATION?

17 A. THE NEWSLETTER ON INTELLECTUAL FREEDOM AND I
18 COULD CHECK BACK AT THE ISSUE TO SEE WHAT SOURCE I USED
19 THERE.

20 Q. AND DID YOU RELY ON THE NEWSLETTER FOR
21 INTELLECTUAL FREEDOM'S REPORT ON THAT INCIDENT IN
22 FORMING YOUR EXPERT OPINION IN THIS CASE?

23 A. YES, I DID.

24 Q. WHAT DID THE NEWSLETTER ON INTELLECTUAL FREEDOM
25 REPORT ABOUT THE INCIDENT IN WAILUKU, HAWAII?

1 A. IT REPORTED THAT SCHOOL OFFICIALS HAD RESTRICTED
2 SHOWING OF A VIDEO ABOUT DISCRIMINATION AGAINST
3 HOMOSEXUALS AFTER THERE WERE PARENTAL OBJECTIONS.

4 Q. WHAT DOES THAT INCIDENT SUGGEST TO YOU?

5 A. IT SUGGESTS TO ME -- IT IS SOMETHING I HAVE SEEN
6 IN MANY INCIDENTS I REPORTED IN THE NEWSLETTER, THAT IT
7 IS NOT JUST SEXUAL ACTIVITY, HOMOSEXUAL SEXUAL ACTIVITY,
8 BUT THE VERY FACT OF HOMOSEXUALITY IS OBJECTIONABLE TO
9 AT LEAST A SIGNIFICANT PORTION OF THE AMERICAN PUBLIC.
10 THEY BELIEVE THAT ANY DISCUSSION OF HOMOSEXUALITY THAT
11 IS NOT CONDEMNATORY IS INAPPROPRIATE FOR MINORS.

12 Q. IN YOUR REPORT DID YOU DISCUSS AN INCIDENT THAT
13 OCCURRED LAST YEAR IN FULLERTON, CALIFORNIA?

14 A. YES, I DID.

15 Q. AND WHAT WAS THE SOURCE FOR THAT REPORT IN YOUR
16 EXPERT REPORT?

17 A. THE MARCH 2005 ISSUE OF THE NEWSLETTER ON
18 INTELLECTUAL FREEDOM.

19 Q. DID YOU RELY ON THE MARCH 2005 NEWSLETTER ON
20 INTELLECTUAL FREEDOM IN FORMING YOUR EXPERT OPINION IN
21 THE CASE?

22 A. YES, I DID.

23 Q. WHAT DID THE NEWSLETTER REPORT ON THE OCCURRENCE
24 IN FULLERTON, CALIFORNIA LAST YEAR?

25 A. REPORTED --

1 MS. ULRICH: YOUR HONOR, I OBJECT TO THE
2 EXTENT THAT HE IS NOT ASKING FOR AN OPINION BUT JUST
3 ASKING FOR THE HEARSAY INFORMATION.

4 THE COURT: OBJECTION SUSTAINED.
5 BY MR. WIZNER:

6 Q. WHAT IS YOUR -- LET ME REWIND -- DID YOU FORM AN
7 OPINION ON THE BASIS OF THE REPORT IN THE NEWSLETTER
8 ABOUT THE INCIDENT IN FULLERTON, CALIFORNIA?

9 A. YES, I DID.

10 Q. AND WHAT DID YOU CONSIDER IN FORMING THAT
11 OPINION?

12 A. WELL, CONSIDERING THE FACT THAT IN THIS CASE IT
13 WAS REPORTED THAT THE EDITOR OF A HIGH SCHOOL NEWSPAPER
14 WAS REMOVED FROM HIS POST FROM PUBLISHING PROFILES OF
15 GAY STUDENTS, IT ONCE AGAIN REAFFIRMED MY OPINION THAT
16 HOMOSEXUALITY ITSELF IS CONSIDERED BY MANY PEOPLE TO BE
17 AN INAPPROPRIATE TOPIC FOR MINORS.

18 Q. GOING BACK, IN YOUR REPORT, DID YOU DESCRIBE
19 ANOTHER ACTION TAKEN BY THE OKLAHOMA HOUSE OF
20 REPRESENTATIVES?

21 A. YES, I DID.

22 Q. WHAT WAS THE SOURCE OF THAT REPORT ABOUT THE
23 OKLAHOMA HOUSE OF REPRESENTATIVES?

24 A. IT WAS THE NEWSLETTER ON INTELLECTUAL FREEDOM.
25 JULY ISSUE, 2005.

1 Q. DID YOU RELY ON THAT NEWSLETTER IN FORMING AN
2 OPINION?

3 A. YES, I DID.

4 Q. AND WHAT IS YOUR OPINION ABOUT THE INCIDENT
5 INVOLVING THE OKLAHOMA HOUSE OF REPRESENTATIVES?

6 A. MY OPINION IS THERE IS AT LEAST ONE STATE IN THE
7 UNITED STATES, OKLAHOMA, HAS ASSURED THAT IF LEGISLATORS
8 HAD THE POWER TO DO SO, THEY WOULD REMOVE ALL
9 HOMOSEXUALLY-THEMED BOOKS FROM ACCESS TO ANYONE UNDER
10 THE AGE OF 17.

11 MS. ULRICH: OBJECTION, CALLS FOR
12 SPECULATION.

13 THE COURT: RECEIVED AS EXPERT OPINION,
14 OVERRULED.

15 BY MR. WIZNER:

16 Q. AND IN FORMING THAT OPINION, DID YOU CONSIDER A
17 PARTICULAR ACTION TAKEN BY THE OKLAHOMA HOUSE OF
18 REPRESENTATIVES?

19 A. YES. WHEN LAST YEAR, THEY VOTED BY A MARGIN OF
20 81 TO 3 FOR A NONBINDING RESOLUTION CALLING ON OKLAHOMA
21 LIBRARIES TO CONFINE HOMOSEXUALLY-THEMED BOOKS AND OTHER
22 AGE-INAPPROPRIATE MATERIAL TO AREAS EXCLUSIVELY FOR
23 ADULT ACCESS AND DISTRIBUTION.

24 MR. WIZNER: AND, YOUR HONOR, WE WERE NOT
25 OFFERING THAT RESOLUTION AS AN EXHIBIT IN THIS CASE, BUT

1 I WOULD LIKE TO DISPLAY THE RESOLUTION THAT PROFESSOR
2 REICHMAN JUST TESTIFIED ABOUT AS A DEMONSTRATIVE EXHIBIT
3 ON THE SCREEN.

4 THE COURT: FIRST, YOU HAVE TO FIND OUT
5 WHETHER -- WHAT HIS CONNECTION WITH THE RESOLUTION IS.
6 I DON'T KNOW WHAT IS IN THE -- I DON'T HAVE THE REPORT
7 PAGES IN FRONT OF ME SO I DON'T KNOW WHAT THE
8 INVESTIGATION THE NEWSLETTER ARTICLE PURPORTED TO MAKE
9 INTO THE ISSUE DISCOVERED. I DON'T KNOW HIS CONNECTION
10 WITH THE RESOLUTION.

11 MR. WIZNER: PROFESSOR REICHMAN HAS
12 TESTIFIED THAT HE DID NOT DO ANY INDIVIDUAL REPORTING,
13 BUT THAT ANYTHING THAT APPEARS IN THE NEWSLETTER HAS
14 ALREADY BEEN PUBLISHED IN NEWSPAPERS ELSEWHERE. WOULD
15 YOU LIKE ME TO LAY THAT FOUNDATION FOR THIS DOCUMENT?

16 THE COURT: YOU CAN'T TELL WHAT YOU ARE
17 ASKING HIM TO REFER TO BECAUSE YOUR QUESTION DOES NOT
18 INCLUDE ANY PROVISOS. YOU JUST ASKED HIM TO COMMENT ON
19 THE RESOLUTION WHICH IS NOT ON THE SCREEN YET, AND I
20 DON'T KNOW -- THERE IS NO EVIDENCE TO SHOW HOW THAT
21 RESOLUTION GOT TO HIS ATTENTION. YOU NEVER KNOW.

22 BY MR. WIZNER:

23 Q. PROFESSOR REICHMAN, HOW DID THE OKLAHOMA HOUSE
24 RESOLUTION THAT YOU JUST REFERRED TO COME TO YOUR
25 ATTENTION?

1 A. WELL, I CAN'T REMEMBER THE ACTUAL SPECIFIC THING
2 ALTHOUGH I CAN PROBABLY LOOK AT THE SOURCE IN THE
3 EXHIBIT HERE AND SEE, BUT IT WAS RELATIVELY WIDELY
4 REPORTED IN NEWSPAPERS, AT LEAST ONE OF WHICH MUST HAVE
5 COME TO MY ATTENTION. I READ ABOUT IT. I CANNOT RECALL
6 WHETHER AT THAT MOMENT I READ THE ENTIRE RESOLUTION OR
7 ONLY READ PORTIONS OF IT AND USED IT IN THE NEWSLETTER.

8 Q. SO THE RESOLUTION WAS REPORTED ON IN THE
9 NEWSLETTER. WHICH ISSUE?

10 A. IN THE ISSUE OF, I BELIEVE, JULY 2005.

11 Q. FOR THE RECORD, THAT IS INCLUDED IN PLAINTIFFS'
12 EXHIBIT 23. AND DID YOU ALSO DISCUSS THAT IN YOUR
13 EXPERT REPORT?

14 A. YES, I DID, ON BATES STAMP PAGE 26.

15 Q. AND DID YOU RELY ON THAT RESOLUTION IN FORMING
16 YOUR EXPERT OPINION IN THIS CASE?

17 A. YES, I DID.

18 MR. WIZNER: YOUR HONOR, AT THIS TIME I
19 WOULD LIKE TO DISPLAY A COPY OF THAT RESOLUTION, AND
20 HAVE THE WITNESS READ A PORTION OF IT INTO THE RECORD.

21 MS. ULRICH: OBJECTION, YOUR HONOR, THE
22 WITNESS STATED THAT -- LACK OF FOUNDATION. THE WITNESS
23 STATED THAT HIS KNOWLEDGE OF THIS IS WHAT WAS REPORTED
24 IN NEWSPAPERS AND IN THE NEWSLETTER, NOT THAT HE IS
25 FAMILIAR WITH THE RESOLUTION ITSELF THAT THEY ARE

1 SEEKING TO USE AS DEMONSTRATIVE EXHIBIT.

2 THE COURT: OBJECTION SUSTAINED. IT'S
3 THE SAME PROBLEM I MENTIONED BEFORE. THIS IS A DOCUMENT
4 WHICH MAY OR MAY NOT HAVE BEEN REPORTED IN ITS ENTIRETY
5 IN THE NEWSLETTER AND ANY SOURCE THE NEWSLETTER USED.
6 EVEN THOUGH WIDELY REFERRED TO, DOES NOT REFER TO THE
7 ENTIRE DOCUMENT.

8 MR. WIZNER: OKAY. LET'S MOVE ON.

9 BY MR. WIZNER:

10 Q. PROFESSOR REICHMAN, YOU TESTIFIED THAT YOU
11 REVIEWED THE WEBSITES OF SCARLETLETTERS.COM, NERVE.COM,
12 PHILADELPHIA GAY NEWS AND SCARLETEEN.COM. BASED ON YOUR
13 EXPERIENCE EDITING THE NEWSLETTER AND YOUR REVIEW OF
14 THOSE WEBSITES, DO THOSE PLAINTIFFS OFFER GAY AND
15 LESBIAN MATERIALS SIMILAR TO THAT WHICH HAS BEEN
16 CHALLENGED AROUND THE COUNTRY?

17 A. YES, THEY DO. THEY ALSO OFFER MATERIALS MORE
18 EXPLICIT THAN WHAT HAS BEEN CHALLENGED, IN MY
19 EXPERIENCE.

20 Q. PROFESSOR REICHMAN, YOUR REPORT INCLUDES A
21 SECTION ON THE RELEVANCE OF THE MOTION PICTURE
22 ASSOCIATION'S MOVIE RATING SYSTEM TO PLAINTIFFS' FEARS
23 ABOUT COPA. AS A GENERAL MATTER, HOW ARE THE MOVIE
24 RATINGS RELEVANT TO YOUR REPORT?

25 A. WELL, I THINK THEY ARE RELEVANT BECAUSE IN MY

1 OPINION, MUCH OF THE AMERICAN PUBLIC HAS TAKEN THE MPAA
2 MOVIE RATINGS AS A STANDARD OF WHAT IS APPROPRIATE FOR
3 MINORS TO VIEW AND IS APPLIED BY MANY PEOPLE IN THE
4 PUBLIC. INDEED, IN SOME CASES, LOCAL AUTHORITIES
5 ATTEMPT TO USE THE STANDARDS IN WHAT THEY -- THE
6 CRITERIA THEY USE FOR PURCHASING NOT ONLY VIDEOS BUT
7 OTHER THINGS FOR LIBRARIES AND SCHOOLS. IN MANY
8 CENSORSHIP CASES, I NOTED THAT COMPLAINANTS, BE THEY
9 SCHOOL BOARD MEMBERS OR PRIVATE CITIZENS OR GOVERNMENT
10 OFFICIALS, OFTEN SAY THAT IF THIS WERE A MOVIE IT WOULD
11 BE RATED R, OR -- OF COURSE IF IT IS A MOVIE AND IT IS
12 RATED R, THEY SAY THEREFORE THIS SHOULD NOT BE
13 AVAILABLE, ET CETERA.

14 A DIFFERENCE OF COURSE BETWEEN THE MPAA
15 RATINGS AND THE COPA STANDARD AS I UNDERSTAND IT, IS
16 THAT THE MPAA MAKES A DISTINCTION BETWEEN YOUNGER MINORS
17 AND OLDER MINORS.

18 MS. ULRICH: OBJECTION, YOUR HONOR. THE
19 WITNESS IS GETTING INTO LEGAL CONCLUSIONS ABOUT WHAT
20 COPA MEANS.

21 MR. WIZNER: THE WITNESS TESTIFIED TO HIS
22 OWN UNDERSTANDING. HE HAS ALREADY SAID HE IS NOT A
23 LAWYER OFFERING LEGAL OPINION IN THIS CASE.

24 MS. ULRICH: I WOULD SAY THEN HIS
25 TESTIMONY IS IRRELEVANT, YOUR HONOR.

1 MR. WIZNER: THE QUESTION WAS HOW HE
2 UNDERSTOOD.

3 THE COURT: LET ME BACK UP A MINUTE.
4 IS THE MOVIE RATING ANALYSIS A PART OF
5 THE EXPERT REPORT?

6 MR. WIZNER: YES.

7 THE COURT: I WILL RECEIVE THE EVIDENCE
8 AS NOT A LEGAL OPINION BUT AN OPINION OF AN EXPERT BASED
9 ON HIS RESEARCH.
10 BY MR. WIZNER:

11 Q. HAD YOU FINISHED YOUR ANSWER AT THE TIME OF THE
12 OBJECTION?

13 A. NO. NO.

14 Q. LET ME JUST RESTATE THE QUESTION. THE QUESTION
15 WAS HOW THE MOVIE RATINGS SYSTEM WAS RELEVANT TO YOUR
16 REPORT.

17 A. THE FINAL AREA OF RELEVANCE THAT I WANTED TO --
18 I WAS IN THE MIDST OF MENTIONING WAS THE MPAA STANDARDS
19 MAKE A DISTINCTION BETWEEN YOUNGER MINORS AND OLDER
20 MINORS. THERE IS -- THERE ARE AS MOST PEOPLE KNOW
21 SEVERAL LAYERS OF RATINGS, G, PG13 AND R. AND THE WIDE
22 ACCEPTANCE OF THE MPAA STANDARDS SIGNIFIES TO ME THAT A
23 GOOD PORTION OF THE PUBLIC BELIEVES THERE IS A
24 DISTINCTION AS WELL BETWEEN WHAT IS APPROPRIATE FOR A
25 YOUNG MINOR OF SAY, 7 OR 8 YEARS OLD AND AN OLDER MINOR

1 OF SAY, 15 OR 16.

2 Q. AND IN YOUR REPORT, YOU ALSO DISCUSS FINES THAT
3 WERE IMPOSED RECENTLY BY THE FEDERAL COMMUNICATIONS
4 COMMISSION. AS A GENERAL MATTER, HOW ARE THE ACTIONS OF
5 THE FCC RELEVANT TO YOUR REPORT?

6 A. WELL, I THINK THEY ARE RELEVANT IN INDICATING
7 HOW GOVERNMENT REGULATORY POWER CAN BE USED TO LIMIT OR
8 ATTEMPT TO LIMIT EXPRESSION FOR ACCESSIBLE TO MINORS,
9 PARTICULAR SEXUAL EXPRESSION.

10 Q. ANY OTHER WAYS IN WHICH THE FCC'S ACTION ARE
11 RELEVANT TO YOUR REPORT?

12 A. WELL, ONCE AGAIN, IT INDICATES A QUESTION OF
13 WHAT THE PUBLIC BELIEVES IS RELEVANT FOR MINORS. IN THE
14 FCC ACTIONS, FOR INSTANCE, WHERE THEY, NOT TOO LONG AGO
15 FINED 103 CBS STATIONS THE THEN MAXIMUM FINE OF \$32,500
16 FOR AIRING -- ACTUALLY A REAIRING OF THE PROGRAM WITHOUT
17 A TRACE BECAUSE OF A SUPPOSED ORGY SCENE IN THE PROGRAM.
18 THEY DID THIS IN RESPONSE TO PUBLIC PRESSURES, GENERATED
19 E-MAILS, PROTESTS, ET CETERA TO THE COMMISSION. AND IT
20 SUGGESTS TO ME THAT PUBLIC OPINIONS ON THESE THINGS ARE
21 -- CAN HAVE AN EFFECT ON GOVERNMENT ACTION.

22 Q. IN YOUR REPORT YOU INCLUDE A DISCUSSION OF
23 COMMUNITY STANDARDS. ARE YOU OFFERING A LEGAL OPINION
24 ABOUT THIS ISSUE?

25 A. NO, I'M NOT. I'M NOT AN ATTORNEY.

1 Q. ARE YOU OFFERING AN EXPERT OPINION AS TO THE
2 PREVAILING STANDARDS IN VARIOUS COMMUNITIES?

3 A. NO, I CANNOT SAY THAT.

4 Q. WHAT IS THE RELEVANCE TO YOUR REPORT OF THE
5 ISSUE OF COMMUNITY STANDARDS?

6 A. WELL, I THINK THE RELEVANCE IS SIMPLE. WITH
7 RESPECT TO ANYTHING ON THE INTERNET THAT IS AVAILABLE IS
8 AVAILABLE IN ALL COMMUNITIES AND CANNOT BE AVAILABLE IN
9 ONLY SOME COMMUNITIES. AND THEREFORE THE STANDARDS OF
10 ANY COMMUNITY WHEN APPLIED TO THE INTERNET WILL HAVE TO
11 BE THE STANDARD OF ALL COMMUNITIES.

12 MS. ULRICH: OBJECTION, YOUR HONOR, MOVE
13 TO STRIKE. HOW THE INTERNET WORKS AND THE TECHNOLOGY OF
14 THE INTERNET IS WELL BEYOND THE SCOPE OF THIS EXPERT'S
15 EXPERTISE.

16 MR. WIZNER: I'M NOT SURE IT REQUIRES AN
17 EXPERT TO KNOW THAT PLACING MATERIAL ON THE INTERNET IS
18 NOT LIKE OFFERING A BOOK FOR SALE IN ONE STATE, AND HE
19 TESTIFIED TO HIS GENERAL UNDERSTANDING OF HOW THE
20 INTERNET WORKS, NOT AS AN EXPERT.

21 THE COURT: THE EXPERTISE ABOUT COMPUTERS
22 AND THE INTERNET IS SO MINIMAL IN THIS EXPRESSION OF HIS
23 OPINION, I WILL OVERRULE THE OBJECTION.

24 BY MR. WIZNER:

25 Q. HAD YOU COMPLETED YOUR ANSWER ABOUT THE

1 RELEVANCE OF COMMUNITY STANDARDS?

2 A. YES.

3 Q. AND ARE THERE ANY INCIDENTS THAT YOU DESCRIBE IN
4 YOUR REPORT THAT SUPPORTED YOUR CONCLUSIONS ABOUT
5 COMMUNITY STANDARDS?

6 A. WELL, ONE, FOR EXAMPLE, IN ALABAMA, IN CULLMAN,
7 ALABAMA WHERE A PROSECUTOR CHARGED PLAYBOY AND PLAYGIRL
8 WITH OBSCENITY AND SPECIFICALLY SAID THAT THESE WERE
9 OBSCENE IN THE COMMUNITY STANDARDS OF COLEMAN, WHERE I
10 THINK MOST PEOPLE WOULD THINK IN MOST COMMUNITIES IN THE
11 UNITED STATES THEY ARE NOT OBSCENE. HAD THE DISTRICT
12 ATTORNEY BEEN ABLE TO MOUNT A CHALLENGE TO THE WEBSITES
13 OF PLAYBOY AND PLAYGIRL AND HAD THAT DISTRICT ATTORNEY
14 BEEN SUCCESSFUL IN RULING THAT THEY WERE OBSCENE IN
15 CULLMAN, ALABAMA, PLAYBOY AND PLAYGIRLS, IT SEEMS TO ME,
16 WOULD HAVE LITTLE CHOICE BUT TO REMOVE THEIR SITE FOR
17 ALL OTHER COMMUNITIES.

18 Q. AND WERE THERE ANY OTHER EXAMPLES OF ACTUAL OR
19 THREATENED PROSECUTIONS THAT SUPPORT YOUR CONCLUSION
20 ABOUT COMMUNITY STANDARDS?

21 A. YES. IN MY REPORT, I REPORTED ON AN INCIDENT --
22 MS. ULRICH: OBJECTION, YOUR HONOR, AGAIN
23 THIS APPEARS TO BE A MEANS TO READ HEARSAY INTO THE
24 RECORD.

25 THE COURT: I'M SORRY, YOUR VOICE DROPPED

1 AT THE END OF YOUR STATEMENT.

2 MS. ULRICH: I'M SORRY. THIS APPEARS TO
3 BE ANOTHER ATTEMPT TO READ HEARSAY INTO THE RECORD.

4 THE COURT: THE WITNESS HAS A TENDENCY TO
5 ANSWER QUESTIONS THAT MIGHT WELL BE LIMITED TO A YES
6 ANSWER WITH A RENDITION OF WHAT WOULD HAPPEN IF YOU
7 ASKED HIM. AND WE WILL ASK THE WITNESS NOT TO DO THAT.
8 IF YOU ARE ASKED WHETHER YOU DID SOMETHING, YOU EITHER
9 DID IT OR YOU DIDN'T. IT'S NOT THE TIME TO VOLUNTEER
10 WHAT YOU HAVE LEARNED WHEN YOU DID DO SOMETHING. SO
11 THAT WILL HELP A LITTLE BIT.

12 MR. WIZNER: SO THE QUESTION --

13 THE COURT: THE QUESTION IS WITHDRAWN.

14 MR. WIZNER: THE QUESTION IS WITHDRAWN
15 AND WILL BE REASKED.

16 IF IT IS A YES OR NO QUESTION, YOU WILL
17 ANSWER YES OR NO. THE QUESTION IS, WERE THERE OTHER
18 INCIDENTS THAT YOU INCLUDE IN YOUR REPORT THAT SUPPORTED
19 YOUR CONCLUSION ABOUT COMMUNITY STANDARDS?

20 A. YES.

21 Q. AND WHAT, IF ANYTHING, WERE THOSE INCIDENTS?

22 MS. ULRICH: SAME OBJECTION, YOUR HONOR.

23 THE COURT: I CAN'T TELL YOU HOW TO TRY
24 THIS CASE, BUT YOU SHOULD ASK HIM WHAT HIS OPINION IS
25 AND ASKED HIM WHAT IT WAS BASED ON.

1 MR. WIZNER: WE ARE WORKING BACKWARDS.

2 BY MR. WIZNER:

3 Q. AND IF YOU WILL REPEAT WHAT YOUR -- WHAT WAS
4 YOUR OPINION OR CONCLUSION ABOUT COMMUNITY STANDARDS IN
5 THIS CASE?

6 A. AGAIN, MY OPINION ABOUT THE COMMUNITY STANDARDS
7 IS THAT THE STANDARDS -- WHEN APPLIED TO INTERNET
8 MATERIALS, THE STANDARDS OF ONE COMMUNITY MUST
9 EFFECTIVELY BECOME THE STANDARDS OF ALL.

10 MR. WIZNER: AT THIS POINT, YOUR HONOR,
11 PLAINTIFFS WOULD LIKE TO MOVE PLAINTIFFS' EXHIBITS 21,
12 22 AND 23 INTO EVIDENCE.

13 THE COURT: WOULD YOU CHARACTERIZE THEM
14 QUICKLY PLEASE?

15 MR. WIZNER: YES. PLAINTIFFS' EXHIBIT 21
16 IS THE WITNESS' CURRICULUM VITAE.

17 THE COURT: ANY OBJECTION?

18 MS. ULRICH: NO OBJECTION TO THE CV, YOUR
19 HONOR.

20 MR. WIZNER: PLAINTIFFS' EXHIBIT 22 IS
21 PROFESSOR REICHMAN'S EXPERT REPORT.

22 MS. ULRICH: NO OBJECTION TO THE REPORT.

23 MR. WIZNER: PLAINTIFFS' EXHIBIT 23 ARE
24 VARIOUS ISSUES OF THE NEWSLETTER ON INTELLECTUAL FREEDOM
25 THAT WERE INCLUDED AS EXHIBITS TO PLAINTIFFS' EXPERT

1 REPORT BUT HAD BEEN SEPARATED OUT FOR THE COURT'S
2 CONVENIENCE.

3 MS. ULRICH: DEFENDANT DOES OBJECT TO
4 EXHIBIT 23, WHICH APPEARS TO BE A THREE INCH BINDER
5 WORTH OF MATERIALS OF THE NEWSLETTER AS HEARSAY EVIDENCE
6 AND THEREFORE NOT ADMISSIBLE, AS WELL AS RELEVANCE
7 OBJECTIONS. OBVIOUSLY, THE REPORT DID NOT ENCOMPASS
8 EVERY ARTICLE INCLUDED IN THAT ATTACHMENT. TO THE
9 EXTENT THAT THEY ARE NOT DISCUSSED IN THE REPORT, THEY
10 ARE NOT RELEVANT.

11 THE COURT: PLAINTIFFS' EXHIBIT 21 IS
12 RECEIVED INTO EVIDENCE. PLAINTIFFS' EXHIBIT 22 IS
13 RECEIVED INTO EVIDENCE. PLAINTIFFS' EXHIBIT 23 IS
14 RECEIVED INTO EVIDENCE, NOT FOR THE TRUTH OF THE MATTERS
15 SET FORTH THEREIN BUT TO SHOW A RECORD OF WHAT THE
16 WITNESS SAID HE REFERRED TO. AND VIRTUALLY ALL OF
17 THIS -- AS A BASIS FOR ALMOST ALL OF HIS OPINIONS. THAT
18 IS THE RULING. OF COURSE IT'S ONCE AGAIN THEORETICALLY
19 COULD BE INCLUDED IN ANY MOTION TO STRIKE THAT MAY COME
20 OUT AS A RESULT OF THIS CROSS EXAMINATION.

21 (P 21, P 22, P 23 ADMITTED INTO
22 EVIDENCE.)

23 BY MR. WIZNER:

24 Q. PROFESSOR REICHMAN, HAVE YOU FORMED AN EXPERT
25 OPINION IN THIS CASE?

1 A. YES, I HAVE.

2 Q. WHAT IS THAT OPINION?

3 A. MY OPINION IS THAT THE DEFENDANTS HAVE A
4 REASONABLE RIGHT TO FEAR THAT THEIR EXPRESSION WOULD BE
5 CHILLED WERE COPA TO BE ENFORCED.

6 Q. DID YOU MEAN PLAINTIFFS WHEN YOU SAID
7 DEFENDANTS?

8 A. DID I SAY DEFENDANTS? I MEAN PLAINTIFFS. I'M
9 SORRY. I'M MARRIED TO A DEFENSE ATTORNEY SO...

10 Q. AND ON WHAT BASIS DO YOU EXPRESS THAT OPINION?

11 A. ON THE BASIS THAT MATERIALS SIMILAR TO THEIRS
12 HAVE BEEN CHALLENGED -- SIMILAR OR EVEN LESS EXPLICIT OF
13 THEIRS HAVE BEEN CHALLENGED THROUGHOUT THE COUNTRY AS
14 INAPPROPRIATE TO MINORS OR EVEN HARMFUL TO MINORS.

15 MR. WIZNER: PLAINTIFFS HAVE NO MORE
16 QUESTIONS AT THIS TIME.

17 THE COURT: CROSS EXAMINE.

18 PROFESSOR REICHMAN, IF YOU WILL ANSWER
19 MS. ULRICH'S QUESTIONS, PLEASE.

20 MS. ULRICH: I DO HAVE HARD COPIES FOR
21 THE COURT IF THE COURT WOULD LIKE TO LOOK AT THEM, IF I
22 MIGHT APPROACH.

23 CROSS EXAMINATION

24 BY MS. ULRICH:

25 Q. GOOD MORNING, PROFESSOR REICHMAN.

1 A. GOOD MORNING.

2 Q. YOU CONTRACT WITH THE AMERICAN LIBRARY
3 ASSOCIATION TO COMPILE THE ALA NEWSLETTER, CORRECT?

4 A. YES.

5 Q. AND YOU COMPILE THIS NEWSLETTER BY REVIEWING
6 NEWSPAPER ARTICLES, DON'T YOU?

7 A. NEWSPAPER AND OTHER PERIODICAL ARTICLES AND
8 ARTICLES ONLINE, YES.

9 Q. YOU DO NOT GO TO THE SCHOOLS OR LIBRARIES
10 THEMSELVES TO WRITE THE ARTICLES FOR THE NEWSLETTER, DO
11 YOU?

12 A. NO, I DO NOT.

13 Q. AND YOU MAKE CERTAIN EDITORIAL DECISIONS ABOUT
14 WHAT TO INCLUDE IN THE ALA NEWSLETTER, DON'T YOU?

15 A. YES, I DO.

16 Q. AND LIBRARY ISSUES ARE AT THE FOREFRONT, AREN'T
17 THEY?

18 A. YES.

19 Q. AND AS A GENERAL MATTER, YOU DO NOT COVER IN THE
20 NEWSLETTER STORIES ABOUT SHOPS SELLING PORNOGRAPHY, DO
21 YOU?

22 A. OCCASIONALLY, BUT NOT FREQUENTLY.

23 Q. NOW THE ALA'S POSITION ON FILTERING IS THAT IT
24 SHOULD NOT BE COMPELLED IN THE LIBRARIES, ISN'T IT?

25 A. AS I UNDERSTAND THEIR POSITION, YES.

1 Q. AND ISN'T IT YOUR OPINION THAT FILTERS ARE
2 RATHER CRUDE VEHICLES FOR PREVENTING ACCESS TO WEBSITES?

3 A. LET ME PUT IT THIS WAY. IT IS MY PERSONAL
4 OPINION THAT MY EXPERIENCE, VERY LIMITED WITH FILTERS,
5 ABOUT 10 TO 15 YEARS AGO WITH AN AOL FILTER FOR MY
6 CHILDREN, WERE RATHER CRUDE MECHANISMS, BUT I WOULD NOT
7 CALL MY OPINION ON THAT AN EXPERT OPINION.

8 Q. AND, IN FACT, YOU ARE NOT HOLDING YOURSELF OUT
9 AS AN EXPERT ON FILTERING, ARE YOU?

10 A. NO, I AM NOT.

11 Q. AND YOU ARE NOT HOLDING YOURSELF OUT AS AN
12 EXPERT ON INTERNET TECHNOLOGY, ARE YOU?

13 A. NO, I AM NOT.

14 Q. AND YOU ARE NOT A LAWYER, ARE YOU?

15 A. NO, I AM NOT.

16 Q. YOU ARE NOT HOLDING YOURSELF OUT AS AN EXPERT ON
17 THE LEGAL DEFINITION OF WHAT'S HARMFUL TO MINORS UNDER
18 COPA, ARE YOU?

19 A. NO, I AM NOT.

20 Q. YOU DISCUSSED A LITTLE BIT IN YOUR DIRECT
21 EXAMINATION ABOUT COMMUNITY STANDARDS. I BELIEVE THAT
22 YOU STATED THAT THE APPLICATION OF COMMUNITY STANDARDS
23 TO THE WEB NECESSARILY MEANS THAT THE STANDARDS OF ANY
24 COMMUNITY THAT WOULD HAVE ANY ACCESS TO THE INTERNET
25 WOULD BE THE COMMUNITY BY WHICH MATERIAL IS JUDGED. DO

1 I UNDERSTAND THAT CORRECTLY?

2 A. IT WOULD HAVE TO BE. IF -- IF A COMMUNITY
3 DECIDED THAT MATERIAL AVAILABLE ON THE INTERNET WAS
4 ILLEGAL IN THAT COMMUNITY, THEN IT WOULD EFFECTIVELY
5 MAKE IT ILLEGAL IN OTHER COMMUNITIES AS WELL.

6 Q. THIS CONCLUSION IS BASED ON YOUR UNDERSTANDING
7 OF INTERNET TECHNOLOGY, ISN'T IT?

8 A. I GUESS SO. I MEAN, IT JUST SEEMS COMMON
9 KNOWLEDGE TO ME.

10 Q. YOU DON'T KNOW WHETHER IT IS TECHNOLOGICALLY
11 FEASIBLE FOR A WEBSITE TO TAILOR ITS COMMUNICATIONS TO
12 CERTAIN GEOGRAPHIC AREAS, DO YOU?

13 A. NEITHER KNOW IF IT IS TECHNOLOGICALLY OR
14 FINANCIALLY FEASIBLE, BUT I NEVER HEARD OF IT.

15 Q. IN YOUR REPORT YOU DO NOT DEFINE COMMUNITY, DO
16 YOU?

17 A. NO, I DO NOT.

18 Q. AND YOUR UNDERSTANDING OF COMMUNITY IS BASED ON
19 THE LEGAL MILLER TEST, ISN'T IT?

20 A. WELL, MY OPINION ON COMMUNITY IS NOT A LEGAL
21 OPINION. I HAVE ALREADY TESTIFIED THAT I'M NOT A
22 LAWYER, BUT I CERTAINLY AM AWARE OF THE MILLER DECISION.

23 Q. THE MILLER DECISION, THE STANDARDS THEREIN ARE
24 WHAT YOU ARE REFERRING TO WHEN YOU REFER TO COMMUNITY IN
25 YOUR REPORT, ISN'T IT?

1 A. WELL, AGAIN, A LAY UNDERSTANDING, IF YOU WILL,
2 OF THE MILLER STANDARD. I DO NOT CLAIM AGAIN TO BE AN
3 ATTORNEY.

4 Q. SO THE LAY UNDERSTANDING IS HOW YOU ARE USING
5 COMMUNITY IN YOUR EXPERT REPORT?

6 A. YES.

7 Q. THAT LAY UNDERSTANDING OF THE MILLER TEST,
8 CORRECT?

9 A. THAT SOUNDS FAIR TO ME.

10 Q. YOU WOULD AGREE, WOULDN'T YOU, THAT THERE IS A
11 DIVISION WITHIN COMMUNITIES BETWEEN THOSE THAT SUPPORT
12 THE CHALLENGES THAT YOU HAVE REPORTED ON AND THOSE THAT
13 DO NOT SUPPORT THE CHALLENGES?

14 A. WELL, THERE IS ALMOST ALWAYS A DIVISION OF SOME
15 SORT. IN SOME CASES THE CHALLENGES GET OVERWHELMING
16 SUPPORT. IN SOME CASES THEY GET LITTLE SUPPORT. IN
17 SOME CASES THE COMMUNITIES ARE DIVIDED.

18 Q. YOU DISCUSS AT LENGTH SCHOOL CHALLENGES IN YOUR
19 REPORT, AND IF I COULD HAVE MR. BYRDSONG BRING UP
20 PLAINTIFFS' EXHIBIT 22 WHICH I BELIEVE IS YOUR EXPERT
21 REPORT IN THIS CASE, AND PAGE 6 OF THAT REPORT.

22 MS. ULRICH: WOULD IT BE HELPFUL TO HAVE
23 MR. BYRDSONG WORK AT THIS MONITOR HERE?

24 THE COURT: I WONDER WHAT THE WITNESS IS
25 LOOKING AT. WHAT IS THE WITNESS LOOKING AT?

1 THE WITNESS: THE SCREEN IS BLANK. THERE
2 IT IS.

3 MS. ULRICH: THANK YOU, MR. BYRDSONG.

4 THE WITNESS: I HAVE THE SAME PAGE HERE
5 THAT IS MORE LEGIBLE FOR ME.

6 BY MS. ULRICH:

7 Q. FEEL FREE TO USE THE HARD COPY.

8 A. THANK YOU.

9 Q. MR. REICHMAN, IF YOU LOOK ON PAGE 6 OF YOUR
10 EXPERT REPORT AND YOU STATE THAT: A USEFUL MEASURE OF
11 THE PROPENSITY OF BOTH GOVERNMENT OFFICIALS AND PRIVATE
12 INDIVIDUALS TO CENSOR MATERIALS FOR MINORS IS THE EXTENT
13 TO WHICH THESE MATERIALS HAVE BEEN CHALLENGED IN OUR
14 NATION'S SCHOOLS. THAT IS WHAT YOU STATE IN YOUR
15 REPORT, CORRECT?

16 A. YES.

17 Q. YOU MAKE THIS CONCLUSION BASED ON THE FACT THAT
18 SCHOOLS ARE THE SINGLE INSTITUTION WHERE MINORS ARE MOST
19 FREQUENTLY CONCENTRATED, DON'T YOU?

20 A. YES.

21 Q. IN YOUR REPORT, YOU USE THE WORD "CENSOR" TO
22 MEAN RESTRICTING ACCESS TO, IS THAT CORRECT?

23 A. YES.

24 Q. AND THIS WOULD INCLUDE REMOVING MATERIAL FROM A
25 SCHOOL LIBRARY?

1 A. YES.

2 Q. YOUR DEFINITION OF CENSORSHIP WOULD INCLUDE
3 PARENTS NOT WANTING CERTAIN THINGS USED IN A SCHOOL
4 CURRICULUM, WOULDN'T IT?

5 A. YES.

6 Q. AND IT WOULD INCLUDE INDIVIDUALS NOT WANTING
7 CERTAIN BOOKS IN THEIR PUBLICLY-FUNDED LIBRARIES,
8 WOULDN'T IT?

9 A. YES.

10 Q. YOU DO NOT LIMIT THE USE OF YOUR WORD
11 "CENSORSHIP" IN YOUR REPORT TO CRIMINAL PROSECUTIONS, DO
12 YOU?

13 A. NO, I DO NOT.

14 Q. IN FACT, THE VAST MAJORITY OF EXAMPLES OF
15 CENSORSHIP IN YOUR REPORT ARE NOT CRIMINAL PROSECUTIONS,
16 ARE THEY?

17 A. NO, THEY ARE NOT.

18 Q. NONE OF THE SCHOOL CHALLENGE EXAMPLES IN YOUR
19 REPORT WERE DONE BY THE FEDERAL GOVERNMENT, WERE THEY?

20 A. NO. TO MY KNOWLEDGE THE FEDERAL GOVERNMENT DOES
21 NOT HAVE MUCH SAY IN THESE THINGS IN LOCAL SCHOOLS.

22 Q. SCHOOLS HAVE DIFFERING POLICIES ABOUT WHAT IS
23 SUITABLE MATERIAL FOR THEIR CHILDREN IN THE SCHOOL,
24 DON'T THEY?

25 A. YES.

1 Q. ISN'T IT TRUE THAT THE STANDARDS FOR RESOLVING
2 CHALLENGES TO BOOKS IN SCHOOLS DEPENDS ON THE SPECIFIC
3 POLICY OF THE SCHOOL DISTRICT INVOLVED?

4 A. YES.

5 Q. ISN'T IT TRUE THAT ONE DIFFERENCE BETWEEN WHAT
6 YOU TERM SCHOOL CENSORSHIP AND COPA IS THAT COPA IS ONLY
7 ENFORCEABLE THROUGH THE COURTS?

8 A. YES.

9 Q. IF WE COULD TURN BACK TO YOUR EXPERT REPORT
10 WHICH IS EXHIBIT 22. ON PAGE 6, SUBSECTION A, WHICH IF
11 I UNDERSTAND CORRECTLY MIGHT BE PAGE 7 OF PLAINTIFFS'
12 EXHIBIT NUMBERS, COULD YOU PLEASE READ THE SECOND
13 SENTENCE UNDER SUBSECTION A THAT REFERS TO YOUR BOOK
14 CENSORSHIP AND SELECTION.

15 A. IN THE THIRD EDITION OF CENSORSHIP AND
16 SELECTION: ISSUES AND ANSWERS FOR SCHOOLS, I DISCUSSED
17 THIS ISSUE AT SOME LENGTH.

18 THE COURT: READ MORE SLOWLY PLEASE, SO
19 THE COURT REPORTER CAN KEEP UP WITH YOU.

20 THE WITNESS: (SEE PAGES 10 TO 15),
21 REPORTING ON SEVERAL NATIONAL SURVEYS FROM THE 1980S AND
22 1990S, WHICH TOGETHER SUGGESTED THAT THE PROBLEM
23 WAS "REAL, NATIONWIDE AND GROWING." TO QUOTE ONE SUCH
24 REPORT.

25 Q. THANK YOU. AND THAT QUOTE OF "REAL, NATIONWIDE

1 AND GROWING," COMES FROM A 1980 REPORT, DOESN'T IT?

2 A. YES.

3 Q. IF YOU COULD TURN TO PAGE 7 OF YOUR EXPERT
4 REPORT:

5 AROUND THE MIDDLE OF THAT PAGE, YOU
6 DISCUSS A SURVEY IN TEXAS, DON'T YOU?

7 A. YES.

8 Q. AND YOU DIDN'T READ THE ACTUAL SURVEY IN
9 PREPARING YOUR REPORT, DID YOU?

10 A. I DON'T RECALL, I MIGHT WELL HAVE.

11 Q. WELL, YOUR REPORT RELIES ON THE NEWSLETTER
12 ARTICLE, DOESN'T IT?

13 A. I UNDERSTAND. I'M SORRY. YES. I READ THE
14 NEWSLETTER ARTICLE. I MAY -- MOST LIKELY READ THE
15 SURVEY FOR THE NEWSLETTER ARTICLE. DID I REREAD IT FOR
16 THE REPORT? PROBABLY NOT. NO.

17 Q. I WOULD LIKE TO SHOW YOU WHAT HAS BEEN MARKED AS
18 DEFENDANT'S EXHIBIT 360. DO YOU RECOGNIZE THIS DOCUMENT
19 FROM YOUR DEPOSITION?

20 A. YES. THIS IS THE ARTICLE THAT THIS STATEMENT IN
21 THE REPORT IS BASED UPON.

22 THE COURT: EXHIBIT NUMBER AGAIN PLEASE?

23 MS. ULRICH: EXHIBIT NUMBER 360.

24 BY MS. ULRICH:

25 Q. DOESN'T THIS ARTICLE STATE AND I QUOTE: IN

1 RECENT YEARS, J.K. ROWLING'S POPULAR HARRY POTTER SERIES
2 HAS SURPASSED OTHER BOOKS IN GENERATING CHALLENGES AND
3 BANS.

4 A. YES.

5 Q. SO ARE YOU SAYING THAT A WEBSITE WHO PUBLISHED
6 THE HARRY POTTER SERIES WOULD REASONABLY FEAR
7 PROSECUTION UNDER COPA?

8 A. NO. UNLESS IT WAS BEING CHALLENGED FOR SEXUAL
9 CONTENT, ALTHOUGH I DON'T BELIEVE THE CHALLENGES TO
10 HARRY POTTER HAVE MAINLY BEEN OVER SEXUAL CONTENT, BUT
11 OVER ALLEGED WITCHCRAFT.

12 Q. IN FACT, THE CHALLENGES REPORTED IN THE SURVEY
13 WERE NOT LIMITED TO CONTENT WITH SEXUAL MATERIAL, WERE
14 THEY?

15 A. NO, THEY WERE NOT, I DID NOT CLAIM SO.

16 THE COURT: ARE YOU TALKING AGAIN ABOUT
17 HARRY POTTER? ARE YOU STICKING WITH HARRY POTTER?

18 MS. ULRICH: I'M SORRY, ABOUT EXHIBIT
19 360, IS THE SURVEY FROM TEXAS TO WHICH HE REFERS.

20 BY MS. ULRICH:

21 Q. IN THAT SURVEY, THE CHALLENGES WERE NOT LIMITED
22 TO CONTENT WITH SEXUAL MATERIAL, CORRECT?

23 A. NO. BUT THE SURVEY DID SAY THAT THE MOST COMMON
24 COMPLAINT WAS AGAINST SEXUAL CONTENT.

25 Q. YOU NOTE IN YOUR EXPERT REPORT THAT WILLIAM

1 FAULKNER'S AS I LAY DYING WAS REMOVED FROM A CLASSROOM
2 FOR PROFANITY, DON'T YOU?

3 A. YES.

4 Q. IN FACT, YOU DO NOT REPORT THE FINAL OUTCOME OF
5 THAT INCIDENT, DO YOU?

6 A. NO, I DON'T.

7 Q. WASN'T THAT BOOK RETURNED A WEEK LATER TO THE
8 CLASSROOM AFTER EMBARRASSING NATIONAL PUBLICITY?

9 A. I DON'T KNOW. THAT MAY WELL BE THE CASE.

10 Q. CAN WE PUT UP DEFENDANT'S EXHIBIT 361, PLEASE.

11 IF YOU LOOK AT PAGE 3 OF THIS EXHIBIT,
12 DOES THIS EXHIBIT CONFIRM THAT THE BOOK WAS RETURNED A
13 WEEK LATER?

14 A. YES.

15 Q. THANK YOU.

16 YOU ALSO NOTE IN YOUR REPORT --

17 THE COURT: EXCUSE ME FOR INTERRUPTING.

18 I'M SORRY. I DID NOT MOVE QUICKLY.

19 IF I'M GOING TO RELY AS YOU WISH I WOULD
20 ON THE CROSS EXAMINATION STATEMENT OF THE WITNESS, I
21 HAVE TO BE DARN SURE WHAT THIS IS A QUOTE FROM.

22 MS. ULRICH: I WILL CLEAR THAT UP.

23 THE COURT: YOUR D 361 REFERENCE WAS
24 MERELY TO THE EXHIBIT NUMBER.

25 MS. ULRICH: I'M HAPPY TO CLEAR THAT UP.

1 BY MS. ULRICH:

2 Q. DO YOU RECOGNIZE 361 FROM YOUR DEPOSITION,
3 PROFESSOR REICHMAN?

4 A. YES. IT'S FROM -- WHAT'S ON THE SCREEN RIGHT
5 NOW?

6 Q. I BELIEVE SO. I HAVE A HARD TIME SEEING THE
7 SCREEN. IS EXHIBIT 361 AN EXCERPT FROM YOUR REPORT,
8 CENSORSHIP AND SELECTION?

9 A. YES, IT IS.

10 Q. YOU ALSO NOTE IN YOUR --

11 THE COURT: THANK YOU.

12 BY MS. ULRICH:

13 Q. IN YOUR REPORT ABOUT A PETITION IN TENNESSEE
14 AGAINST STEINBECK'S OF MICE AND MEN, YOU ALSO TOOK THIS
15 EXAMPLE FROM YOUR BOOK, CENSORSHIP AND SELECTION, DIDN'T
16 YOU?

17 A. YES, I DID.

18 Q. AT THE TIME YOU WROTE THE REPORT, YOU DIDN'T
19 KNOW ANYTHING MORE ABOUT THIS INCIDENT THAN WHAT WAS IN
20 YOUR BOOK, DID YOU?

21 A. NO, I DID NOT.

22 Q. SO YOU DIDN'T KNOW THE OUTCOME OF THIS PETITION,
23 DO YOU?

24 A. NO, I DON'T REMEMBER THE OUTCOME OF THE
25 PETITION.

1 Q. YOU DON'T KNOW THE AGE GROUP OF THE SCHOOL
2 CHILDREN AFFECTED FOR THIS PETITION, DO YOU?

3 A. I CAN'T SAY FOR SURE RIGHT NOW, BUT ALMOST EVERY
4 CHALLENGE THAT I HAVE ENCOUNTERED OF MICE AND MEN HAS
5 BEEN TO HIGH SCHOOL CHILDREN.

6 Q. IN WE COULD PULL UP EXHIBIT 361, PLEASE.

7 IF WE COULD -- THIS IS THE EXCERPT FROM
8 YOUR BOOK?

9 A. YES.

10 Q. GO TO PAGE 3 OF THIS EXHIBIT. ON PAGE 3,
11 DOESN'T YOUR BOOK STATE: IN 1992 OVER A THOUSAND PEOPLE
12 IN TENNESSEE SIGNED A PETITION AGAINST OF MICE AND MEN,
13 PROTESTING ITS BLASPHEMOUS LANGUAGE?

14 A. YES.

15 Q. THIS BOOK DOES NOT CONTAIN ANY OTHER INFORMATION
16 ABOUT THIS INCIDENT, DOES IT?

17 A. NO.

18 Q. IT DOES NOT CONTAIN THE AGE GROUP OF SCHOOL
19 CHILDREN AFFECTED, DOES IT?

20 A. NO.

21 Q. IT DOES NOT STATE THE WORDS THAT THE PARENTS
22 WERE PROTESTING OVER IT, DOES IT?

23 A. NO.

24 Q. YOU ALSO STATE IN YOUR EXPERT REPORT, YOU
25 DISCUSS THE BOOK FOREVER BY JUDY BLUME. DO YOU RECALL

1 THAT?

2 A. I THINK SO, YES.

3 Q. IF YOU WOULD LIKE TO REFRESH YOUR RECOLLECTION,
4 YOU CAN LOOK AT PAGE 8 OF YOUR EXPERT REPORT, WHAT YOU
5 HAVE NUMBERED PAGE 8.

6 YOU DESCRIBE THIS BOOK AS DEALING WITH A
7 YOUNG GIRL'S EMERGENCE INTO WOMANHOOD AND HER DIFFICULT
8 FIRST EXPLORATION OF THE MEANING OF LOVE. CORRECT?

9 A. YES.

10 Q. THIS IS ALSO A BOOK THAT YOU WROTE ABOUT IN YOUR
11 BOOK, CENSORSHIP AND SELECTION, CORRECT?

12 A. YES.

13 Q. IF WE COULD TURN BACK TO EXHIBIT 361, PLEASE.
14 PAGE 6 OF THIS EXHIBIT - I'M SORRY, PAGE 7 OF THE
15 EXHIBIT. ISN'T IT TRUE THAT DESPITE COMPLAINTS IN
16 WYOMING, THE BOOK FOREVER HAS BEEN RETAINED IN BOTH
17 JUNIOR AND SENIOR HIGH SCHOOL LIBRARIES?

18 A. YES.

19 Q. ISN'T IT TRUE THAT THERE WAS WIDESPREAD SUPPORT
20 FOR THIS BOOK AT A PUBLIC HEARING?

21 A. AT THAT PUBLIC HEARING.

22 Q. AND THAT AT THAT HEARING, WHILE SIX PEOPLE SPOKE
23 FOR ITS REMOVAL, 41 DEFENDED THE SELECTION OF THE BOOK?

24 A. THAT IS WHAT I WROTE.

25 Q. ISN'T IT YOUR POSITION THAT THE MERE FACT OF A

1 COMPLAINT WITHIN A COMMUNITY IS ENOUGH TO ESTABLISH A
2 REASONABLE FEAR OF PROSECUTION?

3 A. A SINGLE COMPLAINT, NO. IT IS MY OPINION,
4 HOWEVER, THAT THE ACCUMULATION OF COMPLAINTS IS ENOUGH
5 TO CREATE AN ATMOSPHERE THAT COULD POTENTIALLY BE TAKEN
6 BY SOME PEOPLE AS CHILLING.

7 Q. I BELIEVE YOU TESTIFIED EARLIER THIS MORNING
8 ABOUT A BOOK KING AND KING?

9 A. YES.

10 Q. I BELIEVE YOU STATED, AND PLEASE CORRECT ME IF
11 I'M WRONG, THAT THIS IS A CHILDREN'S BOOK WITHOUT ANY
12 SEXUAL CONTENT?

13 A. YES, IT IS.

14 Q. AND YET YOU STATED THAT BOOK HAD RECEIVED
15 COMPLAINTS?

16 A. YES, QUITE A FEW ACTUALLY IN RECENT YEARS.

17 Q. SO IT IS YOUR OPINION THAT A WEBSITE OPERATOR
18 WHO PLAYS KING AND KING ON THE WEB WOULD REASONABLY FEAR
19 PROSECUTION UNDER COPA?

20 A. NO, THAT WAS NOT MY TESTIMONY. IT IS NOT WHAT
21 MY OPINION IS. MY OPINION IS, IS THAT IF THERE WERE
22 PEOPLE WHO WOULD BE PRESSURING SCHOOL BOARDS AND OTHER
23 LIBRARY BOARDS AND OTHER LOCAL AUTHORITIES TO REMOVE
24 SOMETHING AS INNOCUOUS AS KING AND KING BECAUSE OF ITS
25 ALLEGED HOMOSEXUAL CONTENT BEING HARMFUL TO MINORS, THEN

1 THERE WOULD SURELY BE AT LEAST THE SAME SIZE IF NOT
2 LARGER GROUP PRESSURING GOVERNMENT TO GO AFTER MORE
3 EXPLICIT SITE MUCH LIKE THOSE OF PLAINTIFFS.

4 Q. YOU ALSO MENTION IN YOUR REPORT THAT BOOKS WITH
5 POSITIVE DEPICTIONS OF GAY PARENTING AND WITHOUT SEXUAL
6 CONTENT HAVE LED SOME PEOPLE TO CALL THEM PORNOGRAPHIC,
7 DO YOU NOT?

8 A. YES.

9 Q. YOU DO NOT THINK IT IS REASONABLE TO CALL BOOKS
10 WITHOUT SEXUAL CONTENT PORNOGRAPHIC, DO YOU?

11 A. PERSONALLY, NO.

12 Q. YOU MENTION IN YOUR EXPERT REPORT AN EXAMPLE OF
13 A PTA PRESIDENT DEMANDING THE REMOVAL OF A SEX EDUCATION
14 VIDEO BECAUSE IT DID NOT PROMOTE ABSTINENCE, DIDN'T YOU?

15 A. YES.

16 Q. YOUR REPORT DOES NOT INCLUDE THE OUTCOME OF THIS
17 COMPLAINT, DOES IT?

18 A. NO, IT DOES NOT.

19 Q. YOU DO NOT KNOW THE OUTCOME OF THIS COMPLAINT,
20 DO YOU?

21 A. NO, I DON'T.

22 Q. YOU ALSO NOTE IN YOUR REPORT OBJECTIONS TO AIDS
23 EDUCATION IN THE TEXTBOOK, HUMAN SEXUALITY. YOUR REPORT
24 DOES NOT INCLUDE THE OUTCOME OF THIS OBJECTION, DOES IT?

25 A. NO, IT DOES NOT.

1 Q. YOU DO NOT KNOW THE OUTCOME OF THIS OBJECTION,
2 DO YOU?

3 A. NO, I DO NOT.

4 Q. WOULD YOU AGREE THAT SCHOOL BOARDS GET TO DECIDE
5 WHAT IS ON A SCHOOL'S CURRICULUM?

6 A. WITHIN LIMITS OF THE LAW, YES.

7 Q. AND DO YOU BELIEVE PARENTS SHOULD HAVE THE RIGHT
8 TO BE VOCAL ABOUT HOW THEIR CHILDREN ARE EDUCATED WITHIN
9 THE SCHOOL SYSTEM?

10 A. OF COURSE.

11 Q. YOU ALSO DISCUSS IN YOUR REPORT MOVIES AND
12 TELEVISION. IF YOU COULD TURN TO PAGE 10 OF YOUR REPORT
13 AT THE BOTTOM OF PAGE 10 AND READ THE SENTENCE UNDER
14 SUBSECTION (B)?

15 A. THE REFERENCE TO HBO AND CINEMAX SUGGESTS THAT
16 PUBLIC RESPONSE TO SEXUAL CONTENT IN FILMS AND ON
17 TELEVISION MAY PROVIDE ANOTHER MEASURE OF THE PROPENSITY
18 OF BOTH GOVERNMENT OFFICIALS AND CITIZENS TO LABEL
19 MATERIAL "HARMFUL" TO OR "INAPPROPRIATE" FOR MINORS.

20 Q. ONE ASPECT OF THIS THAT YOU DISCUSS IN YOUR
21 REPORT IS THE MPAA A MOVIE RATINGS SYSTEM, IS THAT
22 CORRECT?

23 A. YES.

24 Q. THIS SYSTEM IS NOT BASED ON FEDERAL LAW, IS IT?

25 A. NO, IT IS NOT.

1 Q. IT IS NOT BASED ON STATE LAW, IS IT?

2 A. NO, IT IS NOT.

3 Q. IT IS NOT BASED ON COPA, IS IT?

4 A. NO, IT IS NOT.

5 Q. IF YOU LOOK TO PAGE 11 OF YOUR REPORT, YOU STATE
6 THAT UNDER MPAA RATINGS, IF A MOVIE USES MORE THAN ONE
7 SEXUALLY DEPRIVED EXPLETIVE, THE MOVIE MUST BE RATED R,
8 CORRECT?

9 A. YES. WAIT A MINUTE. SINGLE USE REQUIRES AT
10 LEAST A PG. MORE THAN ONE SUCH -- YES. YES.

11 Q. I WOULD LIKE TO SHOW YOU WHAT HAS BEEN MARKED AS
12 DEFENDANT'S D 362. DO YOU RECOGNIZE THIS DOCUMENT FROM
13 YOUR DEPOSITION?

14 A. YES. THIS IS -- I BELIEVE YOU CAN FIND THIS ON
15 THE WEBSITE OF MPAA.

16 Q. AND THIS DESCRIBES THE MPAA RATINGS, DOESN'T IT?

17 A. YES, ALTHOUGH THEY ALSO HAVE MATERIAL ON THEIR
18 WEBSITE AS I RECALL, HAVING VISITED IT, THAT IS MORE
19 THOROUGH THAN THIS.

20 Q. DO I UNDERSTAND CORRECTLY, LOOKING AT THE R
21 RATINGS SYMBOL THAT AN R RATED FILM MAY INCLUDE STRONG
22 LANGUAGE, VIOLENCE, NUDITY, DRUG ABUSE, OTHER ELEMENTS,
23 OR A COMBINATION OF THE ABOVE?

24 A. YES.

25 Q. SO A MOVIE COULD RECEIVE AN R RATING BASED ON

1 VIOLENCE ALONE?

2 A. YES, IT COULD.

3 Q. A MOVIE COULD RECEIVE R RATING BASED ON DRUG
4 ABUSE ALONE?

5 A. YES, IT COULD.

6 Q. YOU'RE NOT AN EXPERT IN THE DECISION MAKING
7 PROCESS OF THE MPAA, CORRECT?

8 A. NO, I'M NOT.

9 Q. I BELIEVE YOU TESTIFIED EARLIER TODAY THAT THE
10 COPA STANDARDS ARE LESS FLEXIBLE THAN MPAA RATINGS
11 BECAUSE THEY DO NOT INCLUDE GRADATIONS FOR AGE?

12 A. YES.

13 Q. BUT YOU ARE NOT A LAWYER, AND YOU CLAIM NO LEGAL
14 EXPERTISE, DO YOU?

15 A. NO, I DON'T, BUT I READ THE STATUTE SO...

16 Q. YOU HAVE NOT READ HARMFUL TO MINORS CASE LAW
17 DISCUSSING THE AGE ISSUE, HAVE YOU?

18 A. I HAVE OCCASIONALLY IN PREPARING THE NEWSLETTER,
19 BUT NOT TO THE POINT WHERE I WOULD OFFER AN EXPERT
20 OPINION AS AN ATTORNEY.

21 Q. YOU ALSO DISCUSS FCC FINES IN YOUR REPORT. YOU
22 WOULD AGREE, WOULDN'T YOU, THAT TELEVISION INDECENCY
23 RULES DO NOT APPLY COPA'S HARMFUL TO MINORS DEFINITION,
24 WOULDN'T YOU?

25 A. I CAN'T ANSWER THAT BECAUSE THAT WOULD REQUIRE

1 ME TO MAKE A LEGAL OPINION THAT I REALLY DON'T FEEL
2 QUALIFIED TO ANSWER.

3 Q. YOU DID TESTIFY AS TO THIS TOPIC AT YOUR
4 DEPOSITION, DID YOU NOT?

5 A. YES.

6 Q. YOU DID GIVE AN OPINION AT YOUR DEPOSITION, DID
7 YOU NOT?

8 THE COURT: TALKING ABOUT FCC MATTERS?

9 MS. ULRICH: FCC, YES.

10 THE WITNESS: ON THE QUESTION YOU JUST
11 ASKED? YOU SAY GIVE AN OPINION.

12 MR. WIZNER: IF SHE IS GOING TO ASK HIM
13 ABOUT THE DEPOSITION, SHE OUGHT TO SHOW THE DEPOSITION
14 RATHER THAN ASKING HIM TO REMEMBER THE DEPOSITION.

15 THE COURT: IF YOU ARE GOING TO ASK HIM
16 QUESTIONS ABOUT PRECISELY WHAT HE TESTIFIED TO, PLEASE
17 HAVE THE PAGE PUT UP ON THE SCREEN.

18 MS. ULRICH: SURE, YOUR HONOR, I WILL BE
19 HAPPY TO.

20 THE COURT: AND LINE NUMBER.

21 MS. ULRICH: BRING UP PAGE 156 AND 157 OF
22 THE DEPOSITION.

23 THE COURT: DATE OF THE DEPOSITION,
24 PLEASE.

25 MS. ULRICH: DATE OF THE DEPOSITION WAS

1 AUGUST 14TH, 2006.

2 THE COURT: OKAY. THANK YOU.

3 BY MS. ULRICH:

4 Q. THE QUESTION AT THE DEPOSITION WAS: DO YOU KNOW
5 WHETHER TELEVISION INDECENCY RULES APPLY COPA'S HARMFUL
6 TO MINORS DEFINITION?

7 ANSWER: I UNDERSTAND THEY DON'T.

8 DID I READ THAT CORRECTLY?

9 A. YES.

10 Q. GOING BACK TO YOUR EXPERT REPORT YOU MENTIONED
11 BOTH ON PAGE 17 OF YOUR REPORT AND I BELIEVE YOU TALKED
12 ABOUT THIS BRIEFLY THIS MORNING, THAT TEXAS GIRL SCOUT
13 TROOP LEADERS CHALLENGED A SEXUAL EDUCATION WEBSITE
14 SPONSORED BY THE HARRIS COUNTY PUBLIC LIBRARY. YOUR
15 INFORMATION FOR THIS COMES FROM A NEWSLETTER ARTICLE,
16 DOESN'T IT?

17 MR. WIZNER: OBJECTION TO THE EXTENT THAT
18 THIS QUESTION INDICATES THAT HE REFERRED TO THIS IN HIS
19 TESTIMONY THIS MORNING, WHICH HE DID NOT.

20 MS. ULRICH: I APOLOGIZE, MY MISTAKE.

21 THE COURT: THE RECORD IS CLEAR. GO
22 AHEAD.

23 THE WITNESS: REPEAT THE QUESTION.

24 BY MS. ULRICH:

25 Q. THE INFORMATION THAT YOU HAVE FOR THIS EXAMPLE

1 COMES FROM THE NEWSLETTER ARTICLE, CORRECT?

2 A. YES.

3 Q. THAT WAS JANUARY 2004?

4 A. YES.

5 Q. IN FACT THE COMPLAINT WAS FROM ONE PERSON, WAS
6 IT NOT, AS REPORTED IN THE NEWSLETTER ARTICLE?

7 A. THAT MAY BE THE CASE, I DON'T RECALL BUT...

8 Q. IF WE COULD PULL UP DEFENDANT'S EXHIBIT 365
9 PLEASE.

10 DO YOU RECOGNIZE EXHIBIT 365?

11 A. YES. THIS IS THE ARTICLE FROM THE NEWSLETTER
12 THAT THE REPORT REFERENCE WAS BASED ON.

13 Q. DOESN'T THIS ARTICLE INDICATE THAT ONE PERSON
14 WAS THE ONE WITH THE COMPLAINT?

15 A. YES. THE GIRL SCOUT TROOP LEADER.

16 Q. THIS COMPLAINT WAS NOT BASED ON BEHALF OF THE
17 GIRL SCOUTS, WAS IT?

18 A. NO.

19 Q. AND DOESN'T THE ARTICLE STATE THAT THE LIBRARY
20 DIRECTOR STOOD BY THE WEBSITE?

21 A. WELL, IT SAYS: WHILE PARK STOOD BEHIND THE
22 WEBSITE SHE DID SAY THAT A COMMITTEE HAD BEEN FORMED TO
23 STUDY THE ISSUE TO SEE IF THE COUNTY SHOULD CONTINUE TO
24 PROVIDE THE MATERIAL ONLINE.

25 I DO NOT KNOW WHAT HAPPENED AFTER THAT.

1 Q. YOU ALSO STATE ON PAGE 17 OF YOUR REPORT AN
2 INCIDENT IN MARPLE, PENNSYLVANIA WHERE YOU STATE THAT A
3 GROUP OF CITIZENS SOUGHT TO REMOVE ALL SEX EDUCATION
4 MATERIALS FROM A PUBLIC LIBRARY. THAT WAS ALSO BASED ON
5 A NEWSLETTER ARTICLE, WASN'T IT?

6 A. YES.

7 Q. PULL UP DEFENDANT'S EXHIBIT 367, PLEASE. DO YOU
8 RECOGNIZE EXHIBIT 367 FROM YOUR DEPOSITION?

9 A. YES.

10 Q. AND DOES THIS CONTAIN THE NEWSLETTER ARTICLE TO
11 WHICH YOUR REPORT REFERS?

12 A. YES.

13 Q. THERE IS NOTHING IN THIS ARTICLE TO INDICATE
14 THAT ALL SEX EDUCATION MATERIALS WERE TO BE REMOVED,
15 DOES IT?

16 A. WELL, I DON'T HAVE THE WHOLE ARTICLE IN FRONT OF
17 ME. THERE IS MORE OF IT SO...

18 Q. IF WE CAN PULL UP THE FULL PAGE. THANK YOU.

19 THE COURT: DO YOU WANT HIM TO READ
20 SOMETHING?

21 MS. ULRICH: THE QUESTION IS, THIS
22 ARTICLE DOES NOT STATE THAT ALL SEX EDUCATION MATERIALS
23 WERE SOUGHT TO BE REMOVED FROM THE LIBRARY, DOES IT?

24 THE WITNESS: IT'S NOT CLEAR WHETHER IT
25 IS ALL OR JUST A LOT OF THEM.

1 BY MS. ULRICH:

2 Q. IT SPECIFICALLY MENTIONS TWO TITLES, CORRECT?

3 A. YES.

4 Q. ONE OF THE ISSUES RELATED TO THIS INCIDENT?

5 A. THREE, ACTUALLY, I THINK.

6 Q. OKAY.

7 A. NO. FOUR. SEX TIPS SEX TOYS 101; THE JOY OF
8 GAY SEX; THERE IS GREAT SEX TIPS; AND THERE IS THE
9 ILLUSTRATED GUIDE TO EXTENDED MASSIVE ORGASM, WHICH ARE
10 THE FOUR TITLES MENTIONED SPECIFICALLY IN THE ARTICLE.

11 Q. WOULD IT BE A SAFE ASSUMPTION THAT THOSE ARE NOT
12 ALL OF THE SEX EDUCATION MATERIALS AT THE LIBRARY?

13 A. PROBABLY A SAFE ASSUMPTION, ALSO JUDGING FROM
14 THE ARTICLE IT WOULD BE A SAFE ASSUMPTION THAT THOSE ARE
15 NOT ALL THE MATERIALS CHALLENGED EITHER.

16 Q. ONE OF THE ISSUES RELATED TO THIS INCIDENT WAS
17 THAT PEOPLE DOES NOT WANT THEIR TAX DOLLARS SPENT ON
18 WHAT THEY TERMED PORNOGRAPHIC MATERIALS, WASN'T IT?

19 A. YES.

20 Q. GOING BACK TO YOUR EXPERT REPORT, YOU ALSO
21 MENTIONED, AND I BELIEVE YOU DID TALK ABOUT THIS EARLIER
22 THIS MORNING, ABOUT AN INCIDENT IN ANCHORAGE, ALASKA.

23 A. YES.

24 THE COURT: I DON'T WANT TO RUSH YOU AT
25 ALL. IF YOU ARE NEARING THE END OF YOUR CROSS

1 EXAMINATION, THEN I'D SAY WE FINISH IT. IF YOU ARE NOT,
2 WE WILL TAKE A MORNING RECESS.

3 MS. ULRICH: I THINK IT MIGHT BE
4 APPROPRIATE TO HAVE A MORNING RECESS, YOUR HONOR.

5 THE COURT: COURT IS IN RECESS FOR 10
6 MINUTES, WE ARE OFF THE RECORD. COUNSEL ARE EXCUSED.

7 (BREAK TAKEN.)

8 THE CLERK: ALL RISE. COURT IS IN
9 RECESS.

10 THE COURT: THE GOVERNMENT MAY RESUME
11 YOUR CROSS EXAMINATION.

12 MS. ULRICH: THANK YOU, YOUR HONOR.

13 BY MS. ULRICH:

14 Q. I BELIEVE WE LEFT OFF ON PAGE 17 OF YOUR EXPERT
15 REPORT IN WHICH YOU CITED A SCHOOL BOARD VOTING TO
16 RESTRICT ACCESS TO THE BOOK, IT'S PERFECTLY NORMAL,
17 WHICH IS A POPULAR SEX EDUCATION BOOK FOR CHILDREN
18 ENTERING PUBERTY. DO YOU SEE THAT REFERENCE?

19 A. YES.

20 Q. IN FACT, THE SCHOOL BOARD ONLY RESTRICTED ACCESS
21 TO ELEMENTARY SCHOOL STUDENTS, DIDN'T IT?

22 A. I BELIEVE THAT MAY BE THE CASE, YES.

23 Q. IF WE COULD PULL UP EXHIBIT 368, PLEASE. DO YOU
24 RECOGNIZE DEFENDANT'S EXHIBIT 368?

25 A. YES. THIS IS THE ARTICLE FROM THE NEWSLETTER ON

1 WHICH THE STATEMENT IN THE REPORT WAS BASED.

2 Q. THE FIRST SENTENCE STATES THAT ACCESS WAS
3 RESTRICTED TO ELEMENTARY SCHOOL LIBRARIES?

4 A. YES.

5 Q. ACCESS WAS ALLOWED TO MIDDLE SCHOOL STUDENTS,
6 WASN'T IT?

7 A. YES.

8 Q. YOU WOULD ASSUME THAT THE SCHOOL BOARD HAS THE
9 INHERENT POWER TO CONTROL ITS CURRICULUM FOR ELEMENTARY
10 SCHOOLS, WOULDN'T YOU?

11 A. I WOULD ASSUME THEY HAVE THE INHERENT POWER TO
12 CONTROL THE CURRICULUM FOR MIDDLE AND HIGH SCHOOLS AS
13 WELL.

14 Q. YOU STATE IN YOUR REPORT THAT TWO CHILDREN'S SEX
15 EDUCATION BOOKS ARE ON THE 10 MOST CHALLENGED TITLES IN
16 THE COUNTRY, CORRECT?

17 A. YES.

18 Q. THESE TWO BOOKS ARE IT'S PERFECTLY NORMAL AND
19 IT'S SO AMAZING, A BOOK ABOUT EGGS, SPERM, BIRTH, BABIES
20 AND FAMILIES, CORRECT?

21 A. YES.

22 Q. SO YOU BELIEVE THAT A WEBSITE OPERATOR THAT
23 PLACES THOSE TWO BOOKS ON A WEBSITE WOULD REASONABLY
24 FEAR PROSECUTION UNDER COPA?

25 A. THAT IS NOT WHAT MY REPORT SAYS. THAT IS NOT

1 WHAT I'M TESTIFYING TO. I BELIEVE THAT THESE ARE
2 INDICATIVE OF THE KIND OF ATTITUDES THAT WOULD BE
3 PREVAILING IN THE SOCIETY AND COULD BE USED TO TRY TO
4 PRESSURE FOR PROSECUTIONS UNDER COPA OR ANY OTHER
5 STATUTE, BUT I CANNOT PREDICT WHAT BOOKS OR WHAT
6 MATERIALS WOULD BE PROSECUTED UNDER COPA.

7 Q. THESE ARE BOOKS WITH FREQUENT COMPLAINTS,
8 CORRECT?

9 A. YES, THEY ARE.

10 Q. ON PAGE 18 OF YOUR REPORT, YOU DISCUSS A
11 DEMONSTRATION REGARDING BOOKS IN AN OCALA, FLORIDA
12 LIBRARY, CORRECT?

13 A. YES.

14 Q. YOU DO NOT KNOW WHETHER THE LIBRARY CHANGED ITS
15 POLICIES BECAUSE OF THIS DEMONSTRATION, DO YOU?

16 A. NO, I DO NOT.

17 Q. ON PAGE 20 OF YOUR REPORT, YOU MENTION A
18 COMPLAINT IN CHARLES COUNTY, MARYLAND REGARDING THE
19 REQUIRED READING LIST IN THE SCHOOL. YOU DON'T KNOW THE
20 OUTCOME OF THIS COMPLAINT, DO YOU?

21 A. NO, I DON'T, BUT THE VERY FACT THAT THE
22 COMPLAINT WAS MADE BY THE VICE CHAIR OF THE BOARD OF
23 EDUCATION IS WHAT I WAS ATTEMPTING TO HIGHLIGHT.

24 Q. YOU DO NOT KNOW THE OUTCOME OF THE INSTANCE IN
25 GUILDERLAND, NEW YORK OF A TRUSTEE WANTING STICKERS

1 PLACED ON CERTAIN BOOKS IN THE LIBRARY, DO YOU?

2 A. NO, I DON'T, BUT ONCE AGAIN, THE POINT WAS THAT
3 IT WAS NOT JUST AN ORDINARY CITIZEN, BUT A LIBRARY
4 TRUSTEE.

5 Q. YOUR REPORT INCLUDES CHALLENGES OF PRIVATE
6 INDIVIDUALS IN IT, DOES IT NOT?

7 A. YES, IT DOES.

8 Q. I BELIEVE YOU TESTIFIED EARLIER THAT BECAUSE
9 COPA HAS CIVIL PENALTIES, THAT CAN LEAD TO AN EVEN MORE
10 CHILLING EFFECT, DIDN'T YOU?

11 A. YES, I DID.

12 Q. THIS CONCLUSION IS BASED ON AN ASSUMPTION THAT
13 PRIVATE CITIZENS COULD BRING LAWSUITS UNDER COPA?

14 A. ON THAT POSSIBILITY, BUT I'M NOT AN ATTORNEY,
15 AND I'M NOT TESTIFYING AS A LEGAL EXPERT.

16 Q. YOU DO NOT KNOW HOW CIVIL PENALTIES ACTUALLY
17 WOULD WORK UNDER COPA, DO YOU?

18 A. NO, I DO NOT.

19 Q. YOU HAVE STATED THAT CLASSIC LITERATURE, SUCH AS
20 CATCHER IN THE RYE, IS OFTEN CHALLENGED, CORRECT?

21 A. YES.

22 Q. ARE YOU STATING THAT A WEBSITE OPERATOR PLACING
23 CATCHER IN THE RYE ON THE WEB WOULD REASONABLY FEAR
24 PROSECUTION UNDER COPA?

25 A. NO, I'M NOT.

1 Q. EVEN THOUGH IT HAS BEEN FREQUENTLY CHALLENGED?

2 A. MY REFERENCES TO CATCHER IN THE RYE AND OTHER
3 WORKS OF LITERATURE WAS TO NOTE THAT CHALLENGES AND IN
4 GENERAL THE ATMOSPHERE SURROUNDING THESE THINGS IS NOT
5 AFFECTED NECESSARILY BY THE LITERARY QUALITY OR
6 NOTORIETY OF THE WORKS.

7 Q. YOU ALSO CITE AS EXAMPLES IN YOUR REPORT
8 SUPPORTING THE PLAINTIFFS FEAR OF PROSECUTION THE FACT
9 THAT TWO BOOKS WERE CHALLENGED IN CONNECTICUT. THE
10 TITLES OF THESE BOOKS WERE THE WITCH OF BLACKBIRD POND
11 AND BRIDGE TO TERABITHIA. THESE BOOKS WERE CHALLENGED
12 BECAUSE OF WITCHCRAFT, CORRECT?

13 A. YES.

14 Q. THEY WERE NOT CHALLENGED BECAUSE OF SEXUAL
15 CONTENT, WERE THEY?

16 A. NO, NOR DID I CLAIM SO.

17 Q. IF YOU COULD TURN TO PAGE 26 OF YOUR REPORT. IF
18 YOU COULD PLEASE READ THE LAST BULLET POINT ON PAGE 26
19 OF YOUR REPORT FOR ME.

20 A. CERTAINLY. ALSO IN 2004, SOUTH CAROLINA
21 LEGISLATORS DEMANDED CUTS IN THE BUDGET OF SOUTH
22 CAROLINA EDUCATIONAL TELEVISION AFTER IT AIRED A
23 DOCUMENTARY ON GAYS, WE ARE YOUR NEIGHBORS.

24 Q. IN FACT, IT WAS NOT MULTIPLE LEGISLATORS, BUT
25 ONE LEGISLATOR THAT MADE THIS STATEMENT, CORRECT?

1 A. I DON'T RECALL, TO BE HONEST, BUT IF THAT IS
2 WHAT IT SAID IN THE NEWSLETTER ARTICLE, I WILL ACCEPT
3 THAT.

4 Q. YOU DID NOT REPORT ON THE -- STRIKE THAT,
5 PLEASE. IF WE CAN PULL UP DEFENDANT'S EXHIBIT 372,
6 PLEASE.

7 DO YOU RECOGNIZE EXHIBIT 372?

8 A. IT'S AN ARTICLE FROM THE NEWSLETTER OR A PAGE
9 FROM THE NEWSLETTER.

10 Q. IS THIS THE ARTICLE ABOUT THE CHALLENGED BOOKS
11 FOR WITCHCRAFT THAT YOU REFERRED TO IN YOUR REPORT?

12 A. I ASSUME SO. THE END OF THAT ARTICLE.

13 Q. DOESN'T TOM MURPHY OF THE CONNECTICUT DEPARTMENT
14 OF EDUCATION NOTE THAT IT IS RARE THAT A BOOK IS REMOVED
15 AT A PARENT'S REQUEST?

16 A. YES, EXCEPT I WOULD NOTE TWO THINGS. I RECORDED
17 THIS IN THE NEWSLETTER SIMPLY AS PART OF THE STORY AS
18 ONE WAY OF SAYING WHAT A PLAYER SO-TO-SPEAK IN THE
19 INCIDENT SAID. I FIND FRANKLY THAT CONTENTION DIFFICULT
20 TO BELIEVE. MANY REQUESTS TO REMOVE BOOKS ARE NOT
21 REPORTED TO STATE DEPARTMENTS OF EDUCATION. I CERTAINLY
22 DON'T KNOW THE SPECIFICS OF HOW CONNECTED TO REMOVAL
23 EFFORTS THE CONNECTICUT DEPARTMENT OF EDUCATION HAS
24 BEEN. IT VARIES FROM STATE TO STATE OF HOW MUCH
25 INTEREST THEY TAKE IN SUCH THINGS.

1 Q. THIS IS WHAT YOU REPORTED IN YOUR NEWSLETTER
2 THOUGH, ISN'T IT?

3 A. THIS IS FROM THE NEWSLETTER, YES. I REPORT -- I
4 WRITE MANY -- WE WRITE MANY THINGS IN THE NEWSLETTER.
5 WE TRY TO BE EVEN HANDED.

6 Q. ON PAGE 21 OF YOUR REPORT YOU NOTED THAT SCHOOL
7 DISTRICT TRUSTEES IN BAKERSFIELD, CALIFORNIA SOUGHT
8 REMOVAL FROM SCHOOL CLASSROOMS OF THE BOOK, THE BLUEST
9 EYE, CORRECT?

10 A. YES.

11 Q. THE COMPLAINANT IN THIS INSTANCE CALLED THE BOOK
12 OBSCENE, DIDN'T HE?

13 A. I ASSUME SO, YES.

14 Q. ISN'T IT TRUE THAT A COMMITTEE DETERMINED THAT
15 THE BOOK WAS NOT, IN FACT, OBSCENE?

16 MR. WIZNER: IF SHE IS REFERRING TO AN
17 EXHIBIT, SHE SHOULD SHOW THE WITNESS THE EXHIBIT.

18 MS. ULRICH: IF WE CAN PULL UP EXHIBIT
19 373, PLEASE.

20 THE COURT: 373?

21 MS. ULRICH: 373. YOUR HONOR.

22 THE COURT: THANK YOU.

23 BY MS. ULRICH:

24 Q. DOES THIS REFRESH YOUR RECOLLECTION ABOUT WHAT
25 YOU REPORTED IN YOUR REPORT?

1 A. YES. THIS APPEARS TO BE THE REPORT THAT THIS
2 WAS BASED UPON.

3 Q. AND IF YOU LOOK ON PAGE 2 OF DEFENDANT'S EXHIBIT
4 373, IT IS STATED -- THE COMPLAINANT STATED THAT THE
5 BOOK IS OBSCENE, ACCORDING TO A DICTIONARY DEFINITION.
6 CORRECT?

7 A. YES.

8 Q. AT THE TOP OF THE SECOND COLUMN IT'S STATED THAT
9 THE COMMITTEE REPORTED THAT THE BOOK WAS NOT OBSCENE,
10 CORRECT?

11 A. YES.

12 Q. ON PAGE 22 OF YOUR REPORT, YOU STATE THAT
13 LITERATURE FOR SMALL CHILDREN SUCH AS CLIFFORD THE BIG
14 RED DOG AND DISNEY'S CHRISTMAS STORYBOOK HAVE COME UNDER
15 ASSAULT, AS YOU PUT IT. DO YOU SEE THAT?

16 A. YES.

17 Q. CLIFFORD THE BIG RED DOG DOES NOT HAVE ANY
18 SEXUAL CONTENT, DOES IT?

19 A. NO, IT DOES NOT. IN FACT, JUST TO MAKE
20 EVERYTHING CLEAR, SINCE THIS REPORT WAS WRITTEN, THE
21 SCHOOL DISTRICT THAT DID THIS, IN FACT, DROPPED THEIR
22 CONTENTIONS THAT CLIFFORD THE BIG RED DOG AND DISNEY'S
23 CHRISTMAS STORYBOOK, BUT CONTINUED TO FOCUS ON A NUMBER
24 OF OTHER REJECTED TITLES.

25 Q. I TAKE IT FROM THE INCLUSION IN YOUR REPORT THAT

1 THESE WERE TWO TITLES THAT HAD RECEIVED COMPLAINTS?

2 A. AT THAT TIME, YES.

3 Q. DO I ALSO UNDERSTAND CORRECTLY THAT YOU WOULD
4 NOT CONTEND THAT A WEBSITE OPERATOR PLACING CLIFFORD THE
5 BIG RED DOG ON THE WEB WOULD REASONABLY FEAR PROSECUTION
6 UNDER COPA?

7 A. NO, THAT IS NOT MY TESTIMONY.

8 Q. NOR WOULD YOU CONTEND THAT A WEBSITE OPERATOR
9 PLACING DISNEY'S CHRISTMAS STORYBOOK WOULD REASONABLY
10 FEAR PROSECUTION UNDER COPA?

11 A. NO, THAT IS NOT MY CONTENTION.

12 Q. IS IT SAFE TO ASSUME THAT DISNEY'S CHRISTMAS
13 STORYBOOK CONTAINS NO SEXUAL CONTENT?

14 A. I HAVE NOT LOOKED AT THE BOOK, BUT IF I WERE A
15 BETTING MAN, THAT IS WHERE I WOULD PUT MY MONEY.

16 Q. SOME OF THE MATERIALS NOTED IN YOUR REPORT HAVE
17 BEEN OBJECTED TO AS BEING OBSCENE, CORRECT?

18 A. YES.

19 Q. IT IS YOUR POSITION, ISN'T IT, THAT PLAINTIFFS
20 DO NOT REASONABLY FEAR PROSECUTION UNDER OBSCENITY LAWS?

21 A. NO, THEY DO NOT.

22 Q. ISN'T IT TRUE THAT YOU ALSO CONCLUDE IN YOUR
23 REPORT THAT PHILADELPHIA GAY NEWS, THE PLAINTIFF, IS NOT
24 AN EXPLICITLY SEXUAL SITE BY ANY REASONABLE DEFINITION?

25 A. YES, BUT UNFORTUNATELY MY EXPERIENCE IN THIS

1 AREA IS THAT REASONABLE STANDARDS DO NOT ALWAYS PREVAIL.

2 Q. IN YOUR REPORT, YOUR REVIEW OF PLAINTIFFS
3 WEBSITES LED YOU TO CONCLUDE THAT THERE IS NOTHING ON
4 THEM THAT COULD BE DEEMED HARMFUL TO MINORS UNDER ANY
5 REASONABLE DEFINITION OF THOSE WORDS. DIDN'T YOU
6 CONCLUDE THAT IN YOUR REPORT?

7 A. YES, THAT IS MY PERSONAL OPINION, BUT ONCE AGAIN
8 WHAT IS REASONABLE IS NOT WHAT IS ALWAYS PREVALENT.

9 Q. NO FURTHER QUESTIONS.

10 THE COURT: DON'T GO AWAY, SIR.

11 MR. WIZNER: NO REDIRECT, YOUR HONOR.

12 THE COURT: OKAY. I TAKE THAT BACK. YOU
13 ARE EXCUSED.

14 (WITNESS EXCUSED.)

15 THE COURT: LEAVE ANY PAPERS BEHIND THAT
16 ARE NOT YOURS.

17 MS. ULRICH: YOUR HONOR, DEFENDANT WOULD
18 LIKE TO MOVE TO STRIKE THE TESTIMONY OF PROFESSOR
19 REICHMAN AS HIS CONCLUSIONS DO NOT MEET THE REQUIREMENTS
20 OF FEDERAL RULE OF EVIDENCE 702 FOR EXPERT TESTIMONY.
21 FIRST, IT IS NOT BASED ON SUFFICIENT DATA, WHICH IS
22 REQUIRED UNDER RULE 702. IT IS BASED ON ANECDOTAL
23 EVIDENCE FROM VARIOUS NEWSLETTER ARTICLES AND THE
24 OUTCOME OF MANY OF THE ANECDOTES UPON WHICH HE REPORTED
25 IS NOT KNOWN. IN FACT, THE EXPERT REPORT IS ESSENTIALLY

1 A 30 PAGE DOCUMENT OF ANECDOTES WITH VERY LITTLE
2 ANALYSIS. AGAIN, THIS RELATES TO THE SECOND ELEMENT
3 UNDER RULE 702. THE TESTIMONY IS NOT DONE BY RELIABLE
4 PRINCIPLES AND METHODS. IT IS SIMPLY AN AMALGAMATION OF
5 ANECDOTAL EVIDENCE THAT IS HEARSAY WITHIN HEARSAY.
6 THIRD, UNDER RULE 702, THE WITNESS HAS NOT APPLIED THE
7 PRINCIPLES AND METHODS RELIABLY TO THE FACTS OF THIS
8 CASE. THE WITNESS' EXPERTISE IS IN WHAT HE HAS CALLED
9 CENSORSHIP IN SCHOOLS AND LIBRARIES. THE PUBLICATION
10 THAT HE WORKS FOR IS THE AMERICAN LIBRARY ASSOCIATION.
11 THIS IS SOMETHING COMPLETELY DIFFERENT THAN THE LAW OF
12 COPA AND THE LEGAL REQUIREMENTS FOR WHAT IS HARMFUL TO
13 MINORS UNDER COPA. HIS CONCLUSION THAT THE PLAINTIFFS
14 WOULD REASONABLY FEAR PROSECUTION UNDER COPA MUST BE
15 BASED ON THE DEFINITION UNDER COPA, NOT ON ANECDOTAL
16 EVIDENCE AND COMPLETELY OTHER CIRCUMSTANCES SUCH AS
17 PUBLIC SCHOOLS AND LIBRARIES.

18 ADDITIONALLY, THE EXPERT PURPORTS TO
19 RELATE SOME OF HIS EXPERTISE BASED ON LEGAL ASSUMPTIONS
20 ABOUT HOW COPA WOULD WORK EVEN THOUGH HE IS NOT A LEGAL
21 EXPERT ADMITTEDLY. FOR THESE REASONS WE WOULD SEEK BOTH
22 TO STRIKE HIS TESTIMONY AS AN EXPERT WITNESS IN THIS
23 CASE, AS WELL AS STRIKE EXHIBIT 23 WHICH ARE AGAIN MORE
24 ANECDOTAL EVIDENCE AS REPORTED IN THE NEWSLETTER AND NOT
25 RELEVANT TO THE LEGAL STANDARDS UNDER COPA.

1 THE COURT: 23 IS HIS REPORT.

2 MS. ULRICH: NO. THE ATTACHMENTS TO HIS
3 REPORTS. WE WOULD ALSO SEEK TO STRIKE HIS REPORT IN THE
4 EVENT THAT THE COURT DOES STRIKE HIM AS AN EXPERT
5 WITNESS, OBVIOUSLY, YOUR HONOR.

6 THE COURT: THAT IS EXHIBIT 22?

7 MS. ULRICH: CORRECT, YOUR HONOR.

8 THE COURT: HEAR FROM THE PLAINTIFFS
9 PLEASE.

10 MR. WIZNER: YES, YOUR HONOR. THIS IS
11 PRINCIPALLY AN OBJECTION ABOUT RELEVANCE. IT IS NOT
12 ABOUT PROFESSOR REICHMAN'S EXPERTISE, AND INDEED IT
13 COULD NOT BE. THERE IS LITERALLY NO ONE IN THE COUNTRY
14 WITH PROFESSOR REICHMAN'S EXPERTISE ABOUT THE KINDS OF
15 MATERIALS INCLUDING SEXUAL MATERIALS THAT HAVE BEEN
16 TARGETED FOR CENSORSHIP AND SUPPRESSION BOTH BY
17 GOVERNMENT OFFICIALS AND BY PRIVATE CITIZENS.

18 OUR ARGUMENT AS IT WAS IN RESPONSE TO THE
19 MOTION IN LIMINE IS THAT THIS ARGUMENT GOES TO WEIGHT
20 AND NOT TO ADMISSIBILITY. DEFENDANT IS FREE TO ARGUE,
21 HAS ARGUED AND PRESUMABLY WILL ARGUE AT CLOSING THAT
22 PROFESSOR REICHMAN'S TESTIMONY IS TOO ATTENUATED FROM
23 THE ISSUES OF COPA AND THE KIND OF STORIES THAT HE HAS
24 REPORTED ON FOR 25 YEARS ARE NOT STRONG EVIDENCE OF
25 PLAINTIFFS' FEAR OF PROSECUTION OR COPA'S OVERBREADTH.

1 AND YOUR HONOR IS FREE TO DECIDE AT THE CONCLUSION OF
2 THIS CASE HOW MUCH WEIGHT TO GIVE THAT TESTIMONY, BUT I
3 DON'T THINK THAT DEFENDANT HAS COME CLOSE TO
4 ESTABLISHING THAT THAT TESTIMONY IS NOT ADMISSIBLE FOR A
5 NUMBER OF REASONS.

6 FIRST OF ALL, COPA HAS NEVER BEEN
7 ENFORCED AND DEFENDANT HAS BEEN SOMEWHAT STINGY IN
8 DISCOVERY IN SHARING WHAT KINDS OF PROTOCOLS OR
9 GUIDELINES WILL BE USED TO ENFORCE COPA. THEREFORE
10 SPEAKERS AROUND THE COUNTRY MUST BE LEFT TO THEIR OWN
11 DEVICES IN DETERMINING WHAT KIND OF RISKS THAT THEY ARE
12 GOING TO TAKE IN PERFORMING THEIR SPEECH TO A
13 BROADLY-WORDED STATUTE.

14 SECOND OF ALL, DEFENDANT SEEMS TO BE
15 EQUATING ACTUAL PROSECUTIONS AND CONVICTIONS WITH
16 REASONABLE FEAR OF SUCH PROSECUTIONS AND CONVICTIONS.
17 THERE ARE MANY PLAINTIFFS AND MANY OTHER SPEAKERS WHO
18 CAN'T AFFORD TO WAIT FOR JUDICIAL RESOLUTION OF A
19 PROSECUTION BUT EVEN THE FEAR ITSELF OF A PROSECUTION
20 WOULD BE ENOUGH TO CHILL AND CHANGE THEIR SPEECH. AND
21 AS THE 3RD CIRCUIT HAS SAID, EVEN EXTREME APPLICATIONS
22 OF CONTENT BASED LAWS ARE RELEVANT TO DETERMINING
23 PLAINTIFF CHILL. AND AS THIS COURT AND THE SUPREME
24 COURT HAVE HELD PREVIOUSLY, EVEN HYPERBOLIC CLAIMS OF
25 CHILL ARE RELEVANT TO PLAINTIFFS' STANDING AND TO THE

1 REACH OF THE STATUTE.

2 PROFESSOR REICHMAN'S TESTIMONY IS
3 RELEVANT IN ANOTHER RESPECT. IT IS RELEVANT TO
4 PLAINTIFFS' VAGUENESS AND OVERBREADTH CLAIMS. THE
5 QUESTION AGAIN FOR PLAINTIFFS IS WHETHER GIVEN THE
6 INEXACT NATURE OF THE SPEECH DESCRIBED IN THE ACT AND
7 THE CATASTROPHIC COSTS OF GUESSING WRONG, THEY CAN
8 AFFORD EVEN TO APPROACH THE LINE SEPARATING WHAT COPA
9 PRESCRIBES AND WHAT IT PERMITS.

10 TWO MORE BRIEF POINTS, YOUR HONOR. AS
11 MENTIONED PREVIOUSLY, COPA DOES HAVE CIVIL PENALTIES AS
12 WELL AS CRIMINAL. THOSE CIVIL PENALTIES HAVE A LESSER
13 STANDARD. MOREOVER, IT HAS NEVER BEEN DETERMINED
14 WHETHER THOSE CIVIL PENALTIES WOULD BE PRIVATELY
15 ENFORCEABLE OR ONLY PUBLICLY ENFORCEABLE BY THE UNITED
16 STATES, AND THAT IS SOMETHING THAT SPEAKERS WOULD HAVE
17 TO TAKE INTO ACCOUNT. IF IT WERE DETERMINED TO BE
18 PRIVATELY ENFORCEABLE, AND CERTAINLY THAT IS NOT A
19 FRIVOLOUS ARGUMENT, THEN THE COMPLAINTS FROM AROUND THE
20 COUNTRY THAT WERE TESTIFIED TO THIS MORNING, EVEN THOSE
21 THAT DID NOT RESULT IN GOVERNMENT RESPONSE, WOULD BE
22 VERY RELEVANT.

23 FINALLY, WE HAVE HEARD TESTIMONY ABOUT
24 THE AFFIRMATIVE DEFENSES IN THIS CASE. WE HAVE HEARD
25 TESTIMONY THAT PUTTING UP A CREDIT CARD SCREEN OR

1 PUTTING UP SOME KIND OF AGE VERIFICATION DEVICE WOULD
2 CREATE A COST TO THE WEBSITE, SUCH THAT EVERY TIME A
3 VISITOR CAME TO A WEBSITE THERE WOULD BE AN EXPENSE TO
4 THAT WEBSITE. CERTAINLY, ORGANIZED CAMPAIGNS LIKE WE
5 HEARD ABOUT TODAY IN THE CONTEXT OF THE FCC COULD RESULT
6 IN A FORM OF HECKLER'S VETO. ORGANIZED PUBLIC PRESSURE
7 AGAINST A WEBSITE EVEN IN THE ABSENCE OF A PROSECUTION
8 MIGHT WELL BE VERY RELEVANT TO THE KIND OF MATERIAL THAT
9 PEOPLE COULD PUT ON THE WEB.

10 PROFESSOR REICHMAN'S TESTIMONY WILL
11 ASSIST THE FACT FINDER IN ALL OF THESE DETERMINATIONS.
12 I THINK THERE IS VERY LITTLE CONCERN THAT THE
13 FACT-FINDER WILL BE UNDULY INFLUENCED OR PREJUDICED BY
14 THIS TESTIMONY AND WE THINK YOU SHOULD ACCEPT IT.

15 MS. ULRICH: YOUR HONOR, IF I MAY JUST
16 BRIEFLY RESPOND.

17 THE COURT: YES, PLEASE.

18 MS. ULRICH: THE PLAINTIFFS THEMSELVES
19 CAN TESTIFY AS TO THEIR FEAR OF PROSECUTION. PROFESSOR
20 REICHMAN HAS BEEN OFFERED AS AN EXPERT TO SAY THAT THEIR
21 FEAR OF PROSECUTION IS REASONABLE. HE HAS NOT BEEN
22 PROFFERED AS AN EXPERT ON PLAINTIFFS' VAGUENESS OR
23 OVERBREADTH CLAIMS, ALTHOUGH IT NOW APPEARS THAT
24 BELATEDLY HE IS BEING SOUGHT AS AN EXPERT IN THAT AREA,
25 WHICH OBVIOUSLY WE WOULD STRENUOUSLY OBJECT TO.

1 PROFESSOR REICHMAN'S EXPERTISE IS IN SCHOOLS AND
2 LIBRARIES. HIS EXPERTISE IS NOT AT ALL TIED TO THE
3 STATUTORY LANGUAGE OF COPA. HE HAS NO EXPERTISE IN
4 STATUTORY INTERPRETATION, CIVIL PENALTIES, COSTS TO
5 WEBSITE OPERATORS AND OTHER POINTS THAT PLAINTIFFS'
6 COUNSEL HAS RAISED. THERE IS SIMPLY NOT A FIT BETWEEN
7 PROFESSOR REICHMAN'S EXPERTISE IN SCHOOL BOARDS AND
8 LIBRARIES AND COMPLAINTS TO THOSE AND THE STATUTORY
9 LANGUAGE OF COPA AND WHAT THAT MEANS AND WHAT SOMEBODY
10 CAN REASONABLY FEAR PROSECUTION UNDER THAT STATUTORY
11 LANGUAGE.

12 MR. WIZNER: ONE FINAL REMARK, YOUR
13 HONOR. IN DENYING DEFENDANT'S MOTION TO DISMISS THIS
14 CASE PRIOR TO THE OUTSET OF THIS TRIAL, YOUR HONOR NOTED
15 IN A FOOTNOTE THAT IN SOME COMMUNITIES --

16 THE COURT: YOU MEAN THE DEFENDANT'S
17 MOTION?

18 MR. WIZNER: DEFENDANT'S MOTION TO
19 DISMISS.

20 THE COURT: YOU CALLED IT PLAINTIFFS'
21 MOTION?

22 MR. WIZNER: I'M HAVING A PROBLEM.
23 DEFENDANT'S MOTION TO DISMISS.

24 YOUR HONOR NOTED IN A FOOTNOTE THAT IN
25 SOME COMMUNITIES EVEN HOMOSEXUAL KISSING MAY BE

1 CONSIDERED PRURIENT. AGAIN, THE KIND OF TESTIMONY
2 OFFERED BY PROFESSOR REICHMAN HERE IS INTENDED TO ASSIST
3 THE COURT IN THOSE KINDS OF DETERMINATIONS. HE IS NOT
4 INTENDED TO BE AN EXPERT ON WHETHER THE STATUTE IS
5 VAGUE. THAT WOULD BE A LEGAL CONCLUSION. THE POINT OF
6 HIS TESTIMONY IS THAT THERE ARE SPEAKERS AROUND THE
7 COUNTRY WHO MAY VERY WELL BE CHILLED AND DETERRED FROM
8 OFFERING SPEECH ON THE WEB BECAUSE OF THE PUBLIC
9 ATMOSPHERE THAT HAS SURROUNDED THE ISSUE OF SEXUAL
10 SPEECH IN SCHOOLS, LIBRARIES AND ELSEWHERE.

11 THE COURT: HAVING HAD A MODEST BUT
12 FOCUSED EXPERIENCE WITH DAUBERT AND ITS PROGENY, AND
13 HAVING WRITTEN OPINIONS ON IT, I FIND THIS -- THE OFFER
14 OF THIS TESTIMONY EXTRAORDINARILY CHALLENGING TO THE
15 COURT ON THE ISSUE OF ULTIMATE ADMISSIBILITY.

16 I THINK WHAT IS FAIR TO THE PARTIES AND
17 PERMISSIBLE IS THIS. I WILL MAKE A CONDITIONAL RULING
18 THAT THE RESEARCH MODALITIES AND METHODOLOGY OF
19 ANALYZING THIS MATERIAL IS NOT OPAQUE, IT'S NOT
20 FANCIFUL, IT IS A PLAIN AND OPEN, EASILY UNDERSTOOD
21 METHOD. I'M IMPRESSED WITH THE VOLUME OF MATERIAL THAT
22 THE WITNESS WAS EXPOSED TO AND REPORTED ON IN
23 PLAINTIFFS' EXHIBIT 23 WHICH I BELIEVE ARE THE
24 ATTACHMENTS. DO I HAVE THAT STRAIGHT? YES. I'M
25 FURTHER AWARE AS I MENTIONED THE OTHER DAY THAT UNDER

1 ONE OF THE CASES AND LINE OF CASES AFTER DAUBERT,
2 STARTING WITH KUMO TIRE, TESTIMONY FROM A PURPORTED
3 EXPERT WHO IS NOT A SCIENTIST, ENGINEER OR OTHER EXPERT
4 OF THAT TYPE, THAT THE COURT CAN RECEIVE TESTIMONY FROM
5 PEOPLE WHO ARE NOT SCIENTISTS BUT WHO HAVE FIRSTHAND
6 EXPERIENCE WITH THE DATA THAT IS REFERRED TO IN THERE,
7 AND BE A BASIS FOR THEIR OPINION. SO IN VERY GENERAL
8 TERMS THE STATUS OF THE WITNESS AS AN EXPERT QUA STATUS
9 IS NOT THE ISSUE, NOR HAS IT BEEN ARGUED. THE OPINIONS
10 ARE CLAIMED BY THE DEFENSE TO BE IRRELEVANT TO GREAT
11 MEASURE AND OF A QUALITY NOT UP TO THE STANDARDS
12 REQUIRED BY THE LAW NOR DO HIS OPINIONS FIT INTO THE
13 TASK BEFORE THE COURT. AND FIT IS A WORD OF ART, AS WE
14 KNOW. ACCORDINGLY, BEING WELL AWARE THAT THIS IS A
15 NON-JURY PROCEEDING, THE COURT HEREBY DENIES THE MOTION
16 TO STRIKE CONDITIONALLY AND THE COURT WILL REVISIT THE
17 ISSUE IN THE CONTEXT OF THE ENTIRE CASE WHEN THE COURT
18 DECIDES THE MERITS. AND I WOULD AUTHORIZE THE PARTIES
19 IN SUBMITTING ANY ARGUMENTS OR MATERIALS POST-TRIAL.
20 THEY ARE INVITED TO REASSERT OR RECHALLENGE AND
21 RE-RESPOND SO I WILL TAKE ANOTHER LOOK LATER.

22 I THINK IT'S A DISCRETIONARY ISSUE, I
23 SUSPECT, BUT AS SUCH IN A NON-JURY PROCEEDING I DON'T
24 THINK ANYBODY IS INJURED BY IT. I'M CERTAINLY NOT NOR
25 WOULD ANY FACT FINDER BE IMPRESSED WITH SOME DEFINITIVE

1 SCIENTIFIC OPINION AS WE ARE IN MANY OTHER CASES WITH
2 THIS TYPE OF EVIDENCE. I THINK THE TYPE OF EVIDENCE IS
3 EXTRAORDINARILY UNUSUAL AS IS THE ISSUE BEFORE THIS
4 COURT, AND THE ISSUE OF WHAT COMMUNITY STANDARDS ARE AND
5 THE LIKELIHOOD OF PROSECUTION -- FEAR OF PROSECUTION,
6 I'M SORRY, ARE SOMEWHAT ELUSIVE CONCEPTS. I WILL NOT
7 SAY THEY ARE ILLUSORY BUT THEY ARE DIFFICULT TO RESOLVE.
8 AND THE COURT NEEDS ALL THE HELP IT CAN GET. AND YOU
9 WILL READ WHAT MY FINAL DECISION IS AND HOW THIS FITS
10 INTO THE WHOLE PICTURE IN MY ADJUDICATION ON THE MERITS.
11 THAT CONCLUDES MY RULING ON THE MOTION TO STRIKE THE
12 MATERIAL. SO THE MOTION AS TO ALL REQUESTS TO STRIKE IS
13 DENIED CONDITIONALLY FOR THE REASONS STATED ABOVE.

14 IS PLAINTIFF PREPARED TO CALL THE NEXT
15 WITNESS?

16 MR. HANSEN: WE ARE, YOUR HONOR.

17 MS. MARSHALL: PLAINTIFFS WOULD LIKE TO
18 CALL PLAINTIFF ADAM GLICKMAN, YOUR HONOR.

19 THE COURT: YOU ARE NOT NEAR A
20 MICROPHONE. IT WOULD HELP.

21 MS. MARSHALL: PLAINTIFFS WOULD LIKE TO
22 CALL ADAM GLICKMAN.

23 THE COURT: WATCH YOUR STEP, PLEASE.

24 ADAM GLICKMAN, PLAINTIFF'S WITNESS,
25 SWORN.

1 THE CLERK: STATE AND SPELL YOUR FULL NAME
2 FOR THE RECORD, PLEASE.

3 THE WITNESS: ADAM K. GLICKMAN. A-D-A-M,
4 MIDDLE INITIAL K, G-L-I-C-K-M-A-N.

5 DIRECT EXAMINATION

6 BY MS. MARSHALL:

7 Q. GOOD MORNING, MR. GLICKMAN.

8 A. GOOD MORNING.

9 Q. FIRST, I WOULD LIKE TO THANK YOU FOR COMING THIS
10 MORNING FROM CALIFORNIA AFTER HAVING ALREADY BEEN HERE
11 LAST WEEK AND EXPECTING TO TESTIFY ON THURSDAY.

12 A. MY PLEASURE.

13 Q. WE APPRECIATE YOUR EFFORTS AND TIME.

14 MR. GLICKMAN, WHERE DO YOU LIVE?

15 A. LOS ANGELES, CALIFORNIA.

16 Q. ARE YOU MARRIED?

17 A. I AM.

18 Q. DO YOU HAVE CHILDREN?

19 A. I DO.

20 Q. HOW MANY?

21 A. TWO.

22 Q. HOW OLD ARE THEY?

23 A. THEY ARE BOTH TWO.

24 Q. DO YOU HAVE A COLLEGE DEGREE?

25 A. I DO.

1 Q. FROM WHERE?

2 A. TUFTS UNIVERSITY.

3 Q. WHEN DID YOU RECEIVE THIS DEGREE?

4 A. 1989.

5 Q. WHAT FIELD OF STUDY?

6 A. I WAS A DOUBLE MAJOR, SOCIOLOGY AND PHILOSOPHY.

7 Q. I'M SORRY. WHAT WAS THE SECOND ONE?

8 A. PHILOSOPHY.

9 Q. ARE YOU EMPLOYED?

10 A. I AM.

11 Q. WHERE ARE YOU CURRENTLY EMPLOYED?

12 A. CONDOMANIA.

13 Q. AND HOW LONG HAVE YOU BEEN EMPLOYED AT

14 CONDOMANIA?

15 A. 16 YEARS.

16 Q. CAN YOU SPELL CONDOMANIA FOR THE COURT.

17 A. C-O-N-D-O-M-A-N-I-A.

18 Q. WHAT POSITION DO YOU CURRENTLY HOLD AT

19 CONDOMANIA?

20 A. CEO.

21 Q. HOW LONG HAVE YOU HELD THIS POSITION?

22 A. 16 YEARS.

23 Q. WHAT ARE YOUR RESPONSIBILITIES AS CEO?

24 A. OVERSEE MOST ASPECTS OF BUSINESS, FROM RETAIL TO

25 E-COMMERCE TO WHOLESALE. MANAGEMENT ISSUES, HIRING,

1 FIRING EMPLOYEES. BUYING, PURCHASING, JUST MAKING SURE
2 EVERYBODY IS DOING THEIR JOB AND THAT WE ARE PURSUING
3 OUR VISION.

4 Q. DID YOU FOUND THE COMPANY?

5 A. I DID.

6 Q. WHEN WAS THAT?

7 A. 1991.

8 Q. AND WHERE IS CONDOMANIA HEADQUARTERED?

9 A. IN LOS ANGELES.

10 Q. AND WHERE IS IT INCORPORATED?

11 A. STATE OF MASSACHUSETTS.

12 Q. IS CONDOMANIA A FOR PROFIT CORPORATION?

13 A. WE ARE.

14 Q. WHAT IS CONDOMANIA?

15 A. CONDOMANIA IS A SPECIALTY RETAILER FOCUSING ON
16 CONDOMS AND OTHER SAFER SEX AND ROMANCE RELATED
17 PRODUCTS.

18 Q. DO YOU HAVE A RETAIL STORE?

19 A. YES.

20 Q. WHERE IS THAT LOCATED?

21 A. NEW YORK CITY.

22 Q. HOW LONG HAVE YOU HAD THAT RETAIL STORE?

23 A. 16 YEARS.

24 Q. WHAT WAS THE GENESIS OF CONDOMANIA?

25 A. AT TUFTS UNIVERSITY IN THE LATE 1980S, AIDS, HIV

1 WAS BECOMING A BIG DEAL ALONG WITH TALK OF CONDOMS AS
2 REALLY THE ONLY METHOD OF PREVENTION SHORT OF
3 ABSTINENCE, YET NONE OF MY FRIENDS WANTED ANYTHING TO DO
4 WITH THIS PRODUCT. IT WAS UNCOMFORTABLE TO BUY, TO USE,
5 HAD A REAL BAD REPUTATION OR STIGMA. I WAS VERY
6 ENTREPRENEURIAL AND VERY MUCH INVOLVED WITH MY SOCIOLOGY
7 MAJOR, UNDERSTANDING THE WAY SOCIETY WORKS, CULTURE
8 TRENDS, NORMS AND THOUGHT THERE HAS TO BE A BETTER WAY,
9 THERE'S GOT TO BE A WAY TO REPOSITION THIS PRODUCT SO
10 THAT PEOPLE DON'T MIND CARRYING IT, USING IT.

11 SO AS A SOCIOLOGICAL EXPERIMENT, AS AN
12 ENTREPRENEURIAL ENDEAVOR I PACKAGED GENERIC CONDOMS IN
13 WHAT LOOKED LIKE A MATCH BOOK. ON ONE SIDE WAS A
14 CARTOON OF OUR MASCOT, WHICH WAS JUMBO THE ELEPHANT.
15 AND ON THE OTHER SIDE, IT SAID A SAFE JUMBO IS A HAPPY
16 JUMBO. AND I WENT OUT DOOR TO DOOR SELLING TUFTS
17 CONDOMS. WELL, HALF THE DOORS WERE ADMITTEDLY SLAMMED
18 IN MY FACE, BUT THE OTHER HALF BOUGHT EAGERLY AND THE
19 MOST AMAZING DISCOVERY WAS MADE, WHICH IS THAT IF YOU
20 CAN REPOSITION THIS PRODUCT IN THE MIND OF THE CONSUMER,
21 GIVE THEM ANOTHER REASON TO HAVE THE PRODUCT, SUCH AS A
22 SCHOOL MEMENTO, IT CHANGES THEIR RELATIONSHIP WITH THE
23 PRODUCT. AND FROM THAT EXPERIENCE, I REALIZED THAT
24 PEOPLE COULD BE CARRYING AND USING THIS PRODUCT IN A WAY
25 THAT THEY HAD NEVER DONE BEFORE.

1 THAT LED TO A SURVEY IN MY SOCIOLOGY
2 MAJOR WHICH LED TO MY SENIOR THESIS IN MY SOCIOLOGY
3 MAJOR LOOKING AT THE PUBLIC AND THE PRIVATE WHEN IT
4 BECAME TO THE ISSUE OF CONDOMS, WHICH LED TO THE
5 ESTABLISHMENT OF MY FIRST COMPANY AS A GRADUATE OF
6 COLLEGE CALLED CUSTOM CONDOMS, WHICH EVENTUALLY LED TO
7 THE OPENING OF CONDOMANIA IN 1991 AS AMERICA'S FIRST
8 CONDOM STORE WITH THE PREMISE OF BEING TO PROVIDE AN
9 ENVIRONMENT WHERE PEOPLE COULD FEEL SAFE AND COMFORTABLE
10 LEARNING ABOUT AND PURCHASING CONDOMS AND CONDOM RELATED
11 PRODUCTS.

12 Q. DOES CONDOMANIA HAVE A WEBSITE?

13 A. WE DO.

14 Q. WHEN WAS THE WEBSITE LAUNCHED?

15 A. JANUARY OF 1996.

16 Q. WHAT IS THE WEB ADDRESS?

17 A. CONDOMANIA.COM.

18 Q. WHAT WAS YOUR -- WHAT WAS YOUR INCENTIVE FOR
19 LAUNCHING THE WEBSITE?

20 A. WE HAD ALREADY FIRMLY BEEN ESTABLISHED AS A
21 RETAIL COMPANY WITH SOME EIGHT STORES AROUND THE UNITED
22 STATES, AND IT WAS EXPENSIVE AND DIFFICULT TO MANAGE
23 STREET LEVEL RETAIL AS A SMALL COMPANY. THE INTERNET
24 PROMISED A WAY TO EXPAND OUR PRODUCTS, OUR SERVICES, OUR
25 BRAND TO A GLOBAL AUDIENCE IN A WAY THAT WAS MUCH MORE

1 EFFICIENT AND COST EFFECTIVE.

2 Q. WHAT IS CONDOMANIA.COM'S MISSION?

3 A. THE MISSION OF THE WEBSITE IS VERY SIMILAR TO
4 THE MISSION OF THE COMPANY ESTABLISHED IN THE VERY
5 BEGINNING, WHICH WAS TO PROVIDE INFORMATION AND GUIDANCE
6 FOR PEOPLE TO PURCHASE CONDOMS OR RELATED PRODUCTS IN
7 THE PRIVACY OF THEIR OWN HOME IN SOMEWHAT OF AN
8 ANONYMOUS FASHION AND TO UNDERSTAND THAT THERE IS A
9 WORLD OF CHOICES OUT THERE AND INFORMATION THAT IS JUST
10 NOT AVAILABLE AT YOUR LOCAL DRUGSTORE PHARMACY.

11 Q. DO YOU HAVE ONLINE RETAIL COMPETITORS?

12 A. WE DO.

13 Q. WHO ARE THEY?

14 A. DRUGSTORE.COM, AMAZON.COM, CONDOMS.COM, JUST TO
15 NAME A FEW.

16 Q. DO THOSE SITES CONTAIN CONTENT SIMILAR TO
17 CONDOMANIA.COM?

18 A. SOME DO IN SOME WAYS.

19 Q. IN WHAT WAYS ARE THEY SIMILAR?

20 A. THEY SELL A LOT OF THE SAME PRODUCTS WE SELL.

21 Q. HOW ARE THEY DIFFERENT?

22 A. NONE OF THEM PROVIDE THE GUIDANCE AND THE
23 DETAILED INFORMATION, THE PERSONAL FIRSTHAND ACCOUNTS OF
24 THE WAY THESE PRODUCTS CAN BENEFIT THE USER AND ARE
25 INTENDED TO BE USED.

1 Q. BACK TO YOUR WEBSITE. HOW MANY PAGES ARE ON
2 CONDOMANIA.COM'S WEBSITE?

3 A. IT'S A HARD QUESTION TO ANSWER BECAUSE THERE IS
4 BOTH STATIC PAGES AND DYNAMIC PAGES. I WILL EXPLAIN. A
5 STATIC PAGE IS A PAGE THAT EXISTS LIKE A PAGE IN A BOOK,
6 IT IS ALREADY WRITTEN AND IT EXISTS ON THE INTERNET.
7 THOSE PAGES WOULD BE OUR SAFER SEX INFORMATION PAGES OR
8 PAGES WITH MAGAZINE REVIEWS ABOUT PRODUCTS. WE CARRY
9 OVER 700 PRODUCTS IN OUR WEBSITE. ALL THOSE PRODUCTS
10 ARE PULLED OUT OF DATABASES WHEN SOMEONE WANTS TO SEE A
11 PAGE DETAILING THAT PRODUCT. SO THE PAGE DOES NOT
12 ACTUALLY EXIST UNTIL SOMEBODY WANTS INFORMATION ON THAT
13 PRODUCT AND THEN A TEMPLATE IS POPULATED WITH THE
14 RELEVANT FIELDS BASED ON THE PRODUCT AND THE INFORMATION
15 FOR THAT PRODUCT.

16 Q. DO YOU MEASURE TRAFFIC TO YOUR WEBSITE?

17 A. YES.

18 Q. HOW DO YOU MEASURE THE TRAFFIC TO YOUR WEBSITE?

19 A. FOR THE LAST YEAR WE HAVE USED A VERY
20 COMPREHENSIVE TOOL, A PROGRAM CALLED FIRECLICK MADE BY A
21 COMPANY CALLED DIGITAL RIVER.

22 Q. WHAT DOES FIRECLICK MEASURE?

23 A. IT IS A VERY COMPREHENSIVE WEB ANALYTIC TOOL
24 THAT MEASURES ALL ASPECTS OF TRAFFIC, VISITORS,
25 E-COMMERCE SALES, TRENDS, CONVERSION RATES. IT'S MEANT

1 TO GIVE US VISIBILITY INTO WHAT IS ACTUALLY HAPPENING ON
2 OUR WEBSITE IN REAL TIME.

3 Q. DO YOU RECEIVE REGULAR REPORTS FROM FIRECLICK?

4 A. WE DO. FIRECLICK, AS I MENTIONED, PROVIDES UP
5 TO THE MOMENT DATA. SO WE MIGHT GENERATE A REPORT ON
6 ANY GIVEN MOMENT ABOUT SOMETHING HISTORICAL OR THE
7 TRENDS OR WE MIGHT ACTUALLY JUST CHECK INTO THE WEB
8 ANALYSIS AND THE REALTIME ANALYTICAL DATA IN THE MOMENT
9 TO SEE WHAT'S GOING ON.

10 Q. HOW OFTEN DO YOU USE FIRECLICK TO GET ACTIVITY
11 OR TO GET INFORMATION REGARDING THE ACTIVITY ON YOUR
12 WEBSITE?

13 A. UPWARDS OF 20 TIMES A DAY.

14 Q. BASED ON YOUR REVIEW OF THE FIRECLICK DATA
15 GATHERING, HOW MANY UNIQUE VISITORS DO YOU HAVE TO YOUR
16 WEBSITE ON AN AVERAGE DAY?

17 A. LOOKING BACK OVER THE LAST 12 MONTHS, 4,000 TO
18 5,000 UNIQUE VISITORS A DAY.

19 Q. AND I APOLOGIZE IF WE HAVE BEEN OVER THIS BEFORE
20 WITH OTHER WITNESSES, BUT CAN YOU BRIEFLY EXPLAIN WHAT A
21 UNIQUE VISITOR IS AS OPPOSED TO NONUNIQUE VISITOR?

22 A. THE UNIQUE VISITOR IS DEFINED BY OUR SOFTWARE AS
23 AN INDIVIDUAL THAT HAS COME TO THE WEBSITE TO SEE WHAT
24 WE HAVE. IT COULD BE ONE PAGE OR 10 PAGES. IT'S
25 DIFFERENT THAN VISITS, RIGHT. ONE UNIQUE VISITOR SUCH

1 AS MYSELF COULD VISIT THE WEBSITE FOUR TIMES THAT DAY.
2 IF WE WERE COUNTING VISITS, WELL, THEN I HAVE JUST
3 ACCOUNTED FOR FOUR VISITS, BUT I'M JUST ONE UNIQUE
4 VISITOR, SO I JUST ACCOUNTED FOR ONLY ONE UNIQUE VISIT.

5 Q. AND WHAT PERCENTAGE OF THE UNIQUE VISITORS TO
6 YOUR WEBSITE PURCHASE SOMETHING?

7 A. TWO AND-A-HALF PERCENT ON AVERAGE.

8 Q. IS CONDOMANIA.COM A SIGNIFICANT ELEMENT OF
9 CONDOMANIA'S BUSINESS?

10 A. VERY SIGNIFICANT. IT REPRESENTS ABOUT 80
11 PERCENT OF OUR REVENUE.

12 Q. IS VISITOR TRAFFIC IMPORTANT TO THE RETAIL SALES
13 AT CONDOMANIA.COM?

14 MR. HIRT: OBJECTION, YOUR HONOR, VAGUE.

15 THE COURT: REWORD.

16 BY MS. MARSHALL:

17 Q. IS THE TRAFFIC TO YOUR WEBSITE IMPORTANT TO THE
18 SALES THAT YOU GENERATE AT CONDOMANIA.COM?

19 A. VERY IMPORTANT.

20 OUR SITE IS AN EDUCATIONAL SITE. WE
21 INFORM CUSTOMERS, WE HELP THEM IN THEIR DECISION-MAKING
22 PROCESS. WE DON'T ASSUME THAT ANY VISITOR IS A CUSTOMER
23 UNTIL THEY HAVE HAD A CHANCE TO SPEND TIME ON OUR
24 WEBSITE AND GO THROUGH THE LEARNING PROCESS OF THE
25 DIFFERENT PRODUCTS THAT ARE AVAILABLE. SO IT'S CRITICAL

1 THAT WE HAVE VISITORS BECAUSE IT'S VISITORS THAT LEAD TO
2 CUSTOMERS. IN ADDITION, OUR CONVERSION RATE, LIKE MANY
3 OTHER E-COMMERCE SITES THAT I'M AWARE OF, IS TWO
4 AND-A-HALF, THREE PERCENT. YOU NEED AN AWFUL LOT OF
5 WELL-QUALIFIED VISITORS TO GENERATE REVENUE. FINALLY,
6 WE BELIEVE THAT TODAY'S VISITORS ARE TOMORROW'S
7 CUSTOMERS. VERY OFTEN SOMEONE MAY VISIT THE WEBSITE
8 FOUR, FIVE, SIX TIMES, OUR DATA TELLS US, BEFORE THEY
9 MAY ACTUALLY MAKE A PURCHASE.

10 Q. FOR THOSE WHO PURCHASE PRODUCTS ON
11 CONDOMANIA.COM, DO YOU KNOW IF THEY ARE LOCATED IN THE
12 UNITED STATES OR ABROAD?

13 A. WE DO.

14 Q. HOW DO YOU KNOW?

15 A. WE SHIP TO THEM.

16 Q. ARE ANY OF THE PURCHASERS FROM OUTSIDE THE
17 UNITED STATES?

18 A. THEY ARE.

19 Q. HOW MANY?

20 A. APPROXIMATELY 12 PERCENT OF OUR ORDERS ARE
21 SHIPPED TO INDIVIDUAL CONSUMERS OUTSIDE THE UNITED
22 STATES.

23 Q. DO YOU COLLECT ANY DEMOGRAPHICAL DATA ON THE
24 UNIQUE VISITORS TO YOUR WEBSITE?

25 A. THE ONLY DEMOGRAPHIC DATA WE COLLECT AT ALL ARE

1 FOR PEOPLE WHO ARE ACTUALLY MAKING A PURCHASE, PRIMARILY
2 THEIR ADDRESS. IN THE PAST, UP UNTIL A YEAR AGO AND FOR
3 THOUSANDS OF CUSTOMERS IN OUR DATABASE, WE HAD OPTIONAL
4 QUESTIONS TO CHECK THAT INCLUDED AGE, ASKING PEOPLE TO
5 PUT THEMSELVES IN AN AGE GROUP, AND GENDER, ASKING THEM
6 TO IDENTIFY THEIR GENDER.

7 Q. WHAT PERCENTAGE OF THOSE PURCHASERS FILLED OUT
8 THE OPTIONAL INFORMATION?

9 A. IT WAS ABOUT 40 PERCENT AT THAT TIME.

10 Q. AND WHAT WERE THE DEMOGRAPHICS OF THOSE
11 PURCHASERS WHO FILLED OUT THE OPTIONAL INFORMATION?

12 A. GENERALLY SPEAKING, ABOUT 65 PERCENT OF OUR
13 CUSTOMERS IDENTIFIED THEMSELVES AS BEING MALE, AND AGAIN
14 GENERALLY SPEAKING, ABOUT 55, 50 PERCENT OF OUR
15 CUSTOMERS WERE OVER THE AGE OF 35, AND ABOUT 50 PERCENT
16 WERE UNDER THE AGE OF 35.

17 Q. WERE ANY OF THE PURCHASERS 18 YEARS OLD OR
18 YOUNGER?

19 A. YES.

20 Q. WHAT PERCENT?

21 A. ABOUT TWO PERCENT IDENTIFIED THEMSELVES AS BEING
22 UNDER 18.

23 Q. DO YOU KNOW IF ANY PURCHASERS ARE 17 YEARS OLD
24 OR YOUNGER?

25 A. YES.

1 Q. HOW DO YOU KNOW THAT?

2 A. OUR WEBSITE IS NOT AN ABSOLUTE CHANNEL. BY THAT
3 I MEAN, WHEN SOMEONE COMES TO OUR WEBSITE, IT IS NOT
4 UNUSUAL THAT THEY WOULD THEN CALL US TO ASK A FOLLOW-UP
5 QUESTION ABOUT A PRODUCT THEY ARE LOOKING AT ON OUR
6 WEBSITE. IT'S NOT UNUSUAL FOR SOMEONE TO LOOK AT OUR
7 WEBSITE AND THEN CALL US TO PLACE THE ORDER. NOT EVERY
8 WEB-GENERATED LEAD RESULTS IN WEB ORDER, IT CAN RESULT
9 IN AN ACTUAL PHONE ORDER. AND I AND MY STAFF HAVE
10 SPOKEN TO MANY TEENAGERS WHO CALL US WITH QUESTIONS
11 ABOUT PRODUCTS THAT THEY INTEND TO BUY, THAT THEY ARE
12 BUYING OR JUST QUESTIONS IN GENERAL AFTER VISITING OUR
13 WEBSITE.

14 Q. ARE ANY OF THE PURCHASERS AT CONDOMANIA.COM 17
15 YEARS OLD OR YOUNGER?

16 A. YES.

17 Q. HOW ARE THE PURCHASES MADE ON CONDOMANIA.COM?

18 A. IF THEY ARE MADE ON CONDOMANIA.COM, THEY ARE
19 MADE WITH A CREDIT CARD.

20 Q. WHAT IS THE MINIMUM INFORMATION A CREDIT CARD
21 COMPANY REQUIRES YOU TO PROVIDE ON THE PURCHASER?

22 A. THE MINIMUM AMOUNT OF INFORMATION THAT OUR
23 PROCESSOR REQUIRES FOR ANY TRANSACTION IS SIMPLY A
24 CREDIT CARD NUMBER AND EXPIRATION DATE.

25 Q. DO YOU SELL PRODUCTS IN YOUR NEW YORK STORE TO

1 PERSONS UNDER THE AGE OF 17?

2 A. YES.

3 Q. ARE THOSE PURCHASES MADE WITH CREDIT CARDS?

4 A. SOME ARE.

5 Q. IS IT YOUR EXPERIENCE THAT PEOPLE UNDER THE AGE
6 OF 17 HAVE ACCESS TO CREDIT CARDS TO MAKE PURCHASES?

7 MR. HIRT: OBJECTION, LACK OF FOUNDATION
8 FOR A GENERALIZED OPINION.

9 THE COURT: SUSTAINED.

10 LAY A FOUNDATION.

11 BY MS. MARSHALL:

12 Q. IN YOUR EXPERIENCE, DO YOU KNOW IF PEOPLE UNDER
13 THE AGE OF 17 HAVE ACCESS TO CREDIT CARDS?

14 MR. HIRT: SAME OBJECTION. I'M SORRY,
15 YOUR HONOR. WITHDRAW THAT. CALLS FOR YES OR NO. I'M
16 SORRY.

17 MS. MARSHALL: OKAY.

18 THE WITNESS: YES.

19 BY MS. MARSHALL:

20 Q. HOW DO YOU KNOW THIS?

21 A. I TRY TO SPEND A GOOD AMOUNT OF TIME IN OUR
22 RETAIL STORE IN NEW YORK CITY. I ALSO AM IN CONSTANT
23 COMMUNICATIONS WITH OUR STAFF AND MANAGEMENT OF OUR
24 STORE IN NEW YORK CITY. IT IS FROM THOSE EXPERIENCES
25 DIRECTLY THAT I KNOW OUR STORE SELLS TO TEENAGERS WHO

1 HAVE CREDIT CARDS.

2 Q. A FEW MORE QUESTIONS WITH RESPECT TO THE
3 VISITORS TO YOUR WEBSITE AS OPPOSED TO THE PURCHASERS.
4 FIRECLICK, DOES FIRE CLICK COLLECT ANY DEMOGRAPHICAL
5 DATA ON VISITORS TO THE WEBSITE?

6 A. FIRECLICK HAS THE ABILITY TO DETERMINE IF
7 VISITORS ARE COMING FROM A CERTAIN GEOGRAPHICAL AREA,
8 WHETHER IT'S COUNTY, STATE OR COUNTRY, BUT WE HAVE NO
9 WAY OF KNOWING FROM THAT REPORTING WHICH VISITORS
10 CORRESPOND TO WHICH CUSTOMERS. THAT IS TO SAY, IT'S ALL
11 ANONYMOUS. IF FIRECLICK TELLS US THAT FIVE PERCENT OF
12 OUR TRAFFIC IS COMING FROM THE STATE OF CALIFORNIA,
13 THERE IS NO WAY FOR US TO KNOW WHO THOSE PEOPLE ARE.
14 IT'S JUST ANONYMOUS NUMBERS.

15 Q. FROM THE FIRECLICK INFORMATION, ARE YOU ABLE TO
16 DETERMINE IF YOU HAVE VISITORS TO YOUR WEBSITE WHO
17 RESIDE IN COUNTRIES OTHER THAN THE UNITED STATES?

18 A. YES.

19 Q. DO YOU KNOW WHAT PERCENT ARE FROM OUTSIDE THE
20 UNITED STATES?

21 A. APPROXIMATELY 15 PERCENT.

22 Q. AGAIN, THIS IS AS OPPOSED TO THE PURCHASERS, BUT
23 DO YOU KNOW IF YOU HAVE VISITORS TO YOUR SITE WHO ARE
24 UNDER THE AGE OF 17?

25 A. YES.

1 Q. AND HOW DO YOU KNOW THAT?

2 A. OVER THE LAST 10 YEARS, I HAVE HAD MANY
3 OPPORTUNITIES TO ANSWER OUR 800 CALLS, AND I HAVE HAD
4 DIRECT DISCUSSIONS WITH OUR STAFF THAT ANSWERS 800
5 CALLS, AND WE HAVE SPOKEN TO -- I HAVE SPOKEN TO MANY
6 TEENAGERS WHO CALL US WITH A FOLLOW-UP QUESTION AFTER
7 VISITING OUR WEBSITE.

8 Q. SO JUST TO BE CLEAR, DO YOU IN FACT HAVE
9 VISITORS TO YOUR WEBSITE WHO ARE UNDER THE AGE OF 17?

10 A. YES.

11 Q. DOES CONDOMANIA.COM HAVE A TARGET AUDIENCE?

12 A. WE DO, YES.

13 Q. CAN YOU DESCRIBE THE TARGET AUDIENCE OF
14 CONDOMANIA.COM?

15 A. IT'S BROAD IN ONE SENSE IN THAT IT'S INCLUSIVE
16 OF ALL AGES AND BACKGROUNDS.

17 IT'S MORE FOCUSED IN THE SENSE THAT OUR
18 TARGET AUDIENCE IS ANYONE WHO WANTS TO LEARN MORE ABOUT
19 THE PRODUCTS THEY ARE BUYING. WE ARE AN
20 INFORMATIONALLY-DRIVEN SITE. WE PROVIDE GUIDANCE THAT
21 HELP PEOPLE MAKE CHOICES IN THEIR BUYING DECISION-MAKING
22 PROCESS.

23 Q. DO YOU SELL PRODUCTS AT CONDOMANIA.COM THAT ARE
24 AVAILABLE FOR PURCHASE IN DRUG STORES?

25 A. YES.

1 Q. WHY DO PEOPLE VISIT YOUR WEBSITE TO PURCHASE
2 THESE PRODUCTS IF THEY CAN PURCHASE THEM IN ANY
3 DRUGSTORE?

4 MR. HIRT: YOUR HONOR, OBJECTION, LACK OF
5 FOUNDATION.

6 THE COURT: LAY A FOUNDATION, PLEASE.
7 BY MS. MARSHALL:

8 Q. DO YOU KNOW WHY PEOPLE PURCHASE PRODUCTS AT YOUR
9 WEBSITE THAT ARE AVAILABLE FOR PURCHASE IN ANY CORNER
10 DRUGSTORE?

11 A. YES.

12 Q. HOW DO YOU KNOW THAT?

13 A. I KNOW THAT BECAUSE OVER THE LAST 10 YEARS I
14 HAVE SPOKEN WITH A LOT OF OUR CUSTOMERS. I'VE EXCHANGED
15 E-MAILS WITH THOSE CUSTOMERS, MY STAFF HAS AS WELL.
16 PEOPLE COME TO US FOR A COUPLE OF KEY REASONS. ONE,
17 PRIVACY. IT IS OFTEN DIFFICULT AND EMBARRASSING, THEY
18 REPORT TO US, TO BUY THESE PRODUCTS IN A DRUGSTORE.
19 TWO, THERE IS A WIDE RANGE OF PRODUCTS AVAILABLE TODAY
20 IN THIS MARKETPLACE, IN THE CONDOM CATEGORY. THERE
21 COULD BE SOME 60 OR 70 CHOICES AT A DRUGSTORE AND NO ONE
22 TO ASK ABOUT THE DIFFERENCES BETWEEN THE DIFFERENT
23 PRODUCTS AND THE BRANDS AND THE FEATURES AND THE COLORS
24 AND THE MATERIALS. THERE IS A GREAT DEAL OF INFORMATION
25 THAT OUGHT TO ACCOMPANY THE SALE OF THESE PRODUCTS.

1 THAT INFORMATION IS NOT BEING PROVIDED BY THE RETAILERS.
2 IN MY OPINION THAT INFORMATION IS NOT BEING
3 APPROPRIATELY SUPPLIED BY THE MANUFACTURERS. IT'S
4 CONDOMANIA'S MISSION TO MAKE SURE THAT ALL OF OUR
5 CUSTOMERS HAVE ACCESS TO UNFETTERED, UNBIASED, HONEST
6 INFORMATION ABOUT ALL OF THE PRODUCTS THAT WE SELL.

7 Q. DOES YOUR COMPANY HAVE COMMUNITY OUTREACH
8 PROGRAMS?

9 A. YES.

10 Q. PLEASE DESCRIBE THE COMMUNITY OUTREACH PROGRAMS
11 FOR THE COURT.

12 A. TODAY'S COMMUNITY OUTREACH PROGRAM AT CONDOMANIA
13 RESIDES PRIMARILY AT OUR NEW YORK STORE. WE HAVE AN
14 OUTREACH COORDINATOR WHO HAS A DEGREE FROM N.Y.U. IN
15 SEXUAL HEALTH. SHE IS ALSO A MANAGER OF OUR STORE. AND
16 SHE HAS CREATED A PROGRAM CONSISTENT WITH OUR PROGRAMS
17 OVER THE YEARS THAT PROVIDES A RESOURCE TO THE COMMUNITY
18 TO PROVIDE SAFER SEX INFORMATION, CONDOM INFORMATION,
19 SEXUAL HEALTH INFORMATION, INFORMATION ABOUT STDs
20 PRIMARILY TO TEENAGERS. WE USE OUR STORE AS A WORKSHOP.
21 WE INVITE GROUPS INTO OUR STORE. THEN WE ALSO SEND HER
22 AND OTHER STAFF OUT INTO THE COMMUNITY TO HELP TEACH
23 YOUNG PEOPLE ABOUT THE PRODUCTS AND ISSUES.

24 Q. ARE TEENAGERS PART OF THE COMMUNITY OUTREACH
25 PROGRAMS?

1 A. YES.

2 Q. WHAT HAVE YOU LEARNED ABOUT TEENAGERS AND SEXUAL
3 EDUCATION OR SEXUAL RESOURCES FROM THESE OUTREACH
4 PROGRAMS?

5 A. WHAT I HAVE LEARNED, WHAT WE HEAR AGAIN AND
6 AGAIN, WHAT MY OUTREACH COORDINATOR REPORTS TO ME IS
7 THAT MANY TEENAGERS TODAY DON'T HAVE ACCESS TO THE
8 INFORMATION THAT THEY NEED THAT THEY WANT TO PROTECT
9 THEMSELVES. WHAT WE HEAR FROM THESE TEENAGERS IS THAT
10 THEY ARE NOT GETTING IT AT HOME FROM THEIR PARENTS,
11 OFTEN NOT GETTING IT FROM THEIR SCHOOLS OR YOUTH GROUPS
12 AND THEY FEEL LOST. IT IS FOR THOSE REASONS AMONGST
13 OTHERS THAT OUR PROGRAM IS SO SUCCESSFUL IN PROVIDING
14 THE INFORMATION IN THE HIP, FUN WAY THAT CONDOMANIA
15 DOES.

16 Q. ARE TEENAGERS AN IMPORTANT PART OF
17 CONDOMANIA.COM'S AUDIENCE?

18 A. YES, THEY ARE.

19 Q. HOW SO?

20 A. ONE, IT IS PART OF OUR MISSION TO PROVIDE SAFER
21 SEX INFORMATION TO YOUNG PEOPLE. WE CONSIDER THEM TO BE
22 AN ESPECIALLY IMPORTANT CATEGORY, NOT ONLY BECAUSE THEY
23 ARE TOMORROW'S CUSTOMERS FOR US. SOME OF THEM ARE
24 TODAY'S CUSTOMERS; MOST OF THEM ARE TOMORROW'S
25 CUSTOMERS. BUT WE BELIEVE IN WHAT WE ARE DOING. THE

1 CDC REPORTS THAT THERE ARE MILLIONS OF STDS CONTRACTED
2 EACH YEAR, MANY OF THEM BY TEENAGERS. WE KNOW FROM THE
3 CDC AND OTHER AGENCIES THAT THERE ARE UP TO ONE MILLION
4 UNINTENDED TEENAGE PREGNANCIES IN THE UNITED STATES
5 ALONE EACH YEAR. WE KNOW THAT THE UNITED STATES HAS
6 DOUBLE THE TEEN PREGNANCY RATE OF ANY OTHER ADVANCED
7 COUNTRY IN THE WORLD. AND ONE OF THE REASONS I STARTED
8 THIS COMPANY, EVEN THOUGH WE ARE A FOR PROFIT COMPANY,
9 IS TO MAKE THESE PRODUCTS AND THIS INFORMATION AVAILABLE
10 WHEN OTHERS ARE NOT DOING IT.

11 Q. IS ALL OF THE CONTENT ON YOUR WEBSITE
12 CONDOMANIA.COM AVAILABLE FOR FREE?

13 A. YES, IT IS.

14 Q. IS IT IMPORTANT THAT THE CONTENT ON YOUR WEBSITE
15 BE AVAILABLE FOR FREE?

16 A. YES, IT IS.

17 Q. IF NOT ALREADY OBVIOUS, WHY IS THAT?

18 A. IT'S AT THE FOUNDATION OF OUR MISSION, TO
19 PROVIDE HONEST, UNBIASED INFORMATION TO ANYBODY WHO
20 WANTS TO HAVE IT.

21 Q. MR. GLICKMAN, I BELIEVE WHAT YOU HAVE IN FRONT
22 OF YOU IS A BINDER OF PAPERS PREVIOUSLY MARKED AS
23 PLAINTIFFS' EXHIBIT 40. PLEASE TAKE A MOMENT TO REVIEW
24 EACH OF THE PAGES IN THAT BINDER.

25 MS. MARSHALL: YOUR HONOR, I APOLOGIZ. I

1 HAVE A BINDER FOR YOU. IF I CAN APPROACH?

2 THE COURT: YES.

3 THE WITNESS: OKAY.

4 BY MS. MARSHALL:

5 Q. DO YOU KNOW WHAT THESE PAGES ARE?

6 A. I DO.

7 Q. WHAT ARE THEY?

8 A. THEY ARE PAGES FROM OUR WEBSITE.

9 Q. ARE THEY ACCURATE REPRESENTATIONS OF THE PAGES
10 FROM YOUR WEBSITE?

11 A. YES.

12 Q. I WOULD NOW LIKE TO TURN YOUR ATTENTION TO THE
13 FIRST PAGE OF PLAINTIFFS' EXHIBIT 40. I APOLOGIZE, YOUR
14 HONOR, COULD YOU SWITCH THE ELECTRONIC EXHIBIT CONTROLS
15 TO PLAINTIFFS?

16 THE COURT: SURE.

17 MS. MARSHALL: THANK YOU.

18 BY MS. MARSHALL:

19 Q. MR. GLICKMAN, YOU CAN REFER TO THE PAGES IN YOUR
20 BINDER OR WHAT IS ON THE SCREEN FOR YOU. SO TURNING TO
21 THE FIRST PAGE OF EXHIBIT 40, CAN YOU PLEASE DESCRIBE
22 THIS PAGE FOR THE COURT?

23 A. THIS IS CONDOMANIA'S HOME PAGE.

24 Q. PLEASE DESCRIBE WHAT AN INTERNET USER CAN FIND
25 ON THIS PAGE.

1 A. WHEN WE DESIGNED THIS PAGE, WE DID IT
2 RECOGNIZING THAT THERE ARE SEVERAL KEY DIFFERENT TYPES
3 OF VISITORS THAT WE HAVE. AND THE IDEA IS TO MAKE OUR
4 PRODUCTS AS EASILY ACCESSIBLE TO THE DIFFERENT TYPES OF
5 VISITORS. ONE TYPE OF VISITOR ALREADY KNOWS WHAT THEY
6 WANT AND WANTS TO GET TO THOSE PRODUCTS AS FAST AS
7 POSSIBLE. SO WE HAVE VARIOUS DROP DOWNS AND
8 NAVIGATIONAL SCHEMES THAT ALLOW THOSE PEOPLE TO GET TO
9 EXACTLY WHAT THEY WANT AS FAST AS THEY CAN.

10 WE HAVE A LARGE SEGMENT OF OUR AUDIENCE
11 THAT COMES TO US KNOWING THEY WANT SOME TYPE OF PRODUCT
12 IN OUR DIFFERENT CATEGORIES, BUT NOT KNOWING WHICH ONE.
13 THESE PEOPLE ARE COMING FOR GUIDANCE IN THEIR PURCHASING
14 AND SELECTION PROCESS. THERE ARE OTHER PEOPLE WHO ARE
15 RESEARCH ORIENTED. THEY WANT BACKGROUND INFORMATION.
16 THEY WANT ARTICLES AND REVIEWS OF DIFFERENT PRODUCTS TO
17 LEARN ABOUT THE DIFFERENT PRODUCTS THAT WE SELL. THERE
18 ARE SOME PEOPLE WHO HAVE COME TO US SIMPLY BECAUSE THEY
19 WANT SOMETHING DIFFERENT, SOMETHING THAT THEY CAN'T FIND
20 PERHAPS AT A LOCAL DRUGSTORE AS EASILY. AND THEN WE
21 HAVE PEOPLE WHO COME SOLELY FOR SAFER SEX INFORMATION,
22 EDUCATIONAL INFORMATION.

23 Q. NOW, I WOULD LIKE TO LOOK AT A FEW PAGES FROM
24 YOUR WEBSITE, USING THIS HOME PAGE AS SORT OF THE
25 STARTING POINT OR LAUNCHING POINT, AS IF WE WERE A

1 VISITOR ONLINE AND NAVIGATING THROUGH THE SITE. SO
2 STARTING WITH THIS HOME PAGE THAT YOU JUST IDENTIFIED,
3 AND DESCRIBED, CAN YOU DESCRIBE FOR THE COURT THE "THEY
4 FIT" SECTION IN THE UPPER RIGHT-HAND CORNER?

5 A. YES. YOU CAN SEE WE GIVE THIS AN AWFUL LOT OF
6 SPACE AND ATTENTION. THIS PROMOTES AND FEATURES THE
7 WORLD'S FIRST LINE OF INDIVIDUALLY FIT OR CUSTOM FITTING
8 CONDOMS. NEVER BEFORE HAS SUCH A LINE EXISTED. IT IS
9 FOR THE TIME BEING EXCLUSIVE TO OUR COMPANY, AND IT
10 ALLOWS PEOPLE TO LEARN ABOUT THIS LINE AND THE
11 EXTRAORDINARY BENEFITS OF HAVING A CONDOM WHICH IS
12 INDIVIDUALLY SIZED OR FITTED FOR THEM.

13 IF YOU WERE TO CLICK ON THE THEY FIT LOGO
14 OR ANYWHERE IN THAT AREA YOU WOULD BE TAKEN TO A PAGE
15 WHICH WE WOULD CONSIDER TO BE THEY FIT CONDOMS' GATEWAY
16 PAGE OR HOME PAGE FOR THAT PRODUCT.

17 Q. HOW MANY SIZES DOES THE THEY FIT CONDOMS COME
18 IN?

19 A. PRESENTLY 70.

20 Q. NOW, TURNING YOUR ATTENTION TO PAGE 3 OF
21 PLAINTIFFS' EXHIBIT 40, PLEASE DESCRIBE THIS PAGE FOR
22 THE COURT.

23 A. WE CALL THIS THE FIT KIT OR CONDOMANIA FIT KIT.
24 IT IS A ONE-PAGE DOCUMENT, ACTUALLY A TWO-PAGE DOCUMENT,
25 THAT CAN BE DOWNLOADED FOR FREE FROM OUR WEBSITE IN TWO

1 FORMS, A PDF AND A WORD DOCUMENT. IT ALLOWS ANYONE TO
2 CUT OUT THE TWO MEASUREMENT TOOLS, ONE FOR LENGTH AND
3 ONE FOR GIRTH. USING THE TWO TOOLS, ONE WOULD COME UP
4 WITH A SIZE VALUE COMBINATION. IT WOULD BE A LETTER FOR
5 THEIR LENGTH AND A NUMBER FOR THEIR GIRTH. OF COURSE,
6 THIS ASSUMES THAT THEY HAVE AN ERECT PENIS, AS THE
7 ILLUSTRATION SHOWS, AND ONCE THEY COME UP WITH THEIR
8 LETTER AND THEIR NUMBER, THEY PUT IT TOGETHER FOR A
9 PARTICULAR SIZE. THEY WOULD THEN LOOK DOWN AT OUR SIZE
10 CHART, AND ASSUMING THEIR COMBINATION WAS ONE OF THE 70
11 SIZES THAT WE SELL, THEY THEN HAVE IDENTIFIED THEIR
12 INDIVIDUAL SIZE FROM THIS LINE AND THEN THEY CAN GO
13 PLACE THEIR ORDER IF THEY SO CHOOSE.

14 Q. WHY DO THE LETTERS AND THE NUMBERS THAT APPEAR
15 IN THE SIZING KIT, WHY ARE THEY NOT CONSECUTIVE?

16 A. VERY MUCH ON PURPOSE. THEY ARE NONSEQUENTIAL,
17 ALMOST RANDOM. THAT IS BECAUSE WE ARE VERY CONSCIOUS
18 ABOUT PEOPLE'S SENSITIVITIES TO THEIR SIZE. IF I MAY
19 GIVE AN EXAMPLE. IN MY EXPERIENCE OUR CULTURE SEEMS TO
20 HAVE STEREOTYPES OR EASY ACKNOWLEDGMENTS ABOUT BRA
21 SIZES, 36 C MEANS ONE THING, 32 A MEANS ANOTHER. I'M
22 NOT SAYING THAT NEITHER IS GOOD NOR BAD. THEY JUST SEEM
23 TO MEAN SOMETHING TO MOST PEOPLE. WE WANTED TO AVOID
24 THAT. THAT IS WHY OUR SIZING SCHEME IS NONSEQUENTIAL,
25 SO THAT THE SMALLEST ONE, J 33, IS NO MORE OBVIOUS THAN

1 THE VERY LARGEST ONE, WHICH IS A G 22.

2 Q. ARE THE THEY FIT CONDOMS A SIGNIFICANT PORTION
3 OF THE SALES AT CONDOMANIA.COM?

4 A. YES, THEY ARE.

5 Q. WHAT PORTION OF SALES ARE THEY AT
6 CONDOMANIA.COM?

7 A. TODAY THEY REPRESENT ALMOST 15 TO 20 PERCENT OF
8 OUR TOTAL REVENUE THROUGH OUR WEBSITE.

9 Q. NOW, TURNING YOUR ATTENTION BACK TO THE HOME
10 PAGE, PAGE 1 IN PLAINTIFFS' EXHIBIT 40, UNDERNEATH THE
11 THEY FIT CONDOMS AREA, THERE APPEARS TO BE THREE CARTOON
12 CHARACTERS. CAN YOU DESCRIBE EACH OF THESE CHARACTERS
13 IN TURN?

14 A. I CAN.

15 IT MAY BE HELPFUL TO NOTE WHY THEY ARE
16 THERE.

17 BEFORE WE LAUNCHED OUR WEBSITE, AS I
18 MENTIONED, AND TO THIS DAY, WE ARE A RETAIL COMPANY AND
19 WE KNOW THE IMPORTANT ROLE THAT OUR SALESPEOPLE PLAY IN
20 OUR STORES IN PROVIDING THE GUIDANCE AND ANSWERING THE
21 QUESTIONS, EVEN ANTICIPATING THE QUESTIONS THAT OUR
22 CUSTOMERS HAVE. WE WANTED TO FIND A WAY TO REPLICATE
23 THIS EXPERIENCE ONLINE. SO THE FIRST CHARACTER THAT WAS
24 CREATED IS CALLED THE CONDOM WIZARD. THE CONDOM WIZARD
25 ALLOWS SOMEONE WHO PERHAPS DOES NOT KNOW EXACTLY WHICH

1 CONDOM PRODUCT THEY WOULD LIKE TO BUY TO GO THROUGH A
2 SERIES OF QUESTIONS AND ANSWERS TO IDENTIFY THAT SUBSET
3 OF PRODUCTS FROM THE HUNDREDS OF PRODUCTS THAT WE SELL
4 THAT ARE GOING TO BEST MEET THEIR NEEDS.

5 LIKewise, THE LOVE GYPSY DOES THE SAME
6 THING FOR GIFTS AND NOVELTIES. SHE IS AN INTERACTIVE
7 SHOPPING GUIDE, LIKE THE CONDOM WIZARD. AND THE THIRD
8 ONE IS LUCY LUBE, WHO DOES FOR LUBRICANTS WHAT THE
9 WIZARD DOES FOR CONDOMS.

10 Q. WHY DO YOU HAVE CARTOON CHARACTERS SERVING THESE
11 FUNCTIONS ON THE WEBSITE?

12 A. GOING BACK TO MY DAYS AT TUFTS, NOW SOME 18, 19
13 YEARS, IT IS CLEAR TO ME TODAY AS IT WAS THEN THAT
14 CONDOMS IN PARTICULAR CAN BE A DIFFICULT PRODUCT FOR
15 PEOPLE TO BUY. DIFFICULT TO LEARN ABOUT, PERHAPS
16 CREATING FEELINGS OF AWKWARDNESS, EMBARRASSMENT. WE
17 KNOW THAT HUMOR, LEVITY, IS ONE WAY TO PUT PEOPLE AT
18 EASE. THE WIZARD IS KIND OF CUTE, NONTHREATENING, VERY
19 MUCH IN SYNCH WITH THE LOOK AND FEEL AND THE
20 CONVERSATIONAL TONE OF CONDOMANIA.

21 Q. NOW, I WOULD LIKE TO FOLLOW THE LINK FOR ONE OF
22 THESE CHARACTERS, THE CONDOM WIZARD. TURNING YOUR
23 ATTENTION TO PAGE 5 OF PLAINTIFFS' EXHIBIT 40, PLEASE
24 DESCRIBE THIS PAGE FOR THE COURT.

25 A. THIS WOULD BE THE STARTING PAGE FOR THE CONDOM

1 WIZARD, AND WE KNOW THAT WHEN PEOPLE SHOP FOR CONDOMS,
2 EVEN IF THEY ARE NOT VERY FAMILIAR WITH CONDOMS, THERE
3 IS SOMETHING ON THEIR MIND. THERE IS A MOST IMPORTANT
4 CHARACTERISTIC. TYPICALLY IT'S SENSITIVITY. THEY WANT
5 SOMETHING THAT FEELS GOOD. PERHAPS IT IS A SIZE ISSUE;
6 THEY HAVE EXPERIENCED SLIPPAGE OR BREAKAGE DUE TO SIZE
7 ISSUE. THEY WANT SOMETHING FLAVORED FOR ORAL SEX. THIS
8 IS A STARTING POINT THAT SIMPLY ASKS THEM WHICH IS THE
9 MOST IMPORTANT CHARACTERISTIC AND THEN TAKES THEM FROM
10 THERE.

11 Q. NOW, TURNING YOUR ATTENTION TO PAGE 6 OF
12 PLAINTIFFS' EXHIBIT 40, PLEASE DESCRIBE THIS PAGE FOR
13 THE COURT.

14 A. THIS IS A PAGE -- THIS PAGE ASSUMES THAT ON THE
15 PRECEDING PAGE THE VISITOR SAID THAT THE MOST IMPORTANT
16 CHARACTERISTIC TO THEM WAS FLAVOR. SO THE WIZARD THEN
17 TAKES THEM TO THE NEXT STEP, WITH A LITTLE BANTER, THEN
18 SUGGESTS THAT THERE ARE TWO CHOICES IN THE FLAVORED
19 CONDOM CATEGORY. THERE IS CONDOMS THAT ARE FLAVORED
20 WITH A DRY POWDER AND THERE ARE CONDOMS THAT ARE
21 FLAVORED WITH A WET LUBRICANT.

22 Q. NOW, TURNING YOUR ATTENTION TO PAGE 7,
23 PLAINTIFFS' EXHIBIT 40, PLEASE DESCRIBE THIS PAGE FOR
24 THE COURT.

25 A. THIS PAGE ASSUMES THAT ON THE PRECEDING PAGE THE

1 VISITOR CHOSE TASTY LUBRICANT OR A WET LUBRICANT THAT
2 PROVIDED THE FLAVOR FOR THE CONDOM. ON THIS PAGE THE
3 VISITOR IS SIMPLY BEING ASKED WHICH FLAVOR APPEALS MOST
4 TO THEM OF THE EIGHT OR SO CHOICES THAT ARE THERE.

5 Q. DOES THE FLAVOR OF A CONDOM HAVE ANYTHING TO DO
6 WITH ITS EFFECTIVENESS?

7 A. IN TERMS OF EFFICACY, SAFETY, BREAKAGE OR
8 SLIPPAGE, NO, IT DOES NOT.

9 Q. WHY DO YOU MARKET FLAVORED CONDOMS?

10 A. FLAVORED CONDOMS ARE WE BELIEVE -- I BELIEVE
11 FLAVORED CONDOMS ARE IMPORTANT FOR A COUPLE OF REASONS.
12 ONE, THEY ARE JUST KIND OF FUN, A LITTLE BIT OF BASKIN
13 ROBBINS IN THE CONDOM CATEGORY FOR THOSE PEOPLE WHO
14 THOUGHT CONDOMS WERE ALL CUT AND DRY, ONE PHARMACEUTICAL
15 VARIETY. ALL THE DIFFERENT FLAVORS FROM STRAWBERRY TO
16 COLA SUGGESTS THAT THERE IS SOMETHING TO EXPLORE, THAT
17 IT CAN BE FUN. MORE IMPORTANTLY, THOUGH, WE RECOGNIZE
18 AS EDUCATORS, AS OPERATORS OF CONDOMANIA, MY PERSONAL
19 EXPERIENCE OVER 18 YEARS, THAT CONDOMS FOR ORAL SEX CAN
20 BE VERY, VERY IMPORTANT. IT'S OUR OPINION LIKE MANY
21 OTHER SEX EDUCATORS AND HEALTH EDUCATORS THAT I KNOW.

22 MR. HIRT: YOUR HONOR, LACK OF
23 FOUNDATION.

24 THE COURT: YOU SHOULD HAVE DONE IT AT
25 THE OPENING. YOU'RE A LITTLE LATE. NOW THAT THE

1 WITNESS HAS BEEN INTERRUPTED, THE QUESTIONER CAN ASK
2 WHATEVER QUESTION SHE WANTS ABOUT THE SOURCE OF THIS
3 INFORMATION.

4 MS. MARSHALL: THANK YOU, YOUR HONOR. SO
5 YOU WOULD LIKE ME TO LAY ANOTHER FOUNDATION.

6 THE COURT: OBJECTION IS OVERRULED.
7 BY MS. MARSHALL:

8 Q. MR. GLICKMAN --

9 THE COURT: IF YOU WANT TO ENCOURAGE
10 ANOTHER OBJECTION, YOU WILL IGNORE WHAT I SUGGESTED TO
11 YOU.

12 I DON'T KNOW WHAT THE OBJECTOR'S PROBLEM
13 WAS WITH THE LACK OF FOUNDATION. I THINK HE STARTED OUT
14 BY SAYING -- STARTING WITH HIS 18 YEARS AND SO FORTH. I
15 DID NOT RECALL EVERY WORD HE SAID.

16 BY MS. MARSHALL:

17 Q. MR. GLICKMAN, I THINK YOU WERE GIVING US A TWO
18 PART ANSWER AS TO WHY YOU MARKET FLAVORED CONDOMS. YOU
19 WERE INTERRUPTED BEFORE YOU GAVE US THE SECOND PART.

20 A. IN MY EXPERIENCE OVER 18 YEARS, AS HEALTH
21 EDUCATORS, AS SEXUAL HEALTH EDUCATORS AT CONDOMANIA WE
22 RECOGNIZE THAT ORAL SEX DOES CONTAIN SOME RISKS FOR THE
23 TRANSMISSION OF SEXUALLY TRANSMITTED DISEASES,
24 ESPECIALLY AMONGST TEENAGERS TODAY. WE KNOW THIS FROM
25 OUR EXPERIENCE WITH TEENAGERS IN EDUCATING THEM THROUGH

1 OUTREACH PROGRAMS AND THAT FLAVORED CONDOMS CAN BE AN
2 EFFECTIVE TOOL IN HELPING TO ENCOURAGE YOUNG PEOPLE TO
3 USE CONDOMS AND PROTECT THEMSELVES IF THEY CHOOSE TO BE
4 SEXUALLY ACTIVE, IF THEY CHOOSE TO HAVE ORAL SEX.

5 Q. RETURNING TO YOUR HOME PAGE, PAGE 1 OF
6 PLAINTIFFS' EXHIBIT 40, PLEASE DESCRIBE THE LINK THAT
7 APPEARS JUST BELOW LUCY LUBE ON THE RIGHT-HAND SIDE IN
8 THE MIDDLE OF THE PAGE.

9 A. PLEASURE PRODUCING CONDOMS. THIS --
10 THE COURT: EXCUSE ME. I HAVE A
11 QUESTION.

12 YOU SAID REFER TO IT. HE SAID PLEASURE
13 PRODUCING CONDOMS. WITNESS WAS ABOUT TO DO WHAT HE HAS
14 A HABIT OF DOING AND JUST VOLUNTEERING. I WOULD LIKE
15 YOU TO ASK HIM QUESTIONS.

16 MS. MARSHALL: YES, YOUR HONOR.

17 THE COURT: JUST WAIT FOR THE QUESTIONS.
18 BY MS. MARSHALL:

19 Q. PLEASE DESCRIBE WHAT A VISITOR TO YOUR SITE CAN
20 FIND IN THE PLEASURE PRODUCING SECTION OF THE WEBSITE.

21 A. THIS IS A SUBCATEGORY OF CONDOMS THAT HAVE BEEN
22 ENGINEERED OR DESIGNED TO HEIGHTENED PLEASURE AND
23 SENSITIVITY THROUGH THEIR UNIQUE SHAPE. AS YOU CAN SEE,
24 IF YOU ARE TO TAKE DOWN THE PLEASURE PRODUCING
25 DESCRIPTION, THESE CONDOMS ARE BLOATED AND HAVE EXOTIC

1 POUCHES AND UNIQUE SHAPES TOWARDS THE HEAD OF THE
2 CONDOMS WHICH PROVIDE A LOOSER FIT IN THE EXACT AREA OF
3 THE PENIS WHERE MOST OF THE NERVE ENDINGS ARE LOCATED.

4 Q. TURNING YOUR ATTENTION TO PAGE 8 OF PLAINTIFFS'
5 EXHIBIT 40, THIS MIGHT HELP A LITTLE BIT. PLEASE
6 DESCRIBE THIS PAGE FOR THE COURT.

7 A. THIS IS JUST A FEW OF THE CONDOMS I WAS
8 REMARKING ON. YOU CAN SEE THE EXOTIC SHAPES, AND THE
9 IDEA, AS I WAS SAYING, IS THIS. IF A CONDOM IS LOOSER
10 FITTING IN THE AREA WHERE THE NERVE ENDINGS ARE LOCATED,
11 THEN THOSE NERVE ENDINGS MAY REMAIN MORE RECEPTIVE.
12 MORE SENSITIVE TO FEEL. TIGHTER FITTING CONDOMS WE KNOW
13 FOR SOME MEN CAN RESTRICT PLEASURE AND SENSATION BECAUSE
14 THEY HAVE A TENDENCY TO DEADEN THE NERVE ENDINGS. THESE
15 CONDOMS ARE SPECIFICALLY DESIGNED AND MADE BY ALL THE
16 MAJOR MANUFACTURERS AS WELL AS SOME NICHE SMALLER
17 MANUFACTURERS TO BE LOOSER FITTING IN THAT AREA. A
18 COUPLE OF THINGS THEN HAPPEN. ONE, THE NERVE ENDINGS
19 STAY MORE RECEPTIVE BECAUSE THE LATEX IS LOOSER FITTING
20 IN THAT AREA AND THEN TWO, SOME OF THE EXTRA LATEX
21 ACTUALLY WASHES OVER THE SKIN CREATING MORE FRICTION AND
22 SENSATION EMULATING MORE OF A NATURAL EXPERIENCE, IF YOU
23 WILL.

24 Q. RETURNING AGAIN TO YOUR HOME PAGE, PAGE 1 OF
25 PLAINTIFFS' EXHIBIT 40, CAN A VISITOR ACCESS SAFER SEX

1 INFORMATION ON THIS PAGE?

2 A. YES, THEY CAN.

3 Q. WHERE WOULD THEY GO TO DO THAT?

4 A. THE SECTION CALLED SAFER SEX 101 AND MORE.

5 Q. AND NOW TURNING YOUR ATTENTION TO PAGE 13,
6 PLAINTIFFS' EXHIBIT 40, PLEASE DESCRIBE THIS PAGE FOR
7 THE COURT.

8 A. THIS PAGE WOULD BE A DOORWAY INTO ARTICLES AND
9 INFORMATION AT CONDOMANIA SPECIFICALLY RELATED TO SAFER
10 SEX. SOME OF IT MIGHT BE PRODUCT RELATED. A LOT OF IT
11 HAS NOTHING TO DO WITH THE SALES, THE DIRECT SALES OF
12 PRODUCT AT ALL, BUT IS THERE SPECIFICALLY TO HELP
13 EDUCATE AND INFORM.

14 Q. WHAT ARE THE DIFFERENT TOPICS A VISITOR CAN FIND
15 ON THIS PAGE?

16 A. THEY CAN FIND HIV AND AIDS STATISTICS. THEY CAN
17 FIND LINKS OUT TO OTHER WEBSITES THAT PROVIDE HEALTH,
18 SEXUAL HEALTH INFORMATION. THEY CAN FIND AN ARTICLE
19 SPECIFICALLY HERE ABOUT PRODUCT CALL ASTRAGLIDE AND HOW
20 IT MAY BE EFFECTIVE IN FIGHTING HIV AND THEN THEY HAVE
21 ACCESS TO OUR ONLINE SAFER SEX MANUAL. YOU WILL SEE THE
22 DIFFERENT CHAPTERS OF THAT MANUAL ON THE RIGHT-HAND SIDE
23 OF THIS PAGE, BEGINNING WITH SAFER SEX BEGINS WITH YOU.

24 Q. SO IN THAT COLUMN ON THE RIGHT-HAND SIDE, THERE
25 IS A LINE THAT READS DAN'S COTS AND GLOVES. IS THAT A

1 CHAPTER IN THE SAFER SEX MANUAL?

2 A. IT IS.

3 Q. I DON'T HAVE THE PAGE HERE BUT COULD YOU BRIEFLY
4 DESCRIBE FOR THE COURT WHAT ONE MIGHT FIND IN THAT
5 CHAPTER?

6 A. THERE IS A PAGE ALL ABOUT CONDOMS AND THAT PAGE
7 HAS INFORMATION SUCH AS HOW TO CARE FOR YOUR CONDOM, THE
8 PROPER APPLICATION FOR A CONDOM. WE HAPPEN TO KNOW AS
9 EDUCATORS THAT THE EFFECTIVENESS OF CONDOMS IS DIRECTLY
10 RELATED TO ITS CORRECT APPLICATION. IT'S VERY IMPORTANT
11 THAT PEOPLE OF ALL AGES KNOW HOW TO PUT ON A CONDOM,
12 THEY KNOW HOW TO CARE FOR A CONDOM. WE HAVE HEARD
13 ENDLESS STORIES ABOUT PEOPLE, YOUNG AND OLD, WHO HAVE
14 CARRIED CONDOMS AROUND IN THEIR WALLETS FOR THE LAST SIX
15 MONTHS, EFFECTIVELY DESTROYING THOSE CONDOMS, AND THEN
16 RELYING ON THEM, RELYING UPON THEM THE DAY THAT THEY
17 NEED THEM. THIS SECTION OUTLINES THE PROPER CARE OF
18 THOSE CONDOMS SO THAT THEY ARE GOING TO BE AS EFFECTIVE
19 AS POSSIBLE WHEN YOU NEED THEM. AND THEN THERE ARE SOME
20 PICTURES HERE.

21 Q. I'M SORRY. HOLD ON ONE SECOND. I THINK I NEED
22 TO HELP THE COURT BY DIRECTING YOUR ATTENTION TO PAGES
23 14, 15, THAT MIGHT BE WHERE YOU ARE IN PLAINTIFFS --

24 THE COURT: YOUR QUESTION WAS ABOUT DAN'S
25 COTS AND GLOVES.

1 THE WITNESS: I THINK THE WITNESS IS
2 GIVING ME INFORMATION ABOUT WHAT APPEARS ON THE LINE
3 TWO LINES ABOVE DANS COTS AND GLOVES, THE ALL ABOUT
4 CONDOMS LINE.

5 THE COURT: WHAT IS YOUR QUESTION NOW,
6 PLEASE?

7 BY MS. MARSHALL:

8 Q. TURNING YOUR ATTENTION TO PAGES 14 AND 15 OF
9 PLAINTIFFS' EXHIBIT 40 --

10 THE COURT: 14 AND 15?

11 MS. MARSHALL: YES, YOUR HONOR. ONE PAGE
12 OF THE WEBSITE APPEARS ON TWO PAPER PAGES.

13 BY MS. MARSHALL:

14 Q. I'M SORRY TO INTERRUPT. BUT I BELIEVE YOU WERE
15 TALKING ABOUT THIS PAGE, SO SINCE YOU HAVE ALREADY DONE
16 A LOT OF THAT, CAN YOU BRIEFLY FOR THE COURT DESCRIBE
17 WHAT THIS PAGE IS ABOUT?

18 A. YES, AGAIN, SORRY ABOUT THAT.

19 THIS IS THE BEST CARE AND USE OF A CONDOM
20 FROM HOW TO CARE FOR A CONDOM LONG BEFORE YOU USE IT, TO
21 HOW YOU ACTUALLY OPEN THAT CONDOM, TO HOW YOU APPLY IT.
22 YOU WILL SEE THAT THERE ARE ACTUALLY PICTURES SHOWING A
23 CORRECT APPLICATION OF A CONDOM ON A REPRESENTATION OF
24 AN ERECT PENIS. AS I MENTIONED BEFORE, WE KNOW THAT THE
25 EFFECTIVENESS OF ANY CONDOM IS DIRECTLY CORRELATED TO

1 THE BEST USE AND CARE OF THAT CONDOM. SO THIS
2 INFORMATION IS CRITICALLY IMPORTANT.

3 Q. TURNING YOUR ATTENTION TO PAGE 18 OF PLAINTIFFS'
4 EXHIBIT 40. PLEASE DESCRIBE THIS PAGE FOR THE COURT,
5 PAGE 18.

6 A. THIS IS A SECTION -- ACTUALLY A SUBSECTION OF A
7 LARGER CATEGORY THAT WE CALL LITTLE KINKY. THE
8 SUBSECTION IS VIBRATIONS AND MASSAGERS. WE CONSIDER
9 THIS TO BE --

10 MR. HIRT: YOUR HONOR, I THINK HE IS
11 GOING INTO A NARRATIVE.

12 THE COURT: DON'T VOLUNTEER. WAIT FOR A
13 QUESTION.

14 MS. MARSHALL: WAS THAT AN OBJECTION?

15 MR. HIRT: YES, A NARRATIVE.

16 THE COURT: STOP THE ANSWER AND ASK THE
17 WITNESS TO ANSWER.

18 MS. MARSHALL: I ASKED HIM TO DESCRIBE
19 THE PAGE.

20 THE COURT: HE DID. THEN HE WENT --
21 STARTED TO ADD MORE INFORMATION. I STOPPED HIM.

22 MS. MARSHALL: I APOLOGIZE. I GOT LOST
23 IN THE DISCOURSE.

24 BY MS. MARSHALL:

25 Q. IF I MAY BACK UP FOR JUST ONE --

1 THE COURT: WHY DON'T YOU DO THIS. WE
2 ARE GOING TO HAVE A MIDDAY RECESS NOW. SO WE CAN ALL
3 COLLECT OURSELVES AND BE BACK HERE AT 1:30.

4 COURT IS IN RECESS UNTIL 1:30. PARTIES
5 AND COUNSEL ARE EXCUSED. PLEASE COME BACK AT 1:30.
6 WATCH YOURSELF GETTING DOWN.

7 THE WITNESS: THANK YOU.

8 (LUNCH BREAK TAKEN.)

9 THE CLERK: ALL RISE. COURT IS NOW IN
10 SESSION.

11 THE COURT: GOOD AFTERNOON, EVERYBODY.

12 ALL COUNSEL: GOOD AFTERNOON, YOUR HONOR.

13 THE COURT: PLEASE BE SEATED. MR.

14 GLICKMAN, HELLO.

15 THE WITNESS: GOOD AFTERNOON.

16 THE COURT: PLEASE PROCEED.

17 MS. MARSHALL: THANK YOU.

18 BY MS. MARSHALL:

19 Q. MR. GLICKMAN, BEFORE WE LEFT, I BELIEVE WE WERE
20 ON PAGE 18 OF PLAINTIFFS' EXHIBIT 40. I WOULD LIKE TO
21 RETURN TO THAT PAGE FOR JUST A MOMENT.

22 CAN YOU DESCRIBE THIS PAGE FOR THE COURT,
23 PLEASE?

24 A. IT'S A SUBCATEGORY PAGE OF A CATEGORY CALLED
25 LITTLE KINKY FEATURING ITEMS THAT VIBRATE.

1 Q. WHAT ARE THE TYPICAL PRODUCTS THAT ONE MIGHT
2 FIND IN THIS SECTION?

3 A. IT'S ACTUALLY A VARIETY OF VIBRATING PRODUCTS
4 INTENDED FOR SEXUAL PLEASURE AND ENJOYMENT THAT WE
5 CONSIDER TO BE A LITTLE MORE DISCREET, THAT IS TO SAY
6 THEY ARE NOT OVERT PERHAPS AS A CLASSICAL SEX TOY
7 VIBRATOR OR DILDO, OFTEN DISGUISED AS ANOTHER TYPE OF
8 PRODUCT BUT INDEED MEANT FOR SEXUAL PURPOSES.

9 Q. TURNING YOUR ATTENTION NOW TO PAGE 23 OF
10 PLAINTIFFS' EXHIBIT 40, PLEASE DESCRIBE THIS PAGE FOR
11 THE COURT.

12 A. IT'S A PRODUCT DETAIL PAGE FOR A PRODUCT CALLED
13 THE TOPLESS ACADEMY'S GUIDE TO BARTENDING.

14 Q. AND WHAT IS THIS PRODUCT?

15 A. IT'S AN INSTRUCTIONAL VIDEO ON HOW TO BE A
16 BARTENDER AND YOUR INSTRUCTOR IN THE VIDEO IS A TOPLESS
17 WOMAN.

18 Q. AND WHERE ON YOUR WEBSITE CAN THIS BE FOUND, IN
19 WHAT CATEGORY?

20 A. IT'S IN A SUBCATEGORY CALLED BOOKS AND VIDEOS.

21 MS. MARSHALL: YOUR HONOR, AT THIS TIME I
22 WOULD LIKE TO OFFER INTO EVIDENCE PLAINTIFFS' EXHIBIT
23 40.

24 MR. HIRT: NO OBJECTION, YOUR HONOR.

25 THE COURT: PLAINTIFFS' EXHIBIT 40. DOES

1 THAT MEAN ALL THE PAGES, EVEN THE ONES YOU HAVE NOT
2 REFERRED TO?

3 MS. MARSHALL: THAT'S RIGHT, YOUR HONOR.
4 THERE ARE NOT THAT MANY.

5 THE COURT: I WANTED TO MAKE IT CLEAR. P
6 40 IS RECEIVED INTO EVIDENCE.

7 MS. MARSHALL: THANK YOU.

8 (P 40 ADMITTED INTO EVIDENCE.)

9 BY MS. MARSHALL:

10 Q. MR. GLICKMAN, IS THERE A SECTION ON YOUR WEBSITE
11 CALLED AFTER HOURS?

12 A. YES, THERE IS.

13 Q. PLEASE DESCRIBE THE CONTENT THAT CAN BE FOUND IN
14 THE AFTER HOURS SECTION?

15 A. THIS SECTION DOES CONTAIN WHAT WE CONSIDER TO BE
16 MORE EXPLICIT SEX TOYS THAT ARE ADULT IN NATURE.
17 EXAMPLES WOULD BE DILDOS AND VIBRATORS THAT ARE COMMONLY
18 REFERRED TO AS SEX TOYS.

19 Q. CAN THE PRODUCTS IN THE AFTER HOURS SECTION BE
20 FOUND ELSEWHERE ON THE WEBSITE?

21 A. SOME OF THEM CAN, YES.

22 Q. DO YOU REQUIRE VISITORS TO THE AFTER HOURS
23 SECTION TO PROVE THAT THEY ARE ABOVE A CERTAIN AGE
24 BEFORE ACCESSING THE PRODUCTS IN THAT SECTION?

25 A. NO, WE DON'T.

1 Q. DO YOU ASK VISITORS TO THE AFTER HOURS SECTION
2 THEIR AGE BEFORE ALLOWING THEM TO ENTER INTO THAT
3 SECTION?

4 A. NO, WE DON'T.

5 Q. DOES THAT SECTION OF YOUR WEBSITE, THE AFTER
6 HOURS SECTION, HAVE A SPLASH PAGE AT THE START?

7 A. YES, IT DOES.

8 Q. AND WHAT DOES THIS SPLASH PAGE LOOK LIKE?

9 A. IT'S A WARNING PAGE, IF YOU WILL, THAT ADVISES
10 OUR VISITORS, THE VISITORS TO OUR WEBSITE THAT THIS
11 SECTION OF THE WEBSITE DOES CONTAIN PRODUCTS WHICH COULD
12 BE CONSIDERED MORE ADULT IN NATURE.

13 Q. AND WHAT KIND OF PRODUCTS WOULD THOSE BE?

14 A. COMMONLY REFERRED TO AS SEX TOYS, VIBRATORS,
15 DILDOS, PHALLIC-SHAPED SEX TOY ITEMS.

16 Q. WHY DID YOU DECIDE NOT REQUIRE AN AGE
17 VERIFICATION OF THE USER OR VISITOR BEFORE THEY ARE ABLE
18 TO ENTER INTO THE AFTER HOURS SECTION?

19 A. MOST IMPORTANTLY, WE DON'T THINK IT IS OUR PLACE
20 TO DO THAT. WE THINK THAT IS UP TO -- A DECISION THAT
21 CAN BE LEFT UP TO THE INDIVIDUAL VISITORS TO OUR
22 WEBSITE.

23 TWO, WE THINK THAT REQUIRING PEOPLE TO
24 STATE THAT THEY ARE 18 COULD POTENTIALLY VERY MUCH
25 TARNISH OUR BRAND. WE FELT A RESPONSIBILITY TO OUR

1 VISITORS, SINCE THIS IS A RELATIVELY NEW CATEGORY FOR
2 OUR COMPANY AFTER 16 YEARS, TO MAKE THEM AWARE THAT
3 THESE PRODUCTS WERE NOW AVAILABLE ON OUR WEBSITE, BUT WE
4 RECOGNIZE THAT THERE ARE SOME PEOPLE THAT MAY NOT WANT
5 TO SEE THESE PRODUCTS AND THE PURPOSE WAS TO ADVISE THEM
6 THAT WE THINK THAT THEY OUGHT TO BE 18, BUT IT'S NOT OUR
7 PLACE TO VERIFY OR REQUIRE THAT THEY ARE 18.

8 Q. AND WHY DO YOU THINK OR WHY DID YOU THINK IN
9 MAKING YOUR BUSINESS DECISION THAT AN AGE VERIFICATION
10 SCREEN WOULD TARNISH YOUR BRAND?

11 A. FOR 16 YEARS, WE HAVE WALKED A VERY FINE LINE
12 BETWEEN BEING A COMPANY THAT SELLS PRODUCTS IN THE
13 SEXUAL HEALTH SPACE AND A COMPANY THAT COULD BE
14 CONSIDERED TO BE AN ADULT COMPANY, OR IF YOU WILL IN
15 LAYMEN'S TERMS A PORNOGRAPHIC COMPANY. BEFORE WE OPENED
16 CONDOMANIA, THERE WAS NO SUCH THING HAS A CONDOM STORE,
17 THERE WERE DRUG STORES AND SEX SHOPS. WE CREATED A NEW
18 CATEGORY AND DESPERATE TO DEFINE THIS NICHE, WE WALK
19 THAT VERY FINE LINE BETWEEN BEING A MAINSTREAM BRAND, A
20 BRAND THAT COULD BE RECOMMENDED BY MAGAZINE EDITORS,
21 SUCH AS MADEMOISELLE AND GLAMOUR, AND HEALTH EDUCATORS
22 AND PARENTS AND NOT BE CONSIDERED AN ADULT WEBSITE, NOT
23 BE CONSIDERED PORNOGRAPHIC, AS MIGHT CLASSICALLY BE
24 REFERRED TO ON THE INTERNET.

25 Q. HOW LONG HAVE YOU HAD THIS SECTION ON YOUR

1 WEBSITE? YOU MENTIONED IT WAS FAIRLY NEW?

2 A. IT HAS BEEN ABOUT FOUR WEEKS NOW THAT WE HAVE
3 HAD THIS SECTION.

4 Q. IN THOSE FOUR WEEKS, HAVE YOU GATHERED ANY
5 INFORMATION REGARDING VISITORS, THE TRAFFIC TO THIS
6 SECTION OF YOUR WEBSITE?

7 A. YES. AGAIN, USING FIRECLICK, OVER THE LAST FOUR
8 WEEKS CONSISTENTLY, OF THOSE PEOPLE WHO GO THROUGH THIS
9 WARNING PAGE, THIS SPLASH PAGE, WE KNOW THAT 15 TO 20
10 PERCENT OF THEM CHOOSE NOT TO CLICK ON ONE OF THE TWO
11 OBVIOUS LINKS WHICH IS, TAKE ME TO THE TOYS. RATHER
12 THAT 15, 20 PERCENT CLICKS ON, GET ME OUT OF HERE, WHICH
13 TAKES YOU BACK TO THE HOME PAGE, OR THEY CHOOSE ANOTHER
14 NAVIGATIONAL CHOICE FROM OUR NAVIGATIONAL SCHEME AT THE
15 TOP OF THE PAGE.

16 Q. MR. GLICKMAN, ARE YOU FAMILIAR WITH THE LAW
17 BEING CHALLENGED IN THIS CASE?

18 A. YES, I AM.

19 Q. WHAT DO YOU KNOW ABOUT IT?

20 A. COPA, CHILD ON-LINE PROTECTION ACT IS A LAW
21 THAT, IF ENACTED, COULD IMPOSE GREAT PENALTIES, \$50,000
22 A DAY, SIX MONTHS IN JAIL, TO OPERATORS OF A WEBSITE WHO
23 HAVE CONTENT -- LET ME QUALIFY THAT, OPERATORS OF
24 COMMERCIAL WEBSITES THAT HAVE CONTENT THAT CAN BE DEEMED
25 HARMFUL TO MINORS.

- 1 Q. HAVE YOU READ THE ACT YOURSELF?
- 2 A. I HAVE.
- 3 Q. ARE YOU CLEAR ON WHAT SPEECH YOU COULD OR COULD
4 NOT ENGAGE IN IF THE ACT WERE TO TAKE EFFECT?
- 5 A. NO, I'M NOT.
- 6 Q. BASED ON YOUR READING OF THE ACT, CAN YOU TELL
7 WHAT KIND -- WHAT TYPE OF CONTENT IS HARMFUL TO MINORS?
- 8 A. NO, I CAN NOT.
- 9 Q. DO YOU KNOW WHAT IT MEANS FOR CONTENT TO BE
10 PATENTLY OFFENSIVE WITH RESPECT TO MINORS?
- 11 A. NO, I DO NOT.
- 12 Q. DO YOU KNOW WHAT IT MEANS FOR CONTENT TO BE
13 LACKING IN SERIOUS LITERARY, ARTISTIC, POLITICAL OR
14 SCIENTIFIC VALUE FOR MINORS?
- 15 A. NO, I DO NOT.
- 16 Q. ARE YOU ABLE TO TELL BASED ON YOUR READING OF
17 COPA WHICH COMMUNITY STANDARDS WOULD BE USED TO JUDGE
18 WHETHER MATERIAL IS HARMFUL TO MINORS?
- 19 A. NO.
- 20 Q. ARE YOU ABLE TO TELL BASED ON YOUR READING OF
21 THE ACT WHAT "AS A WHOLE" MEANS?
- 22 A. NO.
- 23 Q. DOES ANY OF THE CONTENT ON YOUR WEBSITE,
24 CONDOMANIA.COM, DEPICT, DESCRIBE OR REPRESENT ACTUAL OR
25 SIMULATED SEXUAL ACTS OR SEXUAL CONTACT?

1 A. YES.

2 Q. PROVIDE THE COURT WITH AN EXAMPLE.

3 A. ONE OR TWO. CLEARLY WE HAVE ILLUSTRATIONS OF
4 ERECT PENISES AND APPLICATION OF CONDOMS ON THESE ERECT
5 PENISES. WE HAVE FRANK AND HONEST DISCUSSION ON OUR
6 WEBSITE ABOUT ANAL SEX, LUBRICANTS AND CONDOMS FOR ANAL
7 SEX, LUBRICANTS FOR SUCH ACTS AS FISTING, DENTAL DAMS
8 FOR BOTH VAGINAL ORAL SEX AND ANAL ORAL SEX, OTHERWISE
9 KNOWN AS RIMMING. THIS IS AN HONEST DISCUSSION ABOUT
10 SEXUAL ACTIVITY THAT I'M SURE --

11 MR. HIRT: I THINK HE HAS EXTENDED BEYOND
12 THE QUESTION POSED.

13 THE COURT: PROBABLY ONE OF THOSE YES
14 QUESTIONS. THAT IS A LOGICAL PLACE TO STOP. ASK
15 ANOTHER QUESTION.

16 MS. MARSHALL: I WILL, YOUR HONOR.
17 BY MS. MARSHALL:

18 Q. DO YOU CONSIDER THE CONTENT ON CONDOMANIA.COM
19 VALUABLE FOR ADULTS?

20 A. YES, I DO.

21 Q. DO YOU CONSIDER THE CONTENT ON CONDOMANIA.COM
22 VALUABLE FOR MINORS?

23 A. YES, I DO.

24 Q. ARE YOU AWARE OF WHAT STEPS YOU COULD TAKE TO
25 COMPLY WITH COPA?

1 A. YES, I AM.

2 Q. WHAT ARE THOSE STEPS?

3 A. FROM MY PERSPECTIVE AS AN OPERATOR OF THIS
4 WEBSITE, IT WOULD BE TO PUT UP AN AGE VERIFICATION
5 SYSTEM AT OUR FRONT DOOR THAT WOULD BE LINKED EITHER TO
6 CREDIT CARDS OR TO PERHAPS SOME PUBLIC DATABASES TO
7 CONFIRM THE IDENTITY OF THE INDIVIDUAL.

8 Q. HAVE YOU EVER CONSIDERED PUTTING UP AN AGE
9 VERIFICATION SCREEN ON YOUR WEBSITE?

10 A. NO.

11 Q. WHO CAN ACCESS THE MATERIAL ON CONDOMANIA.COM?

12 A. ANYONE WHO VISITS OUR WEBSITE.

13 Q. DO YOU HAVE ANY REASON TO BELIEVE SOME PEOPLE
14 MAY CONSIDER YOUR CONTENT HARMFUL TO MINORS?

15 MR. HIRT: OBJECTION. CALLS FOR
16 SPECULATION. LACK OF FOUNDATION.

17 MS. MARSHALL: I THINK I ASKED A YES OR
18 NO QUESTION.

19 THE COURT: THE COURT WILL TAKE THE YES
20 OR NO ANSWER, OVERRULED.

21 THE WITNESS: YES.

22 BY MS. MARSHALL:

23 Q. WHY DO YOU BELIEVE THAT?

24 A. IN OUR 16-YEAR HISTORY, I HAVE HAD A CHANCE TO
25 MEET WITH PEOPLE FROM DIFFERENT COMMUNITIES WHO DON'T

1 AGREE, WHO HAVE EXPRESSED AN OPINION THAT THEY DON'T
2 AGREE WITH WHAT WE DO AND HOW WE DO IT. FURTHERMORE, I
3 HAVE SPOKEN WITH PEOPLE AND READ REPORTS AND STUDIES
4 FROM DIFFERENT COMMUNITIES THAT SPECIFICALLY SAY THAT
5 THE SALE OR PROMOTION OF CONDOMS IS IMMORAL, LEADS TO
6 PROMISCUITY, NOT SAFETY, NOT APPROPRIATE FOR TEENAGERS,
7 NEVER MIND THE MORE EXPLICIT STUFF THAT WE HAVE ON OUR
8 WEBSITE. I HAVE HAD FIRSTHAND EXPERIENCE WITH LEADERS
9 FROM DIFFERENT COMMUNITIES WHO JUST SIMPLY DON'T AGREE
10 WITH WHAT WE ARE DOING.

11 Q. DO YOU THINK THAT SOME OF THE MATERIAL ON YOUR
12 WEBSITE IS LESS LIKELY TO BE CONSIDERED HARMFUL TO
13 MINORS THAN OTHER MATERIAL ON YOUR WEBSITE?

14 A. YES.

15 Q. WOULD IT BE FEASIBLE TO SEGREGATE THE MORE
16 HARMFUL MATERIALS FROM WHAT MIGHT BE CONSIDERED LESS
17 HARMFUL MATERIALS ON YOUR WEBSITES?

18 A. NO.

19 Q. WHY NOT?

20 A. IT'S INTERLACED. IT IS ALL WOVEN. YOU CAN'T
21 RESPONSIBLY TALK ABOUT THE USE OF CONDOMS FOR THE
22 PROTECTION OF -- PREVENTION OF STDS WITHOUT HAVING AN
23 HONEST DIALOGUE ABOUT ISSUES SUCH AS ANAL SEX AND HOW TO
24 PUT A CONDOM ON AND HOW TO TAKE A CONDOM OFF. THE
25 INFORMATION NEEDED TO USE THESE PRODUCTS IS INTERWOVEN

1 THROUGHOUT THE WEBSITE AND IN THE VERY PROMOTION OF THE
2 PRODUCTS THEMSELVES.

3 Q. IN YOUR EXPERIENCE, ARE PEOPLE WHO SEEK TO
4 PURCHASE CONDOMS CONCERNED WITH ANONYMITY?

5 A. IN MY EXPERIENCE, YES.

6 Q. HOW WOULD REQUIRING AGE VERIFICATION ON YOUR
7 SITE AFFECT THE MISSION OF CONDOMANIA.COM?

8 A. IT WOULD BE IN DIRECT CONTRAST TO OUR MISSION.
9 OUR MISSION IS TO MAKE THE INFORMATION SURROUNDING THE
10 ISSUES OF CONDOM USAGE AND SEXUAL HEALTH AVAILABLE TO
11 ANYBODY AND EVERYBODY WHO WANTS IT. CLEARLY THOSE
12 PRESUMABLY UNDER 18 OR THOSE WITHOUT A CREDIT CARD,
13 PERIOD, WOULD NOT HAVE ACCESS TO THAT INFORMATION.

14 Q. HOW WOULD REQUIRING AGE VERIFICATION ON YOUR
15 SITE AFFECT THE SUCCESS OF YOUR SITE?

16 A. I THINK IT WOULD BE DETRIMENTAL.

17 MR. HIRT: CALLS FOR SPECULATION,
18 OBJECTION.

19 THE COURT: BACK OFF. THE OBJECTION IS
20 SUSTAINED FOR THE TIME BEING. THE PROGRESSION OF THE
21 QUESTIONS, PLEASE.

22 MS. MARSHALL: YES, YOUR HONOR.

23 BY MS. MARSHALL:

24 Q. DO YOU KNOW HOW REQUIRING AN AGE VERIFICATION
25 SYSTEM ON YOUR SITE WOULD AFFECT THE SUCCESS OF YOUR

1 SITE?

2 THE COURT: THAT IS A YES OR NO.

3 THE WITNESS: YES.

4 BY MS. MARSHALL:

5 Q. HOW DO YOU KNOW THAT?

6 A. WE HAVE SOME NOW DIRECT EXPERIENCE WITH THIS
7 SPLASH WARNING PAGE THAT WE HAVE IN THE AFTER HOURS
8 SECTION. AND OVER THE LAST 10 YEARS THAT WE HAVE
9 OPERATED OUR WEBSITE, WE HAVE HAD A CHANCE TO DIALOGUE
10 WITH OUR CUSTOMERS ABOUT THE POSSIBILITY OF SUCH AN AGE
11 VERIFICATION SYSTEM. CERTAINLY WITH THE INTRODUCTION OF
12 COPA 8 YEARS AGO, THESE ARE ISSUES THAT WE HAVE
13 EXPLORED.

14 Q. AND HOW WOULD REQUIRING AN AGE VERIFICATION
15 SYSTEM ON YOUR SITE AFFECT THE SUCCESS OF YOUR SITE?

16 A. ONE, AS I UNDERSTAND IT, AGE VERIFICATION
17 SYSTEMS CAN BE FEE-BASED AND WE SIMPLY COULDN'T AFFORD
18 TO PAY A FEE FOR EACH ONE OF OUR VISITORS. IT WOULD PUT
19 US OUT OF BUSINESS. TWO, AS I MENTIONED BEFORE, WE HAVE
20 TAKEN GREAT CARE OVER 16 YEARS TO MANAGE OUR BRAND, TO
21 PRESERVE THE INTEGRITY OF OUR BRAND, TO BUILD OUR BRAND
22 AS A MAINSTREAM BRAND EVEN THOUGH WE ARE A SEXUAL HEALTH
23 COMPANY. IT IS MY SINCERE BELIEF THAT HAVING AN AGE
24 VERIFICATION SYSTEM AT OUR FRONT DOOR COULD TARNISH OUR
25 BRAND SEVERELY AND EASILY ALLOW PEOPLE TO ASSOCIATE OUR

1 BRAND, OUR MAINSTREAM BRAND THAT WE HAVE BEEN WORKING SO
2 HARD ON POSITIONING FOR 16 YEARS AS AN ADULT COMPANY,
3 WHICH WE ARE NOT. I THINK IT WOULD SCARE OFF A LOT OF
4 PEOPLE.

5 Q. WHAT COURSE OF ACTION WOULD YOU TAKE IF COPA
6 WERE TO TAKE EFFECT?

7 MR. HIRT: OBJECTION, CALLS FOR
8 SPECULATION.

9 THE COURT: OBJECTION IS SUSTAINED.

10 MS. MARSHALL: IT IS SUSTAINED SO HOLD
11 ON.

12 BY MS. MARSHALL:

13 Q. DO YOU KNOW WHAT COURSE OF ACTION YOU WOULD TAKE
14 IF COPA WERE TO TAKE EFFECT?

15 A. MY WIFE LIKES THE SOUTH OF FRANCE SO WE WOULD
16 PROBABLY HAVE TO MOVE, BECAUSE I COULDN'T AFFORD EVEN
17 ONE DAY'S PENALTY IF ON THE OFF-OFF CHANCE WE WERE TO BE
18 IN VIOLATION.

19 MS. MARSHALL: THANK YOU VERY MUCH. I
20 HAVE NO FURTHER QUESTIONS AT THIS TIME, YOUR HONOR.

21 THE COURT: CROSS EXAMINE.

22 MR. HIRT: YES, THANK YOU, YOUR HONOR.

23 THE COURT: ARE YOU GOING TO USE ANY
24 MATERIALS THAT I NEED TO HAVE AVAILABLE?

25 MR. HIRT: YES. I WAS GOING TO BRING

1 THEM UP, YOUR HONOR. IN ADDITION TO USING THE SCREEN, I
2 DO HAVE HARD COPIES FOR BOTH YOU AND I GUESS CAN I
3 APPROACH THE WITNESS WITH A SET?

4 CROSS EXAMINATION

5 BY MR. HIRT:

6 Q. GOOD AFTERNOON, MR. GLICKMAN.

7 A. GOOD AFTERNOON.

8 Q. MY NAME IS TED HIRT FROM THE DEPARTMENT OF
9 JUSTICE.

10 MR. GLICKMAN, I'D FIRST LIKE TO SHOW YOU
11 WHAT HAS BEEN PREVIOUSLY MARKED FOR THIS CASE AS
12 DEFENDANT'S EXHIBIT 168. I WONDER IF MR. BYRDSONG COULD
13 BRING THAT UP ON THE MONITOR. I THINK MISS MARSHALL MAY
14 HAVE DISCUSSED THIS DOCUMENT WITH YOU. DO YOU RECOGNIZE
15 THE DOCUMENT?

16 A. YES, THAT IS THE CONDOMANIA HOME PAGE.

17 Q. AND IF YOU WERE TO LOOK TO THE BOTTOM OF THAT
18 PAGE OR MAYBE IN THE HARD COPY TO THE SECOND PAGE OF THE
19 HARD COPY EXHIBIT, IT HAS A HEADING AT THE BOTTOM, IT
20 SAYS ABOUT CONDOMANIA, DO YOU SEE THAT ON YOUR PAGE?

21 A. YES.

22 THE COURT: I DON'T SEE IT.

23 MR. HIRT: YOURS MAY HAVE BEEN ROTATED 90
24 DEGREES. YOU ARE LOOKING FOR CONDOMANIA LOGO.

25 THE COURT: I SEE THE LOWER LEFT-HAND

1 CORNER OF THE PAGE. THE PLACE TO PUT THE ARROW AND PUSH
2 THE BUTTON.

3 BY MR. HIRT:

4 Q. IF A VIEWER TO YOUR SITE CLICKED AT ABOUT
5 CONDOMANIA, WOULD THEY GO TO ANOTHER PAGE OF YOUR SITE?

6 A. YES, THEY WOULD.

7 Q. AND NOW LET'S TURN TO WHAT HAS BEEN MARKED AS
8 DEFENDANT'S EXHIBIT 169. AND IS THIS THE PAGE, MR.
9 GLICKMAN, THAT WOULD APPEAR IF YOU HAD CLICKED ABOUT
10 CONDOMANIA?

11 A. YES.

12 Q. AND THIS IS -- THE FIRST PARAGRAPH BEGINS WITH
13 THE HEADING WELCOME TO THE LAND OF LATEX, CONDOMANIA?

14 A. YES.

15 Q. AND IF YOU COULD TURN TO THE 5TH LINE IN THAT
16 DOCUMENT. DO YOU SEE A SENTENCE THAT BEGINS WITH
17 CONDOMANIA FOCUSES?

18 A. YES.

19 Q. READ THAT SENTENCE SLOWLY FOR THE COURT
20 REPORTER?

21 A. CONDOMANIA FOCUSES ON ASSISTING CUSTOMERS OF
22 EVERY AGE, SEX, CULTURE, AND SEXUAL ORIENTATION IN THE
23 PURCHASE OF CONDOMS AND SAFER SEX PRODUCTS.

24 Q. AND IF YOU LOOK TO THE PARAGRAPH THAT IS
25 ENTITLED, OUR VISION, WHAT WE STAND FOR, WHICH IS A

1 LITTLE FURTHER DOWN ON THE PAGE, IS THAT A TEXT THAT
2 ALSO DESCRIBES CONDOMANIA'S PURPOSE?

3 A. YES.

4 Q. YOU SEE A STATEMENT THAT BEGINS, AT CONDOMANIA?

5 A. YES.

6 Q. AGAIN READ THAT OUT LOUD FOR THE COURT.

7 A. AT CONDOMANIA, WE BELIEVE THAT THE BEST WAY FOR
8 THE PUBLIC TO MAKE EDUCATED CHOICES ABOUT SAFER SEX
9 PRODUCTS IS THROUGH ACCESS TO ACCURATE, NONJUDGMENTAL
10 INFORMATION. OUR FOCUS ON EDUCATION ENABLES CUSTOMERS
11 TO FEEL COMFORTABLE ASKING QUESTIONS AND SHARING IDEAS.
12 WE PROVIDE TRAINING TO INSURE THAT THE EMPLOYEES OFFER A
13 SUPPORTIVE AND FRIENDLY SOUNDING BOARD FOR OUR
14 CUSTOMERS' CONCERNS. CONDOMANIA'S VISION IS CRUCIAL TO
15 THE PREVENTION OF UNWANTED PREGNANCIES AND SEXUALLY
16 TRANSMITTED DISEASES, INCLUDING HIV AND AIDS. OUR
17 EMPLOYEES ARE TRAINED TO TAKE THE COMPLICATED MEDICAL
18 TERMINOLOGY, VAGUE SEXUAL INNUENDOES AND MISINFORMATION
19 THAT OFTEN SURROUND THE DISCUSSION OF SEXUALLY
20 TRANSMITTED DISEASES AND TRANSLATE THESE INTO CLEAR AND
21 PRACTICAL INFORMATION THAT CAN BE UTILIZED.

22 Q. OKAY. THEN IF YOU WOULD SKIP DOWN TO THE
23 PARAGRAPH ON THAT SAME PAGE THAT BEGINS WITH THE
24 HEADING, EDUCATIONAL PROGRAMS, LATEX AND LEARNING.
25 COULD YOU READ THAT PARAGRAPH FOR THE COURT.

1 A. IN ADDITION TO MAKING SAFER SEX PRODUCTS
2 AVAILABLE THROUGH RETAIL --

3 THE COURT: SLOWLY.

4 THE WITNESS: IN ADDITION TO MAKING SAFER
5 SEX PRODUCTS AVAILABLE THROUGH RETAIL AND MAIL ORDER
6 SERVICES, WE ALSO PROVIDE EDUCATIONAL PROGRAMS AS A
7 SERVICE TO OUR CUSTOMERS AND SURROUNDING COMMUNITIES.
8 THE EDUCATIONAL SECTION IN OUR STORE FEATURES DISPLAYS
9 FROM COMMUNITY HEALTH AND AIDS ORGANIZATIONS AS WELL AS
10 AN ASSORTMENT OF THE BEST EDUCATIONAL MATERIALS
11 AVAILABLE IN THE U.S. WE OFFER REFERRALS FOR THOSE
12 CUSTOMERS WHO ARE IN NEED OF MEDICAL ADVICE OR
13 INFORMATION ABOUT HIV TESTING. WE PROVIDE IN-STORE
14 WORKSHOPS AND FIELD TRIPS UPON REQUEST AND PARTICIPATE
15 IN EDUCATIONAL EVENTS IN SCHOOLS AND COMMUNITY-BASED
16 PROGRAMS. WE ALSO SERVE AS A RESOURCE FOR THE
17 NON-PROFIT COMMUNITY, PROVIDING WORKSHOPS FOR HEALTH
18 EDUCATORS AND PRODUCTS FOR BENEFITS, EDUCATIONAL EVENTS
19 AND STREET OUTREACH.

20 Q. AND MR. GLICKMAN, WOULDN'T IT BE CORRECT TO SAY
21 THAT IN THAT PARAGRAPH THE WORD "EDUCATIONAL," THE WORD
22 "EDUCATIONAL" APPEARS FIVE TIMES IN THAT PARAGRAPH?

23 A. IT APPEARS, YES.

24 Q. AND THEN FINALLY, GOING TO THE NEXT PARAGRAPH
25 THAT BEGINS, CONTRIBUTION, LATEX AND REAL LIFE, YOU WILL

1 SEE A SENTENCE THAT BEGINS, ENCOUNTERS LIKE THESE.

2 COULD YOU READ THAT SENTENCE ALOUD FOR THE COURT.

3 A. ENCOUNTERS LIKE THESE REMIND US OF THE IMPORTANT
4 ROLE WE PLAY IN HELPING PEOPLE NEGOTIATE COMPLICATED
5 DECISIONS ABOUT SEXUAL ACTIVITY IN THE MIDST OF A HEALTH
6 EPIDEMIC.

7 Q. THANK YOU. SO FROM READING THESE EXCERPTS, IT
8 WOULD BE FAIR TO SAY THAT YOUR MISSION FOR CONDOMANIA IS
9 NOT ONLY TO SELL CONDOMS AND OTHER PRODUCTS TO THE
10 PUBLIC BUT ALSO TO PROVIDE PUBLIC EDUCATION ON SAFER
11 SEX?

12 A. YES.

13 Q. YOU ESTABLISHED CONDOMANIA. IF I UNDERSTAND
14 YOUR TESTIMONY, REALLY TO PROVIDE PUBLIC EDUCATION ON
15 THE BROADER ISSUE OF SAFER SEX PRACTICES, ISN'T THAT
16 CORRECT?

17 A. YES.

18 Q. SO YOU WOULD VIEW EDUCATION AS A KEY GOAL OF
19 CONDOMANIA?

20 A. YES.

21 Q. YOU LAUNCHED THE CONDOMANIA WEBSITE IN 1996, IS
22 THAT CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND I READ ONE OF YOUR PRESS RELEASES. IT
25 INDICATED THAT YOU WORKED WITH A CHRISTOPHER FILKINS TO

1 CREATE THE SITE?

2 A. THAT'S CORRECT.

3 Q. AND YOU AND HE CREATED IT TOGETHER?

4 A. THE INITIAL SITE, YES, THAT'S RIGHT.

5 Q. AND IN 1996, PERHAPS YOU HAD ABOUT 500 PAGES ON
6 THE SITE?

7 A. YES.

8 Q. AND TODAY, 2006, IS THAT PAGE AMOUNT ROUGHLY THE
9 SAME?

10 A. I NEED TO QUALIFY MY ANSWER.

11 Q. SURE.

12 A. THERE ARE APPROXIMATELY 30 TO 40, AS I MENTIONED
13 EARLIER, STATIC PAGES. THESE ARE HTML PAGES THAT EXIST
14 ON THE INTERNET MUCH LIKE PAGES IN A BOOK. THE OTHER
15 FIVE, SIX, 700 PAGES ARE PRODUCT DETAIL PAGES THAT ONLY
16 EXISTS WHEN A USER CALLS UPON THAT PAGE TO VIEW THE
17 PRODUCT AND A TEMPLATE HAS FIELDS THAT ARE POPULATED BY
18 DATABASES. SO WE ONLY HAVE SOME 30 OR 40 PAGES ON OUR
19 WEBSITE TODAY BECAUSE WE HAVE MOVED FROM A STATIC,
20 RELATIVELY STATIC HTML SITE TO A DATABASE DRIVEN SITE.

21 Q. LET'S TURN TO DEFENDANT'S EXHIBIT 174. DO YOU
22 HAVE THAT IN FRONT OF YOU, MR. GLICKMAN, ENTITLED SAFER
23 SEX, GETTING EDUCATED AT CONDOMANIA. I'M SORRY. YOU
24 ARE STILL LOOKING THROUGH THE BINDER?

25 A. I SEE IT ON THE SCREEN.

1 Q. I BELIEVE THAT IS A PAGE THAT YOU DISCUSSED WITH
2 MISS MARSHALL EARLIER IN YOUR TESTIMONY?

3 A. YES, IT IS.

4 Q. AND I DON'T BELIEVE SHE ASKED YOU ABOUT THIS
5 PARAGRAPH, BUT BELOW THE HEADING GETTING EDUCATED AT
6 CONDOMANIA COULD YOU READ INTO THE RECORD THE PARAGRAPH
7 THAT BEGINS, AT CONDOMANIA?

8 A. AT CONDOMANIA, WE BELIEVE THAT THE BEST WAY FOR
9 THE PUBLIC TO MAKE EDUCATED CHOICES ABOUT SAFER SEX
10 PRODUCTS IS THROUGH THE ACCESS TO ACCURATE,
11 NONJUDGMENTAL INFORMATION. OUR FOCUS ON EDUCATION
12 ENABLES CUSTOMERS TO FEEL COMFORTABLE ASKING QUESTIONS
13 AND SHARING IDEAS. WE PROVIDE TRAINING TO ENSURE THAT
14 THE EMPLOYEES OFFER A SUPPORTIVE AND FRIENDLY SOUNDING
15 BOARD FOR CUSTOMERS' CONCERNS.

16 Q. LOOKING TOWARDS THE HEADINGS, YOU HAVE A HEADING
17 THAT INCLUDES LINKS, IS THAT CORRECT?

18 A. THAT'S CORRECT.

19 Q. AND ARE THESE LINKS TO PUBLIC EDUCATION, PUBLIC
20 EDUCATION AND INFORMATION SITES?

21 A. YES, THAT'S CORRECT.

22 Q. AND DOES THAT INCLUDE AGENCIES LIKE THE WORLD
23 HEALTH ORGANIZATION?

24 A. YES.

25 Q. AND PLANNED PARENTHOOD?

1 A. YES.

2 Q. CENTER FOR DISEASE CONTROL?

3 A. YES.

4 Q. PROJECT ACHIEVE? IT MAY NOT BE ON THAT IT
5 ITERATION OF THE SITE.

6 A. I'M NOT SURE.

7 Q. OKAY. BUT OTHER SITES THAT ALSO PROVIDE SAFE
8 SEX INFORMATION AND HEALTH-RELATED INFORMATION?

9 A. ABSOLUTELY.

10 Q. AND YOU HAVE DESCRIBED THAT YOU ALSO ON THE
11 RIGHT-HAND SIDE OF DOCUMENT 174, YOU HAVE A LIST OF
12 SAFER SEX TOPICS, IS THAT CORRECT?

13 A. THAT'S CORRECT.

14 Q. THESE ARE THE TOPICS THAT YOU CITED WITH THE
15 DISCUSSION WITH MISS MARSHALL EARLIER, CORRECT?

16 A. CORRECT.

17 Q. AND YOU DESCRIBED THE 13 TOPICS APPROXIMATELY?

18 A. YES.

19 Q. AND DO THESE TOPICS CHANGE OVER TIME OR ARE THEY
20 RELATIVELY STATIC IN TERMS OF YOUR SITE ALWAYS FEATURING
21 THE SAME TEXT?

22 A. RELATIVELY STATIC.

23 Q. AND THESE INCLUDE INFORMATION ABOUT HIV TESTING
24 FOR EXAMPLE?

25 A. YES.

1 Q. AND AGAIN, THESE ARE ISSUES REGARDING SAFER SEX
2 IF SOMEONE CHOOSES TO HAVE SEX WITH A PARTNER, IS THAT
3 CORRECT.

4 A. CORRECT.

5 Q. IF I CLICKED ON SOME OF THE LINKS, THE HEALTH
6 AND SEXUALITY LINKS, I WOULD GO EITHER TO THE ACTUAL
7 WEBSITE OF ONE OF THE ORGANIZATIONS OR A LISTING OF
8 INFORMATION ABOUT THAT ORGANIZATION, IS THAT CORRECT?

9 A. ARE YOU TALKING ABOUT THE HEALTH AND SEXUALITY
10 LINKS OR ARE YOU TALKING ABOUT OUR SAFER SEX MANUAL?

11 Q. I'M SORRY. NOW I'M GOING BACK TO THE HEALTH AND
12 SEXUALITY LINKS.

13 A. YES, YOU WOULD GO TO THEIR WEBSITE.

14 Q. CORRECT ME IF I'M WRONG, MR. GLICKMAN, BUT YOU
15 DON'T HAVE ANY LINKS ON YOUR SITE TO SO-CALLED ADULT
16 ENTERTAINMENT SITES SUCH AS PENTHOUSE.COM, DO YOU?

17 A. WE DO NOT, THAT'S CORRECT.

18 Q. LET'S TURN TO DEFENDANT'S EXHIBIT 170:

19 A. YES.

20 Q. VERY GOOD. I'M SORRY.

21 AND THIS IS INFORMATION FOR VISITORS, HOW
22 THEY CAN MAKE A PURCHASE ON THE CONDOMANIA SITE, ISN'T
23 THAT CORRECT?

24 A. THAT'S CORRECT.

25 Q. AND THE PURCHASE CAN BE CONDUCTED ONLINE, ISN'T

1 THAT CORRECT?

2 A. THAT'S CORRECT.

3 Q. AND AS YOU POINT OUT IN THE ONLINE HEADING,
4 CONDOMANIA USES A SECURE SERVER TO HELP INSURE THE
5 SECURITY OF YOUR TRANSACTION?

6 A. THAT'S CORRECT.

7 Q. IS THAT CORRECT?

8 A. YES.

9 Q. THE OTHER OPTION FOR A PURCHASER IS THEY CAN
10 PURCHASE BY PHONE, CORRECT?

11 A. CORRECT.

12 Q. OR BY FAX?

13 A. CORRECT.

14 Q. OR BY REGULAR MAIL IN FACT?

15 A. CORRECT.

16 Q. LET'S TAKE A LOOK AT PARAGRAPH -- DEFENDANT'S
17 EXHIBIT 171. DO YOU HAVE THAT IN FRONT OF YOU, MR.
18 GLICKMAN?

19 A. I DO.

20 Q. AND THIS IS THE SO-CALLED PAYMENT OPTIONS PAGE,
21 CORRECT?

22 A. CORRECT.

23 Q. AND BASICALLY, THIS GIVES INSTRUCTIONS ON HOW TO
24 MAKE A CREDIT CARD BASED PURCHASE FROM CONDOMANIA, ISN'T
25 THAT CORRECT?

1 A. CORRECT.

2 Q. AND I TAKE IT THAT CONDOMANIA HAS OFFERED CREDIT
3 CARD TRANSACTIONS TO ITS CUSTOMERS SINCE THE BEGINNING
4 OF YOUR WEBSITE?

5 A. CORRECT.

6 Q. ABOUT 1996?

7 A. CORRECT.

8 Q. AND I ASSUME YOU WOULD CONCLUDE THAT YOUR CREDIT
9 CARD SALES ARE A FAIRLY SUCCESSFUL MEANS OF PURCHASING
10 YOUR PRODUCTS?

11 A. CORRECT.

12 Q. SO WHEN A VISITOR COMES TO THE WEBSITE TO
13 PURCHASE CREDIT -- TO PURCHASE CONDOMS OR OTHER
14 PRODUCTS, THEY BASICALLY ENTER THEIR NAME ON THE CARD,
15 IS THAT CORRECT? IF YOU LOOK AT THE -- AGAIN LOOKING
16 AT -- LOOKING AT DEFENDANT'S EXHIBIT 171, THE LITTLE
17 FILL IN --

18 A. I WOULD ONLY QUALIFY THAT WE WOULD CALL THAT
19 VISITOR A CUSTOMER, BECAUSE WE HAVE VISITORS OF COURSE,
20 THE MAJORITY OF WHICH DON'T PURCHASE. SO WHEN A VISITOR
21 IS BECOMING A CUSTOMER, IN THE PROCESS OF MAKING A
22 PURCHASE, YES, THEY WOULD ENTER IN THAT INFORMATION.

23 Q. SO FIRST THEY ENTER THEIR NAME AS IT APPEARS ON
24 THEIR CREDIT CARD, CORRECT?

25 A. CORRECT.

1 Q. AND THEN THE CARD NUMBER, CORRECT?

2 A. CORRECT.

3 Q. THE TYPE OF CARD?

4 A. CORRECT.

5 Q. AND THE EXPIRATION DATE OF THE CARD?

6 A. CORRECT.

7 Q. AT THAT POINT THEY HAVE A SHOPPING CART AND THE

8 ONLINE TRANSACTION WILL BE PROCESSED?

9 A. CORRECT.

10 Q. I ALSO UNDERSTAND, IF I REVIEWED YOUR SITE

11 CORRECTLY, THAT THE CUSTOMER WOULD HAVE THE OPTION OF

12 ENTERING A PASSWORD TO IDENTIFY HIM OR HERSELF?

13 A. CORRECT.

14 Q. OKAY. I ASSUME YOUR PURPOSE THERE IS THAT WHEN

15 THEY COME BACK TO SHOP AT CONDOMANIA, THEY DON'T HAVE TO

16 FILL IN THE SAME INFORMATION THE SECOND TIME?

17 A. CORRECT.

18 Q. I NOTICE ON -- AGAIN, ON 171, THERE IS A LITTLE

19 BOX IN THE CORNER CALLED HACKER SAFE. DO YOU SEE THAT

20 ON THAT?

21 A. I DO.

22 Q. I ASSUME THE PURPOSE OF THAT IS TO TELL THE

23 CUSTOMER THAT YOUR WEBSITE MEETS SECURITY REQUIREMENTS

24 IN TERMS OF ANTI-HACKING EFFORTS?

25 A. THAT'S CORRECT.

1 Q. IT WAS YOUR DIRECT TESTIMONY THAT YOU SHIP YOUR
2 PRODUCTS TO ALL 50 STATES AND TERRITORIES OF THE U.S.,
3 AS FAR AS YOU KNOW?

4 A. THAT WASN'T MY TESTIMONY.

5 Q. YOU ASSUME THAT YOU SHIP YOUR PRODUCTS TO ALL 50
6 STATES AND TERRITORIES?

7 A. I KNOW THAT WE DO.

8 Q. AS WELL AS TO FOREIGN COUNTRIES?

9 A. CORRECT.

10 Q. MISS MARSHALL ASKED YOU ABOUT YOUR FEAR OF
11 PROSECUTION UNDER COPA. I WANTED TO ASK YOU A FEW
12 QUESTIONS. NOW, FROM REVIEWING -- I DON'T KNOW IF YOU
13 WANT TO LOOK AT PLAINTIFFS' EXHIBIT 40. DO YOU HAVE
14 THAT IN FRONT OF YOU OR IF IT IS ON THE SCREEN, DID SHE
15 TAKE IT BACK OR DID SHE LEAVE IT WITH YOU?

16 A. I HAVE IT.

17 Q. VERY GOOD.

18 NOW, IT'S FAIR TO SAY, MR. GLICKMAN, THAT
19 THE CONDOMANIA WEBSITE DOES NOT DISPLAY ANY IMAGES OR
20 PHOTOGRAPHS OF COUPLES ENGAGED IN SEXUAL INTERCOURSE,
21 DOES IT?

22 A. IT DOES NOT.

23 Q. IT'S FAIR TO SAY THAT CONDOMANIA DOES NOT
24 DISPLAY ANY PHOTOGRAPHS OR IMAGES OF COUPLES ENGAGED IN
25 ANY OTHER SEXUAL CONTACT, ISN'T THAT TRUE?

1 A. THAT'S TRUE.

2 Q. IT'S ALSO TRUE THAT CONDOMANIA DOES NOT DISPLAY
3 ANY PHOTOGRAPHS OR IMAGES OF ONE INDIVIDUAL ENGAGED IN
4 SEXUAL CONTACT OR ACTIVITY, DOES IT?

5 A. THE REASON I HESITATE IS BECAUSE WE DO HAVE THE
6 DIRECTIONS ON HOW TO PUT ON A CONDOM, AND THERE IS AN
7 ERECT PENIS. TO WHOM IT BELONGS, I DO NOT KNOW, BUT
8 PRESUMABLY TO AN INDIVIDUAL.

9 Q. OKAY.

10 BUT, OF COURSE, YOU ARE NOT DISPLAYING AN
11 IMAGE OF SOMEONE ACTUALLY MASTURBATING?

12 A. CORRECT.

13 Q. OR CREATING AN ERECTION?

14 A. CORRECT.

15 Q. CONDOMANIA DOES NOT CONTAIN ANY IMAGES OR
16 PHOTOGRAPHS OF EXCRETORY ACTIVITY, DOES IT?

17 A. I'M SORRY?

18 Q. EXCRETORY ACTIVITY?

19 A. SUCH AS.

20 Q. PEOPLE DEFECATING?

21 A. IT DOES NOT.

22 Q. NOR DOES CONDOMANIA CONTAIN ANY IMAGES OR
23 PHOTOGRAPHS OF A TOTALLY UNCOVERED FEMALE BREAST, DOES
24 IT?

25 A. IT DOES NOT.

1 Q. NOW, FROM YOUR DIRECT TESTIMONY, I WAS
2 UNDERSTANDING THAT YOUR FEAR OF PROSECUTION UNDER COPA
3 INVOLVES SOME OF THE INFORMATION THAT YOU PROVIDE ABOUT
4 SAFER SEX PRACTICES, IS THAT CORRECT?

5 A. THAT'S CORRECT.

6 Q. INCLUDING THE SAFER SEX INFORMATION PAGE THAT WE
7 LOOKED AT EARLIER?

8 A. CORRECT.

9 Q. AND IT IS YOUR TESTIMONY THAT THAT IS BECAUSE
10 YOU DESCRIBE SOME ACTUAL SEXUAL ACTIVITY, IS THAT
11 CORRECT?

12 A. THAT'S CORRECT.

13 Q. IS IT ALSO YOUR TESTIMONY THAT YOUR FEAR OF
14 PROSECUTION RESIDES IN PART BECAUSE YOU SELL CONDOMS OFF
15 THE WEB?

16 A. IN PART, CORRECT.

17 Q. SO IS IT YOUR TESTIMONY THAT THE ACTUAL DISPLAY
18 OF THE CONDOMS COULD SUBJECT YOU TO PROSECUTION UNDER
19 COPA?

20 A. NO.

21 Q. SO LET ME ASK A FOLLOWUP QUESTION. SO THEREFORE
22 IT IS YOUR TESTIMONY THAT IT'S BECAUSE YOU DESCRIBE THE
23 CONDOM PRODUCT IN MORE DETAIL THAN IT IS ACTUALLY A
24 CONDOM?

25 THE COURT: WHAT ABOUT THAT STATEMENT YOU

1 JUST MADE, YOU ENDED UP WITH?

2 MR. HIRT: STRIKE THAT QUESTION, YOUR
3 HONOR. THAT WASN'T A WELL THOUGHT-OUT QUESTION.

4 BY MR. HIRT:

5 Q. LET'S RETURN TO PLAINTIFFS' EXHIBIT 40, PAGE
6 003. MAYBE MR. BYRDSONG COULD BRING THAT UP ON OUR
7 MONITOR. MISS MARSHALL DISCUSSED THIS PAGE WITH YOU A
8 LITTLE BIT. AND JUST TO CLARIFY, IF WE CAN ZOOM IN ON
9 THE MEASUREMENT, MAYBE WE CAN HIGHLIGHT THAT A LITTLE
10 BIT. LET'S SEE IF WE CAN GET A LITTLE MORE SCREEN.
11 LOOKING AT THE BOTTOM OF THE SCREEN, IF I UNDERSTAND
12 YOUR TESTIMONY, MR. GLICKMAN, YOU FEAR PROSECUTION UNDER
13 COPA IN PART BECAUSE OF THAT ILLUSTRATION OF A CONDOM
14 GOING OVER AN ERECT PENIS?

15 A. FIRST OF ALL, THAT IS NOT A CONDOM GOING OVER AN
16 ERECT PENIS. THAT IS --

17 Q. MY SIGHT IS NOT AS GOOD, LOOKING AT IT. IT'S
18 THE MEASUREMENT STICK -- THE MEASUREMENT UTENSIL GOING
19 OVER THE PENIS?

20 A. IN PART. YES.

21 Q. OKAY, THANK YOU.

22 IT HAS BEEN YOUR TESTIMONY, MR. GLICKMAN,
23 IF I UNDERSTAND CORRECTLY, THAT ALL OF THE CONTENT ON
24 YOUR WEBSITE HAS VALUE NOT ONLY FOR ADULTS BUT ALSO FOR
25 MINORS, IS THAT CORRECT?

1 A. CORRECT.

2 Q. YOU BELIEVE IN PART THAT IS THE CASE BECAUSE YOU
3 BELIEVE THAT OLDER MINORS, IN PARTICULAR, NEED MORE
4 SAFER SEX INFORMATION?

5 A. CORRECT.

6 Q. IT'S ALSO YOUR VIEW THAT NONE OF THE MATERIAL ON
7 YOUR WEBSITE SHOULD BE CONSIDERED HARMFUL TO MINORS
8 UNDER COPA, ISN'T THAT CORRECT?

9 A. USING THE WORDS IN MY VIEW SHOULD BE, YOU ARE
10 CORRECT.

11 Q. IT ALSO WOULD BE YOUR JUDGMENT THAT NONE OF THE
12 MATERIALS ON YOUR WEBSITES SHOULD BE CONSIDERED OBSCENE,
13 FOR EXAMPLE?

14 A. AGAIN, IN MY VIEW SHOULD NOT.

15 Q. MR. GLICKMAN, TO YOUR KNOWLEDGE, NEITHER YOU NOR
16 CONDOMANIA HAVE EVER BEEN THREATENED WITH PROSECUTION OR
17 ARRESTED OR CONVICTED FOR ANY MATERIALS THAT HAVE BEEN
18 DISPLAYED ON YOUR WEBSITE, ISN'T THAT TRUE?

19 A. THAT'S TRUE.

20 Q. COMING BACK TO YOUR DIRECT TESTIMONY, MAYBE I
21 MISSED THIS. MISS MARSHALL ASKED YOU ABOUT YOUR
22 COMPETITORS, AND I BELIEVE AT ONE POINT YOU SAID THAT
23 YOUR WEBSITE WAS UNIQUE IN THE SENSE THAT NOT ONLY DO
24 YOU SELL CONDOMS AND OTHER PRODUCTS BUT ALSO PROVIDE
25 SAFER SEX INFORMATION. WAS THAT A CORRECT

1 CHARACTERIZATION OF YOUR TESTIMONY?

2 A. CORRECT.

3 Q. NOW, ISN'T IT TRUE, HOWEVER, THAT AT LEAST ONE
4 OF THE CONDOM MANUFACTURERS CALLED TROJANS ALSO OFFERS
5 SAFE SEX INFORMATION ON ITS WEBSITE?

6 A. I'M NOT FAMILIAR WITH WHAT SAFER SEX INFORMATION
7 TROJAN DOES OFFER.

8 Q. YOU NEVER LOOKED AT THEIR WEBSITE?

9 A. I HAVE.

10 Q. BUT YOU LOOKED AT THE WEBSITE AND DON'T RECALL
11 THE CONTENT OF IT?

12 A. THAT'S CORRECT.

13 Q. WOULD IT REFRESH YOUR RECOLLECTION IF I TENDER
14 TO YOU A DOWNLOAD FROM ITS WEBSITE?

15 A. SURE.

16 MR. HIRT: YOUR HONOR, MAY I APPROACH THE
17 WITNESS?

18 THE COURT: DO YOU HAVE IT MARKED IN SOME
19 WAY?

20 MR. HIRT: I HAVE NOT MARKED IT YET, YOUR
21 HONOR. CAN I GO AHEAD?

22 THE COURT: SHOW IT TO THE OTHER SIDE
23 THEN.

24 MR. HIRT: OKAY, I WILL SHOW IT TO MISS
25 MARSHALL.

1 THE COURT: ANY OBJECTION TO THE CROSS
2 EXAMINATION ON THE DOCUMENT?

3 MS. MARSHALL: YOUR HONOR, TO THE EXTENT
4 THAT IT IS BEING USED TO REFRESH HIS RECOLLECTION FOR
5 SOME FURTHER QUESTIONS, NO.

6 THE COURT: I UNDERSTAND YOU ARE NOT
7 AGREEING TO WHAT IS GOING TO HAPPEN NEXT, BUT YOU DON'T
8 HAVE ANY OBJECTION TO HIS BEING SHOWN THE DOCUMENT.

9 MS. MARSHALL: NO, YOUR HONOR, I DON'T.
10 BY MR. HIRT:

11 Q. TAKE A LOOK AT THAT DOCUMENT.

12 THE COURT: FIRST THING WE HAVE TO DO IS
13 IDENTIFY THE DATE WHEN IT WAS SUPPOSED TO HAVE BEEN
14 SNAPPED, THE PICTURE.

15 MR. HIRT: YES.

16 THE COURT: OTHERWISE --

17 MR. HIRT: YOUR HONOR, WHEN I GET IT BACK
18 FROM HIM, I WILL DO THAT. I SHOULD HAVE DONE THAT.

19 THE WITNESS: OKAY.

20 BY MR. HIRT:

21 Q. HAVE YOU HAD A CHANCE THEN, MR. GLICKMAN, TO
22 LOOK AT THE DOCUMENT I GAVE YOU?

23 A. I HAVE.

24 Q. AND CAN YOU TELL FOR THE COURT THE DATE THAT IT
25 WAS DOWNLOADED FROM THE WEBSITE? I DON'T KNOW IF IT

1 SHOWS THE URL, SHOWS AT THE BOTTOM?

2 A. OCTOBER 21ST, 2006.

3 Q. AND HAVING READ THAT DOCUMENT, DOES THAT REFRESH
4 YOUR RECOLLECTION AS TO WHETHER THE TROJANS MANUFACTURER
5 OF CONDOMS INCLUDES SAFE SEX INFORMATION ON THEIR
6 WEBSITE?

7 A. I'M AFRAID I CAN'T GIVE YOU A VERY SIMPLE YES OR
8 NO. IS IT SAFER SEX INFORMATION, YES. IN MY OPINION,
9 IT'S STERILE SAFER SEX INFORMATION. THAT IS TO SAY, IT
10 LACKS A CERTAIN EXPLICITNESS AND DEPTH THAT I THINK
11 MAKES IT INCOMPLETE.

12 Q. SO YOU WOULD SAY THAT YOU DO A BETTER JOB OF IT
13 THAN THEY DO?

14 A. I WOULD SAY THAT, YES.

15 Q. LET'S TURN TO DEFENDANT'S EXHIBIT 177.

16 Q. DO YOU SEE THAT PAGE IN FRONT OF YOU, MR.
17 GLICKMAN?

18 A. I DO.

19 Q. DO YOU RECOGNIZE IT?

20 A. I DO.

21 Q. IS IT FAIR TO SAY THAT THIS IS THE PORTION OF
22 YOUR WEBSITE WHERE YOU INCLUDE REVIEWS OF CONDOMS THAT
23 HAVE BEEN PUBLISHED IN VARIOUS MAGAZINES?

24 A. YES.

25 Q. THAT INCLUDES MEN'S HEALTH MAGAZINE?

1 A. YES.

2 Q. AND THAT INCLUDES A CONSUMERS REPORT REVIEW OF
3 CONDOMS THAT WAS PUBLISHED IN FEBRUARY OF 2005?

4 A. YES.

5 Q. I ASSUME YOU HAVE READ THE CONSUMERS REPORT
6 REVIEW?

7 A. YES.

8 Q. AND THAT REVIEW APPEARED ON ITS WEBSITE, IS THAT
9 CORRECT?

10 A. YES.

11 Q. IF WE LOOKED FOR IT, DO YOU THINK WE COULD FIND
12 IT ON THEIR WEBSITE TODAY?

13 THE COURT: WHAT WAS THAT?

14 MR. HIRT: CONSUMER REPORTS, YOUR HONOR.
15 I WAS GOING TOO QUICKLY.

16 THE WITNESS: AGAIN, I HAVE TO QUALIFY MY
17 ANSWER, I DON'T KNOW IF THIS IS ACCESSIBLE ONLY TO PAID
18 SUBSCRIBERS OF CONSUMER REPORTS' WEBSITE. IT MAY BE. A
19 LOT OF THEIR PAST STUDIES ARE ONLY AVAILABLE TO PAID
20 SUBSCRIBERS.

21 BY MR. HIRT:

22 Q. WOULD YOU RECOGNIZE THE DOCUMENT IF I SHOWED IT
23 TO YOU?

24 A. ABSOLUTELY.

25 Q. OKAY.

1 MR. GLICKMAN, I WOULD LIKE YOU TO TURN TO
2 DEFENDANT'S 286. IT IS PROBABLY IN THE BACK OF THAT
3 BINDER. DO YOU RECOGNIZE THAT DOCUMENT, MR. GLICKMAN?

4 A. I DO.

5 Q. AND FOR THE RECORD, THESE WERE CONDOMANIA'S
6 RESPONSES AND OBJECTIONS TO DEFENDANT'S FIRST SET OF
7 INTERROGATORIES, IS THAT CORRECT?

8 A. CORRECT.

9 Q. AND IF YOU TURN TO THE VERY LAST PAGE OF THE
10 DOCUMENT, WHICH IS D 286-0016, DO YOU SEE SOMETHING
11 CALLED A VERIFICATION?

12 A. YES.

13 Q. AND IS THAT YOUR SIGNATURE?

14 A. YES, IT IS.

15 Q. SO YOU SIGNED THESE RESPONSES?

16 A. YES, I DID.

17 Q. CAN YOU TURN TO PAGE 6 OF THAT DOCUMENT?

18 A. YEP.

19 Q. AND IF YOU ACTUALLY JUST -- PROBABLY TURN IT
20 OVER TO THE BOTTOM OF PAGE 5, THIS WAS AN INTERROGATORY
21 THAT ASKED THE NUMBER OF VISITORS TO YOUR WEBSITE, ISN'T
22 THAT CORRECT?

23 A. YES.

24 Q. THEN THE ANSWER CARRIES OVER TO PAGE 6, IS THAT
25 CORRECT?

1 A. CORRECT.

2 Q. YOU WILL SEE THAT WE HAVE DRAWN A LINE THROUGH
3 THAT LAST SENTENCE, IS THAT CORRECT? DO YOU SEE THAT?

4 A. YES.

5 THE COURT: SOMEONE HAS DRAWN A LINE.

6 MR. HIRT: I WAS GOING TO GO FURTHER.

7 THE COURT: YOU SAID "WE." I DON'T KNOW

8 WHO THAT IS.

9 BY MR. HIRT:

10 Q. MR. GLICKMAN, IS IT YOUR UNDERSTANDING THAT YOUR
11 COUNSEL AND I AGREED THAT YOU WOULD NOT INVOKE
12 CONFIDENTIALITY WITH REGARD TO THAT ANSWER?

13 A. YES.

14 Q. COULD YOU TURN TO PAGE 7 OF THE SAME DOCUMENT.

15 DO YOU SEE A SENTENCE THAT ALSO HAS BEEN CROSSED OUT?

16 A. YES.

17 Q. IS IT YOUR UNDERSTANDING THAT AGAIN THAT

18 REFLECTS THE AGREEMENT OF YOUR COUNSEL AND MYSELF THAT

19 WE UNDERSTAND THAT YOU ARE NOT ASSERTING CONFIDENTIALITY

20 AS TO THAT RESPONSE?

21 A. YES.

22 Q. LET'S TURN, JUST TO MAKE IT EFFICIENT, TO PAGE

23 8, RESPONSES TO INTERROGATORIES 7 AND 8. DO YOU SEE

24 SIMILAR REDACTIONS OR CROSSING OUTS, I SHOULD SAY?

25 A. YES.

1 Q. THAT ALSO REFLECTS THAT CONFIDENTIALITY IS NOT
2 BEING ASSERTED AS TO THE DOCUMENT?

3 A. CORRECT.

4 Q. TO THE RESPONSES, THANK YOU. TAKE A QUICK LOOK
5 WHILE WE ARE THERE AT PAGE 8. THIS INDICATES THAT IN
6 THE CALENDAR YEAR --

7 THE COURT: WHICH INTERROGATORY, PLEASE?

8 MR. HIRT: RESPONSE TO INTERROGATORY 7.

9 DO YOU SEE THAT IN FRONT OF YOU, MR. GLICKMAN?

10 THE WITNESS: I DO.

11 BY MR. HIRT:

12 Q. THIS INDICATES THAT DURING CALENDAR YEAR 2004,
13 CONDOMANIA PROCESSED 32,680 ORDERS USING A CREDIT CARD,
14 IS THAT CORRECT?

15 A. THAT'S CORRECT.

16 Q. AND THE NUMBER OF UNIQUE VISITORS WHO PROVIDED A
17 CREDIT CARD DURING THAT SAME CALENDAR YEAR WAS 28,090?

18 A. THAT'S CORRECT.

19 Q. DO YOU KNOW OFFHAND WHETHER YOUR CREDIT CARD
20 BUSINESS NOW IN CALENDAR YEAR 2006 IS ROUGHLY THE SAME
21 OR HAS INCREASED OR DECREASED?

22 A. IT'S INCREASED, BUT UNFORTUNATELY BY NOT AS MUCH
23 AS I WOULD HAVE LIKED.

24 Q. VERY WELL. I UNDERSTAND.

25 TURNING TO INTERROGATORY NUMBER 8. THIS

1 ASKS ABOUT THE NUMBER AND VALUE OF CHARGEBACKS FROM
2 CREDIT CARD PURCHASES, AND IF I'M CORRECT, YOU CITED
3 DURING THE PERIOD BEGINNING SEPTEMBER OF 2004 THROUGH
4 SEPTEMBER OF 2005, PLAINTIFF HAD 25 CHARGEBACKS ON ITS
5 WEBSITE, IS THAT CORRECT?

6 A. THAT'S CORRECT.

7 Q. AND THE VALUE OF THE CHARGEBACKS WAS
8 APPROXIMATELY \$2,136?

9 A. YES.

10 Q. MR. GLICKMAN, YOU HAVE DESCRIBED YOURSELF AS
11 CONSIDERED TO BE ONE OF THE NATION'S FOREMOST EXPERTS ON
12 CONDOMS AND SAFER SEX ISSUES, IS THAT CORRECT?

13 A. YES.

14 Q. ACCORDING TO YOUR WEBSITE, YOU HAVE BEEN CITED
15 IN OVER 300 NEWSPAPER AND MAGAZINE ARTICLES IN
16 PUBLICATIONS LIKE THE NEW YORK TIMES, WALL STREET
17 JOURNAL AND BUSINESS WEEK?

18 A. THAT'S CORRECT.

19 Q. AND YOU RECEIVED SEVERAL AWARDS, ISN'T THAT
20 CORRECT?

21 A. THAT'S CORRECT.

22 Q. YOU WERE RECOGNIZED AS ONE OF THE TOP 100
23 ENTREPRENEURS IN THE NATION UNDER 30 BY THE NATIONAL
24 COLLEGIATE ENTREPRENEURIAL ASSOCIATION, ISN'T THAT
25 CORRECT?

1 A. CORRECT.

2 Q. YOU WERE ALSO RECOGNIZED AS ONE OF THE COUNTRY'S
3 100 MOST ACTIVE AND INFLUENTIAL YOUTH LEADERS BY THE
4 YOUTH LEADERSHIP SUMMIT IN WASHINGTON?

5 A. CORRECT.

6 Q. YOU TESTIFIED I BELIEVE ON DIRECT THAT THE SALE
7 OF CONDOMS IS APPROXIMATELY 20 PERCENT OF YOUR REVENUE?

8 A. THAT IS NOT CORRECT.

9 Q. I DID NOT GET IT CORRECT. WHAT WAS YOUR
10 TESTIMONY AS TO THE PERCENTAGE OF YOUR REVENUE FROM SALE
11 OF CONDOMS?

12 A. I DIDN'T GIVE A TESTIMONY AS TO THE PERCENTAGE
13 OF SALES FROM CONDOMS ALONE.

14 Q. CAN YOU PROVIDE SUCH AN ESTIMATE TO US?

15 A. I CAN.

16 SALE OF CONDOMS COMPRISE ABOUT 65 PERCENT
17 OF OUR SALES.

18 Q. AND HOW MANY CONDOMS DOES THAT WORK OUT TO OVER
19 THE COURSE OF A CALENDAR YEAR?

20 A. HUNDREDS OF THOUSANDS.

21 Q. HUNDREDS OF THOUSANDS.

22 DO YOU KNOW THE ANNUAL PRODUCTION OF
23 CONDOMS IN THE UNITED STATES OVER THE COURSE OF A YEAR?

24 A. PRODUCTION?

25 Q. YES. I WILL SEPARATE PRODUCTION FROM SALES.

1 A. I DO NOT KNOW.

2 Q. WOULD YOU ESTIMATE IT WOULD BE IN THE HUNDREDS
3 OF MILLIONS?

4 A. I WOULD ESTIMATE, YES.

5 Q. IN TERMS OF THE SALE OF CONDOMS, WOULDN'T IT BE
6 FAIR TO SAY THAT THE VAST MAJORITY OF CONDOMS ARE SOLD
7 THROUGH RETAIL OUTLETS IN THE UNITED STATES?

8 A. THAT'S TRUE.

9 Q. COULD YOU GIVE A PERCENTAGE, LIKE 90 PERCENT?
10 WOULD THAT BE FAIR?

11 A. IF YOU MEAN BY RETAIL OUTLETS, PHARMACIES,
12 DRUGSTORES, DISCOUNTERS, IT IS PROBABLY MORE THAN THAT.

13 Q. ALL RIGHT. THAT ACTUALLY WAS MY HYPOTHESIS?

14 A. YES.

15 Q. IN YOUR DIRECT EXAMINATION WITH MISS MARSHALL,
16 YOU STATED A CONCERN ABOUT ESTABLISHING AN AGE
17 VERIFICATION SCREEN WERE YOU SUBJECT TO COPA, ISN'T THAT
18 CORRECT?

19 A. CORRECT.

20 Q. AND IF I UNDERSTAND ONE OF YOUR REASONS IT WAS
21 BECAUSE YOU DIDN'T WANT TO BE ASSOCIATED WITH THE ADULT
22 ENTERTAINMENT INDUSTRY, IS THAT CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND I TAKE IT THAT SINCE THE TIME YOU FORMED
25 CONDOMANIA YOU HAVE TRIED TO MAKE SURE THAT YOU ARE

1 SEPARATE IN PERCEPTION FROM THE ADULT ENTERTAINMENT
2 INDUSTRY, ISN'T THAT CORRECT?

3 A. THAT'S CORRECT.

4 Q. IN FACT, IN 1996 WHEN YOU LAUNCHED YOUR WEBSITE
5 YOU BASICALLY INDICATED THAT YOU DID NOT HAVE ANY
6 X-RATED IMAGES, FOR EXAMPLE, ON YOUR WEBSITE, ISN'T THAT
7 CORRECT?

8 A. CORRECT.

9 Q. YOU ALSO SAID YOU HAD NO PORNOGRAPHIC IMAGES OR
10 TEXT ON YOUR WEBSITE?

11 A. IN OUR VIEW OF WHAT PORNOGRAPHIC IS, THAT'S
12 CORRECT.

13 Q. YOU TESTIFIED ON DIRECT EXAMINATION THAT YOU
14 RECENTLY CREATED AN AFTER HOURS SEGMENT TO YOUR WEBSITE?

15 A. CORRECT.

16 Q. AND CAN YOU TELL US APPROXIMATELY WHAT MONTH IN
17 THIS YEAR YOU DID THAT?

18 A. SEPTEMBER.

19 Q. AND IF I UNDERSTAND YOUR TESTIMONY, IT REFLECTS
20 A DECISION ON YOUR PART TO PLACE CERTAIN PRODUCTS BEHIND
21 A WARNING SCREEN, ISN'T THAT CORRECT?

22 A. THAT'S CORRECT.

23 Q. AND, YOUR HONOR, LET ME GO BACK AND CONFER WITH
24 MY COLLEAGUES. I MAY BE BE ABLE TO WRAP THIS UP.

25 (DISCUSSION WITH COUNSEL.)

1 BY MR. HIRT:

2 Q. MR. GLICKMAN, I REMEMBER AT THE VERY BACK OF
3 PLAINTIFFS' EXHIBIT 40. I'M NOT SURE IF IT IS THE LAST
4 PAGE OR NEXT TO THE LAST PAGE THAT MISS MARSHALL SHOWED
5 YOU, THAT INCLUDES THE TOPLESS ACADEMY'S GUIDE TO
6 BARTENDING?

7 A. YES.

8 Q. DO YOU HAVE THAT IN FRONT OF YOU?

9 A. I DO.

10 Q. IS IT FAIR TO SAY THAT THE WOMAN HAS HER BREAST
11 AT LEAST PARTIALLY COVERED BY WHAT HAPPENS TO BE A
12 COCKTAIL GLASS?

13 A. THAT'S CORRECT.

14 Q. IS IT FAIR TO SAY THAT YOU DON'T SHOW STREAMING
15 VIDEO OF THAT TOPLESS BARTENDING ON YOUR WEBSITE, ISN'T
16 THAT CORRECT?

17 A. THAT'S CORRECT.

18 MR. HIRT: I'M ALMOST DONE, YOUR HONOR.

19 (PAUSE.)

20 MR. HIRT: YOUR HONOR, I HAVE NO FURTHER
21 QUESTIONS. AT THIS TIME I WOULD LIKE TO MOVE INTO
22 EVIDENCE DEFENDANT'S EXHIBITS 168, 169 -- LET ME MAKE
23 SURE I HAVE THEM IN THE RIGHT ORDER. 170, 171, 174,
24 177, 298.

25 MR. HIRT: 286. THANK YOU, MR. GLICKMAN.

1 THE COURT: ANY OBJECTION?

2 MS. MARSHALL: ONLY TO EXHIBIT 298. IT
3 MIGHT BE MY BAD NOTETAKING, BUT I DON'T RECALL THAT ONE.

4 MR. HIRT: I DID NOT ACTUALLY
5 AUTHENTICATE THAT WITH MR. GLICKMAN. THAT IS TRUE.
6 IT'S SOME OTHER DISCOVERY RESPONSES, BUT I COULD DO THAT
7 FOR HOUSEKEEPING. I THINK IT IS IN HIS BINDER. I DID
8 NOT ASK ANY QUESTIONS ABOUT IT. I CAN DO SO.

9 THE COURT: MY RESPECTFUL SUGGESTION IS
10 THAT YOU OFFER IN THAT PART THAT YOU WANT IN INSTEAD OF
11 THE WHOLE THING. THE SAME WITH THE OTHER ONE YOU HAD.

12 MR. HIRT: FOR 286, YOUR HONOR, MAYBE I
13 WILL GO BACK TO THAT. I WAS OFFERING IT.

14 THE COURT: IDENTIFY THE QUESTION AND
15 ANSWER THAT YOU ARE OFFERING OR MULTIPLES. THEN WE
16 DON'T HAVE TO HAVE THE WHOLE DOCUMENT.

17 MR. HIRT: I WAS OFFERING IT IN RESPONSE
18 TO MY QUESTIONS CONCERNING CREDIT CARD TRANSACTIONS AND
19 THEREFORE THAT WAS RESPONSES TO INTERROGATORIES 7 AND 8.
20 LET ME TURN TO --

21 THE COURT: ARE YOU OFFERING THE QUESTION
22 AND THE ANSWER INTO EVIDENCE?

23 MR. HIRT: I THOUGHT THAT'S WHAT YOUR
24 HONOR PREFERRED THAT I DO.

25 THE COURT: YES, BUT YOU DID NOT SAY

1 THAT.

2 MR. HIRT: THAT IS MY PURPOSE IS TO OFFER
3 THOSE RESPONSES TO THOSE INTERROGATORIES.

4 THE COURT: 7 AND 8. ARE THERE OTHERS IN
5 THAT DOCUMENT?

6 MR. HIRT: NO, THERE ARE NOT, YOUR HONOR.
7 I WANT TO GO THROUGH 298 JUST TO DOUBLE CHECK TO SEE IF
8 THERE IS ANYTHING IN THERE.

9 THE COURT: YOU WON'T HAVE ANY TROUBLE.
10 MISS MARSHALL WILL AGREE THAT 298 IS AUTHENTIC. THE
11 QUESTION IS WHAT YOU ARE OFFERING IT FOR.

12 MR. HIRT: INTERROGATORY 22, WHICH IS
13 PAGES 5 AND 6, BASICALLY ASKS WHETHER THERE IS ANYTHING
14 ON PLAINTIFF'S WEBSITE THAT IS HARMFUL TO MINORS. AND
15 AT THE BOTTOM OF PAGE 6, THE FIFTH LINE FROM THE BOTTOM.
16 PLAINTIFF DOES NOT BELIEVE ANY MATERIAL ON ITS WEBSITE
17 IS HARMFUL TO MINORS, AND IT GOES ON. AND THE SAME --

18 THE COURT: YOU OFFERED JUST THAT
19 SENTENCE?

20 MR. HIRT: IN FAIRNESS -- THE QUESTION
21 AND ANSWER BECAUSE IT HAS OBJECTIONS. AND THE SAME
22 WOULD BE TRUE FOR INTERROGATORY 23 WHICH HAS A VERY
23 SIMILAR QUESTION AND ANSWER.

24 THE COURT: MISS MARSHALL, DO YOU OBJECT
25 TO THE OFFERS OF THE DISCOVERY FOR THE PURPOSE INTENDED?

1 MS. MARSHALL: NO, YOUR HONOR, TO THE
2 EXTENT THAT WE CAN ALSO MOVE INTO EVIDENCE THE GENERAL
3 OBJECTIONS THAT ARE STATED AT THE FRONT OF EACH OF THE
4 INTERROGATORY RESPONSES.

5 MR. HIRT: I HAVE NO PROBLEM WITH THAT,
6 YOUR HONOR, BUT THEY WERE ANSWERED SUBJECT TO THE
7 OBJECTIONS.

8 THE COURT: I'M AFRAID I DON'T
9 UNDERSTAND, MISS MARSHALL, WHAT YOU WERE SAYING.

10 MS. MARSHALL: THE ANSWERS PROVIDED THAT
11 HAVE BEEN IDENTIFIED BY DEFENSE COUNSEL WERE PROVIDED
12 SUBJECT TO THE OBJECTIONS THAT ARE STATED AT THE FRONT
13 OR THE BEGINNING OF EACH OF THOSE DOCUMENTS. SO FOR THE
14 MATTER OF COMPLETENESS, I BELIEVE THE GENERAL OBJECTIONS
15 STATED AT THE START OF EACH ONE OF THOSE DOCUMENTS
16 SHOULD BE ALSO ENTERED INTO EVIDENCE.

17 THE COURT: ENTIRELY THEORETICALLY. IT'S
18 A VAIN ACT BECAUSE THE OBJECTION -- THE TIME TO OBJECT
19 AND HAVE IT RULED ON IS OVER WITH. HE IS OFFERING IT
20 FOR WHAT WAS DISCLOSED, NOT WHAT WAS NOT DISCLOSED
21 BECAUSE OF AN OBJECTION. YOUR STATEMENT IS IN THE
22 RECORD BUT I WILL RECEIVE THE QUESTION IN INTERROGATORY
23 NUMBER 7, THE ANSWER TO NUMBER 7, THE QUESTION IN
24 INTERROGATORY NUMBER 8 AND ANSWER TO NUMBER 8 IN
25 DEFENDANT'S EXHIBIT 286, RECEIVE INTO EVIDENCE THE

1 QUESTION IN INTERROGATORY NUMBER 22 AND THIS PLAINTIFFS'
2 ANSWER THERETO AND THE QUESTION IN INTERROGATORY 23 AND
3 THIS PLAINTIFF'S ANSWER THERETO ALL IN EXHIBIT NUMBER,
4 DEFENDANT 298.

5 THE COURT: MR. GLICKMAN, YOU ARE
6 FINISHED, SIR.

7 THE WITNESS: THANK YOU.

8 THE COURT: LEAVE THE PAPERS BEHIND AND
9 LET THE LAWYERS WORRY ABOUT IT.

10 A. OKAY. THANK YOU VERY MUCH.

11 THE COURT: YOU'RE WELCOME. CAREFUL
12 GETTING DOWN FROM THE STAND.

13 (WITNESS EXCUSED.)

14 THE COURT: I'M NOT SURE I DID THIS, BUT
15 I MUST DO IT. THE COURT HAS RECEIVED INTO EVIDENCE
16 DEFENDANT'S EXHIBIT 168, 169, 170, 171, 174, 177, 298
17 AND 286. THE LATTER TWO DOCUMENTS ARE RECEIVED AS
18 AMENDED AND REDUCED BY THE PRIOR DISCUSSION.

19 (D 168, D 169, D 170, D 171, D 174, D
20 177, D 298, D 286 ADMITTED INTO EVIDENCE.)

21 THE COURT: IS DR. TEPPER THE NEXT
22 WITNESS? WE HAVE TO SET UP A PLACE FOR HIM.

23 MR. FINE: THAT'S CORRECT, YOUR HONOR.
24 OKAY, THERE WE GO.

25 MR. GOMEZ: YOUR HONOR, I NEED TO STEP

1 OUT OF THE COURTROOM FOR JUST A SHORT PERIOD.

2 THE COURT: DID YOU DECIDE NOT TO USE THE
3 TABLE?

4 MR. FINE: THE WITNESS STAND?

5 THE COURT: THERE WAS SOME THOUGHT THE
6 OTHER DAY OF HAVING DR. TEPPER SIT AT THE TABLE SO HE
7 WOULD HAVE A PLACE TO PUT PAPERS.

8 THE COURT: AT THE END OF THAT TABLE.

9 MR. SEALLS: KENNETH SEALLS ON BEHALF OF
10 THE DEFENDANT. ON FRIDAY, THE PARTIES DISCUSSED AND
11 ACTUALLY TRIED MOVING BACK THE PODIUM SO THAT WE COULD
12 BE SEEN BY THE COURT REPORTER AND BY DR. TEPPER. HENCE
13 WE WOULD SUGGEST THAT BE DONE.

14 THE COURT: IF HE IS SITS WHERE HE IS, IS
15 OTHER EQUIPMENT IN THE WAY, TOO. THAT IS WHY WE CHOSE
16 THE END OF THE TABLE BUT HE HAS TO BE SEEN BY THE LAWYER
17 RESPONSIBLE FOR THE DEFENSE AS WELL AS THE COURT
18 REPORTER AND MYSELF.

19 MR. SEALLS: MAY I SHOW PLAINTIFFS'
20 COUNSEL WHAT WE ACTUALLY TRIED ON FRIDAY AND IT SEEMED
21 TO WORK WELL?

22 THE COURT: MR. FINE.

23 MR. FINE: THAT IS FINE.

24 THE COURT: DR. TEPPER, LET US WORRY
25 ABOUT IT. IT IS NOT YOUR PROBLEM.

1 MR. SEALLS: MAY I APPROACH THE PODIUM,
2 YOUR HONOR?

3 THE COURT: SURE.

4 WHERE WOULD THE WITNESS BE?

5 MR. SEALLS: UNDER THE SCENARIO THAT WE
6 TRIED FRIDAY THE WITNESS WOULD BE BETWEEN THE COURT
7 REPORTER AND THE PODIUM.

8 THE COURT: THERE IS EQUIPMENT THERE.

9 THE COURT REPORTER: THIS IS FINE FOR ME.
10 THIS IS PERFECT.

11 MR. FINE: I THINK IF DR. TEPPER STAYS
12 RIGHT WHERE HE IS IF THAT IS ACCEPTABLE TO DEFENSE
13 COUNSEL, THAT WOULD BE FINE. THEN HE CAN VIEW THE
14 SCREEN AS WELL.

15 MR. SEALLS: THAT IS FINE WITH THE
16 DEFENSE.

17 THE COURT: OKAY, FINE.

18 THE WITNESS: IF WE CAN REMOVE THE DRINK,
19 I WILL PUT THE DOCUMENTS UP HERE.

20 THE COURT: YOU CAN TAKE AWAY ANY EXCESS
21 MATERIAL FROM THE LAST WITNESS, PLEASE.

22 MR. FINE: YOUR HONOR, WHILE WE ARE
23 GETTING SET UP, MAY I APPROACH TO BRING THE WITNESS
24 BINDER?

25 THE COURT: MR. HIRT, COME UP HERE,

1 PLEASE, I WANT YOU TO STAY HERE.

2 (SIDE-BAR.)

3 THE COURT: THIS WON'T BE VERY LONG. I
4 NOTICE THAT THERE'S A YOUNG BOY IN THE AUDIENCE. I
5 DON'T KNOW IF ANYBODY KNOWS WHO HE IS.

6 MR. FINE: DR. TEPPER'S SON. HE DOESN'T
7 MIND HIM BEING HERE.

8 THE COURT: THAT IS ALL I WANT TO KNOW.

9 MR. FINE: THANK YOU, YOUR HONOR.

10 (WHEREUPON THE SIDE-BAR CONFERENCE
11 ENDED.)

12 MITCHELL STEVEN TEPPER, DEFENSE WITNESS,
13 AFFIRMS.

14 THE CLERK: STATE AND SPELL YOUR FULL
15 NAME FOR THE RECORD, PLEASE?

16 THE WITNESS: MITCHELL, M-I-T-C-H-E-L-L,
17 STEVEN, S-T-E-V-E-N, TEPPER, T AS IN TANGO, E P AS IN
18 PAPA -P-E-R.

19 DIRECT EXAMINATION

20 BY MR. FINE:

21 Q. GOOD AFTERNOON, DR. TEPPER.

22 A. GOOD AFTERNOON.

23 GOOD AFTERNOON, JUDGE.

24 THE COURT: GOOD AFTERNOON.

25 BY MR. FINE:

1 Q. TELL US WHERE YOU ARE CURRENTLY EMPLOYED.

2 A. I'M CURRENTLY EMPLOYED FULL-TIME AT THE
3 MOREHOUSE SCHOOL OF MEDICINE IN ATLANTA, GEORGIA.

4 Q. WHAT IS YOUR POSITION AT THE MOREHOUSE SCHOOL OF
5 MEDICINE?

6 A. I AM ASSISTANT PROJECT DIRECTOR OF THE CENTER OF
7 EXCELLENCE FOR SEXUAL HEALTH AND ALSO HAVE AN
8 APPOINTMENT AS RESEARCH ASSISTANT PROFESSOR IN PEDIATRIC
9 SERIES 2.

10 Q. AND CAN YOU GENERALLY TELL US WHAT YOU DO IN
11 THESE POSITIONS AT THE MOREHOUSE SCHOOL OF MEDICINE?

12 A. I'M PRIMARILY IN CHARGE OF A FORD-FUNDED GRANT
13 WITH OUR NEW CENTER OF EXCELLENCE FOR SEXUAL HEALTH
14 UNDER THE STATURE HEALTH LEADERSHIP INSTITUTE, CHARGED
15 WITH THREE MAIN FUNCTIONS: ONE IS TO CREATE A GOLD
16 STANDARD HEALTH CURRICULUM FOR MEDICAL STUDENTS AND
17 OTHER HEALTH PROFESSIONALS; TWO, TO CREATE A NATIONAL
18 BASED DISABILITY FORUM FOR DISCUSSION OF TOPICS OF
19 DISABILITIES AND CHRONIC CONDITIONS; AND 3, OUTREACH TO
20 RELIGIOUS COMMUNITIES SO THAT WE CAN HELP VARIOUS
21 COMMUNITIES REACH OUT TO THEIR CONSTITUENTS IN PROVIDING
22 SEXUAL HEALTH INFORMATION.

23 Q. AND WHEN DID YOU BEGIN WORKING AT THE MOREHOUSE
24 SCHOOL OF MEDICINE?

25 A. OCTOBER 1ST OF THIS YEAR, 2006.

1 Q. CAN YOU GENERALLY TELL US WHAT THE SEXUAL HEALTH
2 NETWORK IS?

3 A. THE SEXUAL HEALTH NETWORK INC. IS MY COMPANY
4 THAT I SET UP IN MAY OF 1996 TO SUPPORT THE FUNCTIONS OF
5 MY WEBSITE, SEXUALHEALTH.COM AND ALSO THE PUBLICATION OF
6 A CURRICULUM PROVIDING COMPREHENSIVE SEXUAL HEALTHCARE
7 IN SPINAL CORD INJURY REHABILITATION AND ALSO TO SERVE
8 AS AN UMBRELLA FOR SOME OF THE OFF-LINE EDUCATION
9 CONSULTATION THAT I PROVIDE BOTH TO CONSUMERS, REHAB
10 HOSPITALS AND OTHER STAKEHOLDERS.

11 Q. YOU SAID THAT YOU SET UP THE SEXUAL HEALTH
12 NETWORK. WHAT IS YOUR PRESENT INVOLVEMENT WITH THE
13 SEXUAL HEALTH NETWORK?

14 A. I'M FOUNDER AND I AM STILL PRESIDENT OF THE
15 SEXUAL HEALTH NETWORK.

16 Q. YOU JUST MENTIONED THAT YOU WERE THE FOUNDER AND
17 THE PRESIDENT. AS THE PRESIDENT OF THE SEXUAL HEALTH
18 NETWORK, WHAT ARE YOUR RESPONSIBILITIES?

19 A. I STILL OVERSEE THE BUSINESS OPERATIONS. I HAVE
20 A CHIEF OPERATING OFFICER, SO I MEET WITH HER REGULARLY
21 TO GO OVER OUR BUSINESS PLANS OR AFFILIATIONS, RESEARCH
22 PLANS; THE CHIEF MEDICAL OFFICER; AND A CHIEF CONTENT
23 OFFICER OR VICE-PRESIDENT OF CONTENT. SO I WORK WITH
24 THOSE THREE PRIMARY MANAGEMENT PERSONNEL IN DIRECTING
25 PRIMARILY THE WEBSITE, SEXUALHEALTH.COM AND ALSO SOME OF

1 OUR RESEARCH AND DEVELOPMENT INITIATIVES.

2 Q. WHAT DID YOU DO BEFORE YOU FOUNDED SEXUAL HEALTH
3 NETWORK?

4 A. I WAS WORKING ON MY PH.D. IN HUMAN SEXUALITY
5 EDUCATION AT THE TIME I FOUNDED THE SEXUAL HEALTH
6 NETWORK.

7 Q. YOU MENTIONED YOU WORKED ON YOUR PH.D. WHERE DID
8 YOU OBTAIN YOUR PH.D.?

9 A. THE UNIVERSITY OF PENNSYLVANIA.

10 Q. AND WHAT WAS YOUR PH.D. IN?

11 A. IN EDUCATION, IN THE PROGRAM OF HUMAN SEXUALITY
12 EDUCATION.

13 Q. AND DO YOU HAVE ANY OTHER GRADUATE DEGREES?

14 A. GRADUATE DEGREE IN PUBLIC HEALTH, A MASTERS IN
15 PUBLIC HEALTH FROM YALE UNIVERSITY.

16 Q. HAVE YOU WRITTEN ANY BOOKS, DR. TEPPER?

17 A. I HAVE EDITED FOUR VOLUMES OF THE WORK SEXUAL
18 HEALTH WHICH WILL BE OUT IN DECEMBER OF THIS YEAR.

19 Q. AND WHAT WAS THE GENERAL SUBJECT MATTER OF THAT
20 FOUR VOLUME PUBLICATION?

21 A. VOLUME 1 IS SEXUAL HEALTH PSYCHOLOGICAL
22 FOUNDATIONS. 2 IS SEXUAL HEALTH PHYSICAL FOUNDATIONS.
23 VOLUME 3 IS SEXUAL HEALTH, MORAL AND CULTURAL
24 FOUNDATIONS. VOLUME 4 IS SEXUAL HEALTH, STATE OF THE
25 ART TREATMENT AND RESEARCH.

1 Q. WHERE DO YOU CURRENTLY LIVE, DR. TEPPER?

2 A. I'M CURRENTLY LIVING IN ATLANTA, GEORGIA.

3 Q. ARE YOU MARRIED, DR. TEPPER?

4 A. YES, I AM.

5 Q. I WANT TO ASK YOU A LITTLE BIT MORE ABOUT THE

6 SEXUAL HEALTH NETWORK. TELL US, WHERE IS THE SEXUAL

7 HEALTH NETWORK LOCATED?

8 A. THE CORPORATE ADDRESS IS 3 MAYFLOWER LANE IN

9 SHELTON, CONNECTICUT, WHICH IS MY HOME OFFICE AND HOME

10 ADDRESS.

11 Q. AND IS THE SEXUAL HEALTH NETWORK A FOR PROFIT

12 COMPANY?

13 A. YES. WE ARE INCORPORATED IN CONNECTICUT.

14 Q. AND I'M NOT SURE IF YOU MENTIONED THIS BEFORE.

15 WHEN WAS THE SEXUAL HEALTH NETWORK FOUNDED?

16 A. WE WERE FOUNDED IN MAY OF 1996 AS AN LLC,

17 LIMITED LIABILITY CORPORATION.

18 Q. WHY DID YOU FOUND THE SEXUAL HEALTH NETWORK?

19 A. WELL, TO FULFILL THE MISSION OF PROVIDING SEXUAL

20 HEALTH INFORMATION TO PEOPLE WITH DISABILITIES AND

21 CHRONIC CONDITIONS.

22 Q. AND WHEN YOU SAY THE MISSION OF PROVIDING

23 INFORMATION TO PEOPLE WITH DISABILITIES, CAN YOU

24 ELABORATE A LITTLE BIT MORE ABOUT WHAT THE MISSION OF

25 THE SEXUAL HEALTH NETWORK IS?

1 A. I'M NOT SURE IF I MADE IT CLEAR, TO MAKE SEXUAL
2 HEALTH INFORMATION EASILY AVAILABLE. THE WORDS ON THE
3 SITE ARE TO END THE SILENCE AROUND ISSUES OF SEXUAL
4 HEALTH AS THEY INTERACT WITH PEOPLE'S MEDICAL
5 CONDITIONS.

6 Q. AND WHY DID YOU DECIDE TO PUBLISH INFORMATION ON
7 THE WORLDWIDE WEB?

8 A. I DISCOVERED THE POWER OF THE WEB WHEN I WAS
9 DOING RESEARCH AND ACTUALLY RECRUITING WOMEN WITH SPINAL
10 CORD INJURIES, A VERY SELECT POPULATION OF WOMEN WITH
11 COMPLETE SPINAL CORD INJURIES BELOW A DIFFERENT LEVEL.
12 THROUGH USING THE INTERNET I WAS ABLE TO RECRUIT WOMEN
13 TO COME FROM DIFFERENT PARTS OF THE COUNTRY TO A
14 LABORATORY AT RUTGERS UNIVERSITY AND ACTUALLY MASTURBATE
15 IN A LAB UNDER VERY STRICT RESEARCH PROTOCOL. AND I
16 DISCOVERED THAT I WAS ABLE TO REACH GREAT POPULATIONS AT
17 A VERY LOW EXPENSE AND SO DECIDED TO USE THE INTERNET TO
18 MAKE INFORMATION THAT WAS HERETOFORE HARD TO FIND EASILY
19 ACCESSIBLE TO THE POPULATION THAT I WAS TRYING TO REACH.

20 Q. IS THERE ANYTHING ABOUT THE FEATURES OF THE
21 WORLDWIDE WEB THAT MAKES IT PARTICULARLY USEFUL FOR
22 PEOPLE WITH DISABILITIES?

23 MR. SEALLS: OBJECTION, YOUR HONOR, CALLS
24 FOR SPECULATION. NO FOUNDATION FOR THE QUESTION.

25 THE COURT: OVERRULED.

1 THE WITNESS: YES. PEOPLE WITH
2 DISABILITIES --

3 THE COURT: EXCUSE ME, DOCTOR. WE WILL
4 JUST TAKE YES AS AN ANSWER AND YOU CAN ASK ANOTHER
5 QUESTION.

6 BY MR. FINE:

7 Q. AND WHAT ABOUT THE WORLDWIDE WEB IS PARTICULARLY
8 USEFUL FOR PEOPLE WITH DISABILITIES?

9 A. WELL, IT GIVES PEOPLE WITH DISABILITIES REALLY
10 UNPARALLELED ACCESS TO THE SAME INFORMATION AS PEOPLE
11 WITHOUT DISABILITIES. SO NO LONGER DO THEY WORRY ABOUT
12 HOW THEY GET TRANSPORTATION TO A LIBRARY OR BOOK STORE,
13 WHETHER THEY GET TO THAT BOOKSTORE AND IT IS ACCESSIBLE.
14 THEY DON'T HAVE TO PAY FOR IT ON SEXUALHEALTH.COM SO ALL
15 THE INFORMATION IS FREE. SO IT'S NOT JUST EASILY
16 ACCESSIBLE, BUT IT'S IN A WAY PHYSICALLY ACCESSIBLE.
17 THERE ARE NOT THE ARCHITECTURAL BARRIERS TO ACCESS THAT
18 SOMEONE MIGHT FIND IN THE PHYSICAL REALM OUTSIDE THEIR
19 HOME.

20 AND ALSO IT'S RELATIVELY ANONYMOUS.
21 THESE ARE QUESTIONS THAT PEOPLE HERETOFORE HAVE NOT
22 ASKED THEIR PHYSICIANS, BUT YET FEEL VERY COMFORTABLE
23 ASKING QUESTIONS ONLINE.

24 Q. HOW MANY PEOPLE VISIT YOUR WEBSITE ON AN AVERAGE
25 MONTH?

1 A. MAY I STATE A RANGE?

2 Q. PLEASE.

3 A. I WOULD SAY THERE ARE BETWEEN SAY 135,000 AND
4 150,000 USER SESSIONS.

5 Q. WHEN YOU SAY USER SESSIONS, WHAT DO YOU MEAN BY
6 THAT?

7 A. THOSE ARE VISITS TO THE WEBSITE WHERE SOMEONE
8 MAY VISIT SEVEN, EIGHT, NINE PAGES. THE WEB ANALYTIC
9 TOOL THAT I USE DOES NOT GIVE ME UNIQUE VISITORS, BUT I
10 CAN TELL YOU THAT OF THOSE 135,000 TO 150,000 VISITORS,
11 OVER 95 PERCENT COME ONCE IN A MONTH.

12 Q. AND YOU JUST MENTIONED A WEB ANALYTIC TOOL THAT
13 YOU USE. TELL US A LITTLE BIT ABOUT WHAT THAT TOOL IS.

14 A. I USE A TOOL CALLED OR A PRODUCT CALLED URCHIN,
15 U-R-C-H-I-N.

16 Q. AND WHAT IS THIS PRODUCT? WHAT INFORMATION DOES
17 THIS PRODUCT PROVIDE YOU WITH?

18 A. IT WILL GIVE ME THE NUMBER OF USER SESSIONS. IT
19 GIVES ME THE NUMBER OF PAGES THEY READ, AVERAGE NUMBER
20 OF PAGES READ, THE TIME SPENT ON THE SITE, WHERE THESE
21 USERS WERE REFERRED FROM, WHETHER IT BE ANOTHER WEBSITE,
22 YOU KNOW, SO I CAN GET REFERRALS FROM OTHER URLS, OR
23 WHAT COUNTRIES THEY CAME FROM.

24 Q. AND WHO IS THE SEXUAL HEALTH NETWORK'S TARGET
25 AUDIENCE?

1 A. OUR TARGET AUDIENCE NOW IN 2006 IS THE AUDIENCE
2 OF THE POPULATION OF PEOPLE WHO ARE INTERESTED IN
3 INFORMATION REGARDING SEXUAL HEALTH.

4 Q. YOU EMPHASIZED THE WORD "NOW." HAS THAT TARGET
5 AUDIENCE FOR THE SEXUAL HEALTH NETWORK CHANGED OVER
6 TIME?

7 A. YES.

8 Q. HOW HAS IT CHANGED?

9 A. INITIALLY I SET IT UP FOR THE PURPOSE OF MAKING
10 HARD TO FIND INFORMATION AVAILABLE ON THE EFFECTS OF
11 DISABILITIES AND CHRONIC CONDITIONS ON PEOPLE'S SEXUAL
12 HEALTH. OVER THE YEARS, THE QUESTIONS AND THE
13 POPULATION OF PEOPLE THAT COME TO SEXUALHEALTH.COM HAVE
14 GROWN TO THE MAJORITY OF PEOPLE WHO COME AND THE
15 QUESTIONS THAT ARE ASKED ARE NOT RELATED TO SEXUALITY
16 AND DISABILITY OR CHRONIC CONDITIONS.

17 Q. DO YOU HAVE ANY USERS WHO ARE TEENS OR OLDER
18 MINORS?

19 A. BASED ON THEIR SELF DISCLOSURES, YES.

20 Q. AND WHEN YOU SAY "SELF DISCLOSURES," WHAT ARE
21 YOU REFERRING TO?

22 A. WHEN PEOPLE ASK A QUESTION, SOMETIMES THEY SAY,
23 I'M 15 YEARS OLD, AND I'M 17 YEARS OLD AND --

24 Q. HOW IMPORTANT TO YOU IS IT FOR OLDER MINORS TO
25 BE ABLE TO ACCESS THE MATERIAL ON YOUR WEBSITE?

1 A. VERY IMPORTANT.

2 Q. WHY?

3 A. BECAUSE I BELIEVE I PROVIDE A GOOD PUBLIC HEALTH
4 SERVICE AND SOMETIMES PEOPLE DON'T HAVE -- OLDER MINORS
5 DON'T HAVE OTHER VENUES TO ACCESS THE INFORMATION THAT
6 THEY ARE INTERESTED IN, CURIOUS ABOUT OR CONCERNED
7 ABOUT.

8 Q. WHO CAN ACCESS THE MATERIAL ON YOUR WEBSITE?

9 A. ANYONE WHO HAS ACCESS TO THE WORLDWIDE WEB.

10 Q. DOES SEXUAL HEALTH NETWORK HAVE USERS FROM
11 OVERSEAS?

12 A. YES.

13 Q. HOW DO YOU KNOW THAT?

14 A. THROUGH LOOKING AT MY URCHIN WEB ANALYTIC TOOL.

15 Q. AND BASED ON YOUR URCHIN, YOUR WEB ANALYTIC
16 TOOL, DO YOU KNOW APPROXIMATELY WHAT PERCENT PERCENTAGE
17 OF YOUR USERS COME FROM OVERSEAS?

18 A. APPROXIMATELY 15 PERCENT.

19 Q. IS IT IMPORTANT TO YOUR WEBSITE TO BE ABLE TO BE
20 ACCESSED BY PEOPLE FROM OVERSEAS COUNTRIES?

21 A. YES.

22 Q. WHY?

23 A. BECAUSE THEY NEED INFORMATION TOO.

24 Q. I WANT TO ASK YOU NOW TO GO INTO A LITTLE BIT
25 MORE DETAIL ABOUT YOUR WEBSITE. WHAT ARE SOME OF THE

1 CATEGORIES OF CONTENT THAT ARE AVAILABLE ON THE WEBSITE?

2 A. WE HAVE MEN'S SEXUAL HEALTH AS A GENERAL
3 CATEGORY, WOMEN'S SEXUAL HEALTH, LOVE AND RELATIONSHIPS,
4 SEXUAL EDUCATION, DISABILITIES AND CHRONIC CONDITIONS,
5 SEXUAL HEALTH RESOURCES, AND SHOPPING.

6 Q. AND WHAT -- WITHIN EACH OF THESE CATEGORIES OF
7 CONTENT, WHAT TYPES OF CONTENT DO YOU HAVE ON THE
8 WEBSITE?

9 A. UNDER MEN AND WOMEN'S SEXUAL HEALTH WE FOLLOW
10 ISSUES THAT MAY BE CONSIDERED SEXUAL DYSFUNCTIONS, LIKE
11 ERECTILE DYSFUNCTION OR PAIN, AND THEN WE HAVE THINGS
12 THAT HAVE TO DO WITH PLEASURE. AND SO WE HAVE MEN'S
13 ORGASMS AND WOMEN'S ORGASMS. THAT MAY HAVE TO DO WITH
14 HOW TO ENHANCE THAT, HOW TO ACHIEVE THAT OR, YOU KNOW,
15 IF THERE IS DIFFICULTY, YOU KNOW, WHAT MIGHT BE THE
16 SOURCES OF THAT.

17 Q. HOW DOES MATERIAL GET ONTO YOUR WEBSITE? WHERE
18 DOES IT COME FROM?

19 A. THE MAJORITY OF THE CONTENT ON THE WEBSITE IS
20 GENERATED IN RESPONSE TO USERS' QUESTIONS.

21 Q. OKAY. OTHER THAN -- I'M GOING TO ASK YOU ABOUT
22 THOSE USER QUESTIONS IN A MINUTE. OTHER THAN CONTENT
23 GENERATED FROM USER QUESTIONS, WHAT OTHER SOURCES OF
24 CONTENT ARE THERE?

25 A. WE PUBLISH ARTICLES OURSELVES. SOME OF THEM ARE

1 ORIGINAL, SOME OF THEM ARE REPURPOSED OR USED FROM OTHER
2 SITES. WE HAVE A NEWS FEED. SO THAT COMES EVERY DAY
3 WITH SEXUAL HEALTH TYPE ARTICLES. WE HAVE WEBCASTS
4 WHICH ARE PROVIDED BY ANOTHER COMPANY WHICH PROVIDE
5 SEXUAL HEALTH RELATED VIDEOS. WE HAVE A BLOG WHICH WE
6 INITIATE TOPICS OF DISCUSSION ON THE BLOG.

7 Q. YOU MENTIONED -- JUST CLARIFY FOR THE RECORD
8 WHAT YOU MEAN BY A WEBCAST?

9 A. A WEBCAST IS BASICALLY A VIDEO YOU WATCH WHEN
10 YOU ARE ON A WEBSITE.

11 Q. OKAY. SO LET ME GO ONE AT A TIME FOR EACH OF
12 THESE DIFFERENT TYPES OF CONTENT THAT YOU JUST
13 MENTIONED. FOCUS FIRST ON THE ARTICLES. WHAT ARE THE
14 SUBJECTS OF THESE ARTICLES?

15 A. THEY RANGE FROM DISCUSSIONS OF VARIOUS SEXUALLY
16 TRANSMITTED DISEASES TO HOW TO IMPROVE OR SPICE UP YOUR
17 LOVE LIFE OR YOUR RELATIONSHIP.

18 Q. AND HOW DO YOU DECIDE WHAT SUBJECTS SHOULD BE
19 COVERED IN THESE ARTICLES THAT YOU PUBLISH?

20 A. WE TRY TO FOCUS ON A NICHE OF ARTICLES THAT MAY
21 NOT BE COVERED WELL IN OTHER VENUES THAT COVER SEXUAL
22 HEALTH.

23 Q. WHAT ROLE, IF ANY, DOES APPROPRIATENESS FOR
24 MINORS PLAY IN WHETHER YOU PUBLISH AN ARTICLE?

25 A. IT'S REALLY NOT A CONSIDERATION.

1 Q. SO YOU JUST DISCUSS ARTICLES. WHAT ABOUT THE
2 VIDEOS? WHAT IS -- YOU MENTIONED VIDEOS EARLIER. WHAT
3 ARE THE SUBJECTS OF THOSE VIDEOS?

4 A. THE SUBJECTS OF THE VIDEOS ARE PRETTY MUCH THE
5 SAME AS I DISCUSSED, ARE THE SUBJECTS OF THE CONTENT,
6 MEN'S SEXUAL HEALTH, WOMEN'S SEXUAL HEALTH, SEXUALLY
7 TRANSMITTED INFECTIONS.

8 Q. CAN YOU ACCESS THE VIDEOS ON YOUR WEBSITE?

9 A. YES.

10 Q. AND DO THE VIDEOS CONTAIN SEXUALLY EXPLICIT
11 DISCUSSIONS?

12 A. YES.

13 Q. WHY DO YOU HAVE VIDEOS THAT CONTAIN SEXUALLY
14 EXPLICIT DISCUSSION ON YOUR WEBSITE?

15 A. WELL, USERS ARE INTERESTED IN SOMETIMES
16 RECEIVING CONTENT BY WATCHING AND LISTENING VERSUS JUST
17 READING.

18 Q. YOU ALSO MENTIONED QUESTIONS AND ANSWERS.

19 A. YES.

20 Q. TELL US A LITTLE BIT MORE ABOUT WHAT YOU MEAN BY
21 THE QUESTIONS AND ANSWERS ON YOUR WEBSITE.

22 A. USERS CAN CLICK ON A LINK THAT SAYS ASK A
23 QUESTION. THE QUESTION BRINGS UP A FORM WHERE THEY ARE
24 REQUIRED TO PUT IN A FIRST NAME. THERE IS NO VALIDATION
25 OF WHAT THAT FIRST NAME IS, AND AN E-MAIL ADDRESS. AND

1 THEN THEY CAN ANSWER QUESTIONS OR NOT ABOUT WHETHER THEY
2 HAVE A MEDICAL CONDITION, WHAT THEIR PRIMARY CONCERN IS,
3 HOW LONG THEY HAD IT AND THEN IF THEY EVER SOUGHT
4 TREATMENT FOR THIS PROBLEM FROM SOMEONE ELSE, WHAT THEY
5 THINK THE SOURCE OF THEIR PROBLEM IS. AND THEN THERE IS
6 A GENERAL PRIMARY QUESTION THAT THEY ASK.

7 Q. AND WHAT ARE THE SUBJECTS OF THE QUESTIONS THAT
8 YOUR USERS ASK?

9 A. WE HAVE A VERY BROAD --

10 THE COURT: I'M CONFUSED. THE WITNESS
11 SEEMS TO BE TALKING ABOUT QUESTIONS THAT, TO PUT IT
12 IMPERSONALLY, THE WEBSITE WOULD ASK THE PATIENT. WHAT
13 HE WAS JUST DISCUSSING, NOT THE OTHER WAY AROUND.

14 MR. FINE: WHY DON'T WE CLARIFY IF WE
15 CAN. YOU EARLIER TESTIFIED THAT A LOT OF THE CONTENT ON
16 YOUR WEBSITE IS GENERATED FROM QUESTIONS. CAN YOU
17 EXPLAIN WHAT YOU MEAN BY THAT?

18 THE WITNESS: IN RESPONSE TO QUESTIONS,
19 YES. WHEN A USER WANTS TO ASK A QUESTION, THEY CLICK ON
20 A LINK AND THERE IS A BRIEF SEXUAL HISTORY THAT THEY CAN
21 FILL OUT WHICH HELPS US BE MORE FOCUSED IN THE
22 INFORMATION WE GIVE. SO INSTEAD OF JUST HAVING AN OPEN
23 TEXT BOX WHERE PEOPLE JUST ASK A QUESTION AND THEN WE
24 MIGHT TOTALLY MISS THE POINT OF THE QUESTION, WE ASK
25 SOME CLARIFYING QUESTIONS IN RESPONSE AND THAT GIVES THE

1 EXPERT THAT ANSWERS THE QUESTION A BETTER SHOT OF GIVING
2 THAT PERSON VALUABLE INFORMATION.

3 THE COURT: IS THIS CONSIDERED A SHORT
4 HISTORY?

5 THE WITNESS: I CONSIDER IT A FOCUSED
6 SEXUAL HISTORY.

7 BY MR. FINE:

8 Q. AND DO THE USERS HAVE TO PROVIDE ANY OF THIS --

9 A. NO.

10 Q. -- INFORMATION?

11 A. NO, THAT'S ALL.

12 Q. FOCUSING NOW NOT ON THE QUESTIONS THAT YOU ASK
13 BUT ON THE QUESTIONS THAT THE USERS ASK, WHAT GENERALLY
14 ARE THE SUBJECTS OF THOSE QUESTIONS?

15 A. I DESCRIBE THE SUBJECTS AS SOME VERY SIMPLE ONES
16 WHICH I CATEGORIZE AS, AM I NORMAL? YOU KNOW, ABOUT
17 PENIS SIZE, ABOUT VAGINAL DISCHARGE, ABOUT MASTURBATION.
18 I GET QUESTIONS ABOUT COULD I BE PREGNANT? IS IT
19 POSSIBLE THAT I GOT A DISEASE? SO THOSE ARE GENERALLY
20 QUESTIONS WE GET FROM YOUNGER AUDIENCES. WE GET
21 QUESTIONS REGARDING ABNORMAL BLEEDING, PAIN INTERCOURSE,
22 EARLY OR RAPID EJACULATION, DELAYED EJACULATION. AM I
23 GAY? AM I LESBIAN? MY PARTNER WANTS TO TRY X. IS THIS
24 NORMAL? AND THEN WE HAVE SOME VERY WHAT I CALL HIGH
25 ACUITY QUESTIONS, WHERE PEOPLE HAVE ALREADY BEEN TO A

1 PHYSICIAN OR ALREADY TALKED TO A HEALTH PROFESSIONAL AND
2 ARE ALMOST LOOKING FOR SECOND OPINIONS. OR THEY HAVE
3 NOT HAD A SATISFACTORY RESPONSE TO THEIR IN-PERSON
4 VISITS AND ARE LOOKING FOR MORE QUALIFIED OR MORE
5 AVENUES TO EXPLORE.

6 Q. AND WHAT IF ANY LIMITS ARE THERE TO THE
7 QUESTIONS?

8 A. WE DON'T HAVE ANY LIMITS ON THE QUESTIONS.

9 Q. AND DO USERS DISCUSS --

10 THE COURT: EXCUSE ME, WHAT DO YOU MEAN
11 LIMITS, LENGTHS OF SUBJECT MATTER --

12 MR. FINE: LET ME CLARIFY.

13 BY MR. FINE:

14 Q. ARE THERE ANY SUBJECT MATTER LIMITS TO THE
15 QUESTIONS THAT USERS CAN POSE?

16 A. NO.

17 Q. DO USERS DISCUSS SEXUALLY EXPLICIT CONTENT IN
18 THEIR QUESTIONS?

19 A. YES, THEY DO.

20 Q. WHAT HAPPENS AFTER A USER POSES A QUESTION?

21 A. IT WILL GO INTO A DATABASE AND THEN OUR CONTENT
22 MANAGER WILL SORT THROUGH THE QUESTIONS THAT ARE IN THE
23 DATABASE AND BASICALLY TRIAGE THOSE QUESTIONS. THEY
24 WILL CHOOSE THE ONES THAT THEY THINK SHOULD BE SENT OUT
25 TO ONE OF OUR EXPERTS TO ANSWER.

1 Q. AND YOU JUST MENTIONED THAT QUESTIONS ARE SENT
2 OUT TO EXPERTS. IF YOU CAN TELL US EXACTLY, SO A USER
3 POSTS A QUESTION TO THE WEBSITE, GOES INTO THE DATABASE,
4 THEN WHAT HAPPENS NEXT?

5 A. THE CONTENT MANAGER, CALLS HER AN EDITOR, TAKES
6 THAT QUESTION, DECIDES IT'S A VALUABLE QUESTION TO
7 ANSWER AND PUBLISH ON THE WEBSITE, SENDS IT TO ONE OF
8 OUR VOLUNTEER EXPERTS OR ANSWERS IT HERSELF OR SOMEBODY
9 ON HER TEAM WILL ANSWER IT. AND THEN IT IS -- IF WE
10 CHOOSE TO ANSWER IT AND PUBLISH IT, WE CAN PUBLISH IT,
11 WE COULD ANSWER QUESTIONS. WE HAVE A FUNCTION ON THE
12 WEBSITE AND THAT IS WHY WE ASK FOR THE E-MAIL ADDRESS.
13 IF IT'S A QUESTION THAT HAS AN EASY ANSWER AND IT HAS
14 BEEN ANSWERED BEFORE, WE MAY JUST PROVIDE A RESOURCE OR
15 LINK AND JUST SEND THAT. WE DO THAT MORE THAN PUBLISH.
16 WE SEND THAT RESOURCE OR LINK BACK TO THE PERSON WHO
17 ASKS THE QUESTION. NOT EVERY QUESTION THAT IS ASKED IS
18 PUBLISHED.

19 Q. LET ME ASK YOU, HOW DO YOU DECIDE WHICH
20 QUESTIONS ARE ACTUALLY PUBLISHED?

21 A. WELL, WE HAVE APPROXIMATELY 2500 ANSWERS TO
22 QUESTIONS, AND THEY ARE CATEGORIZED UNDER THESE VARIOUS
23 CHANNELS. SO OVER TIME, YOU GET TO KNOW THE TYPES OF
24 QUESTIONS WE HAVE ANSWERED ALREADY. SO, YOU KNOW, IF
25 YOU LOOK AT THE 80 OR 100 QUESTIONS THAT COME IN DURING

1 THE WEEK AND YOU LOOK AT THE RESOURCES THAT WE HAVE TO
2 ANSWER THEM, WE PICK QUESTIONS THAT ARE SOMEWHAT UNIQUE
3 OR SOMEWHAT TIMELY.

4 Q. DO ANY QUESTIONS NOT GET POSTED BECAUSE THEY ARE
5 TOO SEXUALLY EXPLICIT?

6 A. NO.

7 Q. AND CAN YOU GIVE US AN EXAMPLE OF A QUESTION
8 THAT IS VERY UNIQUE OR VERY OUT OF THE ORDINARY?

9 A. ONE EXAMPLE IS THAT OF THE FATHER WHO CAME TO
10 THE WEBSITE ASKING ABOUT -- I GUESS HE FOUND HIS 15 YEAR
11 OLD SON OR SO, DOING THINGS WITH A GERMAN SHEPHERD, WITH
12 A DOG. AND HE HAD ALREADY SPOKEN WITH HIS FAMILY
13 PHYSICIAN WHO TOLD HIM NOT TO WORRY, BASICALLY DISMISSED
14 THE BEHAVIOR. AND SO WE ANSWERED THE QUESTION A LITTLE
15 BIT MORE THOROUGHLY, YOU KNOW, WARNING ABOUT GETTING
16 BITTEN OR GETTING DIABETES OR OTHER -- NOT DIABETES,
17 RABIES, EXCUSE ME. SO SOMEBODY -- THERE MAY BE LOGICAL
18 INHERENT DANGERS IN THE BEHAVIOR THAT WAS ASKED ABOUT.

19 Q. AND WHY DID YOU DECIDE THAT THAT QUESTION AND
20 ANSWER WERE WORTH PUBLISHING?

21 A. WELL, AS AN EDUCATOR, WE OFTEN ASSUME IF ONE
22 PERSON ASKS A QUESTION IN A CLASS, THAT OTHER PEOPLE MAY
23 HAVE THE SAME QUESTION. WE KNOW FROM DATA THAT THIS
24 TYPE OF BEHAVIOR IS NOT UNCOMMON, ALTHOUGH IT MAY BE
25 RARE.

1 Q. AND WHY DO YOU PUBLISH THE QUESTIONS AND ANSWERS
2 INSTEAD OF SIMPLY RESPONDING DIRECTLY TO THE QUESTIONER?

3 A. BECAUSE WE BELIEVE THAT MANY OF THE QUESTIONS
4 HAVE VALUES TO OTHER READERS.

5 Q. AND WHO CAN READ THE QUESTIONS AND ANSWERS THAT
6 ARE ON THE WEBSITE?

7 A. ANYONE WITH ACCESS TO THE INTERNET.

8 Q. WHAT DO YOU HAVE TO DO TO READ THE QUESTIONS AND
9 ANSWERS?

10 A. FIND THE SITE AND NAVIGATE THROUGH THE SITE.

11 Q. DO YOU HAVE TO PROVIDE ANY PERSONAL INFORMATION
12 IN ORDER TO READ THE QUESTIONS AND ANSWERS?

13 A. NO.

14 Q. AND YOU EARLIER WERE DISCUSSING SOME OF THE
15 INFORMATION THAT USERS MAY PROVIDE TO THE WEBSITE WHEN
16 ASKING A QUESTION. IS ANY PERSONALLY IDENTIFIABLE
17 INFORMATION REQUIRED TO ASK A QUESTION?

18 A. NO.

19 Q. WHY NOT?

20 A. WE WANT TO MAKE IT SAFE FOR PEOPLE TO DO THIS.

21 Q. WHEN YOU SAY SAFE FOR PEOPLE TO DO THIS, WHAT DO
22 YOU MEAN BY THAT?

23 A. ONE OF THE QUESTIONS WE ASK BACK IN THE FORM IS
24 HAVE YOU TALKED TO ANYONE ELSE ABOUT THIS? AND THE
25 LARGE MAJORITY OF PEOPLE ANSWER NO. SO PEOPLE ARE OFTEN

1 EMBARRASSED OR ASHAMED TO ASK THE QUESTION TO SOMEONE IN
2 PERSON. AND SO WE CHOOSE NOT TO MAKE THEM DISCLOSE
3 THEIR PERSONAL IDENTIFYING INFORMATION, FOR CERTAINLY WE
4 WOULD NOT WANT TO PUBLISH THAT, BUT I DON'T WANT TO HAVE
5 THE RESPONSIBILITY FOR HAVING THAT AVAILABLE ANYWAY.

6 THE COURT: EXCUSE ME FOR INTERRUPTING.
7 WE ARE GOING TO TAKE A TEN-MINUTE RECESS. WE ARE OFF
8 THE RECORD. COUNSEL ARE EXCUSED.

9 (BREAK TAKEN.)

10 THE COURT: MR. FINE, GO RIGHT AHEAD.

11 BY MR. FINE:

12 Q. DR. TEPPER, WHEN WE BROKE, YOU WERE TELLING US
13 ABOUT THE DIFFERENT TIMES OF CONTENT ON THE WEBSITE.
14 YOU ALSO MENTIONED THAT YOU HAVE A BLOG. CAN YOU TELL
15 US A LITTLE BIT. WHAT ARE THE SUBJECTS OF THE BLOG THAT
16 YOU HAVE ON YOUR SITE?

17 A. THE SUBJECTS ON THE BLOG WILL VARY. THE THEME
18 OF THE BLOG IS SEX AND MEANING, SO WE REFLECT ON
19 ANYTHING FROM POLITICAL NEWS TO MOVIES OR BREAST CANCER
20 AWARENESS MONTH OR COPA.

21 Q. DO THEY YOU ALL HAVE A CENTRAL THEME?

22 A. WELL, WE LOOK AT THE MEANING BEHIND SEX THAT IS
23 REPORTED IN THE MEDIA, IN THE NEWS. SO I MEAN, IT'S
24 REALLY TRYING TO ADD MEANING TO OFTEN ISSUES THAT ARE
25 JUST TOUCHED ON AND NOT REALLY DEALT WITH IN MUCH DEPTH

1 OR BRING ATTENTION TO SOMETHING THAT MIGHT HAVE JUST
2 BEEN GLOSSED OVER IN THE MEDIA THAT WE THOUGHT IS WORTH
3 LIVING ON SEXUALHEALTH.COM.

4 Q. ARE THERE ANY SUBJECT MATTER LIMITS TO THE
5 MATERIAL THAT IS POSTED ON YOUR BLOGS?

6 MR. SEALLS: OBJECTION, IT'S VAGUE.

7 THE COURT: WHAT IS THE BASIS? I'M
8 SORRY.

9 MR. SEALLS: THE QUESTION IS VAGUE.

10 THE COURT: WAS THE QUESTION SUBJECT
11 MATTER LIMITS.

12 MR. FINE: YES.

13 THE COURT: OVERRULED.

14 THE WITNESS: THE BLOGS ARE -- I GUESS
15 THAT IS A YES OR NO. CAN YOU REPEAT YOUR QUESTION,
16 PLEASE.

17 BY MR. FINE:

18 Q. THE QUESTION IS, ARE THERE ANY SUBJECT MATTER
19 LIMITS TO THE BLOGS?

20 A. I'M GOING TO SAY YES AND NO. FOR THE -- WE
21 INITIATE THE BLOGS. ONE OF OUR EXPERTS OR SOMEONE WHO
22 IS INVITED INITIATES THE BLOG. IN THERE THERE IS NONE.
23 RESPONSES TO THE BLOGS ARE OFTEN SPAM AND SO IF IT LOOKS
24 LIKE THE RESPONSE IS SPAM, LIKE SOMEONE SAID, IT'S A
25 GREAT THING, GO TO MY LINK AND BUY MY PRODUCT, BASICALLY

1 WE WON'T POST A RESPONSE TO A BLOG THAT SEEMS LIKE IT IS
2 CLEARLY SPAM.

3 Q. JUST TO BE CLEAR, CAN USERS POST RESPONSES TO
4 THE BLOGS THAT YOUR STAFF OR YOUR EXPERTS INITIATE?

5 A. YES, THEY CAN REFLECT ON THE BLOG.

6 Q. AND CAN READERS POST SEXUALLY EXPLICIT COMMENTS
7 IN RESPONSE TO BLOGS?

8 A. YES.

9 Q. AND DO USERS POST SEXUALLY EXPLICIT DISCUSSION
10 IN RESPONSE TO BLOGS?

11 A. TRUTHFULLY, OUR BLOG HAS NOT BEEN THAT ACTIVE SO
12 FAR AS USER RESPONSES.

13 THE COURT: WHAT DID YOU SAY, SIR?

14 THE WITNESS: OUR BLOG HAS NOT BEEN THAT
15 ACTIVE. WE GET MORE SPAM RESPONSES THAN USERS'
16 RESPONSES AND THE RESPONSES THAT WE GET ARE USUALLY MORE
17 ON THE CONGRATULATIONS TYPE. WE HAVE NOT GOTTEN A LOT
18 OF CONTROVERSIAL RESPONSES SO...

19 BY MR. FINE:

20 Q. WHO CAN READ THE BLOGS?

21 A. ANYONE WHO HAS ACCESS TO THE WORLDWIDE WEB.

22 Q. WHO CAN PROVIDE A RESPONSE TO THE BLOGS?

23 A. ANYONE WHO READS THE BLOG AND CHOOSES TO
24 RESPOND.

25 Q. DOES A USER NEED TO PROVIDE ANY PERSONAL

1 INFORMATION IN ORDER TO PROVIDE A RESPONSE TO A BLOG?

2 A. ONCE AGAIN, WE ASK FOR A FIRST NAME AND AN
3 E-MAIL ADDRESS.

4 Q. AND DOES THE FIRST NAME NEED TO BE REAL?

5 A. NO.

6 Q. DOES THE E-MAIL ADDRESS NEED TO CONTAIN
7 PERSONALLY IDENTIFIABLE INFORMATION?

8 A. NO.

9 Q. AND AGAIN, WHY IS THAT?

10 A. MAYBE TO PROVIDE SOME LEVEL OF, IF WE NEEDED TO
11 GET BACK TO SOMEBODY THROUGH E-MAIL ASSUMING THEY GAVE
12 US AN E-MAIL, IF THERE WAS A RESPONSE REQUESTED.

13 Q. DR. TEPPER, IS ALL OF THE SEXUAL HEALTH
14 NETWORK'S CONTENT AVAILABLE FOR FREE?

15 A. YES.

16 Q. DO YOU RESTRICT ACCESS TO ANYONE?

17 A. NO.

18 Q. WHY NOT?

19 A. THE SITE IS THERE FOR THOSE WHO HAVE AN INTEREST
20 OR A NEED IN THE CONTENT. SO I DON'T WANT TO RESTRICT
21 ACCESS TO INFORMATION THAT IS POTENTIALLY LIFE-ENHANCING
22 OR LIFE-SAVING.

23 Q. DR. TEPPER, I'M GOING TO SWITCH SUBJECTS A
24 LITTLE BIT NOW. ARE YOU GENERALLY AWARE OF THE STATUTE
25 THAT IS AT ISSUE IN THIS LAWSUIT?

1 A. YES.

2 Q. AND WHAT DO YOU KNOW ABOUT THE STATUTE?

3 A. THE STATUTE MAKES IT ILLEGAL FOR ANY COMMERCIAL
4 ORGANIZATION TO COMMUNICATE IN THE FORM OF PICTURES,
5 IMAGES, GRAPHICS, WORDS, ANY COMMUNICATION THAT MAY BE
6 DEEMED HARMFUL TO MINORS THAT MAY -- OBVIOUSLY IF IT'S
7 OBSCENE BUT IN ADDITION TO BEING OBSCENE, IF IT PANDERS
8 TO THE PRURIENT INTERESTS OF MINORS OR IF IT LACKS
9 SERIOUS LITERARY OR ARTISTIC VALUE OR DEPICTS OR
10 DESCRIBES SEXUAL ACTS.

11 Q. AND HAVE YOU EVER READ THE STATUTE?

12 A. YES, I'M TRYING TO REPEAT FROM MEMORY WHAT I
13 KNOW OF THE STATUTE.

14 Q. AND BASED ON YOUR READING AND YOUR REVIEW OF THE
15 STATUTE, DO YOU KNOW EXACTLY WHAT SPEECH IS HARMFUL TO
16 MINORS UNDER THE STATUTE?

17 A. NO.

18 Q. WHY NOT?

19 A. I THINK IT'S UNCLEAR IN THIS COUNTRY WHAT IS
20 APPROPRIATE AND WHAT IS NOT APPROPRIATE FOR MINORS WHEN
21 IT COMES TO SEXUALLY EXPLICIT SPEECH, LEARNING,
22 EDUCATION.

23 Q. AND BASED ON YOUR READING AND YOUR REVIEW OF THE
24 STATUTE, DO YOU HAVE AN UNDERSTANDING OF WHAT IT MEANS
25 FOR SPEECH TO BE "PATENTLY OFFENSIVE" WITH RESPECT TO

1 MINORS?

2 A. NO.

3 Q. BASED ON YOUR READING AND REVIEW OF THE STATUTE,
4 DO YOU HAVE AN UNDERSTANDING OF WHAT IT MEANS FOR SPEECH
5 TO BE "PRURIENT" WITH RESPECT TO MINORS?

6 A. NO.

7 Q. DO YOU KNOW WHAT IT MEANS TO BE "PRURIENT" FOR
8 ADULTS?

9 A. NO.

10 Q. WHY NOT?

11 A. EVEN AMONGST PROFESSIONALS, THEY WILL ARGUE HOW
12 MUCH IS TOO MUCH OF AN INTEREST. HOW MUCH MASTURBATION
13 IS TOO MUCH MASTURBATION. AN INTEREST IN A PARTICULAR
14 FETISH, IS IT A PSYCHOLOGICAL PROBLEM OR IS IT JUST A
15 NORMAL VARIATION ON DESIRES. IN THE CONTEXT OF ADULTS,
16 I DON'T KNOW WHERE THE LINE OF GETTING USEFUL
17 INFORMATION AND BECOMING PRURIENT IS DRAWN.

18 Q. BASED ON YOUR READING AND YOUR REVIEW OF THE
19 STATUTE, DO YOU HAVE AN UNDERSTANDING OF WHAT THE LAW
20 MEANS WHEN IT REFERS TO SPEECH THAT TAKEN AS A WHOLE
21 LACKS SERIOUS LITERARY, ARTISTIC, POLITICAL OR
22 SCIENTIFIC VALUE FOR MINORS?

23 A. NO.

24 Q. DO YOU HAVE AN UNDERSTANDING AS TO WHICH
25 COMMUNITY STANDARDS DETERMINE WHAT IS HARMFUL TO MINORS

1 UNDER THE STATUTE?

2 A. NO.

3 Q. DR. TEPPER, DO YOU BELIEVE THAT ANY OF THE
4 CONTENT ON YOUR WEBSITE MIGHT BE CONSIDERED HARMFUL TO
5 MINORS?

6 A. YES.

7 Q. AND WHY DO YOU HAVE THAT BELIEF?

8 A. FOR A NUMBER OF REASONS. WE CAN GO HISTORICALLY
9 TO OBSCENITY LAWS. UNKNOWN. NOT THE TECHNICAL NAME OF
10 THE LAW BUT IF YOU ARE FAMILIAR WITH COMSTOCK AND LAWS
11 THAT WERE MEANT TO PUT IN PLACE FOR THE SAME PURPOSE OF
12 COPA, WHICH I UNDERSTAND IS TO PREVENT THE PROLIFERATION
13 OF PORNOGRAPHY, BUT THAT SAME LAW EFFECTIVELY SILENCED
14 CONTRACEPTION INFORMATION AND ALSO ANY INFORMATION
15 REGARDING ABORTION. THAT LAW WAS PASSED IN 1872 AND WAS
16 NOT REALLY OVERRULED OR DEEMED UNCONSTITUTIONAL UNTIL
17 NEARLY 100 YEARS AFTERWARDS.

18 Q. OTHER THAN THE HISTORICAL EXAMPLES, ARE THERE
19 ANY OTHER REASONS WHY YOU FEAR THAT MATERIAL ON YOUR
20 WEBSITE MIGHT BE CONSIDERED HARMFUL TO MINORS?

21 A. SURE. IN RECENT HISTORY WE HAVE --

22 Q. WHY DON'T YOU -- I'M SORRY TO INTERRUPT. WHY
23 DON'T YOU JUST TELL ME WHAT THEY ARE AND WE CAN GO
24 THROUGH EACH OF THOSE.

25 A. I WOULD SAY THE INCIDENT WITH THE FORMER SURGEON

1 GENERAL, DR. ELDERS, OVER HER COMMENTS REGARDING
2 MASTURBATION WHICH PRETTY MUCH LED TO HER LEAVING
3 OFFICE. TALK ABOUT OUR GOVERNMENT'S POLICY TOWARDS
4 SEXUALITY EDUCATION, WE CALL IT
5 ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION, WHERE WE HAVE
6 GIVEN PROBABLY CLOSE TO ONE BILLION DOLLARS TO PROGRAMS.
7 AND IF A SCHOOL SYSTEM WERE TO ACCEPT FUNDING FOR THEIR
8 SEXUALITY EDUCATION FROM THIS POT OF MONEY, THAT THEIR
9 EDUCATORS ARE DICTATED THAT THEY TELL STUDENTS THAT SEX
10 OUTSIDE OF MARRIAGE IS LIKELY TO CAUSE PSYCHOLOGICAL AND
11 PHYSICAL HARM AND THEY ARE PROHIBITED FROM DISCUSSING
12 THINGS LIKE CONDOMS UNLESS IT IS IN THE CONTEXT OF
13 CONDOM FAILURE RATES. SO THE GOVERNMENT IS VERY
14 SPECIFIC WITH THEIR MONEY ON WHAT PEOPLE WHO TAKE THE
15 MONEY CAN SAY TO CHILDREN, OUR MINORS. SO IF IN SCHOOL,
16 I TOOK THIS MONEY AND I WERE NOT ABLE TO TELL MINORS
17 ABOUT HOW TO PROTECT THEMSELVES IF THEY CHOOSE TO BE
18 SEXUALLY ACTIVE, THEN I HAVE TO ASSUME THAT IF THAT
19 SPEECH IS ONLINE, SOMEBODY MIGHT OBJECT TO THAT SPEECH
20 IF THERE WAS A LAW GIVING THEM THE RIGHT AND MAY ASK A
21 LEGISLATOR TO BRING CHARGES AGAINST ME OR TO MAKE ME PUT
22 UP AN ADULT VERIFICATION SCREEN.

23 Q. THE SUBJECT MATTERS THAT IN YOUR UNDERSTANDING
24 ARE NOT PERMITTED DUE TO THE ABSTINENCE-ONLY FUNDING
25 RULES, DO YOU DISCUSS THOSE SUBJECT MATTERS ON YOUR

1 WEBSITE?

2 A. YES.

3 Q. AND WHY DO YOU DO THAT?

4 A. FROM A PUBLIC HEALTH PERSPECTIVE WE KNOW THAT
5 THE MAJORITY OF MINORS BY THE TIME THEY ARE 17 HAVE
6 ENGAGED IN SEXUAL BEHAVIORS THAT PUT THEM AT RISK. AND
7 SO I THINK IF THEY ARE ENGAGING IN THESE BEHAVIORS AND I
8 CAN GIVE THEM INFORMATION THAT WILL AT LEAST REDUCE
9 THEIR RISK, THEN THAT IS MY RESPONSIBILITY AS A PUBLIC
10 HEALTH PROFESSIONAL.

11 Q. YOU ALSO MENTIONED SOMETHING ABOUT FORMER
12 SURGEON GENERAL ELDERS, CAN YOU PLEASE TELL US WHAT YOU
13 ARE REFERRING TO?

14 A. IN A PRESS CONFERENCE SHE ANSWERED I BELIEVE IN
15 THE AFFIRMATIVE ABOUT THE DISCUSSION, NOT THE TEACHING
16 OF BUT THE DISCUSSION OF MASTURBATION IN SCHOOLS. SHE
17 THOUGHT THAT IT WAS APPROPRIATE AND THAT WAS -- I THINK
18 IT LED TO HER LEAVING OFFICE AS THE SURGEON GENERAL.

19 Q. AND HOW DID THAT INCIDENT AFFECT YOUR FEAR OF
20 PROSECUTION UNDER THE STATUTE AT ISSUE HERE?

21 A. WELL, THE GOVERNMENT IN THAT INSTANCE PUT
22 PRESSURE FOR SOMEONE TO LEAVE OFFICE FOR DISCUSSING
23 SOMETHING THAT WAS NOT POLITICALLY CORRECT OR TASTEFUL.
24 SO IF THE GOVERNMENT CAN DICTATE WHAT IS TALKED ABOUT BY
25 THEIR EMPLOYEES AND WHAT IS TALKED ABOUT BY PEOPLE WHO

1 RECEIVE MONEY FROM THE GOVERNMENT, THEN I HAVE TO
2 BELIEVE THAT THE GOVERNMENT CAN TELL ME WHAT I CAN TALK
3 ABOUT IF THEY WERE GIVEN THE RIGHT TO UNDER THIS LAW.

4 Q. AND DO YOU DISCUSS MASTURBATION ON YOUR WEBSITE?

5 A. YES. WE GET A LOT OF QUESTIONS ABOUT
6 MASTURBATION.

7 Q. OKAY. SO YOU MENTIONED NOW THE INCIDENT WITH
8 SURGEON GENERAL ELDERS, THE ABSTINENCE ONLY FUNDING AND
9 THE COMSTOCK LAWS. ARE THERE ANY OTHER EXAMPLES THAT
10 LEAD YOU TO BELIEVE THAT YOUR MATERIAL MAY BE SUBJECT TO
11 PROSECUTION UNDER THE STATUTE?

12 A. SURE.

13 I HAVE HAD COLLEAGUES WHO HAVE BEEN
14 PERSECUTED FOR PROVIDING SEXUAL EDUCATION EVEN TO ADULTS
15 IN A COLLEGE SETTING. DOCTOR DENNIS DAILY WAS ONE OF
16 OUR MEMBERS OF THE AMERICAN ASSOCIATION OF SEX
17 EDUCATORS, COUNSELORS AND THERAPISTS WHERE ONE STUDENT
18 ACCUSED HIM OF --

19 MR. SEALLS: OBJECTION, YOUR HONOR. THIS
20 IS GETTING INTO HEARSAY.

21 THE WITNESS: IT'S NOT HEARSAY.

22 THE COURT: WAIT A MINUTE. IT MIGHT BE A
23 TECHNICAL PROBLEM.

24 MR. SEALLS: MY OBJECTION, YOUR HONOR, IS
25 THAT THE WITNESS IS PROVIDING HEARSAY TESTIMONY AT THIS

1 POINT.

2 THE COURT: I UNDERSTAND THAT IS YOUR
3 OBJECTION. I'M TRYING TO --

4 MR. FINE: YOUR HONOR, THE INFORMATION IS
5 NOT BEING OFFERED FOR THE TRUTH OF THE WORDS OF THE
6 MATTER. IT IS SIMPLY BEING OFFERED AS A BASIS FOR DR.
7 TEPPER'S FEAR OF PROSECUTION.

8 THE COURT: THAT WILL REMAIN IN THE
9 RECORD FOR THE PURPOSE OF SHOWING STATE OF MIND,
10 EXCEPTION TO THE HEARSAY RULE.

11 THE WITNESS: SO ONE OF OUR COLLEAGUES
12 WAS ACCUSED OF WRONGDOING IN A CLASS FROM A STUDENT THAT
13 WAS TAKING THAT CLASS AS AN ELECTIVE. AND THE
14 UNIVERSITY THREATENED TO TAKE ALL THE FUNDING AWAY FROM
15 THEIR WHOLE DEPARTMENT IN THE UNIVERSITY AND THIS
16 PROFESSOR WAS AT RISK OF LOSING HIS JOB FOR DOING
17 SEXUALITY EDUCATION TO COLLEGE STUDENTS. SO YOU KNOW,
18 IF THIS INFORMATION IS SO CONTROVERSIAL THAT EVEN IN AN
19 ELECTIVE COLLEGE CLASS THAT SOMEONE COULD STAKE LOSING
20 THEIR JOB AND A WHOLE DEPARTMENT LOSING ALL OF THEIR
21 FEDERAL FUNDING, YOU KNOW, THAT PUTS ME AT CONCERN FOR
22 MY SPEECH.

23 Q. ARE YOU AWARE OF ANY INCIDENTS IN WHICH HIGH
24 SCHOOL TEACHERS HAVE RUN INTO TROUBLE AS A RESULT OF
25 ENGAGING IN PROVIDING SEXUAL EDUCATION INFORMATION?

1 A. YES. I HAVE A COLLEAGUE IN THE STATE OF
2 PENNSYLVANIA WHO -- ONCE AGAIN, ONE STUDENT COMPLAINED
3 ABOUT THE TEACHER SAYING SOMETHING THAT WAS
4 INAPPROPRIATE, AND SHE WAS THEN MOVED TO HOME ECONOMICS
5 INSTEAD OF SEXUALITY EDUCATION.

6 Q. WHEN YOU SAY THE STUDENT COMPLAINED ABOUT
7 SOMETHING THAT WAS INAPPROPRIATE, WHAT ABOUT IT WAS
8 INAPPROPRIATE?

9 A. THE STUDENT CLAIMED THAT THE TEACHER SHARED
10 SOMETHING PERSONAL ABOUT HER SEXUAL LIFE.

11 Q. AND HAVE YOU PERSONALLY EVER SUFFERED ANY
12 RESISTANCE BECAUSE OF THE CONTENT OF THE MATERIAL YOU
13 WORK WITH?

14 A. YES.

15 Q. AND PLEASE EXPLAIN.

16 A. AS A PARENT IN A SCHOOL, OTHER PARENTS HAVE BEEN
17 INVITED IN ON LIKE CAREER DAY TO TALK ABOUT WHAT THEY DO
18 AND I HAVE MADE MYSELF AVAILABLE AND VOLUNTEERED MANY
19 TIMES. AND THE SCHOOL HAS NEVER TAKEN ME UP ON MY OFFER
20 TO SHARE, YOU KNOW, WITH MY SON'S CLASSES WHAT I DO.
21 EVEN AROUND THE TABLE OF FRIENDS AND CLASSMATES, THERE
22 IS CONCERNS ABOUT ME COMING INTO THE SCHOOL TO DO ANY
23 SEXUALITY EDUCATION BECAUSE THEY MAY NOT WANT THEIR
24 CHILDREN TO HEAR QUOTE, UNQUOTE EVERYTHING FROM A TO Z
25 ABOUT SEX THAT I MIGHT TELL THEM.

1 Q. DR. TEPPER, DO YOU BELIEVE THAT THE CONTENT ON
2 YOUR WEBSITE IS VALUABLE FOR ADULTS?

3 A. YES.

4 Q. DO YOU BELIEVE THAT IT IS VALUABLE FOR OLDER
5 MINORS?

6 A. YES.

7 Q. DO YOU FEAR THAT OTHERS MAY DISAGREE?

8 A. YES.

9 Q. WHY IS THAT?

10 A. I THINK WE HAVE MENTIONED MANY OF THOSE CASES.
11 THE DISCUSSION OF SEXUAL ACTIVITY AND BEHAVIOR FOR
12 MINORS IS AN EXTREMELY CONTROVERSIAL SUBJECT IN THIS
13 COUNTRY, THERE ARE VERY STRONG OPINIONS ON EACH SIDE.

14 Q. DR. TEPPER, HAVE YOU EVER TESTIFIED IN COURT
15 BEFORE?

16 A. YES.

17 Q. IN WHAT CONTEXT?

18 A. OUTSIDE OF THESE HEARINGS FOR COPA, I HAVE
19 TESTIFIED IN, I BELIEVE, FOUR DIFFERENT STATES FOR
20 STATE-BASED LEGISLATION THAT WERE SIMILAR IN INTENT TO
21 COPA.

22 Q. AND DID THOSE COURTS DETERMINE THAT YOUR SPEECH,
23 THE SEXUAL HEALTH NETWORK, WAS AT RISK?

24 A. YES.

25 Q. AND WHAT HAPPENED IN THOSE CASES? WHAT WAS THE

1 RESULT?

2 A. EACH CASE WAS DEEMED UNCONSTITUTIONAL. NONE OF
3 THOSE LAWS WERE PUT INTO -- WERE ENACTED OR ALLOWED TO
4 BE ENFORCED.

5 Q. OKAY.

6 DR. TEPPER, I WANT TO KNOW HAVE YOU TAKE
7 A LOOK AT PLAINTIFFS' EXHIBIT 37 WHICH CONSISTS OF A SET
8 OF PAPERS IN THE BINDER IN FRONT OF YOU, PLAINTIFFS'
9 EXHIBIT 37. YOU ARE FREE TO USE THE BINDER OR MONITOR,
10 WHATEVER IS EASIER FOR YOU.

11 CAN YOU IDENTIFY WHAT PLAINTIFFS' EXHIBIT
12 37 IS?

13 A. THIS IS A PAGE FROM THE WEBSITE THAT IS AN
14 ARTICLE.

15 Q. AND I WANT TO NOW ASK YOU GENERALLY ALL OF THE
16 DOCUMENTS WITHIN PLAINTIFFS' EXHIBIT 37. WHAT ARE
17 THESE?

18 A. EITHER CURRENT OR PAST PAGES FROM THE WEBSITE.

19 THE COURT: THE NAME OF THE WEBSITE, SIR?

20 THE WITNESS: SEXUALHEALTH.COM.

21 MR. FINE: ARE THESE PAGES ACCURATE

22 REPRESENTATIONS OF WEB PAGES FROM YOUR WEBSITE?

23 THE WITNESS: YES.

24 BY MR. FINE:

25 Q. IF WE LOGGED ON TO YOUR WEBSITE RIGHT NOW, COULD

1 WE FIND THESE WEB PAGES?

2 A. A GREAT MAJORITY OF THEM.

3 Q. LET ME ASK. HOW OFTEN DOES SEXUAL HEALTH
4 NETWORK REMOVE ARTICLES THAT IT PUBLISHES ON THE WEBSITE
5 OR ANY INFORMATION THAT IS PUBLISHED ON THE WEBSITE?

6 A. NOT VERY. WE REVIEWED ALL OF THE CONTENT THE
7 LAST TIME WE UPDATED OUR DATABASE AND SO WE WOULD REMOVE
8 SOMETHING IF THE INFORMATION WAS NO LONGER ACCURATE OR
9 IT BECAME OBSOLETE, IF IT WAS NO LONGER TIMELY.

10 Q. ANY OF THE MATERIAL ON YOUR WEBSITE EVER DEPICT
11 OR DESCRIBE "AN ACTUAL OR SIMULATED SEXUAL ACT OR SEXUAL
12 CONTACT, AN ACTUAL OR SIMULATED NORMAL OR PERVERTED
13 SEXUAL ACT OR A LEWD EXHIBITION OF THE GENITALS OR
14 POST-PUBESCENT FEMALE BREAST"?

15 A. YES.

16 Q. I WANT TO HAVE YOU NOW TURN TO PAGES 8 AND 9 OF
17 PLAINTIFFS' EXHIBIT 37. 8 AND 9. CAN YOU TELL US WHAT
18 THOSE PAGES ARE?

19 A. THIS IS AN INTRODUCTION TO THE CHANNEL ON LOVE
20 AND RELATIONSHIPS.

21 Q. AND IF YOU WOULD LOOK AT THE LEFT-HAND SIDE OF
22 PAGE 8, THERE ARE A NUMBER OF WHAT APPEAR TO BE
23 CATEGORIES. WHAT ARE THOSE ON THE LEFT-HAND SIDE OF THE
24 PAGE?

25 A. THOSE ARE GENERAL, WHAT WE CALL CHANNELS. SO

1 THOSE ARE THE TOPICS I DESCRIBED EARLIER, MEN'S SEXUAL
2 HEALTH, WOMEN'S SEXUAL HEALTH, LOVE AND RELATIONSHIPS,
3 SEXUALITY EDUCATION, DISABILITY AND CHRONIC CONDITIONS,
4 SEXUALLY TRANSMITTED INFECTIONS, SEXUAL HEALTH RESOURCES
5 AND SHOPPING.

6 Q. AND THEN IF YOU LOOK IN THE MIDDLE OF THE PAGE,
7 UNDER THE CAPTION LOVE AND RELATIONSHIPS TOPICS, DOES
8 THAT LIST THE TOPICS THAT ARE WITHIN THE LOVE AND
9 RELATIONSHIPS CHANNEL?

10 A. YES.

11 Q. AND IS MASTURBATION ONE OF THEM?

12 A. YES.

13 Q. AND WHAT WOULD HAPPEN IF WE CLICKED ON THE WORD
14 MASTURBATION?

15 A. IT WOULD BRING UP CONTENT RELATED TO
16 MASTURBATION AND RELATIONSHIPS SO IT MIGHT BE AN
17 ARTICLE, MIGHT BE A Q AND A, QUESTION AND ANSWER, MIGHT
18 BE A VIDEO.

19 Q. OKAY. I WANT TO DIRECT YOUR ATTENTION BACK TO
20 THE VERY FRONT OF PLAINTIFFS' EXHIBIT 37, PAGES 1
21 THROUGH 3.

22 A. OKAY.

23 Q. OKAY? WHAT'S ON PAGES 1 THROUGH 3?

24 A. IT IS AN ARTICLE ENTITLED, THE JOYS THAT
25 VIBRATORS CAN BRING TO YOUR SEX LIFE.

1 Q. AND GENERALLY WHAT IS THE SUBJECT MATTER OF THIS
2 ARTICLE?

3 A. HOW TO INCORPORATE THIS TOOL, THIS VIBRATOR INTO
4 YOUR LOVE LIFE TO ENHANCE YOUR SEXUAL PLEASURE.

5 Q. AND IS THIS ONE OF THE ARTICLES THAT IS
6 CONTAINED WITHIN THE MASTURBATION TOPIC THAT WE WERE
7 JUST LOOKING AT WITHIN THE LOVE AND RELATIONSHIPS
8 CHANNEL?

9 A. YES. IF YOU LOOK AT PAGE 3, IT SAYS THIS
10 ARTICLE APPEARS IN THE FOLLOWING TOPICS, AND SO THAT
11 ARTICLE CAN BE REACHED THROUGH MEN'S HEALTH ORGASM,
12 MEN'S HEALTH MASTURBATION, WOMEN HEALTH'S ORGASM, ET
13 CETERA.

14 Q. AND IS THIS ARTICLE INDICATIVE OF THE TYPES OF
15 ARTICLES OR OTHER CONTENT THAT ARE FOUND IN THESE
16 VARIOUS CATEGORIES, THESE TOPICS?

17 A. YES.

18 Q. AND I WANT TO DIRECT YOU NOW TO THE VERY TOP OF
19 PAGE 3 OF PLAINTIFFS' EXHIBIT 37, THE TOP PARAGRAPH.
20 WHAT DOES THE PARAGRAPH DESCRIBE GENERALLY?

21 A. GENERALLY IT'S DESCRIBING A PARTNER, I'M
22 ASSUMING JERRY IS A MALE, HOLDING A FEMALE PARTNER,
23 SHEILA AND WATCHING HER WHILE SHE ESSENTIALLY
24 MASTURBATES USING A VIBRATOR.

25 Q. WHY DID YOU PUBLISH THIS ARTICLE?

1 A. BECAUSE PEOPLE ARE LOOKING FOR WAYS TO ENHANCE
2 THEIR PERSONAL SEXUAL RELATIONSHIPS, AND IN THIS
3 PARTICULAR AREA THEY ARE TALKING ABOUT THE ELUSIVE G
4 SPOT WHICH IS A SPOT -- THERE WAS A BOOK CALLED THE G
5 SPOT AND MANY PEOPLE ARE CURIOUS ABOUT THIS SPOT AND YOU
6 GET LOTS OF QUESTIONS ABOUT, IT SO IT'S JUST ONE PART OF
7 THE ARTICLE.

8 Q. I'M SORRY?

9 A. THIS IS A DISCUSSION OF A TYPE OF VIBRATOR THAT
10 WILL EFFECTIVELY STIMULATE THAT AREA OF THE ANTERIOR
11 WALL OF THE VAGINA.

12 Q. WHO HAS ACCESS TO THIS ARTICLE?

13 A. WHOEVER HAS ACCESS TO THE WORLDWIDE WEB.

14 Q. I WANT TO NOW DIRECT YOU TO PAGES 10 THROUGH 13
15 IN PLAINTIFFS' EXHIBIT 37. WHAT ARE THESE PAGES?

16 A. THESE PAGES ARE A TOPIC UNDER THE LOVE AND
17 RELATIONSHIPS CHANNEL CALLED KEEPING SEX FUN.

18 Q. AND CAN YOU READ THE TITLES OF THE ARTICLES THAT
19 ARE LOCATED IN THE KEEPING SEX FUN?

20 A. SEX TOYS AND WHERE TO PURCHASE THEM. THE JOYS
21 THAT VIBRATORS CAN BRING TO YOUR SEX LIFE, THAT IS THE
22 ARTICLE WE JUST LOOKED AT, SEXUAL FANTASIES AND
23 RELATIONSHIPS. SPICING UP YOUR SEX LIFE. RESOLVE TO
24 HAVE A SEXIER NEW YEAR. TAOISM AND SEXUALITY. REVIEW
25 OF CLIMATIQUE AROUSAL CREAM. HOW TO NEGOTIATE FOR THE

1 ROMANTIC INTIMACY YOU WANT. CELEBRATE NATIONAL
2 MASTURBATION MONTH. BE A GOOD SEX TOY CONSUMER. YOGA
3 AND SEX. LOVEMAKING TIPS FOR MEN, YOU GET WHAT YOU
4 GIVE.

5 Q. ARE THESE ARTICLES SEXUALLY EXPLICIT?

6 A. YES.

7 Q. HOW WOULD YOU DESCRIBE THE SUBJECTS OF THESE
8 ARTICLES?

9 A. SEXUAL ENHANCEMENT.

10 Q. FOCUSING ON THE LAST ARTICLE, LOVEMAKING TIPS
11 FOR MEN, YOU GET WHAT YOU GIVE, WHAT IS THAT ARTICLE
12 ABOUT?

13 A. IT'S ADVICE TO MEN ABOUT HOW TO BE ESSENTIALLY
14 BETTER LOVERS.

15 Q. IF WE CAN NOW TURN TO PAGES 14 THROUGH 15 OF
16 PLAINTIFFS' EXHIBIT 37, 14 THROUGH 15. WHAT'S ON PAGES
17 14 AND 15?

18 A. AN ARTICLE ON SPICING UP YOUR SEX LIFE.

19 Q. AND GENERALLY WHAT IS THIS ARTICLE ABOUT?

20 A. ABOUT KEEPING YOUR SEXUAL LIFE ACTIVE AND
21 PLEASURABLE, KEEPING YOUR SEX LIFE FROM GETTING BORING
22 IN A LONG TERM RELATIONSHIP.

23 Q. AND IF YOU CAN FOCUS ON THE SECTION IN THE
24 MIDDLE THAT BEGINS AFTER THE WHAT IS IN CAPITAL LETTERS,
25 GIVE NEW TWISTS TO OLD STANDARDS. CAN YOU READ THE NEXT

1 COUPLE OF SENTENCES?

2 A. KISS LIKE YOU MEAN IT EVEN WHEN YOU ONLY HAVE A
3 MINUTE. FOR HER, AS YOU'RE RUSHING OFF TO WORK, GRAB
4 HIM BY THE BELT, PULL HIM TO YOU AND KISS HIM AS THOUGH
5 YOUR VERY LIFE DEPENDED ON IT. FOR HIM, GRAB A TANGLE
6 OF HAIR AND TUG A LITTLE AS YOU PRESS YOUR MOUTH HARD
7 AGAINST HERS, FINISH WITH SOFT TENDER NIBBLES AND
8 MURMUR, I LOVE YOU. SHOULD I KEEP GOING?

9 Q. READ THE NEXT.

10 A. FOR HER, GET A COMPLETE BRAZILIAN BIKINI WAX
11 JUST BEFORE A FUN NIGHT OUT ON THE TOWN. WEAR A SHORT
12 SKIRT, BUT SKIP THE UNDERWEAR. DURING DINNER, GUIDE
13 YOUR SWEETIE'S HAND SLOWLY, VERY SLOWLY FROM KNEE TO
14 THIGH UNTIL HIS FINGERS REACH YOUR SILKY SMOOTH BARE AND
15 PROBABLY MOIST TRIANGLE.

16 Q. AND WHO CAN VIEW THIS ARTICLE, SPICING UP YOUR
17 SEX LIFE?

18 A. ANYONE WHO CAN ACCESS THE WORLDWIDE WEB.

19 Q. AND AGAIN, WHY DID YOU THINK IT WAS WORTH
20 PUBLISHING THIS ARTICLE?

21 A. THERE IS A LOT OF LONG TERM RELATIONSHIPS WHERE
22 SEX HAS LOST ITS THRILL FOR THE COUPLES AND THERE IS A
23 LOT OF DISCUSSION IN THE LITERATURE ABOUT QUOTE,
24 UNQUOTE, SEXLESS MARRIAGES. SO THESE ARE FOR PEOPLE WHO
25 FEEL THAT THEIR SEX LIVES HAVE BEEN LACKING, BUT WANT TO

1 DO SOMETHING TO GET BACK A FEELING THAT MAYBE THEY ONCE
2 HAD AND LOST.

3 Q. I WANT TO ASK YOU NOW TO LOOK AT PAGES 16 TO 17.
4 16 TO 17 OF PLAINTIFFS' EXHIBIT 37.

5 A. OKAY.

6 Q. WHAT'S ON PAGES 16 AND 17?

7 A. THIS IS A QUESTION AND ANSWER.

8 Q. AND WHAT IS THE SUBJECT OF THIS? WHEN YOU SAY
9 THIS IS A QUESTION AND ANSWER, IS THIS WHAT YOU WERE
10 DISCUSSING EARLIER ABOUT USER QUESTIONS?

11 A. A USER SENT IN THIS QUESTION AND DOCTOR VAN
12 KIRK, ACTUALLY OUR CONTENT MANAGER, ANSWERED THIS
13 QUESTION.

14 Q. AND WHAT IS THE SUBJECT OF THIS QUESTION AND
15 ANSWER?

16 A. WELL, IT'S TWO-FOLD.

17 IT'S A HETEROSEXUAL RELATIONSHIP, MAN AND
18 WOMAN, WHERE THE GIRLFRIEND WOULD LIKE TO USE WHAT IS
19 CALLED A STRAP-ON DILDO TO PENETRATE HER BOYFRIEND. SO
20 HE IS ASKING, YOU KNOW -- HE IS INTERESTED. HE WANTS TO
21 KNOW, IF HE DOES THIS, WILL IT MAKE HIM GAY? SO IT'S A
22 QUESTION ABOUT BOTH AN ACTIVITY AND ALSO ABOUT
23 ORIENTATION.

24 Q. AND WHO CAN VIEW THIS QUESTION AND ANSWER?

25 A. ANYBODY WITH ACCESS TO THE WORLDWIDE WEB.

1 Q. I ASSUME IT'S FOR SIMILAR REASONS, BUT CAN YOU
2 TELL US WHY DID YOU THINK THIS QUESTION AND ANSWER WERE
3 PUBLISHED ON THE WORLDWIDE WEB?

4 A. BECAUSE I THINK OFTEN PEOPLE ARE EVEN
5 EMBARRASSED TO REVEAL THEIR CURIOSITIES AND THEIR
6 QUESTIONS AND THEIR CONCERNS EVEN TO THEIR PARTNERS. SO
7 IN THIS CASE IT SEEMS LIKE THIS PERSON MIGHT BE
8 INTERESTED IN THIS ACTIVITY THAT THEIR PARTNER SUGGESTED
9 BUT, YOU KNOW, DIDN'T WANT TO REVEAL THEIR INSECURITIES
10 ABOUT WHAT IF I PARTICIPATED IN THIS BEHAVIOR.

11 Q. AND IF YOU CAN LOOK BACK AT PAGES 10 THROUGH 13,
12 WHICH WE WERE JUST LOOKING AT, PAGES 10 THROUGH 13. MY
13 QUESTION IS, IF YOU LOOK AT THE BOTTOM STARTING ON PAGE
14 10, UNDER THE CAPTION, ANSWERED LOVE AND RELATIONSHIPS,
15 KEEPING SEX FUN QUESTIONS?

16 A. YES.

17 Q. ARE THESE -- IS WHAT APPEARS BELOW THAT, ARE
18 THESE ADDITIONAL QUESTIONS?

19 A. YES. THEY ARE QUESTIONS THAT HAVE BEEN
20 CATEGORIZED TO FIT INTO THIS TOPIC.

21 Q. AND HOW DO YOU FIND OUT WHAT THE ANSWER IS?

22 A. YOU CLICK ON -- WHEN YOU ARE ON THE SITE, YOU
23 CLICK ON THE QUESTION AND IT WILL TAKE YOU TO A PAGE
24 LIKE WE JUST SAW WHERE THERE IS A QUESTION AND AN
25 ANSWER.

1 Q. I WANT TO NOW HAVE YOU JUMP FORWARD TO PAGE 76,
2 PLAINTIFFS' EXHIBIT 37 AGAIN, PAGE 76. WHAT'S
3 REPRESENTED HERE ON PAGE 76?

4 A. THESE ARE GENERAL SEXUALITY EDUCATION TOPICS
5 UNDER THE SEXUAL EDUCATION CHANNEL.

6 Q. WHAT ARE THE TOPICS IN THE SEXUALITY EDUCATION
7 SECTION?

8 A. SEXUAL HEALTH ADVOCACY, HUMAN SEXUAL RESPONSE
9 CYCLES, ORAL SEX, POSITIONS, FANTASIES, SAFER SEX
10 PRACTICES, TECHNIQUES, PENIS IN VAGINA SEX, ANAL SEX,
11 DEFINITIONS AND GLOSSARY, AND HOW TO.

12 Q. ARE THE -- IS THE CONTENT IN EACH OF THESE
13 SUBTOPICS SEXUALLY EXPLICIT?

14 A. YES.

15 Q. DO THEY DESCRIBE OR DEPICT AN ACTUAL OR
16 SIMULATED SEXUAL ACT OR SEXUAL CONTACT OR AN ACTUAL OR
17 SIMULATED NORMAL OR PERVERTED SEXUAL ACT?

18 A. YES.

19 Q. AND I WANT TO NOW DIRECT YOU TO PAGES THAT ARE
20 NUMBERED BACK AT THE BEGINNING, PAGES 4 THROUGH 7, 4
21 THROUGH 7 OF PLAINTIFFS' EXHIBIT 37.

22 A. OKAY.

23 Q. WHAT ARE THESE PAGES REPRESENTING?

24 A. THESE ARE REPRESENTING LINKS TO THE WEBCAST THAT
25 WERE DESCRIBED BEFORE.

1 Q. CAN THESE WEBCASTS BE ACCESSED THROUGH YOUR
2 WEBSITE?

3 A. YES.

4 Q. IF YOU WERE TO ACCESS THESE WEBCASTS, IS IT --
5 THIS IS A VIDEO?

6 A. YES.

7 Q. AND IS THERE SOUND AS WELL?

8 A. YES.

9 Q. AND GENERALLY, WHAT ARE THE SUBJECTS OF THESE
10 VIDEOS?

11 A. WELL, THEY ARE LISTED HERE, HEALTHY SEX,
12 ERECTILE DYSFUNCTION, SEXUALLY TRANSMITTED DISEASES, SEX
13 IN MATURE ADULTS, CONTRACEPTION.

14 Q. LET ME ASK YOU TO FOCUS IN THE FIRST CATEGORY
15 CAPTIONED HEALTHY SEX.

16 A. YES.

17 Q. TELL US WHAT IS THE SUBJECT OF THE FOURTH VIDEO
18 IN THE HEALTHY SEX CATEGORY ON PAGE 4?

19 A. OBJECTS OF DESIRE. THE PSYCHOLOGY OF SEXUAL
20 FETISHES.

21 Q. WHAT IS THAT VIDEO ABOUT?

22 A. IT'S I BELIEVE -- FROM WHAT I RECALL, A COUPLE
23 OF PSYCHOLOGISTS DISCUSSING PEOPLE'S INTERESTS IN
24 OBJECTS OR THINGS THAT ARE NOT TRADITIONALLY CONSIDERED
25 SEXUAL IN NATURE, BUT THEY ARE AROUSED BY THEM SEXUALLY.

1 Q. WHO CAN VIEW THIS VIDEO?

2 A. ANYONE WITH ACCESS TO THE WORLDWIDE WEB.

3 Q. HOW MUCH DOES IT COST?

4 A. NOTHING.

5 Q. I WANT TO NOW DIRECT YOU TO PAGES, TOWARD THE

6 END, PAGES 80 THROUGH 87. 80 THROUGH 87.

7 A. I SEE IT UP THERE. I WILL FIND IT.

8 Q. WHAT IS REPRESENTED ON PAGES 80 THROUGH 87?

9 A. THIS IS THE SHOPPING CHANNEL.

10 Q. AND WHAT KINDS OF PRODUCTS ARE AVAILABLE THROUGH

11 YOUR SHOPPING SETUP?

12 A. VIBRATORS, LUBRICANTS, AUDIO CDS, DVDS OR

13 VIDEOS.

14 Q. WHY DO YOU FEATURE THESE PRODUCTS ON YOUR

15 WEBSITE?

16 A. AS A CONVENIENCE TO OUR USERS, TO GIVE THEM A

17 RESOURCE TO BUY THESE PRODUCTS FROM PLACES THAT WE THINK

18 ARE TRUSTWORTHY AND REPUTABLE.

19 MR. FINE: YOUR HONOR, AT THIS TIME I

20 WOULD LIKE TO MOVE PLAINTIFFS' EXHIBIT 37 INTO EVIDENCE.

21 MR. SEALLS: YOUR HONOR, THE DEFENSE HAS

22 SOME OBJECTIONS TO THE USE OF THE EXHIBIT. THERE ARE

23 CERTAIN PAGES THAT MR. FINE WENT THROUGH WITH DR. TEPPER

24 AND THOSE PAGES ARE ACTUALLY VERY LIMITED. I CAN NAME

25 THEM IF THE COURT WISHES. A MAJORITY OF EXHIBIT 37 WAS

1 NOT AUTHENTICATED OR EVEN COMMENTED ON BY DR. TEPPER,
2 OTHER THAN GENERALLY THINGS THAT ARE ON HIS WEBSITE.
3 THERE ARE SPECIFIC PAGES, YOUR HONOR. THOSE PAGES READ
4 FROM 18 THROUGH 70, THAT ARE EXHIBITS FROM THE
5 PRELIMINARY INJUNCTION HEARING WHICH WE OBJECT TO ON THE
6 GROUNDS OF RELEVANCE. ALSO, YOUR HONOR, THESE PAGES
7 WERE NOT IDENTIFIED DURING DISCOVERY, WHICH IS ANOTHER
8 BASIS FOR OUR OBJECTION. I MAKE THE OBJECTION IN OUR
9 SUBMISSION WHICH WENT INTO THE PRETRIAL ORDER. WE
10 RENEWED THAT OBJECTION WITH THE EXCEPTION BEING THE
11 LIMITED NUMBER OF PAGES THAT DR. TEPPER ACTUALLY
12 IDENTIFIED. I CAN READ THEM IN THE COURT IF THE COURT
13 DESIRES.

14 THE COURT: WAS IT YOUR INTENT TO OBJECT
15 TO ANY PAGE THAT HE DID NOT TESTIFY ABOUT THIS
16 AFTERNOON?

17 MR. SEALLS: CORRECT, YOUR HONOR.

18 MR. FINE: THE GROUND FOR THAT WOULD BE
19 AUTHENTICITY? BECAUSE I'M HAPPY TO HAVE HIM
20 AUTHENTICATE EACH OF THESE PAGES IF WE NEED TO DO THAT.

21 MR. SEALLS: THAT IS ONE GROUND. ANOTHER
22 GROUND, PARTICULARLY WHEN IT COMES TO THE PRELIMINARY
23 INJUNCTION MATTER, IS RULE 403, CONFUSION OF THE ISSUES.
24 WHAT IS SUBMITTED HERE, YOUR HONOR, IS THE PRESENT STATE
25 OF THE WEBSITE AS WELL AS WHAT WAS IN EVIDENCE BACK IN

1 1999. WE ALSO SUBMIT, YOUR HONOR, THAT THERE IS NOT
2 RELEVANCE FROM THE PAGES FROM THE PRELIMINARY INJUNCTION
3 HEARING.

4 MR. FINE: THESE ARE ALL WEB PAGES THAT
5 ARE AVAILABLE ON THE SEXUAL HEALTH NETWORK WEBSITE, AND
6 I CAN GO THROUGH EACH OF THESE AS WELL.

7 THE COURT: I FIND IT NOT STRANGE BUT
8 SOMETHING IS LACKING WHEN YOU IDENTIFY SELECTED PORTIONS
9 AND THEN OFFER THE WHOLE THING. IT SEEMS TO BE
10 OVERBROAD, WHAT YOU ARE TRYING TO DO. I DO ACCEPT THE
11 NOTION THAT THESE ARE DATED. I DON'T KNOW HOW SOMETHING
12 THAT WAS ON THE WEBSITE IN 1999 REMAINS ON THERE NOW,
13 THERE IS NO TESTIMONY ABOUT THAT.

14 MR. FINE: I BELIEVE -- I CAN
15 CERTAINLY ASK DR. TEPPER.

16 THE COURT: YOU ASKED HIM IN THE PRESENT
17 TENSE, VERY GENERAL, ARE THESE FROM YOUR WEBSITE, AND HE
18 SAID YES. I DIDN'T GET ANY DATES, HE DIDN'T GIVE ANY
19 DATES WHETHER THE THINGS ARE STILL THERE OR NOT. I'M
20 GOING TO SUSTAIN THE OBJECTION TO ALL THE MATERIAL
21 EXCEPT WHAT YOU HAVE IDENTIFIED THROUGH THE WITNESS.
22 GIVE YOU AN OPPORTUNITY TO CURE IT.

23 MR. FINE: WITH RESPECT TO THE PAGES IN
24 PLAINTIFFS' EXHIBIT 37 WHICH ARE NOT FROM THE
25 PRELIMINARY INJUNCTION HEARING, WHICH WERE PRINTED OUT

1 AS THE DATES INDICATE, IN 1999, WE ARE HAPPY TO GO
2 THROUGH EACH ONE THAT WE HAVE NOT GONE THROUGH RIGHT NOW
3 AND AUTHENTICATE THEM, WHICH APPEARS TO BE THE
4 DEFENDANT'S ONLY OBJECTION TO THOSE.

5 THE COURT: HIS TESTIMONY IS ONE OF
6 RELEVANCE AS WELL. ASSUMING THEY ARE AUTHENTICATED,
7 THEY ARE NOT RELEVANT. THEY ARE ANCIENT AND OUT OF
8 DATE. YOU HAVE TO PROVE THAT THEY BELONG IN THIS CASE
9 AT THIS TIME. THAT IS ONE OF HIS OBJECTIONS.

10 MR. FINE: JUST TO CLARIFY, YOUR HONOR,
11 AS I UNDERSTAND IT, THERE ARE TWO CATEGORIES OF
12 DOCUMENTS WITHIN PLAINTIFFS' EXHIBIT 37.

13 THE COURT: YOU TELL ME. I DON'T KNOW.
14 YOU KNOW THE EXHIBIT, I DON'T KNOW.

15 MR. FINE: THAT IS WHAT I WANT TO
16 CLARIFY. THERE ARE TWO TYPES OF DOCUMENTS. THERE ARE
17 PAGES THAT WERE PRINTED OUT AS THE DATES INDICATE IN
18 OCTOBER, MOST OF THEM APPEARS TO BE OCTOBER 1ST, 2006.
19 THERE IS A SECOND CATEGORY OF DOCUMENTS WHICH ARE COPIES
20 OF WEB PAGES THAT WERE PRINTED OUT IN CONNECTION WITH
21 THE PRELIMINARY INJUNCTION HEARING IN 1999. SO THERE
22 ARE TWO CATEGORIES. MY UNDERSTANDING IS THAT DEFENDANT
23 IS NOW FOR THE FIRST TIME OBJECTING ENTIRELY TO ANY OF
24 THE PAGES THAT WERE PRINTED OUT IN 1999 AND THAT
25 DEFENDANT IS NOW ALSO OBJECTING, AGAIN, THIS IS THE

1 FIRST TIME WE HAVE HEARD OF THIS, TO THE RECENTLY
2 PRINTED OUT PAGES FROM THE WEBSITE THAT HAVE NOT
3 SPECIFICALLY BEEN AUTHENTICATED BY DR. TEPPER DURING HIS
4 TESTIMONY RIGHT NOW.

5 THE COURT: IS THAT THE OBJECTION, SIR?

6 MR. SEALLS: NOT EXACTLY, YOUR HONOR.

7 THE COURT: STATE IT AGAIN, PLEASE.

8 MR. SEALLS: THE OBJECTION WITH RESPECT
9 TO THOSE PAGES FROM THE PRELIMINARY INJUNCTION HEARING
10 HAS ALREADY BEEN ARTICULATED ON PAGE 15 OF THE PRETRIAL
11 ORDER IN WHICH WE NOTE THAT THERE IS A FEDERAL RULE OF
12 EVIDENCE 402 RELEVANCE OBJECTION. THAT IS WITH RESPECT
13 TO PAGES FROM 1999, I'M QUOTING. THOSE PAGES, YOUR
14 HONOR, WE HAVE NO TESTIMONY ARE STILL ON THE WEBSITE.
15 IN ADDITION TO THAT --

16 THE COURT: THERE IS NO TESTIMONY OF
17 WHETHER OR NOT THEY ARE STILL ON THE WEBSITE. IS THAT
18 WHAT YOU MEAN?

19 MR. SEALLS: IF THE PLAINTIFF CAN TESTIFY
20 TO THAT, THEN OUR OBJECTION BECOMES STILL ONE OF
21 RELEVANCE AS I ARTICULATED EARLIER IN THAT THESE COME
22 FROM THE PRELIMINARY INJUNCTION HEARING. WE HAVE
23 ALREADY PUT THE PLAINTIFFS ON NOTICE THAT WE ARE
24 OBJECTING TO THOSE MATERIALS FROM THE PRELIMINARY
25 INJUNCTION HEARING COMING INTO EVIDENCE UNDER RULE 65.

1 THE COURT: THAT'S CORRECT, YOU DID, AT
2 THE FINAL PRETRIAL CONFERENCE.

3 THE PLAINTIFF ACCEPTED THE TASK OF
4 LOOKING CAREFULLY AT ALL OF THE PRELIMINARY INJUNCTION
5 MATERIAL AND DECIDING WHICH ONES, WHICH ITEMS THEY
6 THOUGHT WERE APPROPRIATE TO OFFER. I ASSUME THIS IS
7 PART OF THE PRODUCT OF THAT ANALYSIS. I DON'T REALLY
8 KNOW. THE STATEMENT THAT YOU DID NOT HAVE ANY NOTICE OF
9 IT IS NOT ENTIRELY ACCURATE, MR. FINE.

10 MR. FINE: YOUR HONOR, FOCUSING ON -- I
11 THINK WE ARE AGAIN -- COUNSEL STILL HAS NOT ADDRESSED
12 THE ISSUE OF LEAVING ASIDE THE PRELIMINARY INJUNCTION
13 DOCUMENTS, THAT THERE ARE ALSO -- I BELIEVE COUNSEL HAS
14 OBJECTED TO DOCUMENTS THAT WERE PRINTED OUT WITHIN THE
15 LAST MONTH, AND I STILL HAVEN'T HEARD WHAT THE OBJECTION
16 IS OTHER THAN AUTHENTICITY.

17 THE COURT: LET'S FIND OUT.

18 MR. SEALLS: TO THAT, YOUR HONOR, I WOULD
19 ADD THAT IT'S CUMULATIVE. THERE IS IN ESSENCE BEING PUT
20 IN THE SAME TYPE OF WEB PAGES TO PROVE THE SAME POINT.
21 IN ADDITION TO THAT, YOUR HONOR, IT'S AWFULLY
22 TIME-CONSUMING WITH DUE RESPECT TO THE COURT'S TIME FOR
23 PLAINTIFF TO WALK THROUGH -- THIS IS A 98 PAGE DOCUMENT,
24 MINUS THOSE 20 OR SO PAGES FROM THE PRELIMINARY
25 INJUNCTION HEARING. AND FOR PLAINTIFFS TO PUT THIS INTO

1 ONE DOCUMENT AND THEN EXPECT THE DEFENSE TO SORT THROUGH
2 AND MAKE OBJECTIONS PER PAGE, THAT IS NOT JUST
3 CUMULATIVE, YOUR HONOR, BUT IT'S A LITTLE BIT OPPRESSIVE
4 IN TERMS OF THE INTRODUCTION INTO EVIDENCE OF WHAT
5 PLAINTIFF NEEDS TO MAKE ITS POINT.

6 THE COURT: THE DEFENSE OBJECTS TO THOSE
7 PAGES THAT WERE PURPORTEDLY PRINTED OUT RECENTLY BUT
8 WERE NOT IDENTIFIED BY THE WITNESS ON THE GROUND THAT
9 IT'S CUMULATIVE, AND UNDER 403, A WASTE OF TIME.

10 MR. SEALLS: THAT'S CORRECT.

11 THE COURT: 403 SAYS WASTE OF TIME OR
12 WHERE THE PREJUDICE OUTWEIGHS THE PROBATIVE VALUE.

13 MR. SEALLS: I SOUGHT TO BE DIPLOMATIC.

14 THE COURT: THE EVIDENCE RULE ITSELF USES
15 WASTE OF TIME.

16 MR. SEALLS: YES, YOUR HONOR.

17 MR. FINE: THAT IS EXACTLY WHY WE ARE
18 TRYING NOT TO GO OVER EVERY SINGLE PAGE IN HERE. IF
19 DEFENDANT IS WILLING TO STIPULATE THAT DR. TEPPER'S
20 SPEECH IS AT RISK, WHICH DEFENDANT HAS NOT BEEN WILLING
21 TO AGREE TO, IT WOULD NOT BE NECESSARY TO PUT IN THE
22 BREADTH AND THE DIVERSITY OF THE TYPE OF SPEECH THAT IS
23 AVAILABLE ON THE WEBSITE. AND THAT IS WHY ALL OF THESE
24 DIFFERENT SORTS OF ARTICLES AND QUESTIONS AND ANSWERS
25 ARE INCLUDED.

1 THE COURT: FOCUSING ON THE WEB PAGE
2 PRINTOUTS -- PURPORTED WEB PAGE PRINTOUTS THAT WERE
3 PRINTED RECENTLY, AND WERE NOT A PART OF THE PRELIMINARY
4 INJUNCTION HEARING, I WOULD PREFER THAT YOU JUST
5 IDENTIFY THOSE AND ASK SOME QUESTIONS THAT QUALIFY THEM
6 AND OFFER THEM AS A GROUP, IF YOU INTEND TO OFFER THEM
7 IN AT ALL. IF YOU DO, THAT IS THE WAY TO DO IT. WE
8 WOULD THUS SAVE A LOT OF TIME. YOU CHOSE NOT TO HAVE
9 HIM EXPLAIN THEM NOT COURT ANYWAY SO IT'S NOT GOING TO
10 LOSE ANY TACTICAL SIGNIFICANCE.

11 MR. FINE: JUST TO GET CLARIFICATION.

12 THE COURT: I DON'T CARE WHAT YOU DO. I
13 SUSTAIN THE OBJECTION. IF YOU DON'T WANT TO FOLLOW THE
14 SUGGESTION, DON'T. IT'S NOT MY CASE.

15 MR. FINE: I'M SIMPLY LOOKING FOR YOUR
16 HONOR TO IDENTIFY THE PAGES THAT WERE NOT SPECIFICALLY
17 REFERENCED. AND WITH RESPECT TO THE PRELIMINARY
18 INJUNCTION WEB PAGES, I CAN CERTAINLY ASK DR. TEPPER
19 WHETHER THESE PAGES ARE STILL ON THE WEBSITE AND I
20 BELIEVE --

21 THE COURT: IF YOU WANT THEM INTO
22 EVIDENCE YOU WILL HAVE TO DO THAT. I SUSTAINED THE
23 OBJECTION SO FAR.

24 MR. FINE: ONE LAST THING ON THE
25 PRELIMINARY INJUNCTION DOCUMENTS. PLAINTIFFS ARE

1 PREPARING A LETTER TO ADDRESS DEFENDANT'S CONCERNS WITH
2 RESPECT TO -- AND THE COURT'S CONCERNS WITH RESPECT TO
3 EXACTLY WHAT PART OF THE PRELIMINARY INJUNCTION EVIDENCE
4 PLAINTIFFS DO WISH TO MOVE INTO EVIDENCE.

5 THE COURT: I ASSUME YOU WANT TO MOVE
6 THESE IN OR YOU WOULD NOT HAVE DONE THAT.

7 MR. FINE: THIS WAS PREPARED BEFORE WE
8 KNEW WHAT THE DEFENDANT'S OBJECTIONS WERE.

9 THE COURT: YOUR PROFFER TODAY WAS
10 PREPARED TODAY IN MY PRESENCE.

11 MR. FINE: AS I'M FLIPPING THROUGH, DR.
12 TEPPER, THE WEB PAGES THAT ARE IN PLAINTIFFS' EXHIBIT 37
13 THAT GO FROM PAGES 18 TO 70, ARE THOSE WEB PAGES STILL
14 AVAILABLE ON THE SEXUAL HEALTH NETWORK WEBSITE?

15 THE WITNESS: THE CONTENT WITHIN THESE
16 PAGES, THE GREAT MAJORITY OF THE CONTENT, THE ARTICLES
17 ARE STILL ON THE WEBSITE. IT LOOKS DIFFERENT BECAUSE WE
18 HAVE UPDATED THE WEBSITE. WE HAVE PUT ARTICLES INTO A
19 DATABASE. WE CHANGED THE LOOK OF THE WEBSITE. AS I
20 SAID EARLIER WHEN YOU ASKED ME ABOUT REMOVING CONTENT
21 FROM THE WEBSITE, WHEN THINGS ARE OUTDATED -- SO FOR
22 EXAMPLE, IF WE GO TO PAGE 18, ONE OF THE EXPERTS
23 PICTURED IN THE LOWER RIGHT-HAND CORNER HAS PASSED AWAY,
24 SO SHE IS NO LONGER ON THE SITE. SO WE HAVE UPDATED OUR
25 NAVIGATION SCHEME SO WHEN YOU LOOK AT PAGE 20 AND YOU

1 LOOK AT THE SEXUAL HEALTH NETWORK AND THAT IS BASICALLY
2 A MAP OF THE SITE, WHEN WE UPDATED THE DATABASE, WE
3 CREATED THE SEVEN OR EIGHT CATEGORIES, MEN'S SEXUAL
4 HEALTH, WOMEN'S SEXUAL HEALTH, BUT DR. DAVIDSON, WHO IS
5 ON PAGE 22, YOU WILL STILL FIND HER PICTURE AND
6 BIOGRAPHY ON THE WEBSITE. SAME CONTENT.

7 THE COURT: EXCUSE ME, SIR. LET'S FIND
8 OUT IF THERE ARE ANY MORE QUESTIONS. THESE PAGES SOUND
9 LIKE THEY WERE NOT EXACTLY THE WAY THEY WERE IN THE
10 DOCUMENT. IF THEY ARE NOT, I'M NOT GOING TO LET THEM
11 IN. I CAN'T GUESS WHAT THE UPDATES WERE. THE DOCUMENTS
12 EITHER ARE IDENTICAL OF WHAT WAS ON THE WEB WHEN THEY
13 WERE PRINTED OR WERE NOT.

14 BY MR. FINE:

15 Q. DR. TEPPER, I WANT TO FOCUS YOU ON THE CURRENT
16 PRINTOUTS. YOU CAN LOOK AT PAGE 73.

17 A. OKAY.

18 Q. WHAT'S THIS?

19 A. THIS IS THE INTRODUCTORY PAGE FOR THE MEN'S
20 SEXUAL HEALTH CHANNEL.

21 Q. IS THE INFORMATION CONTAINED IN THE LINKS ON THE
22 MEN'S SEXUAL HEALTH CHANNEL SEXUALLY EXPLICIT?

23 A. YES.

24 Q. AND DO YOU FEAR PROSECUTION UNDER THIS STATUTE
25 FOR THE CONTENT CONTAINED THEREIN?

1 A. YES.

2 Q. IS THIS AN ACCURATE DEPICTION OF THE WEB PAGE
3 LISTING THE MEN'S HEALTH CHANNEL?

4 A. YES.

5 Q. TURN TO PAGE 74. WHAT IS PAGE 74?

6 A. IT'S THE INTRODUCTION TO THE WOMEN'S SEXUAL
7 HEALTH CHANNEL.

8 Q. AND IS THE INFORMATION CONTAINED WITHIN THE
9 WOMEN'S SEXUAL HEALTH CHANNEL SEXUALLY EXPLICIT?

10 A. YES.

11 Q. DO YOU FEAR PROSECUTION FOR THE INFORMATION
12 CONTAINED WITHIN THE WOMEN'S SEXUAL HEALTH CHANNEL?

13 A. YES.

14 Q. IS THIS AN ACCURATE DEPICTION OF THE WEB PAGE
15 FROM YOUR WEBSITE?

16 A. YES.

17 Q. TURN TO PAGE 77. WHAT IS ON PAGE 77?

18 A. THIS IS THE INTRODUCTION TO OUR DISABILITY AND
19 ILLNESS CHANNEL.

20 Q. AND IS THE INFORMATION CONTAINED WITHIN THE
21 DISABILITY AND ILLNESS CHANNEL SEXUALLY EXPLICIT?

22 A. YES.

23 Q. DO YOU FEAR PROSECUTION UNDER THE STATUTE FOR
24 THE INFORMATION CONTAINED IN THE DISABILITY AND ILLNESS
25 CHANNEL?

1 A. YES.

2 Q. AND IS PAGE 77 AN ACCURATE DEPICTION OF A PAGE
3 FROM YOUR WEBSITE?

4 A. YES.

5 Q. PAGE 78. WHAT'S ON PAGE 78?

6 A. THIS IS THE INTRODUCTION TO THE SEXUALLY
7 TRANSMITTED INFECTION CHANNEL.

8 Q. AND IS THE INFORMATION THAT IS CONTAINED IN THE
9 SEXUALLY TRANSMITTED INFECTION CHANNEL SEXUALLY
10 EXPLICIT?

11 A. YES.

12 Q. DO YOU FEAR PROSECUTION UNDER THE STATUTE FOR
13 THIS INFORMATION?

14 A. YES.

15 Q. AND IS PAGE 78 AN ACCURATE DEPICTION OF A WEB
16 PAGE FROM YOUR WEBSITE?

17 A. YES.

18 Q. PAGE 79. WHAT'S ON PAGE 79?

19 A. THIS IS THE INTRODUCTION TO OUR SEXUAL HEALTH
20 RESOURCE CHANNEL.

21 Q. IS THE INFORMATION CONTAINED WITHIN THE SEXUAL
22 HEALTH RESOURCE CHANNEL SEXUALLY EXPLICIT?

23 A. YES.

24 Q. AND DO YOU FEAR PROSECUTION UNDER THE STATUTE
25 FOR THIS INFORMATION?

1 A. YES.

2 Q. AND IS THIS AN ACCURATE COPY OF A WEB PAGE FROM
3 YOUR WEBSITE?

4 A. YES.

5 Q. PAGE 89. WHAT'S ON PAGE 89?

6 A. A QUESTION ANSWERED BY LARRY SEGAL.

7 Q. IS THE SUBJECT MATTER OF THIS QUESTION AND
8 ANSWER SEXUALLY EXPLICIT?

9 A. YES.

10 Q. AND DO YOU FEAR PROSECUTION FOR THE MATERIAL
11 CONTAINED IN THIS QUESTION AND ANSWER?

12 A. YES.

13 Q. AND IS THIS AN ACCURATE COPY -- TRUE AND
14 ACCURATE COPY OF THE WEB PAGE FROM YOUR WEBSITE?

15 A. YES.

16 Q. TURN TO PAGE 90. I BELIEVE IT IS PAGES 90
17 THROUGH 92. WHAT IS REPRESENTED ON PAGES 90 THROUGH 92?

18 A. THIS IS AN INTRODUCTION TO A TOPIC UNDER LOVE
19 AND RELATIONSHIPS, THE TOPIC BEING SEXUAL ORIENTATION.

20 Q. AND IS THE CONTENT WITHIN PAGES 90 THROUGH 92
21 SEXUALLY EXPLICIT?

22 A. YES.

23 Q. DO YOU FEAR PROSECUTION UNDER THIS COPA STATUTE
24 FOR THE MATERIAL CONTAINED IN THIS SEXUAL ORIENTATION
25 SECTION?

1 A. YES.

2 Q. AND IS THIS A TRUE AND ACCURATE COPY OF A WEB
3 PAGE OR WEB PAGES ON YOUR WEBSITE?

4 A. YES.

5 Q. PAGE 93 TO 94. WHAT IS ON PAGES 93 TO 94?

6 A. THIS IS A SUBTOPIC, ANAL SEX UNDER SEXUALITY
7 EDUCATION.

8 Q. AND IS THE INFORMATION CONTAINED IN THE ANAL SEX
9 TOPIC SEXUALLY EXPLICIT?

10 A. YES.

11 Q. AND DO YOU FEAR PROSECUTION UNDER THE COPA
12 STATUTE FOR THE INFORMATION CONTAINED IN THE ANAL SEX
13 CATEGORY?

14 A. YES.

15 Q. IS THIS A TRUE AND ACCURATE COPY OF A WEB PAGE
16 FROM YOUR WEBSITE?

17 A. YES.

18 Q. ALMOST THERE.

19 PAGES 95 THROUGH 99. WHAT ARE THESE
20 PAGES?

21 A. THESE PAGES ARE A SUBTOPIC OF MEN'S SEXUAL
22 HEALTH ON ERECTILE DYSFUNCTION.

23 Q. IS THE INFORMATION CONTAINED WITHIN THE ERECTILE
24 DYSFUNCTION CATEGORY SEXUALLY EXPLICIT?

25 A. YES.

1 Q. AND DO YOU FEEL PROSECUTION UNDER THE COPA
2 STATUTE FOR THAT MATERIAL?

3 A. YES.

4 Q. AND ARE PAGES 95 THROUGH 99 TRUE AND ACCURATE
5 COPIES OF PAGES FROM YOUR WEBSITE?

6 A. YES.

7 MR. FINE: YOUR HONOR, AT THIS TIME I
8 WOULD LIKE TO MOVE INTO EVIDENCE ALL OF THE PAGES THAT
9 WERE SPECIFICALLY IDENTIFIED AT ANY POINT TODAY DURING
10 DR. TEPPER'S TESTIMONY.

11 THE COURT: WE HAVE TO HAVE A LIST OF
12 THEM. CAN'T MAKE IT UP. WHEN YOU CAN LOOK AT THIS
13 RECORD AGAIN, YOU WILL WISH YOU MADE A LIST.

14 MR. SEALLS: YOUR HONOR, THE DEFENSE DO
15 NOT OBJECT TO THE PAGES BEING ADMITTED WITH THE
16 EXCEPTION OF PAGES 18 THROUGH 70 WHICH ARE FROM THE
17 PRELIMINARY INJUNCTION HEARING IN 1999.

18 THE COURT: YOU ARE CONFUSING THE ISSUE.
19 HE IS ONLY OFFERING PAGES IDENTIFIED TODAY BY THIS
20 WITNESS. HE DID NOT OFFER ANYTHING ELSE.

21 MR. SEALLS: NO OBJECTION TO THOSE PAGES,
22 YOUR HONOR, THAT WERE IDENTIFIED BY THE WITNESS TODAY.

23 MR. FINE: IF IT MIGHT EXPEDITE THINGS,
24 YOUR HONOR, WE CAN -- I'M NOT SURE IF WE ARE GOING TO
25 FINISH NOW. WE CAN COMPILE A LIST OF ALL OF THE PAGES

1 THAT WERE SPECIFICALLY IDENTIFIED RATHER THAN DOING IT
2 RIGHT NOW.

3 THE COURT: THAT WOULD BE A GOOD IDEA SO
4 WE HAVE IT ALL IN ONE PLACE.

5 MR. FINE: WE WILL DO THAT.

6 BY MR. FINE:

7 Q. DR. TEPPER, ARE THE PAGES THAT WE HAVE JUST GONE
8 OVER IN PLAINTIFFS' EXHIBIT 37 GENERALLY INDICATIVE OF
9 THE TYPE OF CONTENT THAT CAN BE FOUND ON THE SEXUAL
10 HEALTH NETWORK'S WEBSITE?

11 A. YES.

12 Q. DO YOU FEAR PROSECUTION UNDER COPA FOR THAT
13 MATERIAL?

14 A. YES.

15 Q. WHY IS THAT?

16 A. BECAUSE OF THE AMBIGUITY OF THE TEST WITH
17 REGARDS TO MINORS.

18 Q. AND WHEN YOU SAY THE AMBIGUITY WITH REGARD TO
19 THE TEST FOR MINORS, WHAT DO YOU MEAN BY THAT?

20 A. AT EACH PRONG OF THE STATUTE, IT SAYS "WITH
21 REGARDS TO MINORS" AND BECAUSE ONCE AGAIN, THERE IS SUCH
22 GREAT DISAGREEMENT IN THIS COUNTRY ABOUT WHAT IS
23 APPROPRIATE FOR MINORS THAT I HAVE TO FEAR THAT BY
24 PROVIDING THIS INFORMATION THAT FITS THE DESCRIPTIONS OF
25 DEPICTING AND DESCRIBING SEXUAL ACTIVITIES, AND MAKING

1 INFORMATION AVAILABLE THAT MAY BE CONSIDERED PRURIENT
2 WITH REGARD TO MINORS, AND, YOU KNOW, EDUCATION ACTUALLY
3 IS NOT LISTED AS ONE OF THE THINGS IN THE THIRD PRONG.
4 IT TALKS ABOUT ARTISTIC AND LITERARY AND SCIENTIFIC
5 VALUE, AND WE HAVE HEARD EARLIER TESTIMONY ABOUT --

6 MR. SEALLS: OBJECTION, YOUR HONOR. IT
7 HAS BECOME A NARRATIVE.

8 THE COURT: HE IS GIVING HIS REASONS,
9 OVERRULED.

10 THE WITNESS: WE HAVE HEARD EARLIER
11 TESTIMONY ABOUT SEX EDUCATION BOOKS BEING BANNED FROM
12 SCHOOL SYSTEMS. SO -- SORRY. I LOST MY TRAIN. DID I
13 COMPLETE MY ANSWER?

14 BY MR. FINE:

15 Q. ARE THERE ANY OTHER REASONS WHY YOU FEAR
16 PROSECUTION FOR THIS MATERIAL THAT YOU HAVE NOT ALREADY
17 TESTIFIED TO?

18 A. NO. I THINK WE HAVE COVERED IT IN OUR
19 TESTIMONY.

20 Q. ARE YOU AWARE OF ANY OTHER WEBSITES THAT OFFER
21 SEXUAL HEALTH OR SEXUAL EDUCATION INFORMATION?

22 A. YES.

23 Q. DOES YOUR SITE -- DOES YOUR WEBSITE CONTAIN
24 LINKS TO OTHER WEBSITES WITH SIMILAR INFORMATION?

25 A. YES, OR COMPLEMENTARY INFORMATION.

1 Q. AND HOW MANY WEBSITES DOES YOUR SITE CONTAIN
2 LINKS TO?

3 A. DOZENS. IS THAT ACCURATE ENOUGH? DOZENS ON THE
4 LINK PAGE.

5 Q. HAVE YOU EVER VISITED THOSE OTHER WEBSITES?

6 A. YES.

7 Q. AND DO THOSE WEBSITES CONTAIN SEXUALLY EXPLICIT
8 INFORMATION?

9 A. YES.

10 Q. AND DID YOU HAVE TO PROVIDE ANY PERSONALLY
11 IDENTIFYING INFORMATION TO ACCESS THE MATERIAL ON THOSE
12 OTHER WEBSITES?

13 A. NO.

14 Q. DR. TEPPER, YOU EARLIER TESTIFIED THAT THE
15 SEXUAL HEALTH NETWORK IS A FOR PROFIT VENTURE. HOW DOES
16 THE SEXUAL HEALTH NETWORK MAKE MONEY?

17 A. WE HAVE SEVERAL REVENUE STREAMS. ADVERTISING,
18 WHEN WE SELL THOSE BANNERS THAT YOU SEE ON THE WEBSITE,
19 CONTENT LICENSING TO OTHER WEBSITES WHO ARE INTERESTED
20 IN PUBLISHING SOME OF OUR CONTENT. RESEARCH GRANTS,
21 WHERE WE ARE DEVELOPING A TOOL THAT WILL MAKE IT USEFUL
22 OR MORE EASY FOR PEOPLE TO FIND TARGETED INFORMATION
23 REGARDING THEIR SEXUAL HEALTH. AND COMMISSIONS ON
24 PRODUCTS THAT ARE SOLD THROUGH THE WEBSITE AFFILIATE,
25 AFFILIATE REVENUES FROM A PERCENTAGE OF THE PRODUCTS

1 THAT ARE BOUGHT WHEN SOMEONE GOES THROUGH THE SITE AND
2 BUYS IT FROM A RECOMMENDED COMPANY.

3 Q. AND LET'S FOCUS FIRST ON ADVERTISING. HOW
4 IMPORTANT IS TRAFFIC TO THE WEBSITE TO YOUR ADVERTISING
5 REVENUES?

6 A. IT'S CRITICAL.

7 Q. WHEN YOU SAY IT IS CRITICAL, WHAT DO YOU MEAN BY
8 THAT?

9 A. MOST OF THE ADS THAT YOU SEE ON SEXUALHEALTH.COM
10 ARE ON A WHAT IS CALLED A CPM, COST PER THOUSAND BASIS.
11 SO I'M PAID ANYWHERE FROM A FEW DOLLARS TO \$60 OR THE
12 COMPANY THAT IS ADVERTISING PAYS BASED ON HOW TARGETED
13 THE AD IS. SO IF AN AD FOR VIAGRA APPEARS IN THE AREA
14 SPECIFICALLY UNDER MEN'S SEXUAL HEALTH AND ERECTILE
15 DYSFUNCTION, PFIZER OR WHOEVER IS BUYING THAT AD FOR
16 PFIZER WILL PAY A LOT MORE THAN IF THE AD FOR VIAGRA
17 SHOWS ON THE HOME PAGE. BUT IN TOTAL, WE ARE -- WE EARN
18 OUR MONEY BASED ON THE DOLLAR AMOUNT, AN AVERAGE DOLLAR
19 AMOUNT PER EVERY THOUSAND IMAGE DELIVERED.

20 Q. SO IN LAYMEN'S TERMS, IF LESS PEOPLE SEE YOUR --
21 THE PAGES ON YOUR WEBSITE, YOU MAKE LESS ADVERTISING
22 MONEY?

23 A. EXACTLY. IT IS TIED DIRECTLY TO THE TRAFFIC.

24 Q. WHAT WOULD HAPPEN TO YOUR ADVERTISING REVENUES
25 IF THE TRAFFIC TO YOUR SITE DECREASED?

1 A. THE ADVERTISING REVENUE WOULD DECREASE IN THE
2 SAME -- WOULD DECREASE.

3 Q. DR. TEPPER, ARE YOU GENERALLY AWARE THAT COPA
4 DESCRIBES STEPS YOU CAN TAKE TO AVOID PROSECUTION?

5 A. YES.

6 Q. AND TELL US, WHAT IS YOUR UNDERSTANDING OF WHAT
7 THOSE STEPS ARE.

8 A. WELL, THAT I COULD PUT UP AN ADULT VERIFICATION
9 SCREEN OR BARRIER WHERE I WOULD COLLECT PEOPLE'S
10 PERSONAL OR PRIVATE, WHATEVER, CREDIT CARD INFORMATION
11 WITH THE ASSUMPTION THAT IF THEY HAD A CREDIT CARD AND
12 IT WAS VALIDATED THAT THEY WERE OF AGE 18 OR OLDER.

13 Q. ARE YOU AWARE OF ANY PRODUCTS OR SERVICES THAT
14 ACCURATELY VERIFY THE AGE OF INTERNET USERS?

15 A. NO.

16 Q. HAVE YOU EVER INVESTIGATED THE POSSIBILITY OF
17 VERIFYING AGE BY USING CREDIT CARDS OF PEOPLE ACCESSING
18 YOUR WEBSITE?

19 A. MANY YEARS AGO IN THE BEGINNING OF WHEN COPA WAS
20 FIRST INTRODUCED.

21 Q. AND WHAT DID YOU LEARN ABOUT THE PROCESS?

22 A. I LEARNED THAT FIRST I WOULD HAVE TO GET A
23 MERCHANT OR A BANK TO FIRST ACCEPT CREDIT CARDS BECAUSE
24 I DON'T SELL ANYTHING MYSELF USING CREDIT CARDS ON THE
25 WEBSITE. AND THEN EACH TIME THAT SOMEONE, THAT THE

1 MERCHANT PROCESSED ONE OF THESE VERIFICATIONS, THERE
2 WOULD BE A CHARGE TO THE WEBSITE OR, YOU KNOW, FOR THAT
3 PROCESSING, EVEN IF THEY DID NOT PURCHASE ANYTHING. SO
4 IT WOULD COST ME PER EVERY VISITOR A FEW PENNIES.

5 Q. AND JUST TO CLARIFY FOR THE RECORD, DOES SEXUAL
6 HEALTH NETWORK CURRENTLY HAVE A CREDIT CARD PROCESSING
7 SYSTEM IN PLACE?

8 A. NO.

9 Q. NOW, EXPLAIN -- I THOUGHT YOU SAID THAT THERE IS
10 A SHOPPING PART TO YOUR WEBSITE.

11 A. YES. I SAID THESE ARE AFFILIATE SALES THAT
12 PEOPLE CAN CLICK ON THE PRODUCT. IT TAKES THEM THROUGH
13 TO ANOTHER COMPANY'S WEBSITE. THE OTHER COMPANY
14 ACTUALLY MAKES THE SALE AND GIVES ME A COMMISSION SO
15 IT'S KIND OF A REFERRAL. IT'S CALLED AN AFFILIATE
16 NETWORK.

17 Q. AND SO DOES YOUR WEBSITE -- DO YOU SELL ANYTHING
18 ON YOUR WEBSITE?

19 A. NO. OH, WELL, ADVERTISING SPACE.

20 Q. AND LET ME ASK YOU NEXT. HAVE YOU WORKED WITH
21 PEOPLE IN AN OFF-LINE CONTEXT WHO ARE SEEKING THE KIND
22 OF SEXUAL HEALTH ADVICE THAT YOU GIVE ON YOUR WEBSITE?

23 A. YES.

24 Q. TELL US IN WHAT CONTEXT YOU WORK WITH THESE
25 INDIVIDUALS?

1 A. I'M INVITED INTO REHAB HOSPITALS TO DO PATIENT
2 EDUCATION. I'M INVITED TO DISABILITY-SPECIFIC GROUPS TO
3 DO CONSUMER EDUCATION. I HAVE DONE TELECONFERENCES FOR
4 THE NATIONAL MULTIPLE SCLEROSIS SOCIETY. COME DECEMBER
5 I WILL BE DOING SOME WORK FOR THE DEPARTMENT OF DEFENSE
6 FOR SEVERELY DISABLED SERVICE PERSONNEL, RETURNING
7 PERSONNEL.

8 Q. HAVE YOU ALSO CONDUCTED RESEARCH FOR PEOPLE WITH
9 DISABILITIES AND THEIR SEXUAL HEALTH ISSUES?

10 A. YES.

11 Q. HAVE YOU COME IN CONTACT WITH INDIVIDUAL
12 PATIENTS AS A RESULT OF THAT RESEARCH?

13 A. PATIENTS OR -- YOU KNOW, I DON'T LIKE TO CALL
14 THEM PATIENTS BECAUSE THE PEOPLE I'M DOING RESEARCH WITH
15 ARE NO LONGER UNDER THE CARE OF A PHYSICIAN. SO THEY
16 ARE JUST CONSUMERS OR PEOPLE WITH DISABILITIES.

17 Q. AND HAVE YOU ALSO REVIEWED RESEARCH AND
18 LITERATURE ON INDIVIDUALS WHO ARE SEEKING SEXUAL HEALTH
19 ADVICE OR SEXUAL HEALTH INFORMATION?

20 A. YES, AND I HAVE ACTUALLY CONDUCTED SOME OF THAT
21 RESEARCH.

22 Q. AND BASED ON YOUR EXPERIENCE THAT YOU ARE JUST
23 DESCRIBING, DO THESE INDIVIDUALS EXPECT MATTERS TO BE
24 KEPT CONFIDENTIAL?

25 A. YES. THE INDIVIDUALS DO.

1 Q. AND WHY IS THAT?

2 A. BECAUSE PEOPLE SHARE INFORMATION THAT THEY FEEL
3 MAY, IF OTHER PEOPLE FOUND OUT, THEY MAY FEEL
4 EMBARRASSED, DISTRESSED, PERHAPS THEY MAY FEEL THAT
5 THEIR REPUTATION MAY BE HARMED.

6 Q. AND HOW DOES THAT NEED FOR CONFIDENTIALITY
7 FACTOR INTO THE OPERATIONS OF THE SEXUAL HEALTH
8 NETWORK'S WEBSITE?

9 A. WELL, ONE OF THE REVENUE STREAMS I TALKED ABOUT
10 WAS GRANTS, RESEARCH. AND IN CONDUCTING RESEARCH, WE
11 NEED TO GET WHAT IS CALLED IRB APPROVAL, INSTITUTIONAL
12 REVIEW BOARD APPROVAL, AND IT'S VERY -- IN ORDER TO GET
13 IRB APPROVAL TO DO SEXUAL HEALTH-RELATED RESEARCH, YOU
14 HAVE TO PROVIDE MANY, MANY ASSURANCES REGARDING PRIVACY,
15 CONFIDENTIALITY AND SECURITY OF PEOPLE'S DATA. IT'S
16 CRITICAL IN ORDER TO CONDUCT RESEARCH TO MAKE SURE THAT
17 YOU HAVE EVERYTHING NECESSARY IN PLACE TO PROTECT
18 PEOPLE'S PRIVACY AND CONFIDENTIALITY. WHEN WE DO
19 RESEARCH, WE ARE COLLECTING PERSONAL IDENTIFIABLE
20 INFORMATION. IT'S DIFFERENT THAN JUST SOMEBODY COMING
21 TO THE WEBSITE AND DOING IT BECAUSE WE ACTUALLY
22 SOMETIMES PAY PEOPLE FOR THEIR PARTICIPATION IN THE
23 RESEARCH. IN THAT SETTING, WE ARE EXTREMELY CAUTIOUS AS
24 FAR AS THE INFORMATION THAT WE COLLECT.

25 Q. I UNDERSTAND. HOW DOES THIS EXPERIENCE, THIS

1 EXTREME CAUTION IN THE OFF-LINE CONTEXT TRANSLATE INTO
2 YOUR ONLINE ACTIVITIES ON THE SEXUAL HEALTH NETWORK
3 WEBSITE?

4 A. WE DO EVERYTHING POSSIBLE TO PROTECT PEOPLE'S
5 INFORMATION AND THEIR -- TO MAKE IT EASY FOR THEM TO ASK
6 THESE EMBARRASSING QUESTIONS OR -- I DON'T KNOW IF I'M
7 GETTING, GIVING YOU THE -- ANSWERING YOUR QUESTION
8 FULLY.

9 Q. SURE. LET ME ASK YOU THIS QUESTION. HOW WOULD
10 YOUR WEBSITE BE AFFECTED IF YOU HAD TO REQUIRE USERS --
11 IF USERS WERE REQUIRED TO PROVIDE PERSONALLY
12 IDENTIFIABLE INFORMATION TO YOU?

13 THE COURT: ON THE WEBSITE INQUIRY?

14 MR. FINE: YES.

15 BY MR. FINE:

16 Q. IN ORDER TO ACCESS YOUR WEBSITE?

17 A. JUST TO READ THE WEBSITE?

18 Q. YES.

19 A. I THINK IT WOULD REALLY PUT A HUGE BARRIER IN
20 FRONT OF PEOPLE'S ACCESS TO READ THE MATERIAL.

21 Q. WHY DO YOU THINK THAT?

22 A. AS A BUSINESS PERSON, ONE OF MY FIRST DEGREES IS
23 IN BUSINESS. AS SOMEONE WHO'S RUNNING A WEB-BASED
24 COMPANY, I LOOK AT PEOPLE'S ATTEMPTS TO MOVE FROM FREE
25 CONTENT TO SUBSCRIPTION-BASED CONTENT WHERE YOU WOULD

1 REQUIRE SOMEBODY TO GIVE INFORMATION. AND FROM --
2 OUTSIDE OF THE AREA OF SEXUAL HEALTH, IT HAS BEEN VERY
3 DIFFICULT FOR COMPANIES TO MONETIZE THAT. SO WE KNOW
4 THAT FROM JUST READING OTHER BUSINESS JOURNALS THAT WHEN
5 PEOPLE ATTEMPT TO BEGIN TO CHARGE OR PUT UP SOME BARRIER
6 TO READING CONTENT THAT SEVERELY LIMITS THE NUMBER OF
7 PEOPLE WHO VIEW THE CONTENT.

8 SO TAKE THAT TO THE AREA OF SEXUAL HEALTH
9 WHERE ANONYMITY IS VERY IMPORTANT TO PEOPLE. PEOPLE
10 COME TO SEXUAL HEALTH, AS I SAY, WHEN THEY ASK A
11 QUESTION, MORE OFTEN THAN NOT, THEY HAVE NOT ASKED
12 ANYONE ELSE THIS QUESTION, WHICH MAY BE VERY PERSONAL
13 FOR THEM AND THERE MAY BE SHAME OR GUILT INVOLVED AND
14 THEY HAVE NOT DISCUSSED IT WITH THEIR HEALTH
15 PROFESSIONAL OR THEIR PARTNER OR PERHAPS THEIR PARENTS
16 OR ANY OTHER PERSON THAT YOU WOULD HOPE THAT SOMEONE
17 WOULD BE ABLE TO GO TO FOR PERSONAL HEALTH INFORMATION.

18 Q. AND BASED ON YOUR EXPERIENCE WORKING WITH PEOPLE
19 WITH DISABILITIES, DO MANY PEOPLE WITH DISABILITIES NOT
20 HAVE CREDIT CARDS?

21 MR. SEALLS: OBJECTION, YOUR HONOR.
22 THERE IS TO FOUNDATION FOR THAT ANSWER.

23 THE COURT: SUSTAINED.

24 BY MR. FINE:

25 Q. DO YOU KNOW, DR. TEPPER, IF PEOPLE WITH

1 DISABILITIES, IF THERE ARE MANY PEOPLE WITH DISABILITIES
2 WHO DO NOT HAVE CREDIT CARDS?

3 MR. SEALLS: SAME OBJECTION, YOUR HONOR.

4 MR. FINE: IT IS A YES OR NO QUESTION.

5 THE COURT: OVERRULED.

6 THE WITNESS: I'M NOT SURE ABOUT CREDIT
7 CARDS.

8 BY MR. FINE:

9 Q. ARE THERE ANY CHARACTERISTICS TO -- DO YOU KNOW
10 IF PEOPLE WITH DISABILITIES HAVE ANY CHARACTERISTICS
11 THAT WOULD ESPECIALLY PUT THEM AT RISK IF THEY WERE
12 REQUIRED TO PAY FOR CONTENT?

13 A. YES. PEOPLE WITH DISABILITIES ARE AMONGST
14 THE --

15 MR. SEALLS: OBJECTION, YOUR HONOR. MOVE
16 TO STRIKE THE REST OF THE ANSWER AFTER YES.

17 MR. FINE: HAPPY TO LAY THE FOUNDATION.

18 THE COURT: SUSTAINED. LAY THE
19 FOUNDATION.

20 BY MR. FINE:

21 Q. DR. TEPPER, YOU JUST TESTIFIED THAT YOU HAVE
22 KNOWLEDGE. HOW DO YOU KNOW ANYTHING ABOUT THE ABILITY
23 OF PEOPLE WITH DISABILITIES TO PAY FOR CONTENT ON THE
24 WEBSITE?

25 A. WELL, WE KNOW FROM NATIONALLY BASED DATABASE AND

1 RESEARCH THAT PEOPLE WITH DISABILITIES ARE THE LARGEST
2 UNEMPLOYED MINORITY GROUP IN THE COUNTRY.

3 MR. SEALLS: SAME OBJECTION, YOUR HONOR.
4 MOVE TO STRIKE. THERE IS STILL NO FOUNDATION FOR WHAT
5 IS LAY OPINION TESTIMONY.

6 THE COURT: OVERRULED.

7 BY MR. FINE:

8 Q. DR. TEPPER, DOES SEXUAL HEALTH NETWORK HAVE ANY
9 CONTENT THAT IS NOT SEXUALLY EXPLICIT?

10 A. PERHAPS OUR POLICY STATEMENTS.

11 Q. WELL, LET ME ASK YOU THIS. WOULD IT BE POSSIBLE
12 FOR YOU TO SEPARATE THE SEXUALLY EXPLICIT CONTENT FROM
13 THE NONSEXUALLY EXPLICIT CONTENT ON THE WEBSITE?

14 A. NO.

15 Q. WHY NOT?

16 A. THE GREAT MAJORITY OF THE CONTENT, SHORT OF
17 POLICIES AND PROCEDURES, IS SEXUAL IN NATURE.

18 Q. IF YOU HAD TO INSTALL A CREDIT CARD OR AGE
19 VERIFICATION SCREEN ON YOUR WEBSITE, WHERE WOULD YOU
20 HAVE TO PLACE IT?

21 A. IT WOULD HAVE TO BE AT A DOMAIN LEVEL, THAT IS
22 AT SEXUALHEALTH.COM DOMAIN LEVEL. BEFORE ANYONE COULD
23 SEE ANY OF THOSE CHANNELS OR SUBTOPICS, THAT WOULD HAVE
24 TO BE -- I WANT TO SAY ON THE HOME PAGE, BUT TECHNICALLY
25 AS SOMEONE TRIES TO ENTER INTO ANY PAGE, AT THE

1 BEGINNING OF THE LISTING WHERE IT SAYS SEXUALHEALTH.COM,
2 AT THAT POINT, IT NEEDS TO STOP AND PUT UP A SCREEN FOR
3 AGE VERIFICATION.

4 Q. AND AGAIN, WHY IS THAT?

5 A. BECAUSE THE NATURE OF THE SITE IS SPECIFICALLY
6 TO ANSWER PEOPLE'S SEXUAL QUESTIONS WITH FRANK SEXUALLY
7 EXPLICIT ANSWERS.

8 Q. AND WHAT WOULD HAPPEN TO SEXUAL HEALTH NETWORK'S
9 BUSINESS IF ALL OF YOUR USERS HAD TO ENTER CREDIT CARD
10 INFORMATION SIMPLY TO GET ACCESS TO THE WEBSITE?

11 A. IT IS MY BEST BUSINESS ESTIMATE THAT I WOULD NOT
12 BE ABLE TO MAINTAIN THE WEBSITE ANY LONGER.

13 Q. AND HOW WOULD THAT FIT WITH THE MISSION OF THE
14 SEXUAL HEALTH NETWORK THAT YOU TALKED ABOUT AT THE
15 BEGINNING OF YOUR TESTIMONY?

16 A. IT WOULD PUT -- IT WOULD MAKE IT IMPOSSIBLE FOR
17 ME TO FULFILL THAT MISSION OF PROVIDING EASILY
18 ACCESSIBLE INFORMATION TO PEOPLE WITH AND WITHOUT
19 DISABILITIES.

20 Q. WHAT WOULD THE SEXUAL HEALTH NETWORK DO IF COPA
21 WERE TO GO INTO EFFECT?

22 MR. SEALLS: OBJECTION, YOUR HONOR, CALLS
23 FOR SPECULATION.

24 THE COURT: SUSTAINED. ONLY BECAUSE YOU
25 HAVE NOT ASKED HIM WHETHER -- IF HE EVEN GAVE IT ANY

1 THOUGHT.

2 BY MR. FINE:

3 Q. DR. TEPPER --

4 THE COURT: DID HE HAVE ANY PLANS OR
5 TALKED TO ANYBODY OR DID WHATEVER HE DID?

6 BY MR. FINE:

7 Q. DR. TEPPER, DO YOU KNOW WHAT THE SEXUAL HEALTH
8 NETWORK WOULD DO IF COPA WOULD GO INTO EFFECT?

9 A. NO.

10 Q. WHY DON'T YOU KNOW?

11 A. BECAUSE I DON'T THINK IT WOULD BE FINANCIALLY
12 FEASIBLE FOR THE COMPANY TO PUT UP AGE VERIFICATION AND
13 THEN ON THE OTHER HAND, YOU KNOW, I DON'T KNOW IF I
14 COULD PUT MYSELF AT RISK OF PUBLISHING THIS INFORMATION
15 SHOULD, YOU KNOW, THIS LAW PASS. SO I DON'T REALLY NEED
16 TO CROSS THAT BRIDGE UNTIL THE UNFORTUNATE EVENT THAT
17 THIS BECAME LAW.

18 MR. FINE: NO FURTHER QUESTIONS NOW, YOUR
19 HONOR.

20 MR. SEALLS: YOUR HONOR, WE WOULD MOVE TO
21 STRIKE THE LAST ANSWER AFTER THE WORD -- WELL, IN ITS
22 ENTIRETY. THE QUESTION WAS WHY DOESN'T HE KNOW AND THE
23 ANSWER IS TOTALLY SPECULATIVE. IT ACTUALLY WENT AROUND
24 HIS PREVIOUS ANSWER NO TO THE QUESTION WHEN HE WAS ASKED
25 WHAT WOULD HE DO IF COPA WOULD GO INTO EFFECT. AND HE

1 WAS ASKED IF HE HAD ANY PLANS TO TALK TO ANYBODY AND HIS
2 ANSWER WAS NO.

3 MR. FINE: YOUR HONOR, I NEVER ASKED THAT
4 QUESTION. THE QUESTION WAS SIMPLY, DO YOU KNOW WHAT THE
5 SEXUAL HEALTH NETWORK WOULD DO. HE ANSWERED NO, THE
6 FOLLOW-UP QUESTION WAS WHY NOT.

7 THE COURT: THE ANSWER IS SOMEWHAT
8 RAMBLING, BUT THE GIST OF IT IS -- THE GIST OF WHAT HE
9 IS SAYING IS, I CAN'T IMAGINE TO TELL YOU THAT I KNOW
10 WHAT THEY WILL DO. I CAN'T TELL YOU. HE JUST HAS
11 NOT -- HE CAN'T FATHOM THE BUSINESS CONTINUING
12 FINANCIALLY AND SO HE DOESN'T KNOW WHAT ELSE TO TELL
13 YOU. THAT IS THE GIST OF THE ANSWER. IT'S A RAMBLING
14 ANSWER, BUT I UNDERSTAND WHY HE BELIEVES WOULD IT BE
15 APPROPRIATE TO MAKE THAT TYPE OF ANSWER. I'M NOT
16 DISRESPECTFUL OF IT, BUT I'M NOT GOING TO STRIKE IT OUT.
17 IT HAS SOME VALUE, OVERRULED.

18 MR. FINE: WE HAVE NO FURTHER QUESTIONS
19 AT THIS TIME, YOUR HONOR.

20 THE COURT: IF THE CROSS EXAMINATION IS
21 GOING TO BE SIGNIFICANT, BEYOND 15 MINUTES, THEN WE
22 OUGHT TO START TOMORROW MORNING.

23 MR. SEALLS: I THINK IT WILL BE OVER 15
24 MINUTES, YOUR HONOR.

25 THE COURT: I JUST PICKED THAT OUT OF THE

1 AIR.

2 MR. SEALLS: BUT FOR THE COURT'S
3 INFORMATION IT MAY BE 20 TO 25.

4 THE COURT: WE WILL DO IT TOMORROW
5 MORNING. THE TRIAL DAY IS CONCLUDED AND COUNSEL IS NOT
6 EXCUSED. AND WE ARE NOT OFF THE RECORD. SEE IF WE HAVE
7 OTHER BUSINESS TO DO.

8 DR. TEPPER, WE WOULD LIKE TO YOU COME
9 BACK TOMORROW MORNING. SORRY WE DID NOT FINISH YOU
10 TODAY.

11 THE WITNESS: THAT'S OKAY.

12 THE COURT: WHAT DO WE HAVE TO COVER NOW,
13 COUNSEL?

14 MR. HANSEN: I THINK THE ONLY MATTER THAT
15 NEEDS ADDRESSING THIS AFTERNOON IS THE SCHEDULE FOR
16 TOMORROW. PLAINTIFFS INTEND TO FINISH DR. TEPPER. WE
17 THEN HAVE TWO WITNESSES SCHEDULED TO TESTIFY TOMORROW.
18 WE HAD A THIRD, YOUR HONOR, MR. FRIED, BUT THAT IS THE
19 MATTER THAT WE ARE STILL TRYING TO NEGOTIATE WITH FLASH
20 NETWORK. SO FIRST WE WILL HAVE MR. PECKHAM. MR.
21 PECKHAM IS A PLAINTIFF IN CHARGE OF URBAN DICTIONARY.
22 WE WILL USE WITH MR. PECKHAM EXHIBITS 41 AND 57. THE
23 NEXT WITNESS WILL BE MARILYN LEWIS. MISS LEWIS IS WITH
24 THE EROTICA AUTHORS ASSOCIATION. WE WILL USE WITH HER
25 EXHIBIT 52. ON THE ASSUMPTION THAT THOSE TWO WITNESSES

1 WILL NOT FILL -- THAT DR. TEPPER'S CROSS EXAMINATION AND
2 THOSE TWO WITNESSES WILL NOT FILL THE ENTIRE DAY, WE ARE
3 PREPARING DEPOSITION DESIGNATIONS TO BEGUN TO BE READ
4 TOMORROW AFTERNOON.

5 THE COURT: ON EITHER DEPOSITIONS THE
6 CONTROVERSY HAS BEEN SOLVED OR THERE WASN'T ANY
7 CONTROVERSY.

8 MR. HANSEN: MY COLLEAGUE CAN ADDRESS
9 THAT.

10 MR. VAN KWAWEGEN: YES, YOUR HONOR.

11 MR. HANSEN: I DIDN'T KNOW IT WAS THAT
12 SIMPLE AN ANSWER.

13 THE COURT: THAT IS THE ULTIMATE
14 INTELLIGATION.

15 MR. VAN KWAWEGEN: THERE IS ONE OTHER
16 ISSUE THAT PLAINTIFF WOULD LIKE TO ADDRESS WITH YOUR
17 HONOR. WE HAVE ASKED THE DEFENDANT TO GIVE AN OFFER OF
18 PROOF FOR MR. SLOANE, AND TO THIS DATE WE HAVE NOT
19 REALLY RECEIVED ONE AND SO WE WANTED TO BRING THAT TO
20 YOUR HONOR'S ATTENTION.

21 THE COURT: I DON'T KNOW WHETHER THERE IS
22 A PROBLEM WITH DOING THAT OR NOT.

23 MR. GOMEZ: YOUR HONOR, THE DEFENDANT HAS
24 PROVIDED AN OFFER OF PROOF WITH RESPECT TO MR. SLOANE.
25 MR. SLOANE IS A REBUTTAL WITNESS. WE HAVE IDENTIFIED

1 THE AREA THAT WE BELIEVE, IF IT'S RAISED IN PLAINTIFFS'
2 CASE-IN-CHIEF, THAT WE MAY NEED TO REBUT, BUT SINCE HE
3 IS A REBUTTAL WITNESS, WE HAVE TO WAIT TO SEE WHAT IT IS
4 THAT THEY ARE GOING TO RAISE.

5 THE COURT: WELL, YOU HAVE PREPARED
6 REBUTTAL WITNESS ON SOME SUBJECT?

7 MR. GOMEZ: YES, YOUR HONOR. CAN I JUST
8 CONFER FOR ONE SECOND.

9 MR. GOMEZ: THE ISSUE THAT HAD COME UP
10 WAS JUST AN ISSUE WITH REGARDING PREPAID CARDS WITH
11 RESPECT TO THE PLAINTIFFS' CASE-IN-CHIEF. WE DON'T KNOW
12 TO WHAT EXTENT PLAINTIFFS ARE GOING TO BE RAISING THAT
13 ISSUE OR HOW THEY RAISE IT WITH RESPECT TO THEIR WITNESS
14 AND WITH RESPECT TO MINORS USING PREPAID CARDS.
15 DEPENDING ON HOW THAT TESTIMONY OR THE PLAINTIFFS ELICIT
16 THAT TESTIMONY, THERE MAY BE REBUTTAL ISSUES THAT WE MAY
17 MAKE WITH RESPECT TO PLAINTIFFS' ALLEGATIONS AS TO OR
18 PRESENTATION OF EVIDENCE AS TO THE SCOPE OF PREPAID
19 CARDS USED BY MINORS.

20 THE COURT: I WILL LET PLAINTIFF ADDRESS
21 IT. IT HAS BEEN ADDRESSED A LITTLE BIT. DO YOU HAVE A
22 KEY WITNESS ON THAT ISSUE?

23 MR. VAN KWAWEGEN: OUR UNDERSTANDING IS
24 THAT MR. SLOANE TO BE A REBUTTAL WITNESS OF PROFESSOR
25 MANN WHO STILL NEEDS TO TESTIFY. HOWEVER, ALL ISSUES

1 HAVE BEEN RAISED IN HIS REPORT AND ALSO DURING HIS
2 DEPOSITION, AND SO QUITE FRANKLY PLAINTIFFS DON'T REALLY
3 UNDERSTAND WHY AN OFFER OF PROOF CANNOT BE FORTHCOMING.
4 THE LATEST E-MAIL WE RECEIVED FROM DEFENDANT SAID THAT
5 MR. SLOANE WOULD BE TESTIFYING WITH REGARD TO PREPAID
6 CARDS AND "OTHER ISSUES" AND WE JUST DO NOT KNOW WHAT
7 OTHER ISSUES WOULD BE.

8 THE COURT: THAT IS NOT AN OFFER OF
9 PROOF? WHEN DO YOU EXPECT TO GET TO MR. MANN?

10 MR. VAN KWAWEGEN: NEXT MONDAY, YOUR
11 HONOR.

12 THE COURT: WELL, THE REBUTTAL WITNESS
13 WON'T TAKE THE STAND FOR QUITE A WHILE IF IT IS PART OF
14 THE DEFENDANT'S CASE. I DON'T KNOW IF IT WILL BE AN
15 EARLY WITNESS OR A LATE WITNESS. SO I DON'T THINK FOR A
16 REBUTTAL WITNESS THAT PLAINTIFF IS ENTITLED TO KNOW WHAT
17 THE TESTIMONY IS GOING TO BE BEFORE THEY PUT ON THE
18 TESTIMONY THE REBUTTAL WITNESS IS GOING TO REBUT, SO WE
19 WILL HAVE THE OFFER OF PROOF DUE TUESDAY MORNING NEXT
20 WEEK.

21 MR. GOMEZ: YES, YOUR HONOR.

22 THE COURT: ASSUMING MR. MANN IS
23 FINISHED.

24 MR. GOMEZ: AFTER MR. MANN IS FINISHED.
25 YES, YOUR HONOR. IF HE IS NOT FINISHED MONDAY, IT WILL

1 BE SHORTLY -- IT WILL BE THE END OF TUESDAY THEN OR
2 SOMETHING LIKE THAT.

3 MR. GOMEZ: YES, YOUR HONOR.

4 THE COURT: YOU CAN START WORKING ON IT
5 NOW. OKAY. WE ARE STILL WORKING ON THIRD PARTY
6 CONCERNS OVER CONFIDENTIALITY.

7 MR. HANSEN: WE ARE, YOUR HONOR, BOTH
8 WITH RESPECT TO FLASH NETWORKS AND VISA, WE HAVE BEEN
9 ACTIVELY WORKING DURING THE DAY TO TRY TO RESOLVE THOSE
10 MOTIONS.

11 THE COURT: OKAY.

12 MR. FINE, WHILE IT IS STILL FRESH IN YOUR
13 MIND, IF YOU GIVE ME -- BE PREPARED TOMORROW MORNING TO
14 PUT IN A LIST OF EXHIBITS FOR DR. TEPPER.

15 MR. FINE: WE WILL DO SO, YOUR HONOR.

16 THE COURT: IT'S JUST A HOUSEKEEPING
17 MATTER. IT'S A QUESTION OF GETTING THEM ALL COLLECTED
18 AND WE WILL GET THAT DONE FIRST THING TOMORROW MORNING.
19 OKAY. OUR COURT DAY IS CONCLUDED. COUNSEL ARE EXCUSED.
20 WE ARE OFF THE RECORD. SEE YOU TOMORROW MORNING
21 ALTHOUGH 9:30.

22 MR. HANSEN: THANK YOU, YOUR HONOR.

23 (COURT PROCEEDINGS CONCLUDED AT 4:35
24 P.M.)

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I CERTIFY THAT THE FOREGOING IS A CORRECT
TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE
ABOVE-ENTITLED MATTER.

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