

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

3 AMERICAN CIVIL LIBERTIES : CIVIL ACTION
4 UNION, ET AL :

5 PLAINTIFF :

6 VS. :

7 ALBERTO R. GONZALES, :
8 IN HIS OFFICIAL CAPACITY AS :
9 ATTORNEY GENERAL OF THE :
10 UNITED STATES :

11 DEFENDANT : NO. 98-05591

12 WEDNESDAY, NOVEMBER 15, 2006
13 COURTROOM 17-A
14 PHILADELPHIA, PA 19106

15

BEFORE THE HONORABLE LOWELL A. REED, JR. SJ

16

NON-JURY TRIAL
17 DAY 15

18

APPEARANCES:

19 CHRISTOPHER A. HANSEN, ESQUIRE
20 ADEN J. FINE, ESQUIRE
21 BEN WIZNER, ESQUIRE
22 CATHERINE CRUMP, ESQUIRE
23 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
24 125 BROAD STREET
25 NEW YORK, NY 10004-2400
(212) 549-2606 FOR THE PLAINTIFFS

26 SUZANNE R. WHITE, CM
27 FEDERAL CERTIFIED REALTIME REPORTER
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30 PHILADELPHIA, PA. 19106
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32 PROCEEDINGS RECORDED BY STENOGRAPHY-COMPUTER,
33 TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 APPEARANCES: (CONTINUED)

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3 KATHARINE MARSHALL, ESQUIRE
4 JEROEN VAN KWAWEGEN, ESQUIRE
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FOR THE DEFENDANT

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25

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 THE COURT REPORTER: GOOD MORNING, YOUR

6 HONOR.

7 THE COURT: THE DEFENSE HAS ANOTHER

8 WITNESS.

9 MR. BEANE: YES. DEFENDANT CALLS DR.

10 SCOTT MORRIS SMITH.

11 THE COURT: YOU MAY AND CERTAINLY. DR.

12 SMITH, COME RIGHT UP HERE, PLEASE.

13 GOOD MORNING, SIR. REMAIN STANDING

14 PLEASE TO TAKE THE OATH.

15 SCOTT M. SMITH, DEFENDANT'S WITNESS,

16 SWORN.

17 THE CLERK: STATE AND SPELL YOUR FULL

18 NAME FOR THE RECORD?

19 THE WITNESS: SCOTT MORRIS SMITH.

20 S-C-O-T-T, M-O-R-R-I-S, S-M-I-T-H.

21 MR. BEANE: IF I MAY APPROACH, YOUR

22 HONOR, I HAVE SOME EXHIBITS FOR YOU AND THE WITNESS.

23 THE COURT: GLAD TO HAVE THEM.

24 DIRECT EXAMINATION

25 BY MR. BEANE:

1 Q. GOOD MORNING, DR. SMITH.

2 A. GOOD MORNING.

3 Q. WHERE ARE YOU CURRENTLY EMPLOYED?

4 A. I'M CURRENTLY EMPLOYED AT BRIGHAM YOUNG
5 UNIVERSITY.

6 Q. AND WHAT IS YOUR POSITION THERE?

7 A. I AM JAMES PASSEY PROFESSOR OF MARKETING.
8 P-A-S-S-E-Y. AND I'M ALSO THE DIRECTOR OF THE INSTITUTE
9 OF MARKETING.

10 Q. WHAT DEPARTMENT IS THAT IN?

11 A. THAT IS IN THE BUSINESS MANAGEMENT DEPARTMENT IN
12 THE MARKETING GROUP OR AREA.

13 Q. WHAT ARE YOUR RESPONSIBILITIES AT THE INSTITUTE
14 OF MARKETING?

15 A. MY RESPONSIBILITIES ARE PRIMARILY TO DIRECT THE
16 RESEARCH THAT IS UNDERTAKEN THERE. WE DO A NUMBER OF
17 CONSULTING PROJECTS WITH MAJOR CLIENTS. WE TUTOR THE
18 STUDENTS IN RESEARCH PROCEDURES, METHODOLOGIES. MOST OF
19 THIS INVOLVES CONSUMER BEHAVIOR RESEARCH WITH CUSTOMERS
20 OF CLIENTS THAT ARE -- THAT ARE WORKING WITH US. WE ARE
21 ALSO DEVELOPING A NATIONAL CONSUMER CONFIDENCE TYPE OF
22 STUDY WORKING WITH VALUES AND ACTIVITIES THAT PEOPLE
23 THROUGHOUT THE UNITED STATES WOULD HOLD, VALUES AND
24 ACTIVITIES.

25 Q. HOW LONG HAVE YOU WORKED AT BRIGHAM YOUNG

1 UNIVERSITY?

2 A. I HAVE BEEN A PROFESSOR THERE FOR 25 YEARS.

3 Q. WHERE ARE YOU LIVING CURRENTLY?

4 A. I'M CURRENTLY LIVING IN THE REPUBLIC OF MOLDOVA.

5 Q. CAN YOU SPELL THAT FOR THE RECORD?

6 A. M-O-L-D-O-V-A.

7 Q. WHY ARE YOU IN MOLDOVA?

8 A. I'M A FULBRIGHT SCHOLAR.

9 Q. AND HOW WERE YOU CHOSEN FOR A FULBRIGHT
10 SCHOLARSHIP?

11 A. IT IS BASED ON EXPERTISE. IT IS A COMPETITIVE
12 AWARD. IT IS BASED ON INTEREST. I HAVE A GEOGRAPHIC
13 INTEREST IN THAT AREA.

14 Q. WHAT TYPE OF WORK ARE YOU DOING IN MOLDOVA?

15 A. I'M DOING SEVERAL THINGS. ONE, I AM TEACHING AT
16 THE ACADEMY OF ECONOMIC STUDIES WHICH IS THE FINEST
17 UNIVERSITY IN THE REPUBLIC. I AM TEACHING STUDENTS HOW
18 TO CONDUCT BUSINESS, HOW TO SET UP AND RUN THEIR OWN
19 BUSINESSES. I'M TEACHING MARKETING MANAGEMENT,
20 INVOLVING HOW TO UNDERSTAND MARKETS AND UNDERSTAND THEIR
21 CONSUMERS THAT THEY HAVE. WE ARE ALSO SETTING UP A
22 NATIONAL CONSUMER CONFIDENCE STUDY FOR MOLDOVA. I'M
23 WORKING WITH A THINK TANK THERE THAT IS RESPONSIBLE FOR
24 DOING THAT.

25 Q. ARE YOU DOING ANY RESEARCH IN MOLDOVA?

1 A. THAT IS PRIMARILY THE RESEARCH THAT I'M INVOLVED
2 IN. WE ARE ALSO DOING ANOTHER STUDY -- RESEARCH STUDY
3 DEALING WITH CONSUMER VALUES AND THEIR INVOLVEMENT IN
4 SOME GOVERNMENT POLITICAL ISSUES THAT ARE THERE.

5 Q. LET'S TURN NOW TO EXHIBIT 91. DO YOU RECOGNIZE
6 THIS DOCUMENT?

7 A. YES. THIS IS THE EXPERT REPORT WHICH I PREPARED
8 FOR THE ACLU VERSUS GONZALES CASE.

9 Q. TURN TO PAGE 18, PLEASE, WHICH I BELIEVE
10 CONTAINS YOUR BIOGRAPHY, IS THAT RIGHT?

11 A. MY FINGERS ARE BOUNCING AROUND HERE.

12 Q. YOU CAN USE THE MONITOR OR THE HARD COPY.

13 A. OKAY, THANK YOU.

14 Q. WHAT DO YOU LIST AS YOUR THREE PRIMARY AREAS OF
15 ACADEMIC INTEREST?

16 A. MY THREE AREAS OF INTEREST ARE INTERNET RESEARCH
17 AND METHODOLOGY, ADVANCED COMPUTER APPLICATIONS FOR
18 INTERNET SURVEY, RESEARCH AND ANALYSIS AND CROSS
19 CULTURAL RESEARCH.

20 Q. WHAT IS INTERNET RESEARCH AND METHODOLOGY?

21 A. INTERNET RESEARCH AND METHODOLOGY BASICALLY
22 INVOLVES RESEARCHING THE INTERNET, CONSUMERS. IT
23 INVOLVES A VARIETY OF PRIMARILY CONSUMER BEHAVIOR TOPICS
24 AND UNDERSTANDING THOSE PEOPLE THAT ARE USING AND
25 PURCHASING USING THE INTERNET.

1 Q. PLEASE GIVE THE COURT A GENERAL DESCRIPTION OF
2 YOUR WORK IN ADVANCED COMPUTER APPLICATIONS FOR INTERNET
3 SURVEY RESEARCH AND ANALYSIS.

4 A. THIS PARTICULAR AREA INVOLVES A LOT OF MY
5 PERSONAL CONSULTING WORK. IT INVOLVES THE DEVELOPMENT
6 OF SOFTWARE AND BUSINESSES THAT ARE FOCUSING ON
7 APPLICATIONS FOR CONDUCTING MARKETING RESEARCH AND
8 SPECIFICALLY RESEARCH OF CONSUMERS AND OTHER
9 INDIVIDUALS, INCLUDING ALSO EMPLOYEES THAT -- AND USING
10 INTERNET TECHNOLOGY.

11 Q. WHAT IS CROSS CULTURAL RESEARCH?

12 A. CROSS CULTURAL RESEARCH IS BASICALLY RESEARCH
13 THAT OCCURS ACROSS GEOGRAPHIC BOUNDARIES OR EVEN WITHIN
14 GEOGRAPHIC BOUNDARIES WHERE CULTURAL DIFFERENCES EXIST,
15 AGAIN THESE ARE CONSUMER BASED STUDIES AND RESEARCH.

16 Q. YOU LISTED THREE PRIMARY AREAS OF ACADEMIC
17 INTEREST. IS THIS AN EXHAUSTIVE LIST OF YOUR AREAS OF
18 EXPERTISE?

19 A. NO, IT'S NOT.

20 Q. WHY DID YOU INCLUDE JUST THREE ITEMS HERE?

21 A. THOSE ARE THE THREE AREAS THAT I SEEM TO BE
22 WORKING IN RIGHT NOW. THEY ARE MICRO AREAS, IF YOU
23 WILL, IN TERMS OF DESCRIBING THE ACTIVITIES THAT I'M
24 ENGAGED IN.

25 Q. ARE THERE OTHER ACADEMIC AREAS THAT ARE

1 ENCOMPASSED BY THESE SPECIFIC TOPIC AREAS?

2 A. THERE ARE.

3 Q. CAN YOU GIVE SOME EXAMPLES?

4 A. YES. PROBABLY THREE OF THEM ARE MOST PREVALENT.

5 THE FIRST WOULD BE INTERNET MARKETING AND INTERNET

6 BUSINESSES. THE SECOND WOULD BE THE AREA OF CONSUMER

7 BEHAVIOR, AND THE THIRD WOULD BE THE AREA OF MARKETING

8 RESEARCH.

9 Q. LET'S DISCUSS EACH OF THOSE IN TURN. WHAT DO
10 YOU MEAN BY INTERNET MARKETING AND INTERNET BUSINESSES?

11 A. INTERNET MARKETING AND BUSINESSES REFERS TO MY
12 STUDIES AND TEACHING, RESEARCH IN THE AREA OF
13 UNDERSTANDING INTERNET MARKETING. I HAVE TAUGHT COURSES
14 IN THIS AREA, I HAVE DEVELOPED COURSES ON HOW TO CONDUCT
15 BUSINESS ON THE INTERNET, HOW CONSUMERS RESPOND AND
16 THEIR BEHAVIOR PATTERNS AS THEY MAKE PURCHASES ON THE
17 INTERNET.

18 Q. YOU ALSO MENTIONED CONSUMER BEHAVIOR. HOW DOES
19 CONSUMER BEHAVIOR RELATE TO THE THREE AREAS THAT YOU
20 LISTED AS YOUR PRIMARY AREAS OF STUDY?

21 A. CONSUMER BEHAVIOR COVERS ALMOST EVERYTHING THAT
22 I DO. IN THE FIELD OF MARKETING, TYPICALLY ONE IS
23 INVOLVED IN EITHER WHAT IS CALLED BUYER BEHAVIOR, WHICH
24 WOULD INVOLVE INDUSTRIAL TYPES OF APPLICATIONS, WORKING
25 BUSINESS TO BUSINESS. IT WOULD BE INVOLVED IN FOCUSING

1 ON CONSUMERS. AND ALL OF MY STUDIES FOCUS ON CONSUMERS
2 OR CONSUMER DECISION MAKERS FOR PRODUCTS AND SERVICES.

3 Q. YOU ALSO MENTIONED MARKETING RESEARCH. PLEASE
4 GIVE THE COURT A GENERAL DESCRIPTION OF YOUR WORK IN
5 MARKETING RESEARCH.

6 A. MARKETING RESEARCH, I'M A PRACTITIONER. I
7 CONDUCT RESEARCH. I CONDUCT A LOT OF RESEARCH, AND I
8 HAVE WRITTEN BOOKS ON MARKET RESEARCH. I WOULD NOT
9 HESITATE TO SAY THAT I'M AN EXPERT IN THAT AREA.

10 Q. DR. SMITH, ARE YOU FAMILIAR WITH THE CHILD
11 ON-LINE PROTECTION ACT?

12 A. I AM.

13 Q. IF I REFER TO IT AS COPA, WILL YOU UNDERSTAND
14 WHAT I'M REFERRING TO?

15 A. I WILL.

16 Q. ARE YOU FAMILIAR WITH THIS CASE, ACLU VERSUS
17 GONZALES?

18 A. I AM.

19 Q. WHAT WERE YOU RETAINED TO DO?

20 A. I WAS RETAINED TO GIVE MY OPINION REGARDING
21 COPA'S EFFECT ON INTERNET BUSINESSES AND BUSINESS
22 MODELS.

23 Q. WERE YOU RETAINED TO GIVE AN OPINION ON THE
24 EFFECT OF COPA ON INTERNET CONSUMERS?

25 A. YES, I WAS.

1 Q. LET'S BACK UP FOR A MOMENT NOW AND TALK ABOUT
2 YOUR EDUCATION.

3 WHERE DID YOU GO TO COLLEGE?

4 A. I DID MY UNDERGRADUATE WORK AT BRIGHAM YOUNG
5 UNIVERSITY.

6 Q. WHAT DID YOU STUDY AT BRIGHAM YOUNG UNIVERSITY?

7 A. I STUDIED BUSINESS MANAGEMENT. MY PRIMARY
8 EMPHASIS WAS IN THE FIELD OF MARKETING.

9 Q. WHEN DID YOU EARN YOUR DEGREE?

10 A. IN 1971.

11 Q. WHAT DID YOU DO AFTER THAT?

12 A. AFTER THAT I WENT DIRECTLY TO AN MBA PROGRAM AT
13 MICHIGAN STATE UNIVERSITY.

14 Q. YOU SAID MBA?

15 A. MBA.

16 Q. THAT IS A GRADUATE SCHOOL OF BUSINESS?

17 A. MASTER'S OF BUSINESS ADMINISTRATION.

18 Q. WHAT TYPES OF COURSES DID YOU TAKE IN BUSINESS
19 SCHOOL?

20 A. I TOOK A VARIETY OF COURSES. THE MBA IS A
21 GENERALIST TYPE OF PROGRAM, BUT YOU ARE ALLOWED TO
22 SPECIALIZE. I SPECIALIZED IN THE MARKETING AREA. I
23 TOOK RESEARCH COURSES, FOCUSING ON CONSUMERS AND
24 CONSUMER BEHAVIOR. I TOOK ORGANIZATIONAL
25 BEHAVIOR/PSYCHOLOGY TYPES OF COURSES FOR UNDERSTANDING

1 BEHAVIOR THERE. I TOOK A VARIETY OF QUANTITATIVE
2 METHODS, STATISTICAL TYPES OF COURSES, ECONOMICS COURSES
3 AND GENERAL BUSINESS COURSES, FINANCE COURSES,
4 ACCOUNTING COURSES.

5 Q. WHAT DID YOU DO AFTER EARNING YOUR MBA?

6 A. AFTER COMPLETING THAT I WENT DIRECTLY TO A PH.D.
7 PROGRAM AT PENNSYLVANIA STATE UNIVERSITY.

8 Q. WHAT WAS THE DOCTORAL PROGRAM?

9 A. THAT WAS A PROGRAM IN MARKETING. MY MINOR AREAS
10 WERE SOCIAL PSYCHOLOGY, SOCIOLOGY, PSYCHOLOGY AND
11 QUANTITATIVE METHODS.

12 Q. WHAT WERE YOUR PRIMARY AREAS OF STUDY?

13 A. MARKETING, SOCIAL PSYCHOLOGY, QUANTITATIVE
14 METHODS.

15 Q. DID YOU STUDY MARKETING AND CONSUMER BEHAVIOR?

16 A. YES, I DID.

17 Q. HOW ARE THOSE TWO RELATED?

18 A. CONSUMER BEHAVIOR IS PROBABLY WHERE MOST
19 MARKETING PROFESSORS ARE. WE FOCUS ON MARKETS AND
20 MARKETS ARE DEFINED AS CONSUMERS. AND WE FOCUS OUR
21 RESEARCH AND ACTIVITIES ON UNDERSTANDING CONSUMERS AND
22 HOW THEY BEHAVE.

23 Q. WHAT WAS YOUR DISSERTATION TOPIC?

24 A. MY DISSERTATION DEALT WITH THE SEGMENTATION OF
25 RETAIL MARKETS AND WAS AN ANALYSIS OF CONSUMER PURCHASES

1 IN THE RETAIL AREA.

2 Q. WHAT DO YOU MEAN BY SEGMENTATION OF RETAIL
3 MARKETS?

4 A. SEGMENTATION IS WHERE YOU SPLIT UP THE MARKET.
5 MR. BEANE, YOU'RE A MARKET OF SIZE ONE, AND THE UNITED
6 STATES AS A WHOLE INCLUDES A MARKET OF MILLIONS OF
7 PEOPLE. AND WE IN MARKETING FOR A PRODUCT WOULD
8 IDENTIFY GROUPS OF PEOPLE THAT WOULD HAVE SIMILARITIES
9 IN TERMS OF ATTITUDES, INTEREST, ACTIVITIES,
10 DEMOGRAPHICS. AND WE IDENTIFY THEM SO THAT THE
11 MARKETING CAN BE MORE EFFECTIVE AND EFFICIENT AND SO
12 THAT WE CAN UNDERSTAND HOW THOSE PEOPLE ARE MAKING
13 DECISIONS.

14 Q. WHAT DID YOU DO AFTER EARNING YOUR PH.D.?

15 A. I BECAME A FACULTY MEMBER AT THE UNIVERSITY OF
16 OREGON.

17 Q. WHAT DID YOU TEACH AT THE UNIVERSITY OF OREGON?

18 A. I TAUGHT A VARIETY OF TOPICS INCLUDING MARKETING
19 RESEARCH, CONSUMER BEHAVIOR, RETAILING, MARKETING
20 MANAGEMENT. I TAUGHT PH.D. COURSES IN -- A PH.D. COURSE
21 IN MULTIVARIATE STATISTICS AND THAT -- I THINK THAT IS
22 PRETTY COMPREHENSIVE. MARKETING STRATEGY WAS TAUGHT
23 ALSO.

24 Q. HOW LONG DID YOU TEACH AT UNIVERSITY OF OREGON?

25 A. FOR TWO-AND-A-HALF YEARS.

1 Q. WHAT DID YOU DO AFTER THAT?

2 A. I BECAME A FACULTY MEMBER AT BRIGHAM YOUNG
3 UNIVERSITY.

4 Q. AND HAVE YOU WORKED AT BRIGHAM YOUNG UNIVERSITY
5 EVER SINCE?

6 A. YES, FOR THE LAST 25 YEARS.

7 Q. WHEN DID YOU BECOME A TENURED PROFESSOR?

8 A. I BECAME A TENURED AND FULL PROFESSOR IN ABOUT
9 1986.

10 Q. WHAT COURSES DID YOU TEACH WHEN YOU WERE FIRST
11 HIRED AT BRIGHAM YOUNG UNIVERSITY?

12 A. WHEN I WAS FIRST HIRED, I TAUGHT GRADUATE LEVEL
13 COURSES IN MARKETING MANAGEMENT. I ALSO TAUGHT COURSES
14 IN CONSUMER BEHAVIOR, IN MARKETING RESEARCH. I THINK
15 THOSE WERE THE ONES WHEN I FIRST CAME TO THE UNIVERSITY.

16 Q. WHAT COURSES HAVE YOU TAUGHT SINCE THEN?

17 A. MORE RECENTLY, I HAVE TAUGHT A SERIES OF COURSES
18 FOCUSING ON HIGH TECHNOLOGY MARKETING. I CREATED
19 COURSES IN INTERNET MARKETING. I HAVE CREATED COURSES
20 IN THE MEASUREMENT AND ANALYSIS OF CONSUMER MARKETS,
21 CONSUMER BEHAVIOR. I HAVE TAUGHT MARKETING RESEARCH
22 COURSES. I HAVE TAUGHT FIELD STUDY CONSULTING COURSES,
23 WHERE STUDENTS WILL CONSULT WITH CLIENTS ON CONSUMER
24 BEHAVIOR PROJECTS, DOING SURVEYS OF CUSTOMERS FOR THEIR
25 CLIENTS.

1 Q. LET'S DISCUSS JUST A COUPLE OF THESE EXAMPLES.

2 YOU MENTIONED INTERNET MARKETING. WHAT GENERALLY IS

3 INCLUDED IN THE COURSE IN INTERNET MARKETING?

4 A. INTERNET MARKETING, I PREPARED A TEXT ON THAT

5 AREA, BUT IT BASICALLY STARTS OUT WITH A BROAD OVERVIEW

6 OF THE INTERNET, WHAT ARE THE TRENDS, THE HISTORY OF THE

7 INTERNET. IT INVOLVES A SEGMENTATION OF THE INTERNET.

8 WHO ARE THE DIFFERENT GROUPS OF PEOPLE THAT ARE USING

9 THE INTERNET, THAT ARE SHOPPING ON THE INTERNET. THEN

10 WE WOULD GO THROUGH A WHOLE SERIES OF DISCUSSION ABOUT

11 INTERNET BUSINESS MODELS, ABOUT STRATEGIES FOR

12 CONDUCTING BUSINESS ON THE INTERNET. FROM THERE WE TALK

13 ABOUT ADVERTISING ON THE INTERNET, ABOUT DEVELOPING

14 WEBSITES FOR THE INTERNET. MY STUDENTS ACTUALLY EVEN

15 DEVELOP WEBSITES AND DO PROGRAMMING FOR THEIR WEBSITES.

16 ONE OF THE STUDENTS ACTUALLY STARTED ADOPTION.COM, WHICH

17 WAS A HUGE SUCCESS, AND STUDENTS HAVE GONE OUT BEING

18 DIRECTORS OF INTERNET PROGRAMS FOR MAJOR CORPORATIONS.

19 IT HAS BEEN QUITE A SUCCESSFUL COURSE.

20 Q. WHAT TOPICS ARE COVERED IN MEASUREMENT AND

21 ANALYSIS?

22 A. MEASUREMENT AND ANALYSIS IS A COURSE THAT I

23 CREATED THAT REALLY GETS TO THE FUN PART OF MARKETING

24 RESEARCH. IT'S FOCUSED ON HOW DO YOU MEASURE AND

25 OPERATIONALIZE THE CONSUMER BEHAVIOR COMPONENTS OF

1 PURCHASING. AND WE TALK ABOUT SUCH THINGS AS ATTITUDES.
2 HOW DO YOU MEASURE ATTITUDES? HOW DO YOU MEASURE
3 MOTIVATION? HOW DO YOU MEASURE DECISIONS, CONSUMER
4 UTILITIES, IF YOU WILL? AND WE HAVE ATTACKED SOME VERY,
5 VERY DIFFICULT VALUE TYPES OF THINGS, MEASURING
6 INTENTIONS AND THOSE TYPES OF THINGS. AND WE FOCUS ON
7 THE MEASUREMENT TASKS. WE HAVE THEM BUILD SURVEYS FOR
8 THE PROJECTS THAT THEY ARE WORKING ON. WE COLLECT THE
9 DATA, WE DO THE ANALYSIS AND THEN PREPARE REPORTS FOR
10 THOSE. IT HAS BEEN AN EXCITING CLASS FOR THE STUDENTS
11 TO HAVE.

12 Q. PLEASE TELL US A LITTLE BIT ABOUT YOUR COURSE IN
13 MARKET RESEARCH.

14 A. THE COURSE IN MARKETING RESEARCH, I USE MY
15 TEXTBOOK THAT I HAVE WRITTEN, AND THIS IS A FULL COURSE.
16 I TEACH IT ON THE UNDERGRADUATE AND ON THE GRADUATE
17 LEVEL AND WE START FROM WHAT IS MARKETING RESEARCH? AND
18 THEN WE GO THROUGH THE PLAN OF CONDUCTING RESEARCH. WE
19 TALKED ABOUT STRATEGIES FOR RESEARCH, THE COSTS OF
20 DIFFERENT TYPES OF RESEARCH, WHETHER IT IS TELEPHONE OR
21 ONLINE OR MAIL. WE TALK ABOUT DOING -- EXTENSIVELY
22 ABOUT ONLINE RESEARCH, SINCE THAT IS ONE OF MY AREAS OF
23 EXPERTISE. THEN WE FOCUS ON THE PROCESS OF MODELLING
24 THE RESEARCH QUESTIONS. AND THEN WE ACTUALLY GET INTO
25 THE MEASUREMENT SCALES THAT ARE THERE. THERE IS A

1 PROJECT ASSOCIATED WITH THE CLASS. THEY HAVE A
2 CONSULTING PROJECT AGAIN. WE BUILD SURVEYS. WE FIELD
3 THE DATA, WE DO THE ANALYSIS, THEY WRITE REPORTS AND
4 PRESENT THEM TO THE CLIENTS THAT THEY ARE WORKING WITH,
5 AND THESE CLIENTS PAY TO HAVE THE RESEARCH DONE.

6 Q. LET'S DISCUSS ONE FINAL AREA, CONSUMER BEHAVIOR.

7 A. YES.

8 Q. WHAT TOPICS ARE INCLUDED IN A COURSE ON CONSUMER
9 BEHAVIOR?

10 A. CONSUMER BEHAVIOR --

11 MR. FINE: OBJECTION. CALLS FOR
12 SPECULATION. THE WITNESS TESTIFIED AT HIS DEPOSITION
13 THAT HE HAS NOT TAUGHT A COURSE ON CONSUMER BEHAVIOR FOR
14 THE LAST 15 YEARS. THE QUESTION WAS WHAT IS TAUGHT IN A
15 CLASS ON CONSUMER BEHAVIOR. IT'S UNCLEAR IF THE WITNESS
16 IS BEING ASKED TO TALK GENERALLY OR TO TALK ABOUT HIS
17 CLASSES 15 YEARS AGO.

18 MR. BEANE: YOUR HONOR, CONSUMER
19 BEHAVIOR, IF YOU LOOK AT THE MONITOR, IS A COURSE THAT'S
20 LISTED HERE ON HIS BIOGRAPHY AS A COURSE THAT HE'S
21 TAUGHT. I'M HAPPY TO ASK IF CONSUMER BEHAVIOR IS
22 INCLUDED IN OTHER COURSES THAT HAVE DIFFERENT TITLES AS
23 WELL.

24 THE COURT: THE OBJECTION IS OVERRULED.
25 YOU CAN SORT THIS OUT WITH CROSS EXAMINATION IF YOU WANT

1 TO.

2 THE WITNESS: WOULD YOU REPEAT THE
3 QUESTION, PLEASE.

4 BY MR. BEANE:

5 Q. CAN YOU EXPLAIN WHAT TYPES OF TOPICS ARE COVERED
6 IN A COURSE ON CONSUMER BEHAVIOR?

7 A. YES, I CAN.

8 I HAVE SERVED AS A CHAIRMAN OF THE
9 DEPARTMENT AND WELL VERSED IN THIS AREA. CONSUMER
10 BEHAVIOR COURSES COVER A BROAD RANGE OF CONSUMER
11 BEHAVIOR TOPICS. TYPICALLY, THEY WILL TALK ABOUT
12 THEORIES OF CONSUMER BEHAVIOR AND THEORIES OF CONSUMER
13 BEHAVIOR WILL RANGE FROM A BROAD MODEL OF BUYER
14 BEHAVIOR, AND THESE MODELS HAVE BEEN AROUND SINCE THE
15 1960'S, MID 1960'S, ORIGINALLY STARTING WITH A MODEL BY
16 JOHN HOWARD OUT OF NEW YORK UNIVERSITY AND JAGDISH
17 SHEFF, J-A-G-D-I-S-H, SHEFF. THESE MODELS HAVE
18 CONTINUED TO EVOLVE, BUT ALL MODELS OF CONSUMER BEHAVIOR
19 INCLUDE A SERIES OF STANDARD COMPONENTS.

20 THESE COMPONENTS WOULD BE SUCH THINGS AS
21 ATTITUDES, BEHAVIORAL PREDISPOSITIONS TO PURCHASE OR
22 MAKE DECISIONS, INTENTION, INTEREST. AND THEY WILL
23 FOCUS ON INVOLVEMENT OF THE CONSUMERS IN MAKING A
24 DECISION. THEY INVOLVE MOTIVATION. THEY INVOLVE SETS
25 OF ATTRIBUTES THAT ARE EVALUATED WITH RESPECT TO THE

1 PRODUCT AND MANY OTHER TOPICS. CONSUMER BEHAVIOR IS
2 SOMETHING WHICH I TEACH IN ALL OF MY COURSES. YOU
3 CANNOT DO A MEASUREMENT AND ANALYSIS COURSE OR A MARKET
4 RESEARCH COURSE WITHOUT TEACHING CONSUMER BEHAVIOR.
5 EVEN WHEN WE TEACH A BASIC MARKETING COURSE, WE TEACH
6 CONSUMER BEHAVIOR. IN MY MEASUREMENT AND ANALYSIS
7 COURSE, IN MY MARKET RESEARCH COURSES WE DO WHAT IS
8 CALLED A LADDERING ANALYSIS, L-A-D-D-E-R-I-N-G, WHERE
9 THE STUDENTS WILL FOCUS ON THE ATTRIBUTES THAT THEY ARE
10 EVALUATING WITH THE PRODUCT, THE DERIVED BENEFITS, THE
11 MOTIVATIONS AND THE VALUES. AND ALL OF THOSE ARE VERY,
12 VERY CENTRAL TO THIS PROCESS OF UNDERSTANDING CONSUMER
13 BEHAVIOR.

14 WE BUY PRODUCTS BECAUSE OF THE BENEFITS
15 THEY GIVE US. IF WE BUY A TWO-SEAT SPORTS CAR, IT'S
16 BECAUSE WE ARE BUYING IT FOR SEX APPEAL OR THE
17 SPORTINESS OF THAT CAR AND WHAT IT DOES FOR OUR IMAGE.
18 BUT THERE ARE CERTAIN VALUES THAT ARE ASSOCIATED WITH IT
19 ALSO. WE GO THROUGH AND STUDY THAT HIERARCHY OF VALUES
20 AS PART OF THAT ATTITUDE RESEARCH, THE THINGS THAT WE
21 MEASURE IN MARKET RESEARCH. YOU CAN'T BUILD A SURVEY
22 WITHOUT UNDERSTANDING CONSUMER BEHAVIOR.

23 Q. IS THERE A DISTINCTION BETWEEN
24 BUSINESS-TO-BUSINESS MARKETING AND BUSINESS-TO-CONSUMER
25 MARKETING?

1 A. YES, THERE IS.

2 Q. WHAT IS THE DIFFERENCE?

3 A. BUSINESS-TO-BUSINESS MARKETING TYPICALLY DOES
4 NOT DEAL WITH CONSUMERS. IT DEALS WITH CUSTOMERS WHO
5 ARE BUSINESS CUSTOMERS. BUSINESS-TO-CONSUMER MARKETING
6 FOCUSES ON THE BUSINESS'S RELATIONSHIP WITH THE CONSUMER
7 MARKETS AND TYPICALLY INVOLVES MARKET SEGMENTATION OF
8 THOSE MARKETS. IT INVOLVES THE CONSUMER BEHAVIOR
9 ASPECTS OF THEM AND ALSO INVOLVES A SERIES OF DECISIONS
10 THAT GO ALONG WITH THAT.

11 Q. WHICH OF THOSE TWO SIDES OF MARKETING HAVE YOU
12 FOCUSED ON?

13 A. ALL OF MY WORK IS IN THE CONSUMER BEHAVIOR SIDE
14 OF THAT, BUSINESS TO CONSUMER.

15 Q. DURING YOUR ACADEMIC CAREER, HAVE YOU BEEN
16 INVOLVED IN ANY ACADEMIC ORGANIZATIONS?

17 A. YES, I HAVE.

18 Q. HAVE YOU PRESENTED ANY ARTICLES TO ANY ACADEMIC
19 ORGANIZATIONS OR CONFERENCES?

20 A. YES, I HAVE.

21 Q. LET'S TURN TO THE LIST OF PAPERS IN REFEREED
22 PROCEEDINGS WHICH BEGINS ON PAGE 25, AND I BELIEVE
23 CONTINUES THROUGH PAGE 30.

24 A. ARTICLES IN REFEREED PROCEEDINGS. MINE STARTS
25 ON PAGE 21. IS THAT -- PAPERS IN REFEREED PROCEEDINGS.

1 Q. I'M SORRY IF I MISSPOKE.

2 A. I DIDN'T KNOW IF YOU WANTED ARTICLES OR PAPERS
3 THAT WERE PRESENTED.

4 Q. LET'S FOCUS FOR THE MOMENT ON PAPERS IN REFEREED
5 PROCEEDINGS.

6 A. ALL RIGHT.

7 Q. HOW MANY PAPERS IN REFEREED PROCEEDINGS ARE
8 THERE HERE?

9 A. ABOUT 65.

10 Q. LET'S DISCUSS A COUPLE OF EXAMPLES. LET'S START
11 WITH THE ONE ON THE BOTTOM OF PAGE 25. WHAT IS SHOPPER
12 SEGMENTATION?

13 A. THIS PARTICULAR ARTICLE IS FOCUSING ON
14 SEGMENTATION OF THE INTERNET SHOPPER MARKET.

15 Q. WHAT TYPES OF ISSUES WERE ADDRESSED IN THAT
16 PAPER?

17 A. THIS IS A PAPER THAT -- THE DATA WAS ACTUALLY
18 COLLECTED IN 2004, JANUARY OF 2004, THAT UPDATED AN
19 EARLIER STUDY THAT WAS DONE IN 2001. AND THE
20 INFORMATION THAT IS THERE BASICALLY PROFILES INTERNET
21 SHOPPERS. IT IDENTIFIES THE MARKET SEGMENTS. IT
22 IDENTIFIES WHO SHOPS AND WHO DOES NOT SHOP ONLINE.

23 Q. LET'S TURN TO PAGE 27 AND LOOK AT THE FOURTH ONE
24 ON THE PAGE.

25 A. 27?

1 Q. YES. IT'S HIGHLIGHTED ON THE MONITOR IF THAT IS
2 MORE CONVENIENT. WHAT IS RETAIL BROWSING BEHAVIOR?

3 A. RETAIL BROWSING BEHAVIOR FOCUSES ON THE
4 DISTINCTION BETWEEN PEOPLE THAT GO TO A STORE AND
5 BROWSE, THAT IS, THEY JUST LOOK AROUND, AS OPPOSED TO
6 THOSE THAT ACTUALLY PURCHASE. THIS PARTICULAR STUDY
7 CAME OUT OF A CONSULTING PROJECT THAT WAS CONDUCTED FOR
8 KMART CORPORATION. AND WE INTERVIEWED SHOPPERS AS THEY
9 WERE GOING INTO STORES, ASKED THEM IF THEY PLANNED ON
10 PURCHASING, WHAT THEY PLANNED ON PURCHASING AND THEN
11 INTERCEPTED THEM ON THE WAY BACK OUT, GAVE THEM THE
12 INCENTIVE THAT WE'D PROMISED, MADE A COPY OF THEIR SALES
13 RECEIPT. AND THEN CORRELATED AND ASKED THEM QUESTIONS
14 ABOUT WHY THEY DIDN'T BUY WHAT THEY PLANNED TO BUY.

15 Q. WHAT TYPES OF OBSERVATIONS WERE YOU ABLE TO MAKE
16 WITH THE DATA IN THE STUDY?

17 A. I GUESS A COUPLE. FUNNY ONE THAT WE CAME UP --
18 MR. FINE: OBJECTION, YOUR HONOR, TO THE
19 EXTENT THAT THE WITNESS IS GOING TO GET INTO DIRECT
20 TESTIMONY HERE ON THE QUALIFICATIONS.

21 THE COURT: THE QUESTION IS WHAT TYPE,
22 AND THAT DOES NOT CALL FOR AN ANSWER THAT INVOLVES THE
23 SUBSTANCE OF THE RESEARCH. IT'S AN ORGANIZATIONAL TYPE
24 OR A HEADING TYPE QUESTION AS I UNDERSTOOD THE QUESTION.
25 LIMITED TO THAT, IF THAT WAS THE INTENT OF THE

1 QUESTIONER, THEN THE QUESTION IS NOT OBJECTIONABLE AT
2 THIS POINT.

3 THE WITNESS: REPEAT THE QUESTION.

4 BY MR. BEANE:

5 Q. PLEASE ANSWER THAT QUESTION JUST IN TERMS OF THE
6 TYPE OF OBSERVATIONS THAT YOU WERE ABLE TO MAKE BASED ON
7 THE DATA IN THIS STUDY.

8 A. YES.

9 WE WERE ABLE TO ANALYZE PRIMARILY THE
10 BROWSER MARKETS, WHAT THEY BOUGHT, WHAT THEY DIDN'T BUY.
11 WE FOUND OUT THAT --

12 THE COURT: EXCUSE ME, SIR. YOU WERE NOT
13 ASKED TO GIVE THE RESULTS OF WHAT YOU WERE DOING, BUT
14 YOU WERE ASKED THE TYPE OF MATTERS THAT WERE INVOLVED
15 WHICH -- YOU DID START TO ANSWER AND THEN YOU SWITCHED
16 OVER TO GIVING THE RESULTS. IF THEY WANT THE RESULTS,
17 THEY WILL ASK YOU.

18 THE WITNESS: OKAY. WE FOCUSED ON
19 BROWSER BEHAVIOR VERSUS NONBROWSER BEHAVIOR. WE FOCUSED
20 ON THE AMOUNT OF PURCHASES, WE FOCUSED ON QUESTIONS OF
21 WHY PURCHASES WERE NOT MADE WHEN THEY HAD PLANNED TO
22 PURCHASE THEM, AND WE FOCUSED ON MERCHANDISING ISSUES
23 RELATED TO THAT.

24 BY MR. BEANE:

25 Q. LET'S LOOK AT ONE MORE PRESENTATION ON THIS PAGE

1 FURTHER UP ON THE LIST: SHE CLICKS, HE CLICKS: GENDER
2 DIFFERENCES IN INTERNET COMMUNICATIONS AND USAGE.

3 A. YES.

4 Q. WHAT ISSUES DID YOU RAISE IN THIS PRESENTATION?

5 A. THIS WAS A STUDY THAT WAS -- ACTUALLY CAME OUT
6 OF CONSULTING RESEARCH WITH BELLSOUTH.NET AS WE DESIGNED
7 AND DID CONSUMER RESEARCH FOR THEIR CONSUMER PORTAL. WE
8 ASKED -- THIS WAS A LONG STUDY, BUT GENERALLY WE ASKED
9 QUESTIONS RELATED TO WHAT TYPES OF THINGS PEOPLE LOOKED
10 AT WHEN THEY WERE EITHER SHOPPING OR DOING WORK ON THE
11 INTERNET. AND WE WERE ABLE TO SEGMENT MARKETS AND
12 IDENTIFY WHAT KIND OF INFORMATION SHOULD BE PUT ON THE
13 BELLSOUTH.NET PORTAL BASED ON THEIR REPORTED EXPERIENCES
14 AND ACTIVITIES.

15 Q. HAVE YOU WRITTEN ANY TEXTBOOKS OR BOOK CHAPTERS?

16 A. I HAVE.

17 Q. LET'S TURN TO PAGE 19. LET'S DISCUSS THE
18 SUBJECT MATTER OF A COUPLE OF THESE BOOKS. JUST BENEATH
19 THE MIDDLE OF THE PAGE THERE IS ONE TITLED FUNDAMENTALS
20 OF MARKETING RESEARCH.

21 A. YES.

22 Q. CAN YOU DESCRIBE THE TYPES OF ISSUES ADDRESSED
23 IN THIS BOOK?

24 A. YES. FIRST OF ALL, THE TITLE IS PROBABLY WRONG.
25 THIS IS FAR FROM A FUNDAMENTALS BOOK. IT INCLUDES

1 EVERYTHING FROM SOUP TO NUTS. IT'S A 900-PAGE MARKETING
2 RESEARCH BOOK. IT WAS ORIGINALLY WRITTEN WITH PAUL
3 GREEN, WHO IS A PROFESSOR AT THE WHARTON SCHOOL, AND
4 COVERS EVERY ASPECT OF MARKETING RESEARCH FROM DEFINING
5 THE RESEARCH PROBLEM, TO STRUCTURING A RESEARCH PROCESS,
6 TO CONSTRUCTING A QUESTIONNAIRE, MEASURING ATTITUDES,
7 INTEREST, HOW TO SEGMENT CONSUMER MARKETS, AND THEN OF
8 COURSE HOW TO DO THE ANALYSIS ON THIS TO DEMONSTRATE THE
9 RESULTS WHICH YOU HAVE.

10 Q. LET'S TURN TO PAGE 20. ABOUT A THIRD OF THE WAY
11 DOWN THE PAGE THERE IS ONE TITLED CROSS CULTURAL
12 RESEARCH IN BUSINESS STUDIES?

13 A. YES.

14 Q. WHAT DOES THIS BOOK ADDRESS?

15 A. I HAVE BEEN THE EDITOR AND HOST FOR A CROSS
16 CULTURAL RESEARCH CONFERENCE FOR A NUMBER OF YEARS.
17 THIS IS THE PROCEEDINGS FROM THAT CONFERENCE. THIS
18 CONFERENCE IS FOR INTERNATIONAL SCHOLARS. THEY COME AND
19 PRESENT THEIR REVIEWED PAPERS. IT FOCUSES ON CONSUMER
20 BEHAVIOR ISSUES ACROSS -- IN DIFFERENT TOPICS ACROSS THE
21 WORLD. THE CONFERENCE IS SPONSORED BY THE ASSOCIATION
22 FOR CONSUMER RESEARCH AND BY THE AMERICAN PSYCHOLOGICAL
23 ASSOCIATION.

24 Q. LET'S MOVE ONE DOWN THE LIST TO A BOOK TITLED
25 MARKETING MODELS AND APPLICATIONS.

1 A. UH-HUH.

2 Q. WHAT ISSUES ARE ADDRESSED IN THIS BOOK?

3 A. THIS MODEL -- THIS BOOK ADDRESSES A LOT OF
4 DIFFERENT ISSUES, BUT BASICALLY IT TEACHES HOW TO TAKE
5 WHAT WE WILL CALL CONSTRUCTS OR THE BASIC ELEMENTS OF
6 BEHAVIOR AND OF THEORY AND TO OPERATIONALIZE THOSE AND
7 TO TURN THEM INTO SOMETHING THAT IS ACTUALLY A VALUE IN
8 PRACTICE. AND IT IS ATTEMPTED TO BRIDGE THE GAP BETWEEN
9 JUST THINKING ABOUT A CONCEPT AND CONCEPTUALIZING IT AND
10 ACTUALLY MAKING IT OPERATIONAL. THE BOOK CONTAINS A
11 SERIES OF SOFTWARE PROGRAMS THAT ARE IN THERE WHICH
12 ALLOW THE STUDENTS OR THE USERS TO ACTUALLY DO DIFFERENT
13 ANALYSES. IT INCLUDES TOPICS IN THERE SUCH AS CONSUMER
14 BEHAVIOR TOPICS AND ADVERTISING TOPICS, TOPICS RELATED
15 TO SALES AND DISTRIBUTION, PRICING, THE FUNDAMENTAL
16 AREAS OF MARKETING, AND GIVING TOOLS FOR THE STUDENTS TO
17 MAKE THAT WORK.

18 Q. LET'S LOOK AT THE NEXT BOOK ON THE LIST,
19 INTERNET MARKETING.

20 A. YES.

21 Q. CAN YOU READ THE DESCRIPTION OF THIS BOOK?

22 A. YES. THIS TEXT FOCUSES ON TRENDS AND TECHNOLOGY
23 FOR CONDUCTING BUSINESS ON THE INTERNET. THE TEXT IS
24 DIRECTED AT INTEGRATING MARKET STRATEGY, RESEARCH, SALES
25 AND ADVERTISING CONCEPTS INTO THE DEVELOPMENT OF AN

1 ACTUAL SITE FOR MARKETING PRODUCTS AND SERVICES ON THE
2 INTERNET.

3 Q. WHAT GENERAL TOPIC AREAS ARE DISCUSSED IN YOUR
4 BOOK ON INTERNET MARKETING?

5 A. GENERAL TOPICS, AGAIN, ARE THE HISTORY OF THE
6 INTERNET, THE STRUCTURE OF THE INTERNET, BUSINESS MODELS
7 ON THE INTERNET, STRATEGIES THAT ARE THERE. WE TALK
8 ABOUT ACTUALLY CONSUMER BEHAVIOR AND DOING ANALYSES TO
9 UNDERSTAND THE CONSUMERS WHO ARE PURCHASING ON THE
10 INTERNET. THEN WE TALK ABOUT A WHOLE SERIES OF TOPICS
11 RELATED TO BUILDING THEIR OWN WEBSITE, THAT REFLECT
12 PROPER PRACTICES FOR ADVERTISING AND SALES. WE GET INTO
13 HTML PROGRAMMING, E-COMMERCE, AND THAT IS PROBABLY
14 ENOUGH OF A LIST.

15 Q. LET'S DISCUSS ONE FINAL EXAMPLE, THE LAST ONE ON
16 PAGE 20, WHAT IS MULTIDIMENSIONAL SCALING?

17 A. THAT IS A HARD THING TO DESCRIBE. THIS IS A
18 PH.D. LEVEL BOOK. IT IS A BOOK THAT FOCUSES ON HOW DO
19 YOU DISPLAY IN THREE OR MORE DIMENSIONS GRAPHICALLY THE
20 PERCEPTIONS WHICH CONSUMERS HAVE OF PRODUCTS AND BRANDS.
21 AND IT INVOLVES EVALUATIONS, COGNITIVE EVALUATIONS OF
22 ATTRIBUTES THAT ARE RELATED TO MAKING DECISIONS. THIS
23 BOOK ALSO CONTAINS A SUITE OF SOFTWARE PROGRAMS WHICH I
24 PRODUCED FOR ALLOWING INDIVIDUALS TO DO THIS. THIS
25 SOFTWARE PACKAGE IS CALLED PCMDS. IT IS USED BY -- I

1 WOULD SAY VIRTUALLY EVERY PH.D. PROGRAM IN THE UNITED
2 STATES AND BY MANY COMPANIES, PRIMARILY CONSUMER PRODUCT
3 COMPANIES, LIKE KODAK, LIKE PROCTOR AND GAMBLE, LIKE
4 COLGATE PALMOLIVE, LIKE GLAXO WELLCOME. THESE ARE
5 COMPANIES THAT HAVE SUFFICIENT RESEARCH STAFF TO DO
6 THEIR OWN VERY, VERY HIGH LEVEL ANALYSIS OF CONSUMERS.

7 THE COURT: EXCUSE ME FOR INTERRUPTING.
8 THE PRECISE QUESTION YOU WERE ASKED -- YOU WERE ASKED
9 WAS WHAT IS MULTIDIMENSIONAL SCALING. YOU SAID IT'S A
10 HARD THING TO DEFINE, AND THEN YOU DESCRIBED THE WRITTEN
11 MATERIAL, BUT YOU NEVER TOOK A CRACK AT DEFINING IT.

12 THE WITNESS: I THINK -- I'M SORRY, YOUR
13 HONOR.

14 THE COURT: MULTIDIMENSIONAL SCALING.

15 THE WITNESS: MULTIDIMENSIONAL SCALING IS
16 A SERIES OF TECHNIQUES THAT ARE USED TO DISPLAY IN THREE
17 OR MORE DIMENSIONS -- TWO, THREE OR MORE DIMENSIONS THE
18 PERCEPTIONS THAT CONSUMERS HAVE WITH RESPECT TO PRODUCTS
19 AND BRANDS THAT THEY ARE EVALUATING. THESE ARE OFTEN
20 USED -- MULTIDIMENSIONAL SCALING MAPS ARE USED TO
21 PROVIDE COMPETITIVE POSITIONING MAPS OF DIFFERENT
22 COMPANIES IN REGARD TO CONSUMER PERCEPTIONS.

23 BY MR. BEANE:

24 Q. HAVE YOU PUBLISHED ANY ARTICLES OR PAPERS IN
25 JOURNALS IN OTHER ACADEMIC PUBLICATIONS?

1 A. YES, I HAVE.

2 Q. LET'S TURN TO PAGE 21. I BELIEVE YOUR ARTICLES
3 ARE LISTED BEGINNING ON PAGE 21 AND CONTINUING THROUGH
4 PAGE 24. DO YOU KNOW HOW MANY ARTICLES OR PAPERS YOU
5 HAVE PUBLISHED?

6 A. ABOUT 35 OR A LITTLE MORE.

7 Q. LET'S DISCUSS A FEW OF THE EXAMPLES. BUT BEFORE
8 I ASK, ARE ANY OF THESE PUBLICATIONS PEER REVIEWED?

9 A. THEY ARE ALL PEER REVIEWED.

10 Q. LET'S START WITH THE FIRST ONE LISTED AT THE
11 BOTTOM OF PAGE 21 ENTITLED: E-SHOPPING LOVERS AND
12 FEARFUL CONSERVATIVES: A MARKET SEGMENTATION ANALYSIS.
13 WHAT DID THIS ARTICLE ADDRESS?

14 A. THIS IS AN ARTICLE ON DATA THAT WAS COLLECTED IN
15 2004. IT ADDRESSES A SEGMENTATION OF THE INTERNET
16 SHOPPING MARKET OR INTERNET USER MARKET. IT IDENTIFIED
17 GROUPS OF INDIVIDUALS WHO SHOP ONLINE AND THOSE THAT DO
18 NOT SHOP ONLINE. IT LOOKED AT THOSE GROUPS OF
19 INDIVIDUALS AND IDENTIFIED WHO THEY ARE AND SOME OF THE
20 REASONS THAT THEY DIDN'T SHOP ONLINE OR WHY THEY DID
21 SHOP, WHAT THEY LIKED ABOUT SHOPPING. IT IDENTIFIED THE
22 RELATIVE IMPORTANCE OF EACH OF THESE DIFFERENT FACTORS
23 THAT. WE TALKED ABOUT FEARFUL CONSERVATIVES. THEY WERE
24 FEARFUL. DO THEY SHOP, DO THEY NOT SHOP. HOW FEARFUL
25 ARE THEY COMPARED TO THEIR PERCEPTIONS, COMPARED TO

1 PEOPLE THAT ARE SHOPPING ONLINE AND IN ABSOLUTE TERMS,
2 HOW FEARFUL ARE THEY.

3 Q. LET'S TURN TO PAGE 23. ABOUT TWO-THIRDS OF THE
4 WAY DOWN, THERE IS AN ARTICLE TITLED EXTERNAL SEARCH
5 EFFORT: AN INVESTIGATION ACROSS SEVERAL PRODUCT
6 CATEGORIES. WHERE WAS THIS ARTICLE PUBLISHED?

7 A. THIS ARTICLE WAS PUBLISHED IN THE JOURNAL OF
8 CONSUMER RESEARCH.

9 Q. WHAT DOES THIS ARTICLE ADDRESS?

10 A. THIS ARTICLE ADDRESSES ISSUES OF INVOLVEMENT AND
11 MOTIVATION OF CONSUMERS AND SPECIFICALLY ASKS THE
12 QUESTION OF IF YOU WERE INVOLVED IN A PRODUCT SERVICE --
13 IN A PRODUCT PURCHASE, THAT IS, IF YOU HAVE A HIGH LEVEL
14 OF MOTIVATION TO PURCHASE A PARTICULAR PRODUCT, WHAT
15 DOES THIS DO TO YOUR SEARCH BEHAVIOR.

16 Q. IF I CAN JUST ASK YOU TO DEFINE A COUPLE OF
17 THINGS. FIRST YOU MENTIONED INVOLVEMENT. CAN YOU
18 EXPLAIN TO US WHAT YOU MEAN BY INVOLVEMENT IN THIS
19 CONTEXT?

20 A. IN LAYMEN'S TERMS INVOLVEMENT WOULD REFER TO HOW
21 EXCITED ARE YOU? YOU KNOW, IS THIS REALLY PART OF YOUR
22 LIFE? DO YOU IDENTIFY WITH THIS PRODUCT THAT YOU ARE
23 PURCHASING?

24 Q. YOU ALSO MENTIONED MOTIVATION. WHAT DOES
25 MOTIVATION MEAN IN THIS CONTEXT?

1 A. MOTIVATION IS PROBABLY MORE BASE THAN
2 INVOLVEMENT. MOTIVATION TYPICALLY REFERS TO NEEDS. IT
3 MIGHT -- EVERY PSYCHOLOGY AND SOCIOLOGY STUDENT IS
4 EXPOSED TO MASLOW'S HIERARCHY OF NEEDS, WHICH FOCUSES ON
5 BASIC MOTIVATIONS FOR LIFE, SUCH THINGS AS THE NEED FOR
6 FOOD AND THE NEED FOR SAFETY, THE NEED FOR LOVE. AND
7 HIGHER LEVELS DEAL WITH THE NEED FOR SELF ACTUALIZATION.
8 AND WE ADDRESS MOTIVATION THROUGH EXCITEMENT AND
9 INVOLVEMENT THERE.

10 Q. I APOLOGIZE FOR INTERJECTING, BUT I THINK YOU
11 WERE STILL ANSWERING WHAT TYPES OF ISSUES ARE ADDRESSED
12 IN THIS ARTICLE.

13 A. THE ISSUES THAT WERE ADDRESSED WERE LARGELY THE
14 RELATIONSHIP BETWEEN INVOLVEMENT AND SEARCH BEHAVIOR.
15 WHAT DO CONSUMERS DO IN SEARCHING OUT PRODUCTS? WHERE
16 DID THEY GO? HOW MUCH DO THEY SEARCH? DO THEY LOOK FOR
17 ADDITIONAL MEDIA, DO THEY LOOK TO FRIENDS? HOW MANY
18 ITEMS DO THEY GO FOR? AND THIS RESEARCH BASICALLY SHOWS
19 THAT THE HIGHER WE ARE INVOLVED, THE MORE SEARCH
20 ACTIVITY WE ARE ENGAGED IN. IF WE LIKE SOMETHING, WE GO
21 FIND OUT ABOUT IT. WE RESEARCH IT.

22 Q. LET'S DISCUSS ONE MORE EXAMPLE. LET'S TURN TO
23 PAGE 22. THERE IS AN EXAMPLE ABOUT THREE QUARTERS OF
24 THE WAY DOWN THE PAGE, AN ARTICLE TITLED FULFILLMENT OF
25 PLANNED AND UNPLANNED PURCHASES OF SALE AND

1 REGULAR-PRICE ITEMS: A BENCHMARK STUDY. WHAT DOES THIS
2 ARTICLE ADDRESS?

3 A. THIS IS THE ACTUALLY THE SAME KMART STUDY THAT I
4 ADDRESSED EARLIER, LOOKING AT INDIVIDUALS WHO ARE
5 SHOPPING AT A STORE WHO MAY OR MAY NOT HAVE PURCHASED,
6 AND EVALUATING NOT ONLY WHAT THEY PURCHASED, THE
7 PROPORTION OF PURCHASES THAT THEY MADE, BUT ALSO WHY
8 THEY DIDN'T PURCHASE AND OF COURSE EXPENDITURES THAT
9 WERE ASSOCIATED THERE.

10 Q. HAVE YOU SERVED IN ANY EDITORIAL POSITIONS?

11 A. I HAVE.

12 Q. LET'S TURN TO PAGE 33. CAN YOU GIVE A COUPLE OF
13 EXAMPLES, PLEASE.

14 A. I HAVE BEEN THE GUEST EDITOR FOR JOURNALS. FOR
15 EXAMPLE, I HAVE BEEN A GUEST EDITOR FOR THE JOURNAL OF
16 BUSINESS RESEARCH SEVERAL TIMES IN 1998, THAT IS THE
17 SECOND ITEM, AND IN THE YEAR 2000. AND I'M CURRENTLY A
18 GUEST EDITOR FOR A SPECIAL ISSUE ON CROSS-CULTURAL
19 RESEARCH THAT HOPEFULLY WILL BE PUBLISHED NEXT YEAR. WE
20 ARE IN THE REVIEW PROCESS OF THOSE ARTICLES. I SERVE ON
21 THE EDITORIAL BOARD FOR THE JOURNAL OF HEALTHCARE
22 MARKETING AND AMONG -- WAS ON THE EDITORIAL BOARD FOR
23 THE JOURNAL OF HEALTHCARE MARKETING, IT'S A HEALTH
24 MARKETING QUARTERLY. I AM AN AD HOC REVIEWER FOR OTHER
25 JOURNALS WHEN THEY HAVE ITEMS THAT NEED TO BE REVIEWED

1 INCLUDING -- IN THE PAST I REVIEWED FOR THE JOURNAL OF
2 MARKETING RESEARCH, THE JOURNAL OF MARKETING, PSYCHOLOGY
3 AND MARKETING, THE JOURNAL OF THE ACADEMY OF MARKETING
4 SCIENCES, AND I'M ON THE EDITORIAL REVIEW BOARD FOR
5 SCIENTIFIC PRESS, MARKETING SERIES.

6 Q. WHAT IS YOUR ROLE WHEN YOU SERVE AS A GUEST
7 EDITOR?

8 A. YOUR RESPONSIBILITY AS AN EXPERT, IF YOU WILL,
9 IN THAT PARTICULAR AREA IS ONE OF PROVIDING CONSTRUCTIVE
10 FEEDBACK TO THE WRITER OF THE JOURNAL ARTICLE, TO HELP
11 THEM ALONG THE WAY OF PUBLICATION. YOU REVIEW A VARIETY
12 OF TOPICS INCLUDING THE APPROPRIATENESS OF THE STATEMENT
13 OF THE PROBLEM THEY HAVE DEFINED, THEIR LITERATURE
14 REVIEW, AS TO WHETHER OR NOT IT IS COMPLETE, YOU
15 EVALUATE THEIR RESEARCH METHODOLOGY, THE SOUNDNESS OF
16 THEIR RESULTS AND THE OVERALL CONTRIBUTION TO THE
17 DISCIPLINE.

18 Q. DO YOU PARTICIPATE IN THE PEER REVIEW PROCESS?

19 A. YES.

20 Q. HOW ARE PEOPLE SELECTED TO SERVE ON THESE
21 EDITORIAL BOARDS?

22 A. IT IS BASICALLY BECAUSE OF YOUR STATURE IN THE
23 DISCIPLINE. YOU ARE RECOGNIZED AS ONE WHO HAS GOOD
24 JUDGMENT, ONE WHO HAS EXPERTISE AND KNOWLEDGE OF THE
25 TOPICS THAT ARE BEING CONSIDERED AND ARE APPROPRIATE FOR

1 THAT JOURNAL.

2 Q. ARE YOU INVOLVED IN ANY BUSINESSES?

3 A. I AM.

4 Q. ARE ANY OF THESE INTERNET BUSINESSES?

5 A. THEY ARE.

6 Q. PLEASE NAME THE INTERNET BUSINESSES.

7 A. I AM INVOLVED IN SEVERAL. QUALTRICS.COM,
8 Q-U-A-L-T-R-I-C-S. I'M INVOLVED IN A BUSINESS CALLED
9 SURVEYZ, S-U-R-V-E-Y-Z.COM AND SURVEYPRO.COM, WHICH
10 STANDS FOR SURVEY PROFESSIONALS.

11 Q. LET'S DISCUSS EACH IN TURN. WHAT KIND OF
12 BUSINESS IS QUALTRICS.COM?

13 A. QUALTRICS.COM IS A BUSINESS WHICH PROVIDES
14 SURVEY RESEARCH -- A SURVEY RESEARCH PLATFORM WHICH IS
15 BRANDED FOR CORPORATE CLIENTS. IT PROVIDES THEM WITH
16 ALL OF THE TOOLS AND TUTORIALS AND SAMPLE SURVEYS, ALL
17 OF THE MATERIALS THAT THEY NEED TO CONDUCT THEIR OWN
18 RESEARCH ONLINE. AND MOST OF THIS RESEARCH, PROBABLY 95
19 PERCENT OF THIS RESEARCH IS CONSUMER-BASED RESEARCH.

20 Q. WHAT IS YOUR ROLE IN THE BUSINESS?

21 A. I AM THE FOUNDER AND THE OWNER.

22 Q. WHAT KINDS OF SERVICES DOES QUALTRICS PROVIDE?

23 A. WE PROVIDE CONSULTING SERVICES. WE ACTUALLY
24 PROVIDE THE ONLINE -- THE BRANDED ONLINE SURVEY RESEARCH
25 SITE FOR THEM. WE PROVIDE ALL OF THE TOOLS FOR BUILDING

1 THE SURVEY. WE PROVIDE ALL OF THE TOOLS FOR DATA
2 COLLECTION, FOR PANEL MANAGEMENT AND FOR ANALYSIS OF THE
3 RESULTS AND ALSO FOR REPORT WRITING. IT'S KIND OF A ONE
4 STOP ON THE WEBSITE, YOU CAN DO YOUR ENTIRE RESEARCH
5 THERE.

6 Q. WHO ARE SOME OF THE CLIENTS?

7 A. WE HAVE A LONG LIST OF CLIENTS THAT USE THIS
8 WEBSITE. I'M A LITTLE TIRED HERE.

9 Q. HOW ABOUT IF YOU START WITH SOME GOVERNMENT
10 CLIENTS?

11 A. GOVERNMENT CLIENTS, THE FEDERAL RESERVE BOARD,
12 THE U.S. ARMY, THE DEPARTMENT OF VETERANS AFFAIRS. WE
13 HAVE THE WORLD HEALTH ORGANIZATION, KODAK, INTEL, ROYAL
14 CARIBBEAN, CELEBRITY CRUISES, SABRE AMERICAN AIRLINES
15 RESERVATION SYSTEMS. WE DO ALL OF TRAVELOCITY'S ONLINE
16 CONSUMER RESEARCH. THE CONFERENCE BOARD, PRIVATE
17 RESEARCH COMPANY OUT OF NEW YORK THAT DOES THE NATIONAL
18 CONSUMER CONFIDENCE STUDIES. WE HAVE -- IN TERMS OF
19 BUSINESS SCHOOLS, WE HAVE MANY BUSINESS SCHOOLS, THE TOP
20 BUSINESS SCHOOLS, WE DO THE RESEARCH FOR THE WHARTON
21 SCHOOL AT THE UNIVERSITY OF PENNSYLVANIA, FOR COLUMBIA
22 UNIVERSITY, FOR THE UNIVERSITY OF MICHIGAN, FOR THE
23 KELLOGG SCHOOL AT NORTHWESTERN UNIVERSITY. THE
24 DEPARTMENT CHAIRMAN AT THE WHARTON SCHOOL IS ALSO THE
25 PRESIDENT OF THE ASSOCIATION FOR CONSUMER RESEARCH, AND

1 SHE IS WORKING WITH US TO OFFER A SPECIAL THING FOR ALL
2 OF THE MEMBERS OF THE ASSOCIATION FOR CONSUMER RESEARCH
3 FOR DOING THEIR CONSUMER RESEARCH. WE HAVE A LOT OF
4 CLIENTS.

5 Q. LET'S TAKE JUST A COUPLE OF EXAMPLES. CAN YOU
6 PLEASE DESCRIBE YOUR WORK WITH THE UNITED STATES ARMY?

7 A. UH-HUH. THE U.S. ARMY IS WORKING ON A PROJECT
8 TO SURVEY SOLDIERS. THEY ARE -- SOLDIERS, AS YOU KNOW,
9 ARE NOT PAID WELL, ABOUT A THOUSAND DOLLARS A MONTH, AND
10 THEY GET INTO FINANCIAL PROBLEMS. SO THEY ARE SURVEYED
11 WHEN THEY COME INTO THE AIT TRAINING, AND THEN THEY ARE
12 OFFERED A FINANCIAL TRAINING CLASS AND THERE IS A
13 PRESURVEY, THERE IS A SURVEY ASSOCIATED WITH HOW WELL
14 THEY EVALUATED THE COURSE. AND THEN EVERY SIX MONTHS
15 AFTER THEY COMPLETE THAT COURSE, THEY GET A FOLLOW-UP
16 EVALUATION SURVEY THAT TRACKS THEIR FINANCIAL PROGRESS
17 TO SEE IF THE COURSE IS MAKING A DIFFERENCE IN THEIR
18 LIVES.

19 Q. YOU MENTIONED THAT YOU HAVE SEVERAL CLIENTS THAT
20 ARE GRADUATE SCHOOLS OF BUSINESS. WHAT TYPE OF SERVICE
21 DO YOU PROVIDE TO THEM?

22 A. KELLOGG SCHOOL, FOR EXAMPLE, WE HAVE OVER 900
23 STUDENTS AND FACULTY MEMBERS THAT ARE REGISTERED ON OUR
24 SITE. AS PART OF THEIR COURSE WORK, MARKET RESEARCH
25 COURSES, FIELD STUDY PROJECT COURSES, THEY CONDUCT THEIR

1 RESEARCH AND USE OUR RESEARCH TOOLS. OFTTIMES THE
2 STUDENTS CALL AND SAY, HEY, I'M HAVING A PROBLEM, I NEED
3 TO DO THIS, MY INSTRUCTOR TOLD ME ABOUT THIS, BUT HE
4 DOESN'T KNOW HOW TO DO IT. SO WE TUTOR THEM AND WALK
5 THEM THROUGH HOW TO MEASURE A CONSUMER BEHAVIOR CONCEPT
6 OR DO SOME ADVANCED TYPE OF THING.

7 Q. LET'S TAKE ONE MORE EXAMPLE. YOU MENTIONED
8 CELEBRITY CRUISE LINES AND ROYAL CARIBBEAN. WHAT DO YOU
9 DO FOR THEM?

10 A. THEY ARE SURVEYORS. THEY TRACK THEIR CUSTOMERS
11 VERY WELL. WE PROVIDE THE TOOLS FOR THEM. WE ALSO WORK
12 WITH THEM IN TERMS OF SOME OF THEIR SURVEYS. THEY HAVE
13 A CAPTAIN'S CLUB. WHEN THEIR CRUISERS, AS THEY CALL
14 THEM, TAKE A CRUISE, AFTER THEY GET DONE, THEY TAKE
15 SURVEYS. THEY DO EVERYTHING FROM WE HAVE A NEW SHIP, WE
16 NEED TO NAME IT, PLEASE HELP US OUT. THEY GET TO CHOOSE
17 FROM DIFFERENT NAMES. OR WE HAVE THREE DIFFERENT TOURS
18 WE ARE CONSIDERING, ONE TO ANARCTICA OR WITH A NATIONAL
19 GEOGRAPHIC EXPERT. YOU CAN GO TO THE GALAPAGOS WITH THE
20 ORNITHOLOGY EXPERT OR YOU CAN GO TO DENALI PARK IN
21 ALASKA AND TAKE A HUMVEE TOUR WITH A LUNCH, YOU KNOW,
22 AND THE NATIONAL GEOGRAPHIC PHOTOGRAPHER OR SOMETHING.
23 THEY EVALUATE CONSUMERS' PERCEPTIONS AND PREFERENCES OF
24 THOSE THINGS. THEY DO A LOT OF DIFFERENT KINDS OF
25 RESEARCH AND STUDIES.

1 Q. LET'S TALK ABOUT THE SECOND BUSINESS YOU
2 MENTIONED, SURVEYZ.COM.

3 A. YES.

4 Q. WHAT KIND OF BUSINESS IS SURVEYZ?

5 A. SURVEYZ IS BASICALLY THE SAME, EXCEPT IT'S THE
6 LOW END MARKET ENTRY IN TERMS OF PRICE. THIS ALLOWS --
7 WHEREAS QUALTRICS IS A CORPORATE SOLUTION WHERE YOU HAVE
8 TO CONTACT US AND WE SET UP A SEPARATE WEBSITE FOR YOU
9 AND YOUR CORPORATE USERS, THEN YOU HAVE COMPLETE CONTROL
10 OVER THAT. THE SURVEYZ SITE IS, COME IN AND REGISTER
11 ITSELF, PAY YOUR 29.95 AND DO YOUR OWN RESEARCH.

12 Q. AND WHAT IS YOUR ROLE IN THAT BUSINESS?

13 A. I'M THE OWNER AND FOUNDER OF THAT ALSO.

14 Q. LET'S TALK ABOUT THE THIRD BUSINESS,
15 SURVEYPRO.COM, OR SURVEY PROFESSIONALS.

16 A. SURVEY PROFESSIONALS. THAT IS OUR CONSULTING
17 BUSINESS AND WE DON'T -- THAT IS NOT A PUBLIC SURVEY
18 SITE, BUT WE DO CONSULTING THROUGH THAT.

19 Q. WHAT TYPE OF CONSULTING WORK?

20 A. VARIETY OF THINGS, PRIMARILY CONSUMER RESEARCH,
21 THOUGH WE HAVE DONE A VARIETY OF DIFFERENT THINGS AS --
22 I HAVE DONE AS A CONSULTANT, RANGING FROM EVALUATING
23 IBM'S WORLDWIDE SALES FORECASTING MODEL. BUT MOST OF
24 WHAT WE DO IS CONSUMER RESEARCH.

25 Q. CAN YOU GIVE A COUPLE OF EXAMPLES OF CASES WHERE

1 YOU WERE DIRECTLY INVOLVED IN CONSTRUCTING THE STUDY?

2 A. AS A CONSULTANT OR JUST CONSTRUCTING SURVEYS OR

3 WHAT ARE YOU --

4 Q. IN THE CONSTRUCTION OF THE STUDY.

5 THE COURT: HE ASKED FOR AN EXAMPLE,

6 CORRECT?

7 MR. BEANE: THAT'S CORRECT.

8 THE WITNESS: I'M SORRY.

9 BY MR. BEANE:

10 Q. I'M ASKING FOR AN EXAMPLE.

11 A. OF CONSTRUCTING A SURVEY? SURE. WE DID A
12 YAHOO.COM, YAHOO STORES. THEY HAVE YAHOO STORES WHICH
13 ALLOWS MERCHANTS ONLINE TO BUILD A STORE AND CONDUCT
14 INTERNET COMMERCE. WE EVALUATED THE PRICING FOR YAHOO.
15 WE EVALUATED WHAT SHOULD BE INCLUDED AS FEATURES AND
16 ATTRIBUTES FOR THESE PEOPLE. WE DID A SURVEY OF THEIR
17 CUSTOMERS AND OF INTERNET BUSINESSES IN GENERAL, ASKING
18 THEM ABOUT WHAT KIND OF A PACKAGE SHOULD THEY PUT FOR
19 DIFFERENT PRICE LEVELS OF THEIR STORES, WHAT SHOULD THEY
20 PRICE? A LOT OF VARIOUS TYPES OF THINGS WERE BUILT INTO
21 THAT STUDY.

22 Q. HAVE YOU EVER DONE ANY CONSULTING OUTSIDE THE
23 CONTEXT OF THE BUSINESSES YOU DESCRIBED?

24 A. YES, I HAVE.

25 Q. CAN YOU GIVE AN EXAMPLE?

1 A. IN THE EARLY DAYS OF THE INTERNET, I DID
2 LECTURING AND CONSULTING FOR ONE OF THE FIRST ONLINE
3 DEPARTMENT STORES, IF YOU WILL, A COMPANY CALLED I MALL.

4 Q. CAN YOU DESCRIBE GENERALLY THE WORK DID YOU WITH
5 I MALL?

6 A. YES, WE -- THEY HAD A BUSINESS MODEL WHERE THEY
7 SOLD CONSULTING SERVICES AND I WENT AROUND, TRAVELLED
8 THROUGHOUT THE UNITED STATES AND DELIVERED SEMINARS ON
9 HOW TO DO INTERNET BUSINESS, HOW TO MARKET YOUR
10 BUSINESSES, WHAT KINDS OF THINGS SHOULD BE ON THE
11 WEBSITES, YOU KNOW, HOW TO PROCEED SETTING UP A
12 SUCCESSFUL INTERNET BUSINESS.

13 Q. IS YOUR WORK IN BUSINESS-TO-CONSUMER MARKETING
14 FOCUSED ON A SPECIFIC INDUSTRY?

15 A. IT IS NOT.

16 Q. IS YOUR WORK IN INTERNET MARKETING FOCUSED ON A
17 SPECIALIZED AREA OF CONSUMER BEHAVIOR?

18 A. IT IS NOT.

19 Q. DO MOST CONSUMER BEHAVIORISTS OR SPECIALISTS IN
20 INTERNET MARKETING FOCUS THEIR WORK ON A SPECIFIC
21 INDUSTRY?

22 A. NO, WE DON'T.

23 Q. WHY NOT?

24 A. I GUESS WE ARE KIND OF LIKE YOU. YOU ARE
25 EXPERTS IN LAW. YOU ARE EXPERT TRIAL LAWYERS, AND YOU

1 TRY MANY DIFFERENT TYPES OF CASES AND BECOME EXPERTS IN
2 THAT AREA. WE LEARN OUR TOOLS AND THEY APPLY TO ALL
3 AREAS OF BUSINESS AND OF MARKETING. AND WE APPLY THEM
4 IN THAT WAY. IT DOES NOT DETRACT AT ALL. IN FACT, IT
5 ADDS TO OUR BREADTH OF EXPERIENCE AND KNOWLEDGE TO HAVE
6 EXPERIENCE IN THE TRAVEL INDUSTRY AND THEN ANOTHER
7 PROBLEM THAT IS DIFFICULT DEALING WITH HIGH TECHNOLOGY,
8 ANOTHER ONE IN DEALING WITH TOOTHPASTE.

9 Q. WOULD YOU CONSIDER YOURSELF A GENERALIST OR A
10 SPECIALIST?

11 A. I'M A SPECIALIST IN SOME AREAS. BUT I GUESS I
12 WOULD CONSIDER MYSELF -- IF I HAD THE CHOICE, I'M A
13 PRACTITIONER. I KNOW THAT DID NOT GIVE YOU YOUR TWO
14 CHOICES, BUT I'M A PRACTITIONER, I MAKE THINGS WORK. I
15 MAKE THEM WORK BY UNDERSTANDING CONSUMER BEHAVIOR AS IT
16 APPLIES ACROSS MANY DIFFERENT AREAS.

17 MR. BEANE: YOUR HONOR, DEFENDANT OFFERS
18 DR. SCOTT MORRIS SMITH AS AN EXPERT IN INTERNET RESEARCH
19 AND METHODOLOGY, ADVANCED COMPUTER APPLICATIONS FOR
20 INTERNET SURVEY RESEARCH AND ANALYSIS, INTERNET
21 MARKETING IN BUSINESSES AND BUYER OR CONSUMER BEHAVIOR.

22 THE COURT: ANY OBJECTION, MR. FINE?

23 MR. FINE: YOUR HONOR, AND THIS GOES
24 DIRECTLY TO THE LAST QUESTIONS THAT WERE JUST BEING
25 ASKED OF THE WITNESS. AT HIS DEPOSITION, PROFESSOR

1 SMITH CONCEDED THAT HE HAS NO EXPERTISE REGARDING THE
2 PORNOGRAPHY INDUSTRY OR THE MOTIVATIONS OR ATTITUDES OF
3 CONSUMERS FOR SEEKING OUT SEXUALLY EXPLICIT CONTENT.
4 AND TO THE EXTENT DEFENDANT WISHES TO HAVE PROFESSOR
5 SMITH TESTIFY TO THOSE SUBJECTS, HE IS NOT QUALIFIED TO
6 DO SO. HE HAS CONCEDED THAT HE HAS NO EXPERTISE IN
7 THOSE AREAS, AND WE SEEK TO PRECLUDE HIM FROM TESTIFYING
8 IN THOSE AREAS.

9 THE COURT: MR. BEANE.

10 MR. BEANE: AS DR. SMITH TESTIFIED, HE IS
11 A GENERALIST, AS ARE MOST PEOPLE IN THE AREAS OF HIS
12 EXPERTISE. AND HE IS ABLE TO APPLY THOSE GENERAL SKILLS
13 AND TECHNIQUES THAT HE HAS LEARNED THROUGH HIS OVER 30
14 YEARS OF EXPERIENCE IN TEACHING AND RESEARCH AND WRITING
15 IN THESE AREAS, REGARDLESS OF THE GEOGRAPHY OF THE
16 MARKET THAT HE IS APPLYING IT TO AND REGARDLESS OF THE
17 MARKET ITSELF. WITH THAT SAID, MOST OF HIS TESTIMONY
18 WILL FOCUS ON THE EFFECT OF -- HIS OPINION ABOUT THE
19 EFFECT OF THE CHILD ON-LINE PROTECTION ACT ON INTERNET
20 BUSINESSES GENERALLY AND INTERNET CONSUMERS GENERALLY.
21 WE ARE NOT PROFFERING HIM AS AN EXPERT ON ALL THE
22 DETAILS OF THE PORNOGRAPHY INDUSTRY, BUT IF PLAINTIFF
23 THINKS THAT IN SOME WAYS HIS LACK OF YEARS OF EXPERIENCE
24 IN THAT PARTICULAR INDUSTRY UNDERMINES HIS OPINION, THAT
25 WOULD GO TO THE WEIGHT OF THE EVIDENCE AND CERTAINLY NOT

1 THE ADMISSIBILITY. THOSE ARE TOPICS THEY CAN EXPLORE ON
2 CROSS EXAMINATION OR THROUGH ANY REBUTTAL WITNESSES AS
3 APPROPRIATE.

4 MR. FINE: YOUR HONOR, SIMPLY TO THE
5 LIMITED SUBJECT THAT PROFESSOR SMITH HAS CONCEDED THAT
6 HE HAS NO EXPERTISE REGARDING MOTIVATIONS --

7 THE COURT: YOU ARE REPEATING YOUR
8 ARGUMENT. I UNDERSTAND WHAT IT IS. THE OBJECTION, IF
9 THERE IS ONE, IS OVERRULED IN THIS RESPECT. THE WITNESS
10 WILL BE ALLOWED TO EXPRESS OPINIONS IN THE AREAS
11 INITIALLY OFFERED BY COUNSEL FOR THE DEFENDANT AND ANY
12 ATTACK OR CONCERN ABOUT EXPERTISE IN MR. FINE'S CONCERNS
13 WILL BE -- ARE TO BE HANDLED IN CROSS EXAMINATION AND
14 ANY MOTIONS TO STRIKE THAT ARE NECESSARY. THE POINT IS
15 PRESERVED AND WE CAN MOVE ALONG.

16 BY MR. BEANE:

17 Q. DR. SMITH, YOU TESTIFIED EARLIER THAT YOU WERE
18 ASKED TO CONSIDER THE EFFECT OF THE CHILD ON-LINE
19 PROTECTION ACT ON INTERNET BUSINESSES AND CONSUMERS.

20 A. YES.

21 Q. DO YOU HAVE AN OPINION?

22 A. I DO.

23 Q. WHAT'S YOUR OPINION?

24 THE COURT: WHAT IS THE QUESTION THAT HE
25 IS GIVING AN OPINION ON?

1 MR. BEANE: I'M ASKING HIM THE BROAD
2 QUESTION FIRST ABOUT WHAT HIS OPINION IS ABOUT THE
3 EFFECT OF THE CHILD ON-LINE PROTECTION ACT ON INTERNET
4 BUSINESSES AND CONSUMERS. OF COURSE, I WILL BE DELVING
5 INTO MORE DETAIL ON THAT AND BREAK IT DOWN.

6 THE COURT: OKAY.

7 THE WITNESS: MY OPINION IS THAT THE
8 CHILD ON-LINE PROTECTION ACT WILL HAVE NO IMPACT,
9 MINIMAL IMPACT.

10 BY MR. BEANE:

11 Q. LET'S TURN TO PAGE 3, WHICH IS THE SUMMARY OF
12 YOUR CONCLUSIONS. WHAT ARE THE TWO BROAD CONCLUSIONS
13 YOU REACHED IN YOUR EXPERT REPORT?

14 A. OKAY. HELP ME WITH THIS.

15 Q. PAGE 3 OR IF YOU CAN LOOK AT THE MONITOR?

16 A. OKAY, THANK YOU. THE TWO CONCLUSIONS THAT I
17 REACH WAS THAT THE COPA ACT WILL HAVE NO SIGNIFICANT
18 EFFECT ON COMMERCIAL WEBSITES ON THE INTERNET AND THAT
19 COPA WILL NOT INHIBIT QUALIFIED CONSUMERS FROM VIEWING
20 ONLINE CONTENT.

21 Q. LET'S FOCUS FIRST ON THE FIRST OF THOSE TWO
22 BROAD CONCLUSIONS. HAS THE INTERNET CHANGED OVER THE
23 LAST 5 TO 10 YEARS?

24 A. ABSOLUTELY.

25 Q. HOW HAS IT CHANGED?

1 A. 10 YEARS AGO, MAYBE AS FEW AS 5 YEARS AGO, THE
2 INTERNET WAS THE WILD, WILD WEST. THERE WAS NO LAW THAT
3 WAS INVOLVED THERE. SINCE THAT TIME, WE HAVE FOUND THAT
4 WE ARE ENFORCING COPYRIGHT PATENT LAWS, WE ARE ENFORCING
5 SPAM LAWS, WE ARE ADOPTING STANDARD BUSINESS PRACTICES
6 ON THE INTERNET. THE INTERNET WAS A NEW TECHNOLOGY THAT
7 -- THERE WAS NO PRECEDENTS FOR THAT BEFORE. WE DID NOT
8 KNOW HOW TO INTERACT WITH IT IN TERMS OF -- EVEN THE
9 CAPABILITIES OF THE INTERNET WERE NOT WELL UNDERSTOOD.
10 AND IT CERTAINLY WAS NOT PART OF STANDARD BUSINESS
11 PRACTICE IN THE EARLY DAYS, BUT AS ANDY GROVE FROM INTEL
12 ONCE STATED, ALL BUSINESS WILL BE INTERNET BUSINESS AT
13 SOME POINT IN THE FUTURE, AND THAT IS COMING TO PASS.

14 MR. FINE: OBJECTION AND MOVE TO STRIKE
15 YOUR HONOR. THERE IS NO FOUNDATION FOR THIS.

16 THE COURT: WE WILL STRIKE OUT THE
17 REFERENCE TO THE HEARSAY, GIVEN WITH GOOD INTENT BY THE
18 WITNESS, BUT IT'S STRICKEN, THE LAST SENTENCE ABOUT THIS
19 ANECDOTE ABOUT THE GENTLEMAN FROM INTEL.

20 MR. FINE: YOUR HONOR, WE ALSO MOVE TO
21 STRIKE THE ENTIRE RESPONSE ON THE GROUNDS THAT THERE IS
22 NO FOUNDATION FOR THIS AND TO THE EXTENT THAT DEFENDANT
23 WISHES TO LAY A FOUNDATION, NONE OF THIS -- THERE IS NO
24 FOUNDATION IN THE EXPERT REPORT.

25 MR. BEANE: YOUR HONOR, IF I MAY.

1 THE COURT: WELL, THE QUESTION -- WELL,
2 THE ORIGINAL QUESTION WAS HAS THE INTERNET CHANGED, THE
3 ANSWER IS YES AND HOW HAS IT CHANGED. THEN HE ANSWERED
4 THE QUESTION FROM HIS POINT OF VIEW. I THINK HIS
5 EXPERTISE IS SO BROAD THAT IT COVERS HIS ABILITY TO
6 ANSWER THE QUESTION. IT CAN BE THE SUBJECT OF CROSS
7 EXAMINATION. THE OBJECTION IS OVERRULED.
8 BY MR. BEANE:

9 Q. HOW DO YOU DEFINE A COMMERCIAL WEBSITE?

10 A. COMMERCIAL WEBSITE IS A WEBSITE THAT BRINGS IN
11 REVENUE, BRINGS IN MONEY.

12 Q. HOW DO INTERNET BUSINESSES MAKE MONEY?

13 A. THERE ARE A VARIETY OF DIFFERENT WAYS, INCLUDING
14 ADVERTISING, SUBSCRIPTIONS. I BELIEVE IN MY REPORT I
15 HAVE ABOUT A DOZEN DIFFERENT BUSINESS MODELS THAT ARE IN
16 THERE THAT FOCUS ON HOW BUSINESSES CAN MAKE MONEY.

17 Q. LET'S TURN THEN TO PAGE 8 OF YOUR EXPERT REPORT.
18 AND LOOK AT THAT LAST PARAGRAPH. WHAT ARE THE DIFFERENT
19 TYPES OF BUSINESS MODELS ON THE INTERNET?

20 A. WE HAVE -- THE FIRST ONE THERE IS A BROKERAGE
21 MODEL, WHERE BUSINESSES WILL BROKER PRODUCTS FROM OTHER
22 BUSINESSES; WE HAVE A CONSUMER MODEL, WHERE CONSUMERS
23 SELL TO OTHER CONSUMERS LIKE EBAY; BUSINESS-TO-CONSUMER,
24 WHERE BUSINESSES SELL PRODUCTS TO CONSUMER AS PRICELINE
25 SELLS HOTELS AND FLIGHTS; ADVERTISING MODELS, WHERE

1 ADVERTISING IS SOLD TO GENERATE REVENUE, GOOGLE DOES
2 THAT, SALON.COM DOES THAT IN PART; INFORMEDIARY, WHERE
3 YOU RECEIVE REVENUE FOR PROVIDING INFORMATION THAT IS
4 PAID FOR; ONLINE MERCHANTS THAT ACTUALLY SELL PRODUCTS,
5 AMAZON.COM IS AN EXAMPLE OF THAT OR WAL-MART;
6 MANUFACTURERS WILL SELL ITEMS ON THE INTERNET, DELL
7 COMPUTERS DOES THIS; AFFILIATE SALES, BARNES AND NOBLE
8 AS AN EXAMPLE HAS AFFILIATES OUT ON THE INTERNET THAT
9 SELL PRODUCTS OR SELL BOOKS FOR THEM.

10 THERE ARE A COUPLE OF DIFFERENT TYPES OF
11 COMMUNITY MODELS; SOME RECEIVE MONEY BY DONATIONS,
12 WIKIPEDIA DOES THAT, I BELIEVE ONE OF THE CLIENT
13 WEBSITES DOES THAT; ADVERTISING-SUPPORTED COMMUNITY
14 WEBSITES; SUBSCRIPTION WEBSITES THAT ARE OUT THERE,
15 WHERE SITES GENERATE MONEY FROM SUBSCRIPTIONS; AND
16 FINALLY WE IDENTIFIED A PAY PER USE SITE WHERE YOU PAY
17 FOR THE SERVICE THAT YOU ARE USING, FOR EXAMPLE WEBEX
18 OFFERS INTERNET CONNECTIVITY FOR CONFERENCING, ELSEVIER
19 OFFERS JOURNAL ARTICLES.

20 Q. I'D LIKE TO ASK SOME MORE DETAILED QUESTIONS
21 ABOUT A COUPLE OF THESE EXAMPLES. BUT BEFORE WE DO
22 THAT, CAN YOU READ THE LAST SENTENCE ON THIS PAGE?

23 A. YES.

24 THE COURT: PAGE 8?

25 MR. BEANE: PAGE 8, THAT'S RIGHT.

1 THE WITNESS: UNDER EACH OF THESE MODELS
2 THE WEBSITE RECEIVES SOMETHING FROM THE CONSUMERS, SUCH
3 AS PAYMENT, INFORMATION, OR A CAPTIVE AUDIENCE FOR THE
4 VIEWING OF ADVERTISEMENTS.

5 BY MR. BEANE:

6 Q. HOW DOES A WEBSITE BENEFIT FROM RECEIVING
7 INFORMATION FROM PEOPLE WHO VISIT THEIR WEBSITE?

8 A. IN SEVERAL BUSINESS MODELS, SUCH AS THE PRODUCT
9 PURCHASE AND ADVERTISING MODELS, IF THE WEBSITE KNOWS
10 WHO YOU ARE WHEN YOU ARE THERE, THEY WILL TAILOR THE
11 CONTENT FOR YOU. THEY WILL TAILOR THE ADVERTISEMENTS,
12 THEY WILL TAILOR THE PRODUCTS THAT YOU SEE. FOR
13 EXAMPLE, IF YOU'VE EVER REGISTERED ON AMAZON AND
14 PROVIDED YOUR INFORMATION OR PURCHASED A PRODUCT THERE,
15 THE NEXT TIME YOU GO IN THERE'S A COOKIE ON YOUR MACHINE
16 THAT TELLS WHO YOU ARE AND THEY WILL HAVE THE BOOKS UP
17 THAT YOU PREVIOUSLY PURCHASED AND MAKE NEW SUGGESTIONS
18 OF THINGS THAT THEY THINK THAT YOU WOULD LIKE TO READ.
19 SO IN AN ADVERTISING SENSE, IF THEY CAN TAILOR TO YOU BY
20 DEMOGRAPHICS, THEY WILL RECEIVE MORE MONEY FROM THE
21 ADVERTISER.

22 Q. YOU MENTIONED A CAPTIVE AUDIENCE IN THAT
23 SENTENCE. WHAT DO YOU MEAN BY CAPTIVE AUDIENCE?

24 A. BY CAPTIVE AUDIENCE, THE ONE THING THAT A
25 WEBSITE WANTS TO DO IS TO KEEP YOU THERE. THE LONGER

1 YOU ARE THERE, THE MORE YOU WILL GET EXPERIENCE WITH
2 THEIR PRODUCTS, THE MORE YOU WILL LOOK AT THEIR
3 ADVERTISING AND THE MORE THEY CAN GENERATE MONEY FROM
4 YOU BASICALLY. SALON.COM, FOR EXAMPLE, YOU COME TO THE
5 WEBSITE AND THERE IS A SPLASH PAGE OF AN ADVERTISEMENT
6 UP TO 30 SECONDS. THEY HAVE YOU CAPTIVE THERE. THEY
7 ARE RECEIVING PREMIUM DOLLARS FOR THAT PARTICULAR
8 ADVERTISEMENT THAT IS -- THAT IS VIEWED BY YOU.

9 Q. LET'S TURN OUT OF THAT TOPIC, THE ADVERTISING
10 MODEL. CAN YOU GIVE ANOTHER EXAMPLE OF A WEBSITE THAT
11 PROFITS FROM ADVERTISING REVENUE?

12 A. THERE ARE A LOT OF DIFFERENT WEBSITES THAT
13 PROFIT FROM ADVERTISING. I GUESS NERVE.COM DOES,
14 SALON.COM DOES, GOOGLE -- GOOGLE, FOR EXAMPLE, GENERATES
15 ALL OF ITS REVENUE FROM ADVERTISING OR 95 PERCENT OF IT.

16 Q. WHAT ARE THE DIFFERENT WAYS THAT BUSINESSES CAN
17 MAKE MONEY FROM ADVERTISING?

18 A. GENERALLY THERE ARE TWO WAYS. ONE IS --

19 MR. FINE: OBJECTION. THIS IS OUTSIDE
20 THE SCOPE OF THE WITNESS' EXPERT REPORT.

21 MR. BEANE: THE ADVERTISING MODEL IS
22 MENTIONED RIGHT HERE. I'M ASKING FOR HIM TO EXPLAIN TO
23 THE COURT THE DIFFERENT WAYS THAT PEOPLE PROFIT FROM
24 THIS. IT CERTAINLY BEARS ON HIS OPINION OF THE EFFECT
25 OF COPA.

1 THE COURT: IT DOES NOT BEAR ON IT. IT'S
2 DISCLOSED, THAT'S ALL.

3 MR. BEANE: I'M ASKING ABOUT EXAMPLES
4 THAT ARE DISCLOSED HERE. HE IS TALKING ABOUT GOOGLE AND
5 SALON. THOSE ARE MENTIONED DIRECTLY IN THE HIGHLIGHTED
6 PORTION OF THE MONITOR.

7 MR. FINE: THE QUESTION FOCUSED ON
8 DIFFERENT FORMS OF ADVERTISING MODELS. THAT IS NOT
9 DISCLOSED IN THE REPORT.

10 MR. BEANE: FOR HIM TO EXPLAIN A LITTLE
11 MORE ABOUT HOW THESE WEBSITES PROFIT IS OBVIOUSLY WITHIN
12 THE SCOPE OF HIS REPORT AND IT'S CERTAINLY FAIRLY WITHIN
13 THE TOPICS THAT THEY WERE ON NOTICE THAT HE WOULD BE
14 ADDRESSING.

15 THE COURT: HOW THIS WITNESS COULD
16 SURVIVE IN HIS CHOSEN PROFESSION WITHOUT KNOWING THE
17 ANSWER TO THIS QUESTION IS BEYOND ME. IT'S CONTAINED
18 INFERENTIALLY IN ANY DISCUSSION OF INTERNET BUSINESS.
19 IT'S VIRTUALLY A FACTUAL DESCRIPTION. I'M GOING TO
20 OVERRULE THE OBJECTION AND ALLOW THE WITNESS TO ANSWER
21 AND MR. FINE CAN COVER THIS ON CROSS EXAMINATION IF HE
22 WANTS TO GO TO THE WEIGHT OF THE EVIDENCE.

23 THE WITNESS: PLEASE REPEAT THE QUESTION.

24 BY MR. BEANE:

25 Q. I BELIEVE THE QUESTION WAS, CAN YOU PLEASE

1 DESCRIBE THE DIFFERENT WAYS THAT WEBSITES CAN PROFIT
2 FROM ADVERTISING?

3 A. YES. THERE ARE GENERALLY TWO METHODS OF
4 PROFITABILITY WITH RESPECT TO ADVERTISING. THESE
5 GENERAL CATEGORIES ARE KNOWN AS PAY PER CLICK AND PAY
6 PER VIEW, WHICH IS BASICALLY A CPM MODEL, WHICH REFERS
7 TO COST PER THOUSAND IMPRESSIONS. AND UNDER, FOR
8 EXAMPLE GOOGLE, IF YOU GO TO THEIR FRONT PAGE, YOU SEE
9 ADVERTISEMENTS TO THE RIGHT AND TO THE TOP. AND WHEN
10 YOU CLICK ON THOSE, THE ADVERTISERS PAY MONEY FOR THAT.
11 THEY ARE PAY PER CLICK. GOOGLE ALSO HAS AN AFFILIATE
12 NETWORK OF WEBSITES THAT HOST GOOGLE ADVERTISEMENTS, AND
13 THOSE CAN EITHER BE PAY PER CLICK OR PAY PER VIEW. IF
14 THEY ARE PAY PER VIEW, EACH TIME THOSE SHOW, WHETHER OR
15 NOT SOMEONE CLICKS ON THE AD, REVENUE IS GENERATED.
16 THAT IS AN EXAMPLE FOR GOOGLE.

17 ON SALON.COM, FOR EXAMPLE, I UNDERSTAND
18 THAT THOSE ARE PAY PER VIEW ADS THAT THEY OFTEN HAVE.
19 THEY MAY HAVE PAY PER CLICK ADS, I DON'T KNOW OF THAT.
20 BUT BANNER ADS ARE OFTEN PAY PER VIEW, PARTICULARLY WHEN
21 THEY COME FROM MAJOR CLIENTS SUCH AS A VOLVO OR A FORD
22 OR PROCTER AND GAMBLE THAT ARE TRYING TO GET BROAD
23 DISSEMINATION OF THEIR -- AWARENESS OF THEIR PRODUCT.

24 Q. YOU ALSO MENTIONED THE SUBSCRIPTION MODEL. WHAT
25 IS THE SUBSCRIPTION MODEL?

1 A. A SUBSCRIPTION MODEL IS WHERE THE SITE GENERATES
2 MONEY BY HAVING THE CUSTOMER SUBSCRIBE TO A PARTICULAR
3 PRODUCT OR SERVICE.

4 Q. CAN YOU GIVE AN EXAMPLE OF A WEBSITE THAT USES
5 THE SUBSCRIPTION MODEL?

6 A. YES. NERVE.COM DOES AND SALON.COM DOES.

7 Q. LET'S TURN TO PAGE 9 OF YOUR REPORT. PLEASE
8 READ THE FIRST SENTENCE.

9 A. SUBSCRIPTION OR REGISTRATION REVENUE MODELS ARE
10 OF INCREASING IMPORTANCE AND PROFITABILITY TO THE
11 INTERNET IN GENERAL BECAUSE QUALITY CONTENT IS MORE
12 VALUED THAN FREE CONTENT.

13 Q. WHAT DO YOU MEAN HERE BY REGISTRATION REVENUE
14 MODEL? IS THAT DISTINCT FROM SUBSCRIPTION MODEL?

15 A. IT CAN BE. SOMETIMES REGISTERING FOR A SITE MAY
16 NOT INVOLVE DIRECT REVENUE, BUT OFTTIMES IT WILL.
17 SOMETIMES WE SUBSCRIBE FOR DIFFERENT THINGS. IN AN
18 E-COMMERCE SETTING WE ARE REGISTERING OR SUBSCRIBING TO
19 BUY SOMETHING.

20 Q. HOW DO BUSINESSES BENEFIT FROM USING A
21 SUBSCRIPTION MODEL?

22 A. IN SEVERAL WAYS. THE MOST OBVIOUS IS THAT IT
23 CREATES A GUARANTEED REVENUE STREAM.

24 MR. FINE: YOUR HONOR, I HAVE TO REPEAT
25 THE OBJECTION. IT IS SIMILAR TO THE ONE THAT WAS

1 PREVIOUSLY MADE. THIS IS FAR BEYOND THE SCOPE OF THE
2 WITNESS' EXPERT REPORT. COUNSEL HAD THE WITNESS READ
3 THE FIRST SENTENCE, WHICH IS ESSENTIALLY AN OPINION. AS
4 YOU CAN SEE FROM THE REPORT ITSELF, THERE IS ABSOLUTELY
5 NO FOUNDATION, NO AUTHORITY CITED FOR THIS PROPOSITION
6 AND THE WITNESS APPEARS TO SIMPLY BE MAKING BROAD
7 ASSERTIONS BASED ON HIS BROAD EXPERIENCE IN THE FIELD.
8 THERE IS SIMPLY NO FOUNDATION. AND TO THE EXTENT
9 COUNSEL WANTS TO LAY ONE, IT IS NOT IN THE REPORT.

10 MR. BEANE: YOUR HONOR, AS WE ESTABLISHED
11 THROUGHOUT THE QUESTIONS ABOUT QUALIFICATIONS, HE HAS
12 EXTENSIVE AND WIDE EXPERIENCE DEALING WITH INTERNET
13 BUSINESSES BOTH IN HIS BUSINESS CAPACITY --

14 THE COURT: EXCUSE ME FOR INTERRUPTING.
15 THE PROBLEM IS DISCLOSURE. HE COULD HAVE BROAD
16 EXPERIENCE BUT YOU HAVEN'T DISCLOSED THE OPINION. I'M
17 JUST HYPOTHETICALLY SUGGESTING. IF YOU HAVEN'T
18 DISCLOSED THE OPINIONS SO THEY COULD BE PREPARED FOR BY
19 THE OPPOSITION, THEN YOU HAVE NOT MET THE RULES. THAT
20 IS THE OBJECTION THAT IS BEING MADE HERE.

21 MR. BEANE: I'D LIKE TO RESPOND MORE
22 DIRECTLY TO THAT POINT THEN.

23 THE COURT: PLEASE DO.

24 MR. BEANE: DR. SMITH HAS OFFERED THE
25 OPINION THAT COPA WILL NOT HAVE A SIGNIFICANT NEGATIVE

1 IMPACT ON BUSINESSES ON THE WEB. I THINK IT ALL DEPENDS
2 ON HOW FINELY YOU ARE GOING TO SLICE THE OPINION HERE.
3 HE WOULD LIKE TO SLICE THIS DOWN TO THE SENTENCE, TO THE
4 WORD MAYBE, BUT THAT BROAD OPINION IS THE ONE THING THAT
5 IS AT STAKE HERE. THERE ARE NOT TOO MANY OPINIONS BEING
6 OFFERED BY THIS WITNESS, AND THIS PARTICULAR REASON FOR
7 SUPPORTING IT, IT'S IMPORTANT TO ESTABLISH HIS VIEWS ON
8 SUBSCRIPTION MODELS AND HOW THEY WORK FOR HIM TO BUILD
9 TO THAT CONCLUSION ABOUT WHY HE THINKS COPA WON'T HAVE A
10 MAJOR IMPACT ON COMMERCIAL WEBSITES ON THE INTERNET.

11 MR. FINE: THE PROBLEM AGAIN, YOUR HONOR,
12 IS THAT IS ALL WELL AND GOOD, BUT NONE OF THIS IS
13 DISCLOSED IN THE EXPERT REPORT.

14 MR. BEANE: YOUR HONOR, I'M ASKING HIM
15 QUESTIONS ABOUT A SENTENCE THAT IS HIGHLIGHTED ON PAGE 9
16 OF HIS EXPERT REPORT. I FAIL TO SEE THE LACK OF
17 DISCLOSURE.

18 THE COURT: OBVIOUSLY, MR. FINE, YOU HAD
19 THIS REPORT BEFORE DR. SMITH'S DEPOSITION WAS TAKEN?

20 MR. FINE: YES. AND QUESTIONS WERE ASKED
21 ABOUT THIS REPORT AND NONE OF THE RESPONSES THAT ARE NOW
22 BEING GIVEN WERE PROVIDED IN THAT DEPOSITION. THIS IS
23 ALL NEW TESTIMONY ESSENTIALLY.

24 MR. BEANE: OF COURSE, IT'S THE NATURE OF
25 THE DISCOVERY PROCESS THAT COUNSEL FOR THE -- THAT IS

1 PROFFERING THE WITNESS DOES NOT ASK QUESTIONS IN THE
2 DEPOSITION. THE IMPORTANT QUESTION IS WHETHER IT'S IN
3 THE REPORT AND WE ARE LOOKING AT IT ON THE MONITOR, YOUR
4 HONOR. IF HE HAS MORE QUESTIONS HE CAN EXPLORE THAT
5 DURING CROSS.

6 THE COURT: MY RULING IS BASED ON THE
7 FOLLOWING: THAT EXPERT REPORT WAS PROVIDED TO THE
8 PLAINTIFFS. THEY WERE ALLOWED TO TAKE THE EXPERT'S
9 DEPOSITIONS, THEY COULD ASK HIM ANY QUESTIONS THEY
10 WANTED TO TO FIND OUT WHAT THE BASIS FOR ANY OF HIS
11 OPINIONS GIVEN IN THE REPORT WERE OR WAS. AND HAVING
12 BEEN ON NOTICE OF THE BROAD NATURE OF THE OPINIONS, IF
13 THEY WANTED TO, THE PLAINTIFFS HAVE THE RESPONSIBILITY
14 TO INQUIRE OF THE DETAILS OF WHAT MADE UP THESE -- THE
15 BASES FOR THOSE OPINIONS, THEY HAD THAT OPPORTUNITY. SO
16 THE OBJECTION IS OVERRULED. IT DOES NOT MEAN THAT YOU
17 CAN WANDER ALL OVER THE MAP, BUT I URGE -- AND MR. FINE
18 WILL DO THIS AS HIS CLIENTS -- AS HIS CLIENT REQUIRES,
19 HE WILL OBJECT WHEN THE WITNESS GETS TOO FAR OFF THE
20 FARM, SO-TO-SPEAK.

21 BY MR. BEANE:

22 Q. DR. SMITH, I BELIEVE YOU WERE EXPLAINING HOW
23 BUSINESSES BENEFIT FROM USING A SUBSCRIPTION MODEL.

24 A. YES. FIRST OF ALL, BUSINESSES WHO USE THE
25 SUBSCRIPTION MODEL LOCK THEIR CUSTOMERS IN. THEY HAVE

1 AN ASSURED REVENUE STREAM FOR THE TERM OF THE
2 SUBSCRIPTION. THE SECOND PART OF THAT IS THAT THEY TRY
3 TO GET THE CONSUMERS OR THE SUBSCRIBERS TO RENEW THEIR
4 SUBSCRIPTIONS. THIS SUBSCRIPTION MODEL IS ADAPTED
5 DIRECTLY FROM THE MAGAZINE INDUSTRY AND WE ARE WELL
6 FAMILIAR WITH THE PROCESSES THAT HAPPEN WHEN WE
7 SUBSCRIBE TO A MAGAZINE WHEN IT COMES NEAR THE TIME OF
8 EXPIRATION. BUT MORE IMPORTANTLY, THIS IS AN ASSURED
9 REVENUE STREAM FOR THE WEBSITE. THEY HAVE MONEY THAT
10 HAS COME IN IN ADVANCE OF THE VIEWING AND IT PROVIDES
11 REVENUES FOR THEM TO DO FURTHER DEVELOPMENT AND TO EARN
12 THEIR BUSINESS.

13 Q. DO SOME WEBSITES THAT USE THE SUBSCRIPTION MODEL
14 OFFER ANY FREE OR SAMPLE CONTENT?

15 A. YES, THEY DO.

16 Q. WHY?

17 A. THE SHORT ANSWER IS THAT IT IS BECAUSE OF VALUE
18 AND TRUST. WEBSITES THAT PROVIDE SAMPLES ALLOW YOU TO
19 EXPERIENCE THE VALUE THAT YOU RECEIVE AS A CONSUMER OF
20 EXPERIENCING THE SUBSCRIPTION. FOR EXAMPLE, THE WALL
21 STREET JOURNAL AND THE NEW YORK TIMES GIVES YOU A SAMPLE
22 SUBSCRIPTION THAT GOES FOR A COUPLE OF WEEKS WHERE YOU
23 CAN LOOK AT THAT. YOU FIND THIS PAPER SUITS YOU, IT
24 PROVIDES YOU THE INFORMATION THAT YOU EXPECT AND WANT
25 AND THEN YOU WILL SIGN UP. IT'S A FOOT IN THE DOOR, IF

1 YOU WILL, TOWARDS THE PURCHASE PROCESS.

2 Q. ARE SAMPLES OR FREE TRIALS IMPORTANT TO

3 CONSUMERS?

4 A. YES, THEY ARE.

5 Q. WHY?

6 A. BECAUSE IT GETS YOU FAMILIAR AT VERY LITTLE

7 COST, ONLY OF YOUR TIME AND OF YOUR REGISTRATION, SO

8 THAT YOU CAN EXPERIENCE AND FIND OUT IF THIS IS WORTH

9 YOUR TIME, IF IT'S THE VALUE THAT YOU ARE ANTICIPATING.

10 WILL YOU USE IT TO THE DEGREE THAT YOU THOUGHT YOU WOULD

11 USE IT?

12 Q. DO WEBSITES PRICE DIFFERENTLY BASED ON THE

13 QUALITY OF THE CONTENT?

14 A. YES, THEY DO.

15 Q. BASED ON THE FEATURES OF THE CONTENT?

16 A. YES.

17 Q. WHY?

18 A. AGAIN, THAT IS AN ISSUE OF VALUE.

19 MR. FINE: OBJECTION.

20 THE WITNESS: WHERE THERE IS ADDITIONAL

21 VALUE --

22 THE COURT: HOLD ON. YOU PROBABLY

23 FIGURED THIS OUT BEFORE BUT WHEN THERE IS AN OBJECTION

24 WE SHOULD ALL STOP.

25 THE WITNESS: I'M SORRY, YOUR HONOR.

1 THE COURT: YES, MR. FINE.

2 MR. FINE: THE OBJECTION I THINK WE ARE
3 GETTING VERY FAR FROM THE FARM HERE. THIS IS NOWHERE
4 DISCLOSED IN THE REPORT. THE GENERAL TOPIC OBVIOUSLY
5 IS, BUT THE SPECIFIC EXAMPLES ARE NOWHERE IN THIS
6 REPORT.

7 MR. BEANE: YOUR HONOR --

8 THE COURT: WE ARE GOING DOWN A SLIPPERY
9 SLOPE. I'M TRYING TO REACH RULINGS THAT ARE FAIR THAT
10 SHOW THAT THE PLAINTIFFS HAD AN OPPORTUNITY TO INQUIRE.
11 I THINK THAT IS AN APT OBSERVATION, BUT IT DOES NOT GIVE
12 YOU FREE REIN TO ASK HIM HOW MANY MOLES ARE ON THE NECK
13 OF THE FEATURE WRITER FOR SALON MAGAZINE. THERE ARE TOO
14 MANY -- IT'S TOO FAR AFIELD. YOU HAVE TO HAVE FAIR
15 DISCLOSURE SO THAT THE OTHER SIDE KNOWS WHAT TO DO. THE
16 DISCLOSURE OF THE MAIN OPINIONS HERE GIVES REASONABLE
17 NOTICE TO THE PLAINTIFFS TO THE GENERAL TOPICS, BUT IF
18 THERE IS NO DISCLOSURE OF ANYTHING WHATSOEVER ON THE
19 SUBJECT, I THINK THERE IS A LIMIT AND --

20 MR. BEANE: YOUR HONOR, IF I MAY RESPOND
21 BRIEFLY.

22 THE COURT: YOU ARE NOT GOING TO RESPOND
23 TO ME. THE OBJECTION IS SUSTAINED AT THIS POINT ON THIS
24 PARTICULAR ISSUE. WE ARE GOING TO HAVE TO KEEP TIGHT
25 REIN ON THIS THING. IT'S NOT GOING TO WANDER ALL OVER

1 THE MAP. YOU PREPARED THE WITNESS BASED ON WHAT YOU
2 WANTED TO DO, BUT IF IT IS NOT DISCLOSED YOU ARE NOT
3 GOING TO GET IT IN.

4 BY MR. BEANE:

5 Q. DR. SMITH, CAN YOU PLEASE REREAD THE FIRST
6 SENTENCE THAT IS STILL HIGHLIGHTED ON THE MONITOR?

7 A. SUBSCRIPTION OR REGISTRATION REVENUE MODELS ARE
8 OF INCREASING IMPORTANCE AND PROFITABILITY TO THE
9 INTERNET IN GENERAL BECAUSE QUALITY CONTENT IS MORE
10 VALUED THAN FREE CONTENT.

11 Q. I WOULD LIKE TO ASK YOU WHAT YOU MEANT BY THE
12 STATEMENT THAT QUALITY CONTENT IS MORE VALUED THAN FREE
13 CONTENT.

14 A. IT IS EXACTLY THAT. AS CONSUMERS WE PAY FOR
15 QUALITY. WE ARE BECOMING MORE SOPHISTICATED AS INTERNET
16 USERS. WE ARE BECOMING BETTER JUDGES, BETTER VERSED IN
17 THE ABILITIES OF THE INTERNET AND HENCE WE EXPECT MORE.
18 WE WANT QUALITY CONTENT AND WE ARE WILLING TO PAY FOR
19 THAT QUALITY.

20 MR. BEANE: YOUR HONOR, AT THIS POINT I'M
21 GETTING READY TO MOVE INTO A NEW TOPIC AREA, I NOTE THAT
22 IT'S JUST PAST ELEVEN O'CLOCK, OUR NORMAL BREAK TIME.
23 WOULD YOU LIKE ME TO CONTINUE?

24 THE COURT: WE WILL TAKE A RECESS NOW
25 BECAUSE TIME GOES FAST WHEN YOU ARE HAVING FUN. TEN

1 MINUTE RECESS. OFF THE RECORD.

2 (BREAK TAKEN.)

3 THE COURT: WELCOME BACK, EVERYBODY.
4 HAVE A SEAT.

5 I HAVE A SUGGESTION FOR MANAGING THE
6 STYLE OF THE REPORT AND THE QUESTIONING THAT MIGHT BE
7 FAIR AND USEFUL. COUNSEL FOR THE DEFENDANT HAS ALREADY
8 DEFINED THIS, AND I'LL TAKE HIS LEAD. WHEN YOU WANT TO
9 QUESTION HIM ABOUT A PARTICULAR SUBJECT, AN UNDERLYING
10 ASPECT OF A PARTICULAR OPINION HE'S GIVEN, REFER HIM IN
11 THE REPORT TO THE OPINION THAT YOU ARE USING AS THE
12 DISCLOSED OPINION AND ASK HIM QUESTIONS BASED ON THAT.
13 THEN WE WILL SEE IF THAT HELPS MR. FINE'S JOB IN
14 PROTECTING HIS CLIENT AS WELL. YOU JUST DID THAT BEFORE
15 THE BREAK. YOU WENT RIGHT BACK TO A SPECIFIC OPINION
16 AND ASKED HIM A QUESTION ABOUT THAT PARTICULAR
17 DISCLOSURE. THAT MAY BE HELPFUL. IT MAY NOT SATISFY
18 EVERYTHING.

19 MR. BEANE: THANK YOU.

20 BY MR. BEANE:

21 Q. LET'S TURN TO PAGE 10 OF YOUR REPORT. LET'S
22 LOOK AT THE LAST PARAGRAPH. YOU DISCUSS FIVE BUSINESS
23 FUNDAMENTALS. WHAT ARE THE FIVE BUSINESS FUNDAMENTALS?

24 A. THESE ARE RELATIVE ADVANTAGE OVER -- A BUSINESS
25 HAVING A RELATIVE ADVANTAGE OVER COMPETING OFFERINGS OR

1 COMPETITION; COMPATIBILITY WITH EXPERIENCE, LIFESTYLES
2 AND VALUES OF THE TARGET MARKET; MINIMUM COMPLEXITY OF
3 USE; TRIAL OR DEMONSTRATION ON A LIMITED BASIS; AND
4 SHOWING OBSERVABLE BENEFITS.

5 Q. DO THESE BUSINESS FUNDAMENTALS APPLY TO ALL
6 COMMERCIAL WEBSITES?

7 A. THEY DO.

8 Q. LET'S CONSIDER EACH OF THESE POINTS IN TURN.

9 WHAT DO YOU MEAN BY A RELATIVE ADVANTAGE
10 OVER COMPETING OFFERINGS?

11 A. RELATIVE ADVANTAGE MEANS THAT YOU ARE OFFERING
12 SOMETHING BETTER THAN THE COMPETITION IS OFFERING, MORE
13 CONTENT, BETTER CONTENT, FINER GRAPHICS, BETTER TEXT.
14 YOU ARE DOING SOMETHING THAT IS JUST BETTER.

15 Q. WHAT DO YOU MEAN BY COMPATIBILITY WITH
16 EXPERIENCES, VALUES, AND LIFESTYLES OF THE TARGET
17 MARKET?

18 A. AS A BUSINESS, WE WANT TO OFFER SOMETHING THAT
19 IS COMPATIBLE WITH WHAT OUR CUSTOMERS DESIRE. EACH OF
20 US, AS A CUSTOMER, WE HAVE EXPERIENCES AND VALUES AND
21 LIFESTYLES. WE GO TO PLACES THAT HAVE THAT SIMILAR TYPE
22 OF THING AND THE INTERNET IS REALLY, REALLY NO DIFFERENT
23 THAN THAT. COPA, FOR EXAMPLE, OFFERS 31 DIFFERENT
24 FLAVORS OF SEX ON THE INTERNET. AND IF THAT IS
25 APPROPRIATE FOR OUR LIFESTYLE OR A PARTICULAR TYPE THAT

1 IS OFFERED IS APPROPRIATE FOR OUR LIFE-STYLE, WELL THEN,
2 THERE WILL BE CUSTOMERS THAT WILL GO BASED ON THAT.

3 Q. WHAT DO YOU MEAN BY MINIMAL COMPLEXITY OF USE?

4 A. MINIMAL COMPLEXITY OF USE MEANS IT SHOULD BE
5 EASIER. WE LIKE THINGS THAT ARE QUICK AND EASY. AND
6 APPLE HAS MADE ITS BUSINESS BEING EASIER TO USE THAN A
7 PC. AND TO THE DEGREE THAT A WEBSITE OR A BUSINESS CAN
8 MAKE THE BUSINESS PROCESS EASY TO USE, NICE MENUS,
9 INTERFACES, THEN THE BUSINESS WILL BE MORE SUCCESSFUL.

10 Q. WHAT DO YOU MEAN BY TRIAL OR DEMONSTRATION ON A
11 LIMITED BASIS?

12 A. WE SEARCH FOR INDICATORS OF VALUE. WE WANT TO
13 KNOW WHAT WE ARE GETTING INTO. WE WANT TO BE ABLE TO
14 TRY THINGS TO SEE IF IT FITS US, IF THE PROMISED VALUE
15 STATEMENTS IN THE ADVERTISEMENTS REALLY ARE WHAT WE ARE
16 GOING TO GET. A TRIAL IS A VERY, VERY IMPORTANT PART OF
17 THAT FOR ANY BUSINESS.

18 Q. DOES THAT APPLY TO ANY COMMERCIAL WEBSITE?

19 A. IT DOES.

20 Q. YOU MENTIONED EARLIER THE SUBSCRIPTION MODEL.

21 DOES THE IMPORTANCE OF TRIAL AND DEMONSTRATION ON A
22 LIMITED BASIS APPLY TO THE SUBSCRIPTION MODEL?

23 A. THAT IS WHAT WE ARE TALKING ABOUT HERE. YES,

24 THAT IS AN EXAMPLE.

25 Q. WHAT DO YOU MEAN BY OBSERVABLE BENEFITS?

1 A. OBSERVABLE BENEFITS, WHEN WE PURCHASE A PRODUCT,
2 WE RECEIVE BENEFITS FROM THAT AND THEY ARE NOT --
3 OFTTIMES THEY ARE NOT JUST IN THE PRODUCT. WE ARE IN
4 PHILADELPHIA, WE GO TO A PHILLIES GAME, WE GO TO WATCH
5 THE GAME, BUT WE ALSO GO TO LISTEN TO THE ORGAN MUSIC,
6 WE GO TO SING THE SONGS, WE GO TO EAT THE HOT DOG. AND
7 THAT IS THE BENEFITS THAT WE RECEIVE. UNDER COPA, THESE
8 PEOPLE ARE GOING TO FANTASY LAND. THEY HAVE THEIR 31
9 DIFFERENT VARIETIES OF SEX. AND WHATEVER BENEFITS THAT
10 ARE TITILLATING AND SEXUALLY ORIENTED THAT THEY ARE
11 GETTING OUT OF THAT, THOSE ARE THE THINGS THAT THEY ARE
12 LOOKING FOR.

13 Q. YOU STATED THAT THE IMPORTANCE OF TRIAL AND
14 DEMONSTRATION ON A LIMITED BASIS WOULD APPLY TO ANY
15 WEBSITE USING THE SUBSCRIPTION MODEL.

16 A. YES.

17 Q. ARE YOU AWARE GENERALLY OF THE REQUIREMENTS THAT
18 COPA WOULD IMPOSE ON COMMERCIAL WEBSITES, SOME
19 COMMERCIAL WEBSITES?

20 A. YES.

21 Q. WHAT IS YOUR UNDERSTANDING OF COPA'S
22 REQUIREMENTS?

23 A. THE REQUIREMENT IS THAT MATERIAL THAT IS JUDGED
24 TO BE PORNOGRAPHIC WOULD BE PLACED BEHIND A DEFINITIVE
25 SCREENER TO PROHIBIT CHILDREN UNDER THE AGE OF 17 FROM

1 VIEWING THAT CONTENT.

2 Q. WHEN YOU SAY THAT THE TRIAL OR DEMONSTRATION ON
3 A LIMITED BASIS IS IMPORTANT, WERE YOU CONSIDERING THE
4 SUBSCRIPTION MODEL?

5 A. YES.

6 Q. AND DO YOU THINK THAT WEBSITES THAT OPERATE WITH
7 A SUBSCRIPTION MODEL WILL STILL BE ABLE TO USE A TRIAL
8 OR DEMONSTRATION?

9 A. ABSOLUTELY.

10 Q. WHY?

11 A. IT'S A QUESTION OF POSITIONING. IT'S A QUESTION
12 OF WHAT IS INCLUDED IN THE SUBSCRIPTION.

13 MR. FINE: ON THIS ONE, YOUR HONOR, I'M
14 GOING TO OBJECT. THERE HAVE BEEN NO STUDIES, REPORTS OR
15 FACTS CITED EITHER IN THE WITNESS' EXPERT REPORT OR IN
16 THE TESTIMONY HERE SO FAR TO ENABLE THE WITNESS TO ISSUE
17 THIS OPINION.

18 MR. BEANE: YOUR HONOR, THIS STATEMENT
19 ABOUT THE IMPORTANCE OF TRIALS AND BENEFITS IS INCLUDED
20 IN THE SECTION SAYING THAT HE DOES NOT THINK THAT COPA
21 WILL HAVE A MAJOR IMPACT ON COMMERCIAL WEBSITES.
22 INCLUDED IN -- ALSO INCLUDED IN THAT SECTION IS A
23 DESCRIPTION OF THE SUBSCRIPTION BUSINESS MODEL. I'M
24 ASKING HIM TO RELATE THESE DIFFERENT ELEMENTS TOGETHER.
25 IF EVERYTHING WAS BROKEN DOWN AND EVERY PIECE OF A

1 REPORT WAS APPLIED TO THE OTHER, YOU WOULD HAVE A
2 THOUSAND PAGE REPORT IN FRONT OF YOU AND WITH SOME OF
3 THE EXPERTS IN THIS CASE POTENTIALLY VOLUMES.

4 MR. FINE: YOUR HONOR, IT'S THE OPINION
5 THAT IS THE PROBLEM HERE. THE OPINION THAT A
6 SUBSCRIPTION MODEL COULD BE ABLE TO OFFER TRIALS AND
7 FREE SAMPLES, THAT IS WHAT IS NOT DISCLOSED IN HERE.
8 THERE IS -- AGAIN THERE HAS BEEN NO STUDIES, NO REPORTS,
9 NO FACTS CITED TO ENABLE THIS WITNESS TO PROFFER THAT
10 OPINION.

11 THE COURT: THE OBJECTION IS SUSTAINED.
12 THE QUESTION AND ANSWER ARE STRICKEN. IF YOU CAN LAY A
13 FOUNDATION THAT IS CONSISTENT WITH THE REPORT, YOU ARE
14 WELCOME TO TRY THAT.

15 BY MR. BEANE:

16 Q. I WOULD LIKE YOU TO FOCUS ON THE BOTTOM OF PAGE
17 10. CAN YOU READ BEGINNING WITH ODDS OF BUSINESS
18 SUCCESS?

19 A. ODDS OF BUSINESS SUCCESS ARE ENHANCED TO THE
20 DEGREE THAT THE BUSINESS PROVIDES AN ACCEPTABLE PAYMENT
21 AND PRICING MODEL AND FOLLOWS SOUND BUSINESS
22 FUNDAMENTALS THAT LEAD POTENTIAL CUSTOMERS TO ADOPTION
23 OF THE PRODUCT OR SERVICE.

24 Q. CAN YOU CONTINUE WITH THE FIRST SENTENCE ON PAGE
25 11.

1 A. BUSINESSES WILL USE THE MODEL THAT PROVIDES THE
2 FASTEST, MOST CONVENIENT AND SATISFYING EXPERIENCES FOR
3 THEIR CUSTOMERS AND WHICH MAXIMIZES PROFIT.

4 Q. DO YOU HAVE AN OPINION ABOUT WHETHER BUSINESSES
5 ARE ABLE TO ADAPT TO CHANGES IN THE MARKETPLACE?

6 A. YES.

7 Q. AND WHAT'S THAT OPINION?

8 A. BUSINESSES ARE EXTREMELY ADEPT AT ADAPTING.
9 BUSINESSES ARE LIKE THE HALFBACK OF MARKETING. AND
10 THEY -- THEIR JOB IS TO ADAPT TO CHANGES IN THE
11 ENVIRONMENT, WHETHER THEY ARE GOVERNMENT, WHETHER THEY
12 ARE SOCIAL, WHETHER THEY ARE POLITICAL, SUPPLY, DEMAND,
13 THAT IS WHAT BUSINESSES DO TO STAY IN BUSINESS, THEY
14 CHANGE.

15 MR. FINE: OBJECTION, YOUR HONOR, MOVE TO
16 STRIKE. THIS OPINION THAT BUSINESSES ARE ABLE TO ADAPT
17 TO CHANGES IS NOWHERE TO BE FOUND IN THE EXPERT REPORT.
18 AGAIN THERE ARE NO STUDIES, NO REPORTS, NO FACTS CITED
19 AS A FOUNDATION FOR THIS OPINION.

20 MR. BEANE: YOUR HONOR --

21 THE COURT: I FIND IT VERY DIFFICULT WHEN
22 YOU DON'T OBJECT TO THE QUESTION AND YOU WAIT UNTIL YOU
23 HEAR THE ANSWER. IF YOU DON'T LIKE IT, THEN YOU MAKE AN
24 OBJECTION. THAT DOES NOT ALLOW THE COURT TO DO ITS JOB,
25 MR. FINE.

1 MR. BEANE: YOUR HONOR, IF I MAY, UNDER
2 MR. FINE'S THEORY THE EXPERT WOULD BE REDUCED TO NOTHING
3 MORE THAN READING THE ENTIRE EXPERT REPORT INTO THE
4 RECORD. I'M FOCUSING ON A SENTENCE HERE THAT TALKS
5 ABOUT BUSINESSES AND THAT THEY PROVIDE THE FASTEST AND
6 MOST CONVENIENT AND SATISFYING EXPERIENCES FOR CUSTOMERS
7 AND WHICH MAXIMIZES PROFIT. I'M JUST ASKING HIM ABOUT
8 THEIR ABILITY TO DO THAT.

9 MR. FINE: THE QUESTION WAS, DO YOU HAVE
10 AN OPINION AS TO WHETHER BUSINESSES CAN ADAPT? THAT HAS
11 NOTHING TO DO WITH THE SENTENCE THAT MR. BEANE JUST READ
12 AND IT'S NOWHERE IN HIS REPORT.

13 MR. BEANE: THOSE TWO CONCEPTS ARE
14 DIRECTLY RELATED, YOUR HONOR.

15 THE COURT: I DON'T FIND ANYTHING THAT
16 GIVES FAIR NOTICE THAT THIS IS AN UNDERLYING OPINION OF
17 THE LAST TWO SENTENCES THAT WERE JUST READ INTO THE
18 RECORD. LET ME LOOK AT THEM AGAIN, PLEASE.

19 MR. BEANE: YOUR HONOR, IF I MAY RESPOND
20 BRIEFLY.

21 THE COURT: DO NOT RESPOND TO ANYTHING AT
22 THIS POINT. BEAR WITH ME A MOMENT. THE LAST TWO
23 SENTENCES WHICH WERE READ INTO THE RECORD AND WHICH
24 FORM, ACCORDING TO THE DEFENSE, THE BASIS FOR ASKING A
25 MORE DETAILED QUESTION, OF COURSE DID NOT NOR HAS

1 DEFENSE COUNSEL POINTED TO ANYTHING IN THIS REPORT THAT
2 GIVES -- ELUCIDATES THE PARTICULAR OPINION THAT WAS JUST
3 STATED BY THE WITNESS. AND I'M LOOKING AT THESE TWO
4 SENTENCES. I DON'T SEE THEM GIVING ANY NOTICE TO THE
5 PLAINTIFFS THAT THEY SHOULD INQUIRE ON THAT SUBJECT AT
6 ALL, KEEPING IN MIND THEY HAD AN OPPORTUNITY AND DID
7 TAKE HIS DEPOSITION.

8 MR. BEANE: IF I CAN RESPOND BRIEFLY,
9 YOUR HONOR.

10 THE COURT: YES.

11 MR. BEANE: DR. SMITH WAS ASKED TO
12 CONSIDER THE EFFECT OF THE CHILD ON-LINE PROTECTION ACT
13 ON COMMERCIAL WEBSITES. SINCE COPA DOES IMPOSE SOME
14 REGULATORY OBLIGATIONS, THIS WHOLE REPORT IS ABOUT A
15 BEFORE AND AN AFTER, COMMERCIAL WEBSITES BEFORE COPA AND
16 COMMERCIAL WEBSITES AFTER. THE ENTIRE SECTION ON THE
17 EFFECT OF COPA ON COMMERCIAL WEBSITES AND ON THE
18 INTERNET IS ABOUT THEIR ABILITY TO ADAPT TO THE
19 REGULATORY CHANGE THAT COPA IMPOSES. GRANTED, THE WORD
20 ADAPT IS NOT IN THOSE SPECIFIC SENTENCES THERE, BUT HE
21 DID GIVE NOTICE THAT HE WAS GOING TO TALK ABOUT
22 BUSINESSES TAKING STEPS TO MAXIMIZE PROFIT LOOKING FOR
23 THE FASTEST, MOST CONVENIENT EXPERIENCE FOR THEIR
24 CUSTOMERS. THE ENTIRE SECTION ON THIS IS ABOUT
25 THE ABILITY TO ADAPT TO COPA'S REGULATORY CHANGES. IF

1 HE CAN'T TALK ABOUT THE ABILITY TO ADAPT, THAT IS
2 TANTAMOUNT TO SAYING HE CAN'T TALK ABOUT HIS REPORT AT
3 ALL.

4 THE COURT: MR. FINE.

5 MR. FINE: THE ONLY RESPONSE AND IT'S
6 SIMILAR TO THE PREVIOUS ONES, YOUR HONOR, IS THE
7 OPINIONS ARE WHAT ARE NECESSARY TO BE PUT IN THE EXPERT
8 REPORT. THE WITNESS IS NOW PROFFERING NEW OPINIONS THAT
9 ARE NOWHERE TO BE FOUND IN THIS REPORT. HIS OPINIONS, A
10 GENERAL ONE, IS THAT COPA WILL HAVE A MINIMAL IMPACT ON
11 COMMERCIAL WEBSITES. THAT IS THE OPINION THAT IS IN THE
12 REPORT. HE IS NOW ISSUING -- ATTEMPTING TO ISSUE A NEW
13 OPINION THAT BUSINESSES IN ADDITION TO NOT BEING
14 IMPACTED THAT GREATLY, BUSINESSES WILL BE ABLE TO ADAPT
15 TO ANY IMPACTS THAT THEY DO SUFFER. THAT IS NOWHERE TO
16 BE FOUND IN THIS REPORT, NOT ON NOTICE AND THE WITNESS
17 SHOULD NOT BE ALLOWED TO TESTIFY TO THIS NEW OPINION.

18 THE COURT: WELL, THE DEFENSE SAYS THAT
19 THE OVERALL, OVERARCHING OPINION GIVEN BY THE WITNESS
20 AND FOR EXAMPLE THE TWO SENTENCES THAT WERE JUST
21 QUOTED -- IN EFFECT, THE DEFENSE SAYS GIVES YOU FAIR
22 NOTICE OF THESE SUBJECTS AND THUS THE UNDERLYING
23 OBSERVATIONS ABOUT THESE SUBJECTS ARE ADMISSIBLE.

24 MR. FINE: THE OBSERVATIONS ARE ONE
25 THING, YOUR HONOR. THIS IS A NEW OPINION.

1 THE COURT: I HAVE BEEN PERSUADED BY
2 DEFENSE COUNSEL THAT THE OPINION -- THE OPINIONS WHICH
3 ARE DISCLOSED IN THOSE TWO SENTENCES AND THOSE ARE
4 OPINIONS AS WELL, FAIRLY INCLUDE THE RESPONSE OF THIS
5 WITNESS TO THAT QUESTION. THE OBJECTION IS OVERRULED.
6 BY MR. BEANE:

7 Q. DR. SMITH, I'M NOT SURE IF YOU HAD THE
8 OPPORTUNITY --

9 THE COURT: HE FINISHED THE QUESTION.
10 THE QUESTION AND ANSWER WAS FINISHED.

11 MR. BEANE: OKAY. THANK YOU FOR
12 REMINDING ME.

13 THE COURT: BECAUSE I REMEMBER NEEDLING
14 MR. FINE ABOUT WAITING TILL THE ANSWER CAME IN. I MEAN
15 NO DISRESPECT, MR. FINE. YOU KNOW THAT.

16 BY MR. BEANE:

17 Q. LET'S TURN NOW TO PAGE 11. I WOULD LIKE TO
18 FOCUS NOW ON THE SECOND MAJOR CONCLUSION YOU REACHED IN
19 YOUR EXPERT REPORT, THAT COPA WILL NOT INHIBIT QUALIFIED
20 CONSUMERS FROM VIEWING ONLINE CONTENT. I BELIEVE YOU
21 STATED EARLIER THAT YOU ARE GENERALLY AWARE OF THE
22 VERIFICATION THAT COPA WOULD REQUIRE FROM CONSUMERS OF
23 ADULT CONTENT.

24 A. YES.

25 Q. CAN YOU PLEASE RESTATE YOUR UNDERSTANDING OF

1 THOSE REQUIREMENTS?

2 A. MY UNDERSTANDING IS THAT COPA REQUIRES A
3 DEFINITIVE SCREEN TO PROHIBIT CHILDREN LESS THAN 17
4 YEARS OF AGE FROM VIEWING PORNOGRAPHY.

5 Q. DO YOU HAVE AN OPINION ABOUT WHETHER COPA WOULD
6 HAVE A MAJOR EFFECT ON CONSUMERS?

7 A. I DO.

8 Q. WHAT IS THAT OPINION?

9 A. MY OPINION IS THAT IT WILL HAVE A MINIMAL EFFECT
10 ON CONSUMERS AND WILL NOT INHIBIT THOSE THAT ARE
11 QUALIFIED FROM VIEWING ONLINE CONTENT.

12 Q. I WOULD LIKE TO DRAW YOUR ATTENTION TO THE FIRST
13 REASON THAT YOU CITE IN YOUR REPORT. IT'S ALSO ON PAGE
14 11. CAN YOU PLEASE READ THAT.

15 A. YES. BARRIERS ARE COMMON IN EVERYDAY SHOPPING
16 ACTIVITIES. CONSUMER BARRIERS HAVE CONCLUDED --
17 CONSUMER BEHAVIORISTS HAVE CONCLUDED THAT PURCHASE IS A
18 RESULT OF ENDURING -- DID YOU WANT ME -- ENDURING
19 PSYCHOLOGICAL --

20 Q. ACTUALLY, NO. I JUST WANTED YOU TO READ THE
21 TITLE THERE. I APOLOGIZE FOR NOT BEING CLEAR. WHAT DO
22 YOU MEAN WHEN YOU SAY THAT BARRIERS ARE COMMON IN
23 EVERYDAY SHOPPING ACTIVITIES?

24 A. JUST THAT THEY ARE. ONLINE, OFFLINE, WE
25 ENCOUNTER BARRIERS TO THE FULFILLMENT OF OUR SHOPPING

1 ACTIVITIES.

2 Q. ARE THERE DIFFERENT TYPES OF BARRIERS?

3 A. THERE ARE.

4 Q. WHAT TYPES OF BARRIERS ARE THERE?

5 A. TWO THAT ARE MOST COMMON ARE BARRIERS DEALING
6 WITH IDENTIFICATION AND BARRIERS DEALING WITH THE TIME
7 REQUIRED TO CARRY THINGS OUT.

8 Q. OKAY. LET'S JUST DISCUSS EACH OF THOSE IN TURN.
9 WHAT DO YOU MEAN BY IDENTIFICATION BARRIER?

10 A. WHEN I GO TO PURCHASE -- OR IF WERE TO GO TO
11 PURCHASE TOBACCO OR ALCOHOL AND I LOOKED YOUNGER THAN I
12 DO NOW, THEY WOULD ASK ME FOR IDENTIFICATION TO PROVE
13 THAT I AM OF AN APPROPRIATE AGE. IF I GO TO THE BANK,
14 EVEN THOUGH I GO IN PERSON, THEY ASK ME FOR
15 IDENTIFICATION. IF I CALLED THEM ON THE PHONE THEY
16 ASKED ME FOR MY MOTHER'S MAIDEN NAME AND LAST DIGITS OF
17 MY SOCIAL SECURITY NUMBER TO VERIFY WHO I AM AND THAT I
18 AM QUALIFIED TO CARRY OUT THAT TRANSACTION WITH THEM.

19 Q. YOU ALSO MENTIONED TIME BARRIERS. CAN YOU GIVE
20 AN EXAMPLE OF A TIME BARRIER?

21 A. TIME IS CURRENCY ALSO. SALON.COM HAS A TIME
22 BARRIER, IF YOU WILL. AS WE GO TO THE FRONT OF THEIR
23 WEBSITE, THEY REQUIRE US TO SPEND UP TO 30 SECONDS TO
24 VIEW AN ADVERTISEMENT BEFORE WE PAID THE ADMISSION TO GO
25 INTO THE SHOW, THE ADMISSION TO GO INTO THE SHOW.

1 Q. CAN YOU THINK OF ANY EXAMPLES OF TIME BARRIERS
2 OUTSIDE OF THE INTERNET CONTEXT?

3 A. I'M SORRY. I'M HAVING TROUBLE --

4 Q. I CAN HELP YOU ALONG IF YOU TURN TO PAGE 12 OF
5 YOUR REPORT.

6 A. OKAY, THANK YOU.

7 Q. LET'S LOOK AT THE THIRD FULL PARAGRAPH THERE.

8 A. OKAY. ABSOLUTELY. WE NOW HAVE TO SHOW UP
9 SEVERAL HOURS AHEAD OF TIME TO GO TO -- TO TAKE A TRIP.
10 THERE ARE A VARIETY OF OTHER THINGS THAT HAPPEN TO US AS
11 WE GO THROUGH SECURITY THAT -- THAT IS A GOVERNMENT
12 REGULATION, IT HAS BEEN IMPOSED UPON US AND WE DO IT. I
13 HAVE NOT NOTICED ANYONE NOT TRAVEL BECAUSE OF IT OR TURN
14 AROUND AND SAY HEY, I DON'T HAVE TIME TO GO, AND WE DO
15 TAKE OUR FLIGHT.

16 Q. IN THE EXAMPLES THAT YOU JUST DESCRIBED, ARE
17 CONSUMERS WILLING TO OVERCOME BARRIERS IN ORDER TO
18 ACHIEVE A GOAL?

19 A. YES, THEY ARE.

20 Q. YOU STATE THAT THIS IS A REASON IN SUPPORT OF
21 YOUR OVERALL CONCLUSION THAT COPA WILL NOT INHIBIT
22 QUALIFIED CONSUMERS FROM VIEWING ONLINE CONTENT. WHAT
23 DOES CONSUMER WILLINGNESS TO TOLERATE BARRIERS IN OTHER
24 CIRCUMSTANCES SUGGEST TO YOU ABOUT CONSUMERS'
25 WILLINGNESS TO TOLERATE A BARRIER LIKE COPA'S REGULATORY

1 REQUIREMENT?

2 A. BARRIERS ARE PART OF LIFE. WE ENDURE TRAFFIC
3 JAMS, WE ENDURE WEATHER. WE ENDURE ALL SORTS OF THINGS.
4 INCONVENIENCE IS SIMPLY PART OF LIVING, AND COPA
5 BARRIERS ARE PART OF LIFE AND PSYCHOLOGICALLY THERE IS
6 NO REASON NOT TO EXPECT THAT THEY WOULD AFFECT US VERY
7 MUCH.

8 Q. LET'S TURN BACK TO PAGE 11 OF YOUR REPORT. NOW
9 I WILL GIVE YOU THE OPPORTUNITY TO READ THAT FIRST
10 HIGHLIGHTED SENTENCE UNDER YOUR GENERAL CONCLUSION THAT
11 BARRIERS ARE COMMON IN EVERYDAY SHOPPING ACTIVITIES?

12 A. CONSUMER BEHAVIORISTS HAVE CONCLUDED THAT
13 PURCHASE IS THE RESULT OF ENDURING PSYCHOLOGICAL
14 PREDISPOSITIONS THAT INVOLVE ATTITUDES, BELIEFS,
15 PREFERENCES AND MOTIVATIONS.

16 Q. WHAT DO YOU MEAN BY THIS?

17 A. THAT BASICALLY AS CONSUMERS WE THINK A LOT, AND
18 WE HAVE -- WE DEVELOP ATTITUDES, WE DEVELOP SETS OF
19 BELIEFS, WE DEVELOP PREFERENCES, WE DEVELOP INVOLVEMENT.
20 WE HAVE MOTIVATION TOWARDS MAKING A PARTICULAR PURCHASE.

21 Q. YOU DESCRIBE DIFFERENT VARIABLES HERE THAT
22 AFFECT CONSUMER BEHAVIOR. DO CONSUMERS MAKE DECISIONS
23 DIFFERENTLY BASED ON THE NATURE OF THE ITEM BEING
24 PURCHASED?

25 A. THEY DO. THEY DO. INVOLVEMENT HAS A LOT TO DO

1 WITH THIS. WE OFTEN TALK ABOUT IMPULSE GOODS OR LOW
2 INVOLVEMENT PURCHASES IN MARKETING, IN CONSUMER
3 BEHAVIOR. ON THE OTHER END OF THE SCALE, THERE ARE HIGH
4 INVOLVEMENT PURCHASES, WHICH TYPICALLY GO ALONG WITH
5 WHAT WE CALL SHOPPING GOODS. AND MAYBE TO GIVE EXAMPLES
6 OF THOSE SO THE COURT WOULD UNDERSTAND THOSE IN A LITTLE
7 BIT MORE DETAIL. WE ARE IN THE CHECK-OUT OF A GROCERY
8 STORE. WE SEE A NEW BREATH MINT THAT IS UP THERE, WE
9 THROW IT IN THE CART, AND WE PURCHASE IT. SO WE REALLY
10 HAVE NOT THOUGHT ABOUT THIS BUT WE PURCHASED IT. THEN
11 WE TRY IT AND WE SAY HMMM, THESE ARE REALLY GOOD. WE
12 DECIDE THAT THAT IS SOMETHING THAT WE WOULD LIKE TO
13 PURCHASE IN THE FUTURE. THAT IS A LOW INVOLVEMENT CASE
14 WHERE THE EVALUATION COMES AFTER THE ACTUAL PURCHASE.
15 MOST SHOPPING GOODS, WE DO NOT DO THAT. WE THINK ABOUT
16 THEM. WE EVALUATE THEM.

17 THE COURT: MOST WHAT GOODS?

18 THE WITNESS: SHOPPING GOODS. IN TERMS
19 OF HIGH INVOLVEMENT PRODUCT FOR A SHOPPING GOOD, THIS
20 MIGHT BE BUYING A NEW COMPUTER, BUYING AN AUTOMOBILE,
21 BUYING A PIECE OF CLOTHING. WE CONSIDER THE ATTRIBUTES
22 THAT ARE COMPOSED IN THIS PARTICULAR PRODUCT. WE LOOK
23 AT IT VERY CAREFULLY AND THEN WE DECIDE IF WE REALLY
24 FEEL GOOD ABOUT IT. AND AFTER WE GO THROUGH THAT
25 PROCESS, THEN WE WILL ACTUALLY MAKE THE PURCHASE

1 DECISION. AND THE DIFFERENCE THERE IS WHERE THE
2 EVALUATION COMES. AND MOST SHOPPING GOOD PRODUCTS WE GO
3 THROUGH THE EVALUATION FIRST AND THEN MAKE THE PURCHASE.
4 BY MR. BEANE:

5 Q. WHEN YOU INCLUDED THIS STATEMENT IN YOUR REPORT
6 ABOUT PSYCHOLOGICAL PREDISPOSITIONS, PREFERENCES AND
7 MOTIVATIONS, PRESUMABLY THAT WAS AN ASPECT OF YOUR
8 BROADER CONCLUSION THAT COPA WILL NOT INHIBIT QUALIFIED
9 CONSUMERS FROM VIEWING ONLINE CONTENT?

10 MR. FINE: OBJECTION, LEADING.

11 THE COURT: SUSTAINED.

12 BY MR. BEANE:

13 Q. DO YOU HAVE AN OPINION ABOUT WHETHER THE
14 CONSUMERS OF ADULT CONTENT HAVE A HIGH OR LOW LEVEL OF
15 INVOLVEMENT?

16 A. YES, I DO.

17 Q. WHAT IS THAT OPINION?

18 MR. FINE: OBJECTION, LACKS FOUNDATION.
19 THE WITNESS -- THIS IS THE PRECISE AREA THAT WE DEALT
20 WITH WHEN THE WITNESS WAS PROFFERED AS AN EXPERT. THE
21 WITNESS HAS TESTIFIED IN HIS DEPOSITION THAT HE HAS NO
22 EXPERTISE ON THE SUBJECT OF MOTIVATIONS OF PEOPLE
23 SEEKING PORNOGRAPHY OR SEXUALLY EXPLICIT CONTENT.

24 MR. BEANE: YOUR HONOR --

25 THE COURT: I DON'T THINK THAT WAS THE

1 QUESTION, BUT LET'S FIND OUT FROM MR. BEANE.

2 MR. BEANE: I HAVE A COUPLE OF COMMENTS,
3 YOUR HONOR. MY FIRST IS THAT MR. FINE THROUGH HIS
4 OBJECTIONS IS BEGINNING TO BEGIN HIS CROSS EXAMINATION
5 BY CITING STATEMENTS IN THE DEPOSITION. THIS IS THE
6 DIRECT EXAMINATION AND HE WILL CERTAINLY HAVE HIS
7 OPPORTUNITY IN THE CROSS EXAMINATION. I'M IN A TIGHT
8 SPOT HERE BECAUSE I WANT TO SHOW THE FOUNDATION FOR IT.
9 I WAS APPARENTLY LEADING IN ASKING HIM TO LINK THESE
10 STATEMENTS HERE ABOUT PSYCHOLOGICAL PREDISPOSITIONS TO
11 HIS OVERALL OPINION ABOUT HOW CONSUMERS MIGHT REACT TO
12 COPA, BUT CLEARLY BY INCLUDING THIS STATEMENT IN THE
13 SECTION HE DOES HAVE AN OPINION ABOUT THAT. I CAN GO
14 ONE WAY OR THE OTHER, BUT SURELY SINCE BOTH OF THESE
15 THINGS ARE IN HIS REPORT, HE OUGHT TO HAVE THE
16 OPPORTUNITY TO EXPLAIN WHAT HE MEANS BY THAT.

17 MR. FINE: THE ISSUE IS, HE IS NOT
18 QUALIFIED TO GIVE THIS TESTIMONY AS AN EXPERT.

19 THE COURT: MR. BEANE, ARE YOU SATISFIED
20 THAT -- FIRST OF ALL, THE QUESTION WE ARE DEALING WITH
21 IS, DO YOU HAVE AN OPINION ABOUT WHETHER THE CONSUMERS
22 OF ADULT CONTENT HAVE A HIGH OR LOW LEVEL OF
23 INVOLVEMENT. THAT IS THE QUESTION THAT WAS -- AND HE
24 SAID YES, I HAVE AN OPINION. THE OBJECTION WAS MADE.
25 SO MR. BEANE, WHERE IN HIS REPORT IS THERE -- STRIKE

1 THAT.

2 MR. BEANE, DO YOU AGREE WITH MR. FINE
3 THAT AT THE DEPOSITION THE WITNESS TESTIFIED HE HAD NO
4 EXPERIENCE IN EVALUATING THE -- I'M PROBABLY MISSTATING
5 MR. FINE'S RECOLLECTION, BUT THE GIST OF IT BEING,
6 MR. FINE SAID AT HIS DEPOSITION, HE SAID HE HAD NO
7 EXPERIENCE IN EVALUATING THE ADULT ENTERTAINMENT AREA.
8 I'M NOT GETTING IT CORRECTLY. I UNDERSTAND THAT. COULD
9 YOU RESTATE IT, MR. FINE, YOUR CONCERN ABOUT THE
10 DEPOSITION?

11 MR. FINE: YES, AT THE DEPOSITION
12 PROFESSOR SMITH TESTIFIED THAT HE HAS NO EXPERTISE OR
13 EXPERIENCE WITH RESPECT TO THE MOTIVATIONS OF
14 INDIVIDUALS SEEKING OUT ADULT MATERIAL.

15 THE COURT: MR. BEANE, IS THAT WHAT HE
16 SAID AT HIS DEPOSITION?

17 MR. BEANE: I'M NOT SURE IF HE MADE THAT
18 PARTICULAR STATEMENT.

19 THE COURT: THEN LET'S GET THE DEPOSITION
20 OUT.

21 MR. FINE: IT'S AT PAGE 179. IF WE
22 SWITCH IT OVER, THE PLAINTIFFS CAN PULL IT UP,
23 SPECIFICALLY PAGES -- PAGE 179, LINES 4 THROUGH 21 OF
24 THE DEPOSITION, PAGE 179 LINES 4 THROUGH 21.

25 THE COURT: DR. SMITH'S DEPOSITION WAS

1 TAKEN ON WHAT DATE?

2 MR. FINE: AUGUST 2, 2006.

3 MR. BEANE: THIS PARTICULAR LINE OF
4 QUESTIONING BEGAN BEFORE HERE, SO I WOULD LIKE TO SHOW
5 YOU A BIT MORE BEFORE YOU RULE ON THIS.

6 THE COURT: SURE. HOW FAR DO YOU WANT TO
7 BACK IT UP?

8 MR. BEANE: TO PAGE 178, LINE 16, PLEASE.

9 THE COURT: WE WILL GO TO PAGE 179, LINE
10 21.

11 MR. FINE: THE OPERATIVE PART IS LINES 19
12 THROUGH 21, IS THE CONCLUDING. AND THE QUESTION READS:
13 AND THE MOTIVATIONS OF PEOPLE SEEKING OUT PORNOGRAPHY
14 ARE OUTSIDE YOUR FIELD OF EXPERTISE?

15 ANSWER: THAT IS CORRECT.

16 THE COURT: ANYTHING ELSE, MR. BEANE,
17 THAT YOU WANT TO BRING TO MY ATTENTION?

18 MR. BEANE: YES. I WOULD LIKE TO CALL TO
19 YOUR ATTENTION, STARTING ON PAGE 178, LINE 16. HE WAS
20 ASKED: AND WHY IS IT THAT YOU THINK PEOPLE WHO SEEK OUT
21 PORNOGRAPHY ARE HIGHLY MOTIVATED? I STATED AN
22 OBJECTION. THEN MR. FINE ASKED: THE QUESTION I'M
23 TRYING TO ASK IS, ARE YOU AWARE OF ANY RESEARCH OR
24 STUDIES THAT SUPPORT YOUR VIEW? THE ANSWER WAS THAT IS
25 A QUESTION, AND THEN MR. FINE SAID PEOPLE SEEKING OUT

1 PORNOGRAPHY ARE HIGHLY MOTIVATED. THE ANSWER WAS: OH,
2 ABSOLUTELY. ABSOLUTELY. SOME OF THEM ARE CITED IN MY
3 REPORT.

4 I WOULD BE HAPPY TO GO THROUGH SOME OF
5 THE ARTICLES THAT HE RELIED UPON TO REACH THIS
6 CONCLUSION, BUT I WOULD LIKE TO MAKE A GENERAL
7 OBSERVATION HERE IF I MAY, YOUR HONOR.

8 THE DANGER OF ALLOWING THIS TYPE OF CROSS
9 EXAMINATION OBJECTION DURING THE DIRECT --

10 THE COURT: WHY DON'T YOU LAY THE
11 FOUNDATION THEN, IF YOU KNOW YOU HAVE -- IF YOU ARE
12 GOING TO FACE THESE KINDS OF OBJECTION, GO BACK AND LAY
13 THE FOUNDATION.

14 MR. BEANE: I WILL, YOUR HONOR.

15 THE COURT: THAT IS ONE WAY TO DEAL WITH
16 IT. I UNDERSTAND YOUR FRUSTRATION, BUT I THINK MR. FINE
17 HAS A RESPONSIBILITY TO BRING TO THE ATTENTION OF THE
18 COURT, HE BELIEVES, TO HIS CLIENT, THAT THIS
19 INTERPRETATION OF THE DEPOSITION IS A CERTAIN WAY WHEN
20 IT'S NOT A NUANCE. IT IS SOMETHING THAT HE CONSIDERS TO
21 BE A DIRECT BAR TO THE TESTIMONY ALTOGETHER. I DON'T
22 THINK HE HAS RAISED FRIVOLOUS OBJECTIONS OR TRIED TO DO
23 HIS CROSS EXAMINATION BY THIS METHODOLOGY. I THINK YOU
24 HAVE TO BE MORE CAREFUL TO LAY THE NECESSARY FOUNDATION.
25 I'M NOT IMPRESSED BY THE REVIEW OF THE DEPOSITION

1 EXCHANGE WITH THE WITNESS THAT MR. FINE'S CONTENTION
2 ABOUT HIS KNOWLEDGE OF THIS AREA IS CORRECT. THE
3 OBJECTION IS OVERRULED. AND THE IMPLIED MOTION TO
4 STRIKE THE ANSWER IS DENIED. I THINK THERE IS ADEQUATE
5 DISCLOSURE IN THAT SCENARIO AT THE DEPOSITION.

6 MR. BEANE: BEFORE I RESTATE MY QUESTION,
7 I WOULD LIKE TO TURN TO THE MATERIALS --

8 THE COURT: HE ALREADY ANSWERED IT,
9 DIDN'T HE?

10 MR. BEANE: I BELIEVE THE OBJECTION CAME
11 BEFORE HE EXPLAINED HIS OPINION.

12 THE WITNESS: YOUR HONOR, I ANSWERED YES.

13 THE COURT: THE WITNESS SAID: THIS IS
14 THE PRECISE AREA THAT WE DEALT WITH THE BUSINESS -- NO,
15 THAT WAS MR. FINE.

16 (PERTINENT TESTIMONY READ BACK.)

17 BY MR. BEANE:

18 Q. BEFORE THE EXCHANGE -- THIS RECENT EXCHANGE, YOU
19 STATED THAT YOU DO HAVE AN OPINION ABOUT WHETHER THE
20 CONSUMERS OF ADULT CONTENT HAVE A HIGH OR LOW LEVEL OF
21 INVOLVEMENT. MY QUESTION FOR YOU NOW IS, WHAT IS THAT
22 OPINION?

23 MR. FINE: OBJECTION. LACKS FOUNDATION.

24 THE COURT: OVERRULED.

25 BY MR. BEANE:

1 Q. YOU CAN ANSWER.

2 A. MY OPINION BASED ON MY RESEARCH WHICH IS CITED
3 ON MY RESUME AND MY REVIEW OF LITERATURE THAT IS
4 INCLUDED IN THE REPORT IS THAT THESE CONSUMERS DO HAVE A
5 HIGH LEVEL OF INVOLVEMENT AND OF MOTIVATION.

6 Q. BEFORE I ASK MORE QUESTIONS, LET'S TURN TO PAGE
7 16 OF YOUR REPORT. THIS IS THE SECTION OF MATERIALS
8 THAT YOU CONSIDERED FOR THIS REPORT. COULD YOU IDENTIFY
9 AN EXAMPLE OF AN ARTICLE YOU READ THAT SUPPORTS YOUR
10 VIEW ABOUT CONSUMERS OF PORNOGRAPHY?

11 A. YES. MANY OF THESE ARTICLES DO.

12 Q. LET'S TAKE THEM ONE BY ONE, PLEASE.

13 THE COURT: WE ARE NOT GOING TO DO ALL 20
14 OF THEM ON THE PAGE, ARE WE?

15 MR. BEANE: I'M HAPPY TO GO THROUGH IT AS
16 QUICKLY AS YOU ARE SATISFIED I HAVE ESTABLISHED A
17 FOUNDATION, YOUR HONOR.

18 THE COURT: IF YOU ARE BACKING INTO THE
19 FOUNDATION, YOU CAN DO THAT, BUT YOU DON'T HAVE TO REFER
20 TO EVERY ARTICLE.

21 BY MR. BEANE:

22 Q. COULD YOU FIRST JUST IDENTIFY THE DIFFERENT
23 ARTICLES TO RELATE -- THAT RELATE TO THIS TOPIC AREA AND
24 THEN I WILL CHOOSE ONE OR TWO TO ASK YOU ABOUT.

25 A. THE TWO BUZZELL ARTICLES REFER TO THIS ARTICLE,

1 B-U-Z-Z-E-L-L. THE CAMERON ARTICLE, C-A-M-E-R-O-N,
2 REFERS TO THIS. THE MITCHELL, M-I-T-C-H-E-L-L ARTICLE.

3 Q. LET'S TURN TO PAGE 17.

4 THE COURT: IS IT THE SAME QUESTION?

5 BY MR. BEANE:

6 Q. SAME QUESTION. CAN YOU JUST IDENTIFY THE
7 ARTICLES THAT YOU RELIED ON FOR YOUR OPINION ABOUT
8 CONSUMER -- PORNOGRAPHY CONSUMERS?

9 A. THE PHILARETOU, P-H-I-L-A-R-E-T-O-U, ARTICLE.
10 THE WILLIAMS ARTICLE, AND THE YBARRA, Y-B-A-R-R-A,
11 ARTICLE.

12 MR. FINE: YOUR HONOR, I'M NOT SURE WHERE
13 COUNSEL IS GOING WITH THIS, BUT IN THE REPORT ITSELF,
14 THERE IS ONE ARTICLE THAT IS CITED AS SUPPORT FOR THE
15 WITNESS' TESTIMONY. IF WE TURN TO PAGE 14 OF THE
16 REPORT, THE ONLY ARTICLE THAT IS ACTUALLY DISCUSSED IN
17 THE TEXT OF THE REPORT IS ONE OF THE BUZZELL ARTICLES.
18 ALL OF THESE OTHER ARTICLES THAT THE WITNESS MAY HAVE
19 READ AT SOME POINT OR OTHER ARE NOT CITED IN THE REPORT
20 ITSELF, AND CANNOT BE THE SUBJECT OF ANY TESTIMONY HERE
21 TODAY. CAN'T SIMPLY GIVE PLAINTIFFS A LIST OF A HUNDRED
22 ARTICLES, SAY THAT THEY HAVE BEEN READ AND ONLY CITE ONE
23 OF THEM IN THE REPORT AND THEN EXPECT PLAINTIFFS TO GO
24 OVER THE OTHER 99. THE ONLY ARTICLE THAT IS OF ANY
25 RELEVANCE HERE IS THE ONE DISCUSSED, WHICH IS THE

1 BUZZELL 2005 ARTICLE.

2 THE COURT: MR. BEANE.

3 MR. BEANE: IN ADDITION TO THINKING IT IS
4 INAPPROPRIATE FOR COUNSEL DURING DIRECT EXAMINATION TO
5 TESTIFY ABOUT THE RELEVANCE OF SPECIFIC ARTICLES TO A
6 LINE OF QUESTIONING, I WOULD LIKE TO POINT OUT THAT WE,
7 AS LAWYERS, WITH DUE RESPECT TO COUNSEL FOR PLAINTIFFS
8 COME FROM THE LEGAL DISCIPLINE WHERE IN ARTICLES WE HAVE
9 A CITATION FOR EVERY STATEMENT THAT WE MAKE. IT APPEARS
10 THAT HE INCLUDED CITATIONS WHEN THERE IS DIRECT
11 RELEVANCE TO A POINT HE IS MAKING THERE, BUT THERE ARE
12 OTHER ONES THAT ALSO FORM THAT VIEW. PRESUMABLY SINCE
13 HE JUST IDENTIFIED THEM, THOSE ARE ARTICLES THAT GAVE
14 SUPPORT TO HIS OVERARCHING VIEW HERE THAT COPA WILL NOT
15 INHIBIT QUALIFIED CONSUMERS FROM VIEWING ONLINE CONTENT.
16 THE FACT THAT IT IS NOT DIRECTLY CITED FOR THAT SENTENCE
17 IS, WITH DUE RESPECT TO COUNSEL FOR PLAINTIFFS, NOT
18 PARTICULARLY RELEVANT HERE. THIS STANDARD HAS NEVER
19 BEEN IMPLIED TO MY KNOWLEDGE THROUGHOUT THE COURTROOM
20 HERE WHERE AN ARTICLE CAN'T BE DISCUSSED TO SUPPORT A
21 SENTENCE UNLESS IT IS CONTAINED RIGHT AFTER THAT EXACT
22 SENTENCE.

23 MR. FINE: IT IS NOT THAT IT IS NOT
24 CONTAINED RIGHT AFTER THAT SENTENCE, YOUR HONOR. IT IS
25 NOT CONTAINED IN THE REPORT AT ALL. AND PLAINTIFFS

1 CANNOT BE FORCED TO DECIPHER WHICH ARTICLES THAT ARE NOT
2 CITED IN THE REPORT SUPPORT THE WITNESS'S POSITION.

3 THE COURT: MY OBSERVATION IS THAT HE HAD
4 THE LIST OF MATERIALS CONSIDERED IN THIS REPORT BEFORE
5 THE DEPOSITION. ALL HE HAD TO DO WAS ASK HIM, DOES
6 ANYTHING ON THIS LIST HAVE ANYTHING TO DO WITH PRIVATE
7 BEHAVIOR BEYOND THE BUZZELL REPORT, AND YOU'D GET THE
8 ANSWER THAT THERE ARE FOUR OR FIVE OTHERS. YOU DID NOT
9 ASK THE QUESTION. YOU WERE ON NOTICE. I DON'T THINK HE
10 HAS TO ADOPT EACH ARTICLE IN THE BODY OF THE REPORT TO
11 PUT -- TO PUT THE PLAINTIFFS ON NOTICE TO ASK QUESTIONS
12 ABOUT IT AND FIND OUT WHAT THE ROLE IS. THE OBJECTION
13 IS OVERRULED.

14 BY MR. BEANE:

15 Q. MR. BYRDSONG --

16 THE COURT: IF IT WAS A MOTION TO STRIKE,
17 IT IS DENIED.

18 MR. BEANE: MR. BYRDSONG, RETURN TO PAGE
19 11, PLEASE.

20 BY MR. BEANE:

21 Q. BEFORE THAT INTERCHANGE, WE WERE DISCUSSING THE
22 FIRST POINT HERE INVOLVING BARRIERS AND PSYCHOLOGICAL
23 PREDISPOSITIONS AND PREFERENCES AND MOTIVATION. HOW IS
24 THE CONSUMERS -- HOW ARE THE CONSUMERS' MOTIVATIONS OR
25 LEVEL OF INVOLVEMENT RELATED TO A CONSUMERS' WILLING TO

1 TOLERATE BARRIERS?

2 A. THEY ARE DIRECTLY CORRELATED. AS A PERSON IS
3 MORE INVOLVED, THEY SEARCH OUT MORE SOURCES OF
4 INFORMATION, THEY TAKE LONGER TIME SEARCHING FOR
5 INFORMATION. THEY GO TO DIFFERENT TYPES OF MEDIA TO
6 FIND THE INFORMATION THAT THEY ARE LOOKING FOR. SEARCH
7 AND INVOLVEMENT AND MOTIVATION ARE VERY HIGHLY
8 CORRELATED.

9 Q. I WOULD LIKE TO TURN NOW TO PAGE 12 IN YOUR
10 REPORT. COULD YOU PLEASE READ THE SECOND -- THE NUMBER
11 2 HEADING NEAR THE BOTTOM OF THE PAGE?

12 A. YES. VISUALLY CONSUMED PRODUCTS ARE PURCHASED
13 PRIOR TO VIEWING.

14 Q. CAN YOU EXPLAIN WHAT YOU MEAN BY THIS?

15 A. WE ARE USED TO PAYING FOR LOOKING AT STUFF.

16 Q. CAN YOU GIVE SOME EXAMPLES OF VISUALLY CONSUMED
17 PRODUCTS THAT ARE PURCHASED PRIOR TO VIEWING?

18 A. SURE. ON A MACRO SCALE, WE PAY TO GO INTO
19 NATIONAL PARKS. WE PAY TO GO TO MOVIES. WE PAY TO VIEW
20 ONLINE PORNOGRAPHY. WE DO A LOT OF DIFFERENT THINGS,
21 PLAYS, PERFORMANCES. GENERALLY MOST THINGS THAT ARE
22 ENTERTAINMENT WE ARE NOT UNCOMFORTABLE ABOUT PAYING
23 THOSE, PAYING THE ARTISTS THAT ARE INVOLVED, PAYING THE
24 AUTHORS, PAYING THE MUSICIANS WHEN WE LISTEN TO
25 SOMETHING, WHEN WE VIEW OR READ ARTICLES OR BOOKS. THIS

1 IS PART OF OUR LIFE. THIS IS PART OF OUR LIFESTYLE. WE
2 PAY.

3 Q. I WOULD LIKE TO TURN NOW TO PAGE 13. MR.
4 BYRDSONG, IF YOU COULD HIGHLIGHT THE FIRST FULL
5 PARAGRAPH, THE TOP OF PAGE 13.

6 THE COURT: DO YOU EXPECT TO PAY?

7 MR. BEANE: THAT'S CORRECT.

8 BY MR. BEANE:

9 Q. CAN YOU READ THAT, DR. SMITH?

10 A. THERE WE GO. YES, I CAN READ IT.

11 Q. WILL YOU READ IT?

12 A. I WILL READ IT.

13 WE EXPECT --

14 THE COURT: WILL YOU ASK HIM TO READ IT?

15 PLEASE READ IT, SIR.

16 THE WITNESS: WE EXPECT TO PAY THE
17 REQUIRED FEE FOR VISUALLY CONSUMED PRODUCTS PRIOR TO
18 CONSUMPTION. THE COPA REQUIRED PREQUALIFICATION IS
19 CONSISTENT WITH EXPECTATIONS OF DEALING WITH A QUALIFIED
20 PURCHASER AND/OR PURCHASE PRIOR TO THE CONSUMPTION
21 EXPERIENCE.

22 BY MR. BEANE:

23 Q. YOU MENTIONED CONSISTENCY WITH EXPECTATIONS.

24 HOW IS -- HOW ARE EXPECTATIONS RELEVANT TO WILLINGNESS
25 TO PURCHASE PRIOR TO VIEWING?

1 A. EXPECTATIONS GET US READY TO DO THINGS. IN
2 TERMS OF PURCHASE, IF IT IS IN A PRODUCT CATEGORY THAT
3 FITS THOSE EXPECTATIONS, SUCH AS ENTERTAINMENT OR
4 VISUALLY CONSUMED PRODUCTS, WE ARE -- WE ARE NOT
5 SURPRISED THAT THEY ARE ASKING US TO PAY FOR THOSE
6 SERVICES OR VISUALLY CONSUMED THINGS THAT WE SEE, READ
7 OR WATCH.

8 Q. HOW IS A CONSUMER'S EXPECTATIONS WITH RESPECT TO
9 A GIVEN PRODUCT RELATED TO HIS WILLINGNESS TO OFFER
10 INFORMATION OR TIME OR MONEY FOR THAT MATTER IN ORDER TO
11 CONSUME THAT PRODUCT?

12 A. I THINK IT HAS TO DO WITH VALUE, AGAIN, BOTH
13 VALUE AND TRUST. IF WE EXAMINE A WEBSITE, EXAMINE THE
14 PRODUCTS THAT ARE BEING OFFERED TO US AND IF WE EXPECT
15 THAT THERE WOULD BE VALUE THAT IS THERE, WE WILL BE
16 WILLING TO PAY TO CONSUME THOSE PARTICULAR PRODUCTS.

17 Q. LET'S TURN TO PAGE 13 OF YOUR REPORT. CAN YOU
18 READ THE THIRD POINT THAT IS IN BOLD IN THE MIDDLE OF
19 THE PAGE, PLEASE?

20 A. YES. ONLINE CONSUMERS ARE WILLING TO TOLERATE
21 COPA'S QUALIFICATION REQUIREMENTS.

22 Q. WHAT DO YOU MEAN BY QUALIFICATION REQUIREMENT?

23 A. AGAIN, IN A GENERAL SENSE OR IN COPA'S SENSE?

24 Q. IN THE CONTEXT THAT YOU USED IT HERE, WITH
25 RESPECT TO COPA.

1 A. THE QUALIFICATION REQUIREMENTS AS I UNDERSTAND
2 THEM FROM COPA IS THAT THERE NEEDS TO BE A DEFINITIVE
3 SCREEN THAT EXCLUDES CHILDREN UNDER THE AGE OF 17,
4 MEANING THAT THERE IS SOME METHOD OF DETERMINING AGE.

5 Q. CAN YOU GIVE AN EXAMPLE OF QUALIFICATION
6 REQUIREMENTS ONLINE?

7 A. THERE ARE MANY. I DO ONLINE BANKING, AND I HAVE
8 TO HAVE CERTAIN REQUIREMENTS FOR DOING THAT. IF ONE
9 PURCHASES ALCOHOL OR IN SOME CASES I BELIEVE
10 PHARMACEUTICALS ONLINE, YOU HAVE TO QUALIFY FOR AGE IN
11 ORDER TO PURCHASE THOSE PRODUCTS LEGALLY.

12 Q. ARE YOU AWARE OF ANY WEBSITES THAT REQUIRE
13 REGISTRATION OR CREDIT CARD INFORMATION FOR ACCESS TO
14 CONTENT?

15 A. YES.

16 Q. CAN YOU GIVE AN EXAMPLE?

17 A. WALL STREET JOURNAL. NEW YORK TIMES. THERE ARE
18 SUBSCRIPTIONS ON SALON AND NERVE.

19 Q. IS COMMERCE ON THE INTERNET GROWING?

20 A. IT IS.

21 Q. WHAT DOES THE GROWTH IN E-COMMERCE SUGGEST TO
22 YOU ABOUT CONSUMERS' COMFORT LEVEL WITH ONLINE SHOPPING?

23 A. RIGHT NOW, WE ARE SEEING A 25 TO 30 PERCENT
24 GROWTH ON AN ANNUAL BASIS AND --

25 MR. FINE: OBJECTION, THIS IS OUTSIDE OF

1 THE SCOPE OF THE WITNESS' REPORT.

2 MR. BEANE: IN THE BEGINNING OF HIS
3 REPORT, HE TALKS ABOUT THE GROWTH OF THE INTERNET AND
4 ALL BUSINESSES ARE NOW INTERNET BUSINESSES. IT IS ALL
5 WITHIN THE SCOPE OF THAT GENERAL TOPIC.

6 MR. FINE: SPECIFICALLY THE REFERENCE TO
7 IT MUST BE BASED ON SOME STUDY OR REPORT SOMEWHERE IF
8 THE WITNESS IS ABLE TO TESTIFY THAT THERE IS A 25
9 PERCENT --

10 THE COURT: OBJECTION SUSTAINED, LAY A
11 FOUNDATION.

12 BY MR. BEANE:

13 Q. LET'S TURN TO -- LET'S LOOK AT PAGE 13 OF YOUR
14 REPORT. LET'S FOCUS ON THE HIGHLIGHTED PORTION NEAR THE
15 BOTTOM OF THE PAGE. IT BEGINS WITH, RESEARCHERS
16 CONSISTENTLY HAVE FOUND.

17 A. YES.

18 Q. CAN YOU READ THAT, THOSE TWO SENTENCES, PLEASE?

19 A. RESEARCHERS CONSISTENTLY HAVE FOUND THAT HUMANS
20 WERE WILLING TO TOLERATE ECONOMIC BARRIERS IN THE FORM
21 OF TIME, INCONVENIENCE, AND MONEY TO ACHIEVE A GOAL.
22 FROM AN ECONOMIC PERSPECTIVE, THIS INELASTICITY OF
23 DEMAND MAY BE HIGH WHERE LOYALTY TO A PRODUCT IS HIGH,
24 OR WHERE THE CONSUMER DERIVES SUFFICIENT VALUE FROM THE
25 PRODUCT.

1 Q. I WOULD LIKE YOU TO READ ACTUALLY THE NEXT
2 SENTENCE AS WELL.

3 A. FOR INSTANCE, THE PORNOGRAPHY INDUSTRY
4 TRADITIONALLY HAS FACED BOTH SOCIAL AND TECHNOLOGICAL
5 BARRIERS THAT HAVE NOT REDUCED INDUSTRY DEMAND.

6 MR. FINE: OBJECTION. MOVE TO STRIKE.
7 LACKS FOUNDATION.

8 MR. BEANE: I JUST ASKED HIM TO READ A
9 SECTION OF HIS REPORT. I WILL LAY A FOUNDATION BEFORE I
10 ASK QUESTIONS ABOUT IT, YOUR HONOR.

11 THE COURT: THE QUESTION IS WITHDRAWN.
12 BY MR. BEANE:

13 Q. DO YOU HAVE AN OPINION ABOUT WHETHER CONSUMERS
14 OF ADULT ENTERTAINMENT ARE WILLING TO OVERCOME SOCIAL
15 BARRIERS?

16 A. YES.

17 Q. HOW DID YOU REACH YOUR OPINION?

18 A. BY RESEARCH THAT I HAVE DONE ON INVOLVEMENT AND
19 MOTIVATION AND BY READING A NUMBER OF ARTICLES THAT ARE
20 CITED IN MY REPORT, PARTICULARLY THE BUZZELL ARTICLE.

21 Q. WHAT IS YOUR OPINION ABOUT THE WILLINGNESS OF
22 CONSUMERS OF ADULT MATERIAL TO OVERCOME SOCIAL BARRIERS?

23 MR. FINE: OBJECTION, CALLS FOR HEARSAY.
24 THE WITNESS TESTIFIED IT WAS BASED ON THE BUZZELL
25 ARTICLE.

1 MR. BEANE: AS WELL AS HIS EXPERIENCE.
2 I'M ASKING FOR HIS OPINION. HE CAN RELY ON MATERIAL --

3 THE COURT: OVERRULED. HE IS A GENERAL
4 EXPERT IN THIS FIELD. HE CAN RELY ON ALL SORTS OF
5 THINGS AND YOU CAN CROSS EXAMINE HIM. OVERRULED.

6 BY MR. BEANE:

7 Q. WHAT IS YOUR OPINION ABOUT THE WILLINGNESS OF
8 CONSUMERS OF ADULT MATERIAL TO OVERCOME SOCIAL BARRIERS?

9 A. MY OPINION IS THAT THEY ARE VERY WILLING AND
10 CAPABLE OF OVERCOMING BARRIERS.

11 Q. I GUESS I WILL BACK UP A SECOND. WHAT IS A
12 SOCIAL BARRIER? CAN YOU EXPLAIN WHAT YOU MEAN BY THAT?

13 A. SOCIAL BARRIERS REFER TO THE CONSUMPTION OF
14 SOCIALLY UNDESIRABLE PRODUCTS OR SERVICES, IF YOU WILL.
15 THERE ARE SOME THINGS THAT WE JUST DON'T WANT PEOPLE TO
16 KNOW THAT WE ARE DOING VERY MUCH.

17 Q. CAN YOU GIVE AN EXAMPLE?

18 A. SURE. IF YOU ASK INDIVIDUALS ABOUT THEIR
19 ALCOHOL CONSUMPTION, THEIR TOBACCO CONSUMPTION, THEY
20 TEND TO UNDERREPORT THAT. IN MANY CASES THEY TEND TO
21 DENY THINGS. IF YOU ASK THEM ABOUT PORNOGRAPHY
22 CONSUMPTION, THEY WILL UNDERREPORT THAT PRODUCT OR FIND
23 WAYS TO NOT HAVE THAT EXPERIENCE KNOWN WHEN THEY ARE
24 ACTUALLY CONSUMING THE PRODUCT.

25 Q. LET'S RETURN TO THE LARGER QUOTE ON PAGE 13,

1 PLEASE.

2 THE COURT: WHAT DO YOU MEAN BY LARGER

3 QUOTE?

4 MR. BEANE: THAT WAS FOR THE BENEFIT OF

5 MR. BYRDSONG, YOUR HONOR. I WILL GIVE MORE SPECIFIC

6 INSTRUCTIONS TO THE WITNESS.

7 BY MR. BEANE:

8 Q. THE LAST SENTENCE IN THAT PARAGRAPH BEGINNING

9 WITH, FROM AN ECONOMIC PERSPECTIVE. WOULD YOU MIND

10 REREADING THAT JUST TO REFRESH YOUR MEMORY ON THIS?

11 A. FROM AN ECONOMIC PERSPECTIVE THIS INELASTICITY

12 OF DEMAND MAY BE HIGH WHERE LOYALTY TO A PRODUCT IS HIGH

13 OR WHERE THE CONSUMER DERIVES SUFFICIENT VALUE FROM THE

14 PRODUCT.

15 Q. IN BUSINESS AND ECONOMIC TERMS, WHAT IS DEMAND?

16 A. DEMAND MEANS THAT I WANT THE PRODUCT. I'M

17 INTERESTED IN PURCHASING THAT PRODUCT.

18 Q. WHAT DOES INELASTICITY OF DEMAND REFER TO?

19 A. IN GENERAL TERMS, IT MEANS THAT NO MATTER WHAT

20 THE BARRIERS ARE, I WANT TO BUY IT. FOR EXAMPLE, AS THE

21 PRICE OF GASOLINE GOES UP, I'M STILL FILLING MY CAR.

22 THAT IS AN EXAMPLE OF AN INELASTIC DEMAND FOR A PRODUCT.

23 OTHER PRODUCTS I MAY SWITCH TO ANOTHER SUBSTITUTE IF

24 IT'S, FOR EXAMPLE, ELASTIC DEMAND AS THE PRICE GOES UP.

25 Q. YOU MENTIONED TWO FACTORS HERE THAT BEAR ON THE

1 ELASTICITY OF DEMAND, PRODUCT LOYALTY AND THE AMOUNT OF
2 VALUE DERIVED FROM A PRODUCT.

3 A. YES.

4 Q. LET'S BREAK THIS DOWN. WHAT IS PRODUCT LOYALTY?

5 A. PRODUCT LOYALTY MEANS THAT I HAVE EXPERIENCE AND
6 I HAVE TRUST. I HAVE ESTABLISHED VALUE, IF YOU WILL,
7 FOR THAT PARTICULAR PRODUCT. THERE ARE A SERIES OF
8 COMPONENTS THAT HAVE BEEN DEFINED IN THE MARKETING
9 LITERATURE DEALING WITH LOYALTY AND --

10 Q. HOW IS PRODUCT LOYALTY ESTABLISHED?

11 A. PRODUCT LOYALTY IS ESTABLISHED THROUGH SEVERAL
12 THINGS, BASICALLY AN ENDURING RELATIONSHIP. IT INVOLVES
13 AN ENDURING RELATIONSHIP WITH A SUPPLIER OR WITH A
14 VENDOR OF A PRODUCT. IT SAYS THAT I TRUST THEM. THERE
15 ARE A LOT OF OTHER COMPONENTS THAT CAN BE IN THERE IN
16 TERMS OF THE FEATURES THAT THEY OFFER RELATED TO MY
17 PRODUCT EXPERIENCE.

18 Q. WHAT DO YOU MEAN BY DERIVING VALUE?

19 A. DERIVING VALUE WOULD MEAN THAT I GET VALUE FROM
20 THE PRODUCT OR SERVICE THAT I AM PURCHASING AND THERE
21 ARE MANY DIFFERENT KINDS OF VALUE THAT ARE ASSOCIATED
22 WITH DIFFERENT PRODUCTS. IT'S NOT JUST DOLLAR VALUE,
23 BUT IT MAY BE VALUE OF STATUS, VARIOUS IMAGES, WHATEVER
24 THE BENEFITS ARE THAT I EXPERIENCE FROM THE PRODUCT.

25 Q. IS THERE A WAY TO MEASURE VALUE?

1 A. CERTAINLY.

2 Q. HOW CAN VALUE BE MEASURED?

3 A. VALUE -- ACTUALLY THERE IS A LOT OF WAYS YOU CAN
4 ASK THE QUESTION. IN TERMS OF SURVEY RESEARCH, YOU CAN
5 MEASURE IT BEHAVIORALLY. YOU CAN MEASURE IT
6 ATTITUDINALLY. WE OFTEN MEASURE VALUE IN A MARKETING
7 SENSE BY HAVING PEOPLE MAKING TRADEOFFS. WOULD YOU LIKE
8 PRODUCT A THAT HAS THESE CONFIGURATIONS OR PRODUCT B
9 THAT HAS THESE CONFIGURATIONS? OR WE CAN CONSIDER
10 INDIVIDUAL ATTRIBUTES THAT ARE RELATED TO THE PRODUCT.

11 Q. DO YOU HAVE AN OPINION ABOUT WHETHER DEMAND FOR
12 ADULT ENTERTAINMENT IS ELASTIC?

13 A. I DO.

14 Q. HOW DID YOU REACH THAT OPINION?

15 A. IT IS REACHED THROUGH THE ARTICLES THAT I HAVE
16 READ THAT ARE CITED IN THE REPORT.

17 Q. AND WHAT IS YOUR OPINION?

18 A. MY OPINION IS THAT THE DEMAND IS INELASTIC.

19 Q. WHY?

20 A. INELASTIC MEANING THAT THEY WILL GO TO
21 CONSIDERABLE TERMS TO ACQUIRE THE PRODUCT.

22 I GUESS VERY BASICALLY, AS WITH ALCOHOL,
23 AS WITH TOBACCO, THERE IS AN INCIDENCE THAT IS ABOUT THE
24 SAME PERCENTAGE THAT IS ADDICTED TO SEX.

25 Q. HOW IS YOUR OPINION ABOUT THE ELASTICITY OF

1 DEMAND FOR ADULT ENTERTAINMENT RELATED TO YOUR BROADER
2 CONCLUSION ABOUT THE WILLINGNESS OF CONSUMERS TO ADAPT
3 TO COPA REQUIREMENTS?

4 A. BACK UP ONE MORE TIME.

5 Q. HOW IS YOUR OPINION ABOUT THE INELASTICITY OF
6 DEMAND FOR ADULT ENTERTAINMENT RELATED TO YOUR BROADER
7 OPINION ABOUT THE EFFECT OF COPA ON CONSUMERS?

8 A. I'M GOING TO ASK YOU TO REPEAT THAT ONE MORE
9 TIME. I WAS DISTRACTED THERE.

10 Q. YOU JUST STATED YOUR OPINION THAT DEMAND FOR
11 ADULT ENTERTAINMENT IS INELASTIC.

12 A. YES.

13 Q. HOW DOES THAT RELATE TO THE BROADER CONCLUSION
14 THAT YOU REACH IN THIS SECTION ABOUT THE EFFECT OF COPA
15 ON CONSUMERS?

16 A. THE EFFECT OF COPA ON CONSUMERS WOULD BE THAT
17 COPA WOULD NOT BE A GREAT BARRIER, THAT INDIVIDUALS
18 WOULD GO THROUGH COPA AND WOULD GO THROUGH THAT GOAL TO
19 PURCHASE THAT PRODUCT.

20 YOUR HONOR, I MADE A MISSTATEMENT A
21 MINUTE AGO. MAY I CORRECT THAT.

22 THE COURT: SURE.

23 THE WITNESS: I SAID PEOPLE WERE ADDICTED
24 TO SEX. THAT IS NOT WHAT I MEANT. WHAT I MEANT IS THAT
25 PEOPLE WERE ADDICTED TO VIEWING PORNOGRAPHY. THERE IS A

1 SUBSTANTIAL DIFFERENCE BETWEEN THOSE TWO. SORRY.

2 BY MR. BEANE:

3 Q. LET'S MOVE ON TO PAGE 14 OF YOUR REPORT.

4 A. YES.

5 Q. YOU STATE IN THE BEGINNING OF THE FINAL
6 PARAGRAPH ON THAT PAGE THAT THE CONSUMPTION OF
7 PORNOGRAPHY REQUIRES A MOTIVATED USER. WHAT DO YOU MEAN
8 BY THAT?

9 A. CONSUMPTION OF PORNOGRAPHY REQUIRES A MOTIVATED
10 USER BECAUSE THE BARRIERS THAT THEY MUST OVERCOME TO
11 VIEW PORNOGRAPHY.

12 Q. THEN I WOULD LIKE TO DRAW YOUR ATTENTION TO THE
13 FINAL TWO SENTENCES OF THAT PARAGRAPH, BEGINNING WITH
14 PORNOGRAPHY CONSUMERS. CAN YOU READ THOSE TWO
15 SENTENCES, PLEASE.

16 A. YES. PORNOGRAPHY CONSUMERS ARE ACCUSTOMED TO
17 OVERCOMING BARRIERS TO CONSUMPTION. COMPARED TO THESE
18 TIMING AND LOCATION DEMANDS, COPA QUALIFICATION
19 STANDARDS REPRESENT A RELATIVELY MINOR OBSTACLE.

20 Q. CAN YOU EXPLAIN WHAT YOU MEAN BY TIMING AND
21 LOCATION DEMANDS?

22 A. YES. PORNOGRAPHY IS OFTEN CONSUMED
23 INDIVIDUALLY. IT IS CONSUMED IN PRIVATE AND FOR MANY
24 INDIVIDUALS, WHERE THERE ARE OTHER FAMILY MEMBERS,
25 SPOUSES, CHILDREN, OR IF THESE ARE CHILDREN, PORNOGRAPHY

1 IS CONSUMED IN THE ABSENCE OF THOSE OTHER INDIVIDUALS.
2 IT IS A SOCIALLY UNDESIRABLE PRODUCT WHERE THERE MAY BE
3 OBJECTIONS ON THE PART OF PARENTS OR OTHER MEMBERS OF
4 THE HOUSEHOLD.

5 MR. FINE: OBJECTION, CALLS FOR
6 SPECULATION. THE WITNESS HAS NO PERSONAL KNOWLEDGE
7 ABOUT THE MOTIVATIONS OF CUSTOMERS SEEKING OUT
8 PORNOGRAPHY. THE ONLY BASIS THAT HE HAS TESTIFIED THAT
9 HE HAS THIS KNOWLEDGE SO FAR IS -- ARE ARTICLES THAT HE
10 HAS READ. THERE HAS BEEN NO -- THOSE ARE HEARSAY. THIS
11 IS NO ESTABLISHMENT THAT THOSE ARTICLES ARE RELIABLE AND
12 ARE RELIED ON BY EXPERTS WHO ACTUALLY HAVE EXPERTISE IN
13 THE FIELD.

14 MR. BEANE: I HAVE TWO RESPONSES TO THAT,
15 YOUR HONOR. FIRST, I'M NOT ASKING HIM TO READ RELIANCE
16 MATERIALS INTO THE RECORD. I'M ASKING HIM ABOUT HIS
17 OPINION BASED ON THE MATERIALS ON WHICH HE RELIED.
18 SECONDLY, HE TESTIFIED EARLIER THIS MORNING THAT
19 PEOPLE -- CONSUMER BEHAVIORISTS ARE TYPICALLY
20 GENERALISTS. THEY APPLY GENERAL TOOLS AND SKILLS TO ANY
21 GIVEN INDUSTRY. SO THE FACT THAT HE HAS NOT BEEN A
22 MEMBER OF THE ADULT ENTERTAINMENT INDUSTRY ONLINE SINCE
23 IT BEGAN IS REALLY IRRELEVANT TO HIS ABILITY TO APPLY
24 ALL OF HIS KNOWLEDGE AND TRAINING AND EXPERIENCE TO A
25 SPECIFIC INDUSTRY AFTER READING A FEW ARTICLES THAT

1 RELATE TO THAT SPECIFIC TOPIC. IN FACT, THERE IS
2 SOMETHING SOURCED IN THIS EXACT PARAGRAPH IF WE PAN BACK
3 TO THE WHOLE PARAGRAPH. I THINK THE FOUNDATION FOR HIS
4 OPINION IS WELL ESTABLISHED.

5 THE COURT: BEAR WITH ME FOR A MOMENT.

6 THE MATERIAL THAT WAS READ INTO THE
7 RECORD, THE NEXT TO THE LAST SENTENCE OR BOTH THE LAST
8 TWO SENTENCES?

9 MR. BEANE: IT WAS THE LAST TWO
10 SENTENCES, YOUR HONOR.

11 THE COURT: LET ME READ THEM TO MYSELF,
12 AGAIN.

13 FINAL POINT MR. FINE?

14 MR. FINE: THE OBJECTION IS NOT TO THE
15 ULTIMATE OPINION. THE OBJECTION IS TO THE FACTS THAT
16 THE SENTENCE, BUZZELL IN A STUDY OF CONSUMER BEHAVIOR
17 CONCLUDED THAT CONSUMPTION OF PORNOGRAPHY IS PRIVATE AND
18 OFTEN PLANNED. THAT'S PURE HEARSAY. THERE HAS BEEN NO
19 FOUNDATION THAT THIS ARTICLE THAT'S BEING READ INTO THE
20 RECORD IS RELIED ON BY EXPERTS IN THE FIELD. HE CAN
21 CERTAINLY OFFER HIS OPINION.

22 MR. BEANE: IF I MAY RESPOND BRIEFLY,
23 YOUR HONOR.

24 THE COURT: YES.

25 MR. BEANE: IF YOU WANT TO READ THE

1 TRANSCRIPT, I DID NOT ASK HIM TO REPEAT BUZZELL'S
2 OPINION. I ASKED HIM HIS OPINION, SO THERE IS NO
3 HEARSAY ISSUE. I'M NOT ASKING HIM TO REPEAT ANYBODY'S
4 OPINION OR STATEMENTS OTHER THAN HIS OWN.

5 (PERTINENT TESTIMONY READ BACK.)

6 THE COURT: THE QUESTION IS WHAT DO YOU
7 MEAN, NOT WHAT DID BUZZELL MEAN?

8 MR. BEANE: THAT'S CORRECT, YOUR HONOR.

9 THE COURT: THAT'S YOUR POINT?

10 MR. BEANE: YES.

11 THE COURT: COULD YOU FINISH READING IT
12 NOW?

13 (PERTINENT TESTIMONY READ BACK.)

14 THE COURT: I TRANSLATE ALL OF THIS INTO
15 OBJECTION ON THE BASIS OF LACK OF FOUNDATION. THAT IS
16 MY TAKE ON WHAT WE CAN DO TO MANAGE THIS ISSUE. THE
17 QUESTION WHAT DO YOU MEAN BY, WHATEVER THAT PHRASE WAS,
18 IS STRICKEN AND THE ANSWER IS STRICKEN AND COUNSEL IS
19 ASKED TO LAY A FOUNDATION.

20 BY MR. BEANE:

21 Q. DO YOU HAVE AN OPINION ABOUT WHETHER COPA'S
22 QUALIFICATION STANDARDS AS YOU REFER TO THEM PRESENT A
23 MINOR OBSTACLE TO VIEWING ADULT CONTENT?

24 A. YES.

25 Q. HOW DID YOU REACH THAT OPINION?

1 A. THROUGH PERSONAL EXPERIENCE AND RESEARCH,
2 THROUGH STUDYING ARTICLES AND JOURNALS WHICH ARE
3 RELEVANT AND ARE FOUND IN PEER REVIEWED JOURNALS.

4 Q. AND WHAT IS YOUR OPINION ABOUT THE WILLINGNESS
5 OF CONSUMERS TO OVERCOME THESE QUALIFICATION STANDARDS?

6 A. MY OPINION IS THAT THEY ARE WILLING AND ABLE TO
7 OVERCOME THE QUALIFICATION STANDARDS.

8 Q. NOW, YOU STATED -- I WOULD LIKE TO FOCUS YOU
9 AGAIN JUST TO MAKE SURE IT IS FRESH, REFERRING YOU TO
10 THE LAST SENTENCE THERE, YOU SAY, COMPARED TO THESE
11 TIMING AND LOCATION DEMANDS, COPA QUALIFICATION
12 STANDARDS PRESENT A RELATIVELY MINOR OBSTACLE.

13 WHAT DID YOU MEAN BY RELATIVELY MINOR
14 OBSTACLE WITH RESPECT TO TIMING AND LOCATION DEMANDS?

15 A. LESS INCONVENIENT, EASIER TO MEET.

16 Q. IN YOUR OPINION, ARE SOME ONLINE BROWSERS
17 WILLING TO PERUSE ADULT CONTENT BUT UNWILLING TO SATISFY
18 COPA'S VERIFICATION REQUIREMENTS?

19 A. YES.

20 Q. WHAT TYPES OF PEOPLE?

21 A. CHILDREN, CERTAINLY, UNDER THE AGE OF 17 AND
22 INDIVIDUALS WHO DO NOT INTEND ON PURCHASING.

23 Q. IN YOUR OPINION, WILL THE POTENTIAL LOSS OF
24 VIEWERS HAVE A MAJOR IMPACT ON THE COMMERCIAL WEBSITES
25 THAT ARE AFFECTED BY COPA?

1 A. IT WILL NOT.

2 Q. WHY NOT?

3 A. MOST OF THOSE GROUPS DO NOT PURCHASE.

4 Q. DO YOU HAVE AN OPINION ABOUT WHAT STRATEGIES A
5 BUSINESS MIGHT ADOPT TO INCREASE THE NUMBER OF WEBSITE
6 VISITORS?

7 A. YES.

8 Q. AND HOW DID YOU REACH THAT OPINION?

9 A. GENERAL BUSINESS EXPERIENCE, MY TEACHING, MY
10 PERSONAL RESEARCH.

11 Q. WHAT IS YOUR OPINION ABOUT WHAT STRATEGIES A
12 BUSINESS MIGHT ADOPT TO INCREASE THE NUMBER OF WEBSITE
13 VISITORS?

14 MR. FINE: OBJECTION. THIS IS AGAIN AN
15 OPINION THAT IS NOT DISCLOSED IN THE REPORT. THERE IS
16 GENERAL TOPIC DISCUSSION ABOUT WHAT BUSINESSES CAN DO TO
17 SUCCEED, BUT THAT DOES NOT PROVIDE A NOTIFICATION TO THE
18 SPECIFIC NEW OPINION.

19 MR. BEANE: THE ISSUE I'M TRYING TO
20 ADDRESS HERE IS CLEARLY ENCOMPASSED WITHIN HIS BROAD
21 OPINION THAT COPA WILL NOT HAVE A MAJOR IMPACT ON THE
22 COMMERCIAL WEBSITES THAT IT REGULATES. CLEARLY,
23 VISITORS ARE IMPORTANT ON SOME LEVEL SO I WOULD JUST
24 LIKE TO ASK HOW THOSE TWO ISSUES -- HOW HE RECONCILES
25 THOSE TWO ISSUES.

1 MR. FINE: HIS OPINION ABOUT NEW
2 STRATEGIES THAT BUSINESSES CAN ADOPT IS NOWHERE
3 DISCLOSED IN THE EXPERT REPORT, YOUR HONOR.

4 MR. BEANE: I'M REFERRING, YOUR HONOR, TO
5 ALL OF THE BUSINESS FUNDAMENTALS AND THE DIFFERENT
6 BUSINESS MODELS THAT WE DISCUSSED IN GREAT DEPTH EARLIER
7 IN THE TESTIMONY.

8 THE COURT: OBJECTION IS OVERRULED.

9 BY MR. BEANE:

10 Q. WHAT IS YOUR OPINION?

11 A. WOULD YOU REPEAT THE QUESTION, PLEASE.

12 Q. WHAT'S YOUR OPINION ABOUT WHAT STRATEGIES A
13 BUSINESS MIGHT ADOPT TO INCREASE THE NUMBER OF WEBSITE
14 VISITORS?

15 A. CERTAINLY ADVERTISING AND GETTING THE NAME OF
16 THE WEBSITE IN RECOGNITION, CROSSLINKING AND SO FORTH,
17 THINGS THAT ARE COMMON TO WEBSITES. THE MOST IMPORTANT
18 THING IS THAT ONCE PEOPLE GET TO WEBSITES, YOU WANT TO
19 KEEP THEM THERE. THAT IS THE NUMBER ONE RULE IN
20 INTERNET BUSINESS. YOU KEEP YOUR VISITORS THERE. A
21 BUSINESS IS VERY MUCH -- AN ONLINE BUSINESS IS VERY MUCH
22 LIKE A DEPARTMENT STORE. YOU GET THEM THERE, YOU HAVE
23 THEM LOOK AROUND, YOU HAVE THEM SEE WHAT PRODUCTS OR
24 SERVICES OR WRITING OR GRAPHICS, IF YOU WILL, PICTURES
25 ARE AVAILABLE. AND THEN YOU GIVE THEM A CHOICE. AND IN

1 TERMS OF BUSINESS UNDER COPA, IT WOULD BE OPTIMAL FOR A
2 BUSINESS TO MOVE THAT PARTITION REQUIRING VERIFICATION
3 BACK AS FAR AS YOU CAN TO KEEP THEM IN THE WEBSITE.
4 THIS GENERATES ADVERTISING REVENUE, BECAUSE THEY WILL BE
5 THERE LONGER, THEY WILL SEE MORE THINGS ON THE WEBSITE.

6 Q. DOES THE OPINION THAT -- THE OPINION THAT YOU
7 JUST EXPRESSED APPLY TO ALL COMMERCIAL WEBSITES
8 REGARDLESS OF THE BUSINESS MODEL?

9 A. IT DOES.

10 MR. BEANE: YOUR HONOR, I WOULD LIKE TO
11 MOVE DEFENDANT'S EXHIBIT 91 INTO EVIDENCE.

12 THE COURT: EXPERT REPORT?

13 MR. BEANE: THAT'S CORRECT.

14 MR. FINE: NO OBJECTIONS, YOUR HONOR.

15 MR. BEANE: IF I CAN HAVE JUST A MOMENT
16 TO CONFER WITH COUNSEL.

17 THE COURT: DEFENSE EXHIBIT 91 IS
18 RECEIVED INTO EVIDENCE.

19 (DEFENDANT'S D 91 RECEIVED IN EVIDENCE.)

20 MR. BEANE: I HAVE NO FURTHER QUESTIONS
21 FOR THE WITNESS AT THIS TIME.

22 THE COURT: MR. FINE, YOU MAY CROSS
23 EXAMINE.

24 MR. FINE: YOUR HONOR, IF I MAY APPROACH?

25 THE COURT: SURE.

1 CROSS EXAMINATION

2 BY MR. FINE:

3 Q. GOOD MORNING, PROFESSOR SMITH.

4 A. GOOD MORNING.

5 Q. YOU HAVE NO OPINION ABOUT THE IMPACT OF COPA ON
6 PLAINTIFF SEXUAL HEALTH NETWORK, CORRECT?

7 A. I DON'T BELIEVE THAT I HAVE EVER DISCUSSED THAT
8 SPECIFICALLY BEFORE.

9 Q. SO MY QUESTION TO YOU IS, YOU HAVE NO OPINION
10 ABOUT THE IMPACT OF COPA ON SEXUAL HEALTH NETWORK, DO
11 YOU?

12 A. I HAVE RENDERED AN OPINION ON ADULT
13 ENTERTAINMENT INDUSTRY IN GENERAL. I HAVE USED EXAMPLES
14 OF SPECIFIC WEBSITES THAT ARE THERE. NOW TO THE DEGREE
15 THAT THEY ARE APPLICABLE TO THE -- THAT PARTICULAR
16 WEBSITE, THEN MY OPINION WOULD HOLD TO THEM.

17 Q. SO YOUR OPINION -- JUST SO WE ARE CLEAR, YOUR
18 OPINION ONLY GOES TO ADULT ENTERTAINMENT WEBSITES, IS
19 THAT CORRECT?

20 A. NO. THE OPINIONS THAT I HAVE RENDERED HAVE BEEN
21 WITH RESPECT TO BUSINESSES IN GENERAL. I HAVE BEEN
22 ASKED MANY QUESTIONS ABOUT THAT. I HAVE ALSO BEEN ASKED
23 ABOUT ADULT ENTERTAINMENT WEBSITES. IF YOU WOULD LIKE
24 TO BE MORE SPECIFIC, I CAN ADDRESS WHAT OPINIONS YOU ARE
25 TALKING ABOUT, BUT I'M NOT GOING TO MAKE A BROAD

1 GENERALIZATION.

2 Q. SURE. I WANT TO FOCUS YOU AS SPECIFIC AS

3 POSSIBLE.

4 A. SURE.

5 Q. SEXUAL HEALTH NETWORK. DO YOU HAVE AN OPINION
6 PASS TO WHAT COPA'S IMPACT ON SEXUAL HEALTH NETWORK WILL
7 BE? YES OR NO.

8 A. I HAVE NOT SPECIFICALLY REVIEWED THAT WEBSITE.

9 Q. SO YOU DON'T HAVE AN OPINION AS YOU SIT HERE
10 TODAY?

11 A. TO THE DEGREE THAT MY OPINIONS APPLY TO THAT IN
12 A GENERAL BUSINESS SENSE FOR BUSINESS MODELS, THE
13 APPLICABILITY WITH RESPECT TO VIEWING OF ADULT MATERIAL
14 WITH RESPECT TO INVOLVEMENT AND MOTIVATION, THEN MY
15 OPINIONS WOULD APPLY THERE, YES.

16 Q. I'M ASKING YOU AS YOU SIT HERE TODAY, DO YOU
17 HAVE AN OPINION AS TO THE IMPACT OF COPA ON THE
18 PLAINTIFFS' SEXUAL HEALTH NETWORK?

19 A. I BELIEVE THAT I HAVE ANSWERED THAT QUESTION.

20 Q. YOU HAVE NOT, UNFORTUNATELY. DO YOU HAVE AN
21 OPINION?

22 A. I BELIEVE THAT I HAVE ANSWERED THAT QUESTION.

23 Q. I'M GOING TO KEEP ASKING YOU AGAIN. DO YOU HAVE
24 AN OPINION?

25 THE COURT: ANSWER THE QUESTION, SIR. DO

1 YOU HAVE ONE OR DON'T YOU?

2 THE WITNESS: OH, OKAY. WOULD YOU BE

3 MORE SPECIFIC WITH THE QUESTION.

4 BY MR. FINE:

5 Q. I WILL TRY TO MAKE IT AS CLEAR AS POSSIBLE.

6 THE COURT: LET ME JUST HELP HIM. HAVE

7 YOU REVIEWED THE ADULT ENTERTAINMENT -- I MEAN THE

8 SEXUAL HEALTH NETWORK? HAVE YOU REVIEWED ANY OF THE

9 THEIR MATERIALS OR SEEN THEIR WEBSITE?

10 THE WITNESS: I HAVE NOT SEEN THE

11 MATERIALS, YOUR HONOR.

12 THE COURT: OR LOOKED AT THE WEBSITE?

13 THE WITNESS: I BELIEVE THAT I HAVE

14 LOOKED AT THE WEBSITE.

15 THE COURT: HAVE YOU APPLIED THE GENERAL

16 PRINCIPLES THAT YOU SAY MIGHT APPLY TO THIS WEBSITE?

17 HAVE YOU PERSONALLY DONE THE ANALYSIS TO DO THE

18 APPLICATION OF YOUR GENERAL STANDARDS TO THE SEXUAL

19 HEALTH NETWORK?

20 THE WITNESS: YES, I HAVE.

21 THE COURT: YOU HAVE DONE THAT WORK?

22 THE WITNESS: YES, I BELIEVE THAT THE

23 OPINIONS THAT I HAVE RENDERED WOULD APPLY TO THAT

24 WEBSITE.

25 THE COURT: I'M ASKING, BEFORE THIS VERY

1 MINUTE IN THIS COURTROOM, HAVE YOU EVER APPLIED THOSE
2 PRINCIPLES TO THE SEXUAL HEALTH NETWORK?

3 THE WITNESS: YES.

4 BY MR. FINE:

5 Q. SO YOUR TESTIMONY NOW IS THAT YOU HAVE FORMED AN
6 OPINION AS TO THE IMPACT OF COPA ON THE SEXUAL HEALTH
7 NETWORK?

8 A. YES.

9 Q. WE CAN NOW PULL UP PLAINTIFFS' EXHIBIT 400, THE
10 DEPOSITION OF SCOTT SMITH RENDERED ON AUGUST 2ND, 2006,
11 IF WE CAN PULL UP PAGE 215, LINES 15 THROUGH 17.

12 THE COURT: WHAT PAGE?

13 MR. FINE: PAGE 215, LINES 15 THROUGH 17.

14 QUESTION: YES OR NO, HAVE YOU FORMED AN
15 OPINION AS TO THE IMPACT OF COPA ON SEXUAL HEALTH
16 NETWORK?

17 ANSWER: I HAVE NOT.

18 BY MR. FINE:

19 Q. THAT WAS YOUR TESTIMONY AT YOUR DEPOSITION,
20 CORRECT?

21 A. THAT IS CORRECT.

22 Q. YOU ALSO HAVE NOT FORMED AN OPINION ABOUT THE
23 SPECIFIC IMPACT OF COPA ON ANY OF THE OTHER PLAINTIFFS,
24 HAVE YOU?

25 A. I HAVE SINCE MY DEPOSITION REVIEWED THE WEBSITES

1 SUCH AS SEXUAL HEALTH NETWORK, AND MY OPINION IS, YES, I
2 HAVE FORMED AN OPINION.

3 Q. SO YOU DIDN'T HAVE AN OPINION AT YOUR DEPOSITION
4 ABOUT THE IMPACT OF COPA ON ANY OF THE PLAINTIFFS?

5 A. THAT IS TRUE.

6 Q. AND WHEN YOU WROTE YOUR EXPERT REPORT, YOU
7 DIDN'T HAVE AN OPINION ABOUT THE IMPACT OF COPA ON ANY
8 OF THE PLAINTIFFS?

9 A. I THINK THAT MY UNDERSTANDING OF YOUR
10 QUESTIONING IN THE DEPOSITION WAS RELATED TO VERY
11 SPECIFIC THINGS THAT WERE IN TERMS OF LEGAL ISSUES AND
12 SO FORTH AND THAT I'M NOT SURE I FULLY UNDERSTOOD WHAT
13 YOU WERE ASKING HERE.

14 Q. I WANT TO MAKE SURE I FULLY UNDERSTAND WHAT YOU
15 ARE SAYING HERE TODAY.

16 A. I'M TRYING TO UNDERSTAND, TOO. I'M SORRY.

17 Q. ARE YOU SAYING THAT YOU HAVE FORMED AN OPINION
18 AS TO THE IMPACT OF COPA ON THE PLAINTIFFS?

19 A. YES, I BELIEVE THAT THOSE ARE STATED IN MY
20 REPORT.

21 Q. SPECIFICALLY WITH RESPECT --

22 THE COURT: YOU BETTER USE THE TERM ALL
23 PLAINTIFFS BECAUSE I DON'T KNOW WHETHER HE UNDERSTANDS.

24 BY MR. FINE:

25 Q. PROFESSOR SMITH --

1 THE COURT: IF THAT IS APPROPRIATE.

2 BY MR. FINE:

3 Q. ARE YOU SAYING THAT YOU FORMED AN OPINION AS TO
4 ALL OF THE -- THE IMPACT OF COPA ON ALL OF THE
5 PLAINTIFFS IN THIS LITIGATION?

6 A. TO THE DEGREE THAT THEY ARE REPRESENTED BY THE
7 ADULT ENTERTAINMENT INDUSTRY, YES.

8 Q. AND JUST TRYING TO -- I DON'T KNOW IF THEY ARE
9 ALL REPRESENTED BY WHAT YOU ARE CALLING THE ADULT
10 INDUSTRY. YOU OBVIOUSLY DON'T. SO I'M ASKING YOU, DO
11 YOU HAVE AN OPINION AS TO THE IMPACT OF COPA ON ALL THE
12 PLAINTIFFS IN THIS LAWSUIT?

13 A. NO, I DO NOT.

14 Q. YOU DON'T HAVE AN OPINION ABOUT THE IMPACT OF
15 COPA ON ANY OF THE SPECIFIC PLAINTIFFS?

16 A. I THINK MUCH OF THAT IS A LEGAL ISSUE. I MEAN,
17 THERE ARE MANY LEGAL ISSUES DEFINING EVERYTHING FROM
18 WHAT IS, YOU KNOW, WHAT IS PORNOGRAPHY AND THINGS THAT
19 ARE OUTSIDE MY SCOPE OF EXPERTISE.

20 Q. THAT IS NOT MY QUESTION. MY QUESTION TO YOU IS,
21 YOU DON'T HAVE AN OPINION AS TO THE IMPACT OF COPA ON
22 ANY OF THE PLAINTIFFS, DO YOU?

23 A. YES, I DO.

24 Q. WHICH PLAINTIFF?

25 A. I THINK I JUST SAID THAT A MINUTE AGO.

1 THOSE -- YOU ARE ASKING ME FOR

2 SPECIFIC --

3 Q. YES, PLEASE TELL ME.

4 A. -- SPECIFIC WEBSITES.

5 Q. WHICH PLAINTIFF HAVE YOU FORMED AN OPINION AS TO
6 THE IMPACT OF COPA ON?

7 A. MY -- LET ME, OKAY.

8 THE WITNESS: YOUR HONOR, I DON'T
9 UNDERSTAND THE NATURE OF THIS QUESTION.

10 THE COURT: IT'S A SIMPLE QUESTION.

11 THE WITNESS: HAVE I FORMED AN OPINION.
12 I DON'T KNOW IF THIS IS A PERSONAL OPINION, A LEGAL
13 OPINION.

14 THE COURT: PROFESSIONAL OPINION, IN YOUR
15 PROFESSIONAL CAPACITY.

16 THE WITNESS: MY PROFESSIONAL CAPACITY IS
17 AN OPINION AS TO WHETHER IT IS APPLICABLE?

18 THE COURT: ASK COUNSEL.

19 THE WITNESS: IS THIS AS TO WHETHER IT IS
20 APPLICABLE OR TO WHETHER MY FINDINGS APPLY TO THAT
21 WEBSITE?

22 THE COURT: LANGUAGE OF THE QUESTION WAS
23 SIMPLE.

24 MR. FINE: I WILL REPEAT IT AGAIN.

25 BY MR. FINE:

1 Q. MY QUESTION TO YOU IS, DO YOU HAVE AN OPINION AS
2 TO THE IMPACT OF COPA ON ANY OF THE SPECIFIC PLAINTIFFS
3 IN THIS LAWSUIT?

4 A. YES.

5 Q. WHICH PLAINTIFF?

6 A. TO THE DEGREE THAT MY FINDINGS ARE APPLICABLE,
7 IT WOULD APPLY TO ALL OF THE PLAINTIFFS' WEBSITES.

8 Q. I'M ASKING YOU -- I UNDERSTAND THAT. WHAT I'M
9 ASKING YOU IS, HAVE YOU FORMED AN OPINION AS TO THE
10 IMPACT OF COPA ON ANY OF THE SPECIFIC PLAINTIFFS? IT'S
11 A YES OR NO QUESTION.

12 A. THE ANSWER IS YES.

13 Q. AND WHICH PLAINTIFFS HAVE YOU FORMED AN OPINION
14 AS TO THE IMPACT OF COPA?

15 A. I HAVE REVIEWED SEVERAL OF THE WEBSITES AND --
16 SPECIFICALLY NERVE AND SALON.COM, AND THE SEXUAL HEALTH
17 NETWORK, AND I BELIEVE THAT -- PERSONALLY THAT COPA
18 WOULD NOT HAVE A SIGNIFICANT EFFECT ON THOSE WEBSITES.

19 Q. THAT IS YOUR PROFESSIONAL OPINION NOW?

20 A. MY PROFESSIONAL OPINION.

21 Q. AND SO YOU ARE NOW SAYING THAT YOU HAVE A
22 PROFESSIONAL OPINION AS TO THE IMPACT OF COPA ON
23 NERVE.COM AND THE SEXUAL HEALTH NETWORK?

24 A. YES.

25 Q. WE CAN PULL UP THE WITNESS' DEPOSITION, SAME

1 PAGE, PAGE 215, LINE 21, CONTINUES ON TO PAGE 216, LINE
2 11.

3 QUESTION: HAVE YOU FORMED AN OPINION AS
4 TO THE IMPACT OF COPA ON ANY OF THE PLAINTIFF WEBSITES?

5 ANSWER: SOME OF THEM I HAVE LOOKED AT,
6 YES.

7 QUESTION: HAVE YOU FORMED AN OPINION AS
8 TO THE IMPACT OF COPA ON ANY OF THE PLAINTIFFS'
9 WEBSITES?

10 ANSWER: YES.

11 QUESTION: WHICH ONES?

12 THERE IS AN OBJECTION.

13 THE WITNESS: WOULD YOU REPEAT THE
14 QUESTION?

15 QUESTION: SURE. I'M ASKING YOU WHICH
16 PLAINTIFF WEBSITES HAVE YOU FORMED AN OPINION AS TO THE
17 IMPACT OF COPA?

18 ANSWER: SALON.COM.

19 QUESTION: ANY OTHERS?

20 ANSWER: THAT WOULD BE THE ONE, I
21 BELIEVE.

22 THAT WAS YOUR TESTIMONY AT THE
23 DEPOSITION, CORRECT?

24 A. YES. UH-HUH.

25 Q. I JUST WANT TO BE CLEAR ABOUT WHAT YOUR OPINION

1 IS WITH RESPECT TO THE IMPACT OF COPA ON COMMERCIAL
2 WEBSITES. NOW I'M FOCUSING ON ALL COMMERCIAL WEBSITES.
3 YOU ARE NOT SAYING THAT COPA WILL HAVE NO IMPACT ON
4 COMMERCIAL WEBSITES, ARE YOU?

5 A. NO.

6 Q. YOU ARE SIMPLY SAYING THAT THE IMPACT WILL BE
7 SMALL.

8 A. THE IMPACT WILL BE SMALL. IT WILL NOT BE
9 SIGNIFICANT.

10 Q. AND THE FINANCIAL COST WILL BE SMALL?

11 A. YES.

12 Q. YOUR OPINION THAT COMMERCIAL WEBSITES WILL NOT
13 BE SIGNIFICANTLY HARMED BY COPA IS BASED ON YOUR
14 ASSUMPTION THAT COPA WON'T REQUIRE ANY WEBSITES TO PLACE
15 AN AGE VERIFICATION SCREEN ON THE HOME PAGE OF THE
16 WEBSITE, CORRECT?

17 A. IT'S BASED ON MORE THAN THAT.

18 Q. IS IT BASED ON YOUR ASSUMPTION THAT WEBSITES
19 WILL NOT HAVE TO PLACE AN AGE VERIFICATION SCREEN ON
20 THEIR HOME PAGE?

21 A. YES, IN PART.

22 Q. AND THERE ARE OTHER REASONS IN ADDITION?

23 A. YES.

24 Q. BUT THAT IS ONE OF THE ASSUMPTIONS OF YOUR
25 OPINION?

1 A. THAT IS ONE OF THE -- THAT IS ONE OF THE FACTORS
2 THAT WOULD INFLUENCE.

3 Q. AND IF A SITE DID HAVE TO PLACE A VERIFICATION
4 SCREEN ON THE HOME PAGE, THAT WOULD CHANGE YOUR OPINION
5 ABOUT THE IMPACT OF COPA ON WEBSITES, CORRECT?

6 A. IT WOULD CHANGE MY OPINION AS TO THE AMOUNT OF
7 IMPACT OF COPA.

8 Q. AND IF A WEBSITE DID HAVE TO PLACE THE
9 VERIFICATION SCREEN ON THE HOME PAGE, THE IMPACT ON THAT
10 WEBSITE WOULD BE SIGNIFICANT, WOULDN'T IT?

11 A. I DON'T KNOW THAT IT WOULD BE SIGNIFICANT.

12 Q. BE MUCH GREATER THAN YOU ARE TESTIFYING THE
13 IMPACT IS TODAY?

14 A. IT IS CONCEIVABLE THAT IT COULD EVEN BENEFIT THE
15 WEBSITE AND GENERATE MORE REVENUE.

16 Q. OKAY. AND SO -- JUST SO I UNDERSTAND YOUR
17 TESTIMONY HERE, WOULD THERE BE A DECREASE IN TRAFFIC TO
18 A WEBSITE IF A WEBSITE HAD TO PLACE AN AGE VERIFICATION
19 SCREEN ON THE HOME PAGE?

20 A. NOT NECESSARILY. IT MAY INCREASE TRAFFIC.

21 Q. SO YOU ARE SAYING PLACING A VERIFICATION SCREEN
22 ON THE HOME PAGE WOULD INCREASE TRAFFIC?

23 A. I'M SAYING IT COULD. IT COULD DECREASE IT. IT
24 COULD GO EITHER WAY.

25 Q. YOU DON'T KNOW ONE WAY OR THE OTHER?

1 A. WELL, IT DEPENDS ON THE IMPLEMENTATION.

2 Q. BUT LET ME ASK YOU FOCUSING ON THE PLAINTIFFS'
3 WEBSITES, YOU DON'T KNOW ONE WAY OR THE OTHER WHAT THE
4 IMPACT ON THE PLAINTIFFS' WEBSITES WOULD BE IF THEY HAD
5 TO PLACE A VERIFICATION SCREEN ON THE HOME PAGE?

6 A. AGAIN, IT DEPENDS ON HOW THEY CHOSE TO
7 IMPLEMENT.

8 Q. DO YOU HAVE AN OPINION TODAY?

9 A. THE ANSWER IS, YES, I DO. IT DEPENDS ON HOW
10 THEY CHOSE TO IMPLEMENT AS TO WHETHER IT INCREASED IT OR
11 DECREASED IT. IT WOULD HAVE AN EFFECT.

12 Q. IT WOULD BE REALLY BAD BUSINESS PRACTICES TO
13 PLACE AN AGE VERIFICATION SCREEN ON THE HOME PAGE,
14 WOULDN'T IT?

15 A. NOT NECESSARILY. IF IT INCREASED BUSINESS, IT
16 WOULD NOT BE.

17 THE COURT: MR. FINE, WE ARE GOING TO
18 TAKE AN HOUR MIDDAY RECESS. COUNSEL ARE EXCUSED. WE
19 ARE OFF THE RECORD. RETURN AT 1:30, PLEASE. DR. SMITH,
20 COME BACK AND JOIN US.

21 (LUNCH BREAK TAKEN.)

22 AFTERNOON SESSION

23 THE CLERK: ALL RISE. COURT IS NOW IN
24 SESSION.

25 THE COURT: WELCOME BACK, EVERYONE. NICE

1 TO SEE YOUR SMILING FACES.

2 YOU MAY PROCEED.

3 BY MR. FINE:

4 Q. PROFESSOR SMITH, INTERNET USERS ARE CONCERNED
5 ABOUT SECURITY ON THE INTERNET, RIGHT?

6 A. CORRECT.

7 Q. AND IDENTITY THEFT OCCURS ON THE INTERNET,
8 CORRECT?

9 A. YES, TO SOME DEGREE.

10 Q. AND FRAUD OCCURS ON THE INTERNET, RIGHT?

11 A. TO SOME DEGREE, YES.

12 Q. AND MANY INTERNET USERS ARE AFRAID OF FRAUD ON
13 THE INTERNET, CORRECT?

14 MR. BEANE: OBJECTION, YOUR HONOR. THIS
15 LINE OF QUESTIONING ADDRESSES ISSUES THAT WERE RAISED IN
16 MR. SMITH'S REBUTTAL REPORT, WHICH WAS NOT OFFERED AS AN
17 EXHIBIT BY DEFENDANT OR AS PLAINTIFFS. THIS REPORT WAS
18 IN RESPONSE TO PROFESSOR DONNA HOFFMAN WHO PREVIOUSLY
19 WAS INVOLVED IN THIS LITIGATION. AS YOU WILL RECALL,
20 SHE IS NOT GOING TO BE TESTIFYING AS A WITNESS. YOU
21 RULED THAT HER TESTIMONY FROM THE PRELIMINARY INJUNCTION
22 WAS NOT ADMISSIBLE IN THIS COURT. BY ASKING QUESTIONS
23 THAT ARE INCLUDED IN HIS REBUTTAL REPORT AND THAT TO BE
24 FAIR WERE ALSO ADDRESSED TO SOME EXTENT DURING HIS
25 DEPOSITION BEFORE MISS HOFFMAN WAS NO LONGER PART OF

1 THIS LITIGATION, THIS LINE OF QUESTIONING GETS INTO
2 ISSUES THAT INDIRECTLY BRINGS IN THE ISSUES THAT MISS
3 HOFFMAN RAISED. IF THEY WANTED THIS EVIDENCE IN THE
4 RECORD, THEY SHOULD HAVE BROUGHT IT IN THROUGH OTHER
5 TESTIMONY.

6 MR. FINE: YOUR HONOR, THIS GOES DIRECTLY
7 TO THE WITNESS' STATED OPINION THAT USERS WILL NOT BE
8 IMPACTED BY COPA, AND WE NEED TO CROSS EXAMINE THE
9 WITNESS.

10 MR. BEANE: FAIR IS FAIR, YOUR HONOR.

11 THE COURT: THE QUESTIONING DURING CROSS
12 EXAMINATION IS QUITE APPROPRIATE TO TEST HIS
13 CREDIBILITY, THE WEIGHT OF THE EVIDENCE, HIS FAR FLUNG
14 OPINIONS WITH HIS EXPERIENCE IS SO VAST THAT IT'S
15 CERTAINLY WITHIN THE REALM OF LIKELIHOOD THAT THESE
16 QUESTIONS CAN BE ASKED AND THE OBJECTION IS OVERRULED.

17 BY MR. FINE:

18 Q. PROFESSOR SMITH, MANY INTERNET USERS ARE AFRAID
19 OF FRAUD ON THE INTERNET, CORRECT?

20 A. SOME INTERNET USERS ARE AFRAID OF FRAUD, YES.

21 Q. MANY INTERNET USERS ARE ALSO AFRAID OF IDENTITY
22 THEFT ON THE INTERNET.

23 A. SOME INTERNET USERS ARE AFRAID OF IDENTITY
24 THEFT, CORRECT.

25 Q. IN FACT, INTERNET USERS ARE INCREASINGLY

1 CONCERNED ABOUT SECURITY ON THE INTERNET, AREN'T THEY?

2 A. IT DEPENDS ON WHAT STUDY YOU LOOK AT. SOME

3 STUDIES INDICATE THE CONCERN IS DECREASING.

4 Q. IN YOUR OPINION HERE, IT'S YOUR OPINION THAT

5 INTERNET USERS ARE INCREASINGLY CONCERNED ABOUT SECURITY

6 ON THE INTERNET, ISN'T IT?

7 A. MY OPINION IS THAT USING THE MOST CURRENT DATA

8 THAT I HAVE AVAILABLE INFORMATION, THAT ACTUALLY

9 INTERNET CONCERN IS DECREASING.

10 Q. SO IT'S YOUR TESTIMONY HERE TODAY --

11 A. THAT IS MY TESTIMONY HERE TODAY.

12 Q. -- THAT INTERNET USERS ARE NOT INCREASINGLY

13 CONCERNED ABOUT SECURITY ON THE INTERNET?

14 A. THE MOST RECENT INFORMATION THAT HAS BEEN

15 PUBLISHED OUT THERE INDICATES THAT THE CONCERN IS

16 DECREASING. THIS IS 2006 DATA.

17 Q. YOU DID NOT CITE THAT MOST RECENT DATA IN YOUR

18 EXPERT REPORT, DID YOU?

19 A. NO. THIS IS POST REPORT. THIS IS CURRENT,

20 CURRENT.

21 Q. I WANT TO TURN YOU TO PAGE 75 OF YOUR

22 DEPOSITION, IF YOU CAN CALL THAT UP, LINES 5 THROUGH 11.

23 QUESTION: DO YOU HAVE AN OPINION AS TO

24 WHETHER INTERNET USERS ARE INCREASINGLY CONCERNED ABOUT

25 SECURITY ON THE INTERNET?

1 ANSWER: I BELIEVE THAT INTERNET USERS
2 ARE CONCERNED, INCREASINGLY CONCERNED, ABOUT SECURITY.
3 NOW, WHETHER THAT'S FOUNDED IS A DIFFERENT ISSUE, YES.
4 THERE'S A LOT OF PRESS THAT IS OUT THERE AND IS BRINGING
5 THAT TOPIC TO PEOPLE'S ATTENTION. AND BY THE WAY I
6 MIGHT NOTE THAT MUCH OF THAT PRESS IS COMING FROM
7 COMPANIES THAT SELL INTERNET SECURITY ITEMS, MARKETING.

8 THAT WAS YOUR TESTIMONY AT YOUR
9 DEPOSITION, RIGHT?

10 A. THAT IS TRUE.

11 Q. YOU MENTIONED THAT THERE ARE NUMEROUS STUDIES
12 OUT THERE. NUMEROUS STUDIES SHOW THAT INTERNET USERS
13 ARE INCREASINGLY CONCERNED ABOUT IDENTITY THEFT AND
14 FRAUD ON THE INTERNET, CORRECT?

15 A. THAT IS TRUE.

16 Q. I WANT TO KNOW --

17 A. OLDER STUDIES.

18 Q. SORRY.

19 A. OLDER STUDIES SHOW THAT.

20 Q. SURE. I WANT TO NOW HAVE YOU TURN TO
21 PLAINTIFF'S EXHIBIT 402 WHICH IS IN THE BINDER IN FRONT
22 OF YOU.

23 A. YES.

24 Q. THAT IS A REPORT ISSUED FOR THE CONSUMER REPORTS
25 WEB WATCH, CORRECT?

1 A. CORRECT.

2 Q. IT WAS CONDUCTED BY THE PRINCETON SURVEY

3 RESEARCH ASSOCIATES INTERNATIONAL?

4 A. THAT IS A QUESTION?

5 Q. YES.

6 A. YES.

7 Q. THIS SURVEY WAS RELEASED ON OCTOBER 26, 2005, IS

8 THAT RIGHT?

9 A. YES.

10 Q. AND PRINCETON SURVEY RESEARCH ASSOCIATES

11 INTERNATIONAL, THAT IS A RELIABLE SOURCE OF INFORMATION?

12 A. THEY ARE A RELIABLE SOURCE OF INFORMATION.

13 Q. AND I WANT TO NOW FOCUS YOUR ATTENTION ON PAGE 3

14 OF THIS DOCUMENT, PLAINTIFFS' EXHIBIT 402, PAGE 3. AND

15 IN THE BOTTOM RIGHT CORNER, THERE IS A BOX WITH THE

16 HEADING, KEY FINDINGS. DO YOU SEE THAT?

17 A. YES.

18 Q. THE FIRST BULLET POINT, CAN YOU READ THAT FOR

19 ME?

20 A. NINE OUT OF 10 U.S. INTERNET USERS OVER 18 HAVE

21 MADE CHANGES TO THEIR BEHAVIOR DUE TO FEAR OF IDENTITY

22 THEFT.

23 Q. PLEASE READ THE SECOND BULLET POINT FOR ME.

24 A. OF THOSE CHANGES, 30 PERCENT SAY THEY HAVE

25 REDUCED THEIR OVERALL USE OF THE INTERNET.

1 Q. SO THIS STUDY FOUND THAT BECAUSE OF FEAR OF
2 IDENTITY THEFT, 30 PERCENT OF THE PEOPLE SURVEYED SAID
3 THEY REDUCED THEIR OVERALL USE OF THE INTERNET, RIGHT?
4 A. YES.
5 Q. THIRD BULLET POINT. WHAT DOES IT SAY?
6 A. 25 PERCENT SAY THEY STOPPED BUYING THINGS
7 ONLINE.
8 Q. THAT IS AGAIN BECAUSE OF THEIR FEAR OF IDENTITY
9 THEFT ON THE INTERNET?
10 A. WHETHER IT WAS BECAUSE OF THEIR FEAR OF IDENTITY
11 THEFT OR NOT, I DON'T KNOW. IT DOES NOT SAY THAT.
12 Q. THE FOURTH BULLET POINT, WHAT DOES THAT SAY?
13 A. AMONG THOSE --
14 Q. WHAT DID THIS SURVEY FIND?
15 A. AMONG THOSE WHO SHOP ONLINE, 29 PERCENT SAY THEY
16 HAVE CUT BACK ON HOW OFTEN THEY BUY THINGS.
17 Q. I NEED YOU TO TURN THE PAGE, TO PAGE 4. THE
18 FIRST FULL PARAGRAPH, THE FIRST BULLET POINT, WHAT DOES
19 THAT BULLET -- WHAT DID THIS STUDY FIND?
20 A. PARDON ME WHILE I READ THE UPPER PART THERE.
21 Q. LET ME ASK YOU A BETTER QUESTION.
22 A. NO. LET ME READ, PLEASE.
23 Q. SURE.
24 A. WOULD YOU LIKE ME TO READ THAT?
25 Q. NO. LET ME ASK YOU THIS QUESTION. FOCUSING ON

1 THE FIRST BULLET POINT, THIS STUDY FOUND THAT 88 PERCENT
2 OF THE PEOPLE SURVEYED SAY THAT KEEPING PERSONAL
3 INFORMATION SAFE AND SECURE IS VERY IMPORTANT FOR A
4 WEBSITE THEY VISIT, CORRECT?

5 A. THAT IS CORRECT.

6 Q. IF YOU LOOK DOWN IN THE SAME PAGE, THE SECTION
7 UNDER IDENTITY THEFT. THE FIRST SENTENCE SAYS: FOR ALL
8 ONLINE USERS CONCERNED ABOUT --

9 A. I'M SORRY. THAT IS NOT ON --

10 Q. I'M SORRY. DO YOU SEE THE SECTION ON IDENTITY
11 THEFT?

12 A. YES.

13 Q. FIRST SENTENCE: FOR ALL ONLINE USERS, CONCERN
14 ABOUT IDENTITY THEFT IS SUBSTANTIAL AND A WORRY THAT HAS
15 CHANGED THEIR BEHAVIOR IN SWEEPING WAYS. THAT IS WHAT
16 THIS STUDY FOUND, CORRECT?

17 A. CORRECT.

18 Q. THE SECOND SENTENCE: FOUR IN FIVE INTERNET
19 USERS, 80 PERCENT, ARE AT LEAST SOMEWHAT CONCERNED THAT
20 SOMEONE COULD STEAL THEIR IDENTITY FROM PERSONAL
21 INFORMATION THAT IS ON THE INTERNET. THAT IS WHAT THIS
22 STUDY FOUND, CORRECT?

23 A. THAT IS CORRECT.

24 Q. THE NEXT SENTENCE, 45 PERCENT SAY THEY WORRY A
25 LOT AND 35 PERCENT SAY THEY WORRY SOME. THAT IS WHAT

1 THIS STUDY FOUND, CORRECT?

2 A. CORRECT.

3 Q. THE NEXT SENTENCE: THESE HIGH LEVELS OF CONCERN
4 HAVE DRIVEN INTERNET USERS TO CHANGE THEIR BEHAVIOR
5 ONLINE TO TRY TO PROTECT THEMSELVES AND THEIR MONEY.
6 CORRECT?

7 A. THAT'S CORRECT.

8 Q. THEN THE THIRD SENTENCE BEGINS: THESE CHARGES
9 INCLUDE: AND THEN FOCUSING ON THE FIRST BULLET POINT.
10 THIS STUDY FOUND THAT A MAJORITY OF INTERNET USERS, 53
11 PERCENT --

12 A. I'M SORRY. WE DON'T HAVE THAT HERE.

13 Q. IF YOU LOOK AT THE FIRST BULLET POINT.

14 A. I DON'T HAVE THAT YET.

15 Q. SORRY. I THINK IT IS THERE. IF YOU CAN BLOW IT
16 UP MAYBE. THE BOTTOM BULLET POINT UNDER IDENTITY THEFT.
17 IT CONTINUES ON TO THE NEXT COLUMN.

18 DO YOU SEE THE FIRST BULLET POINT NOW?

19 A. NO. THAT IS WHAT I SEE.

20 Q. THE BULLET POINT BEGINS: A MAJORITY OF THE
21 INTERNET USERS, 53 PERCENT, SAY THEY HAVE -- THEN IT
22 CONTINUES -- STOPPED GIVING OUT PERSONAL INFORMATION ON
23 THE INTERNET. DO YOU SEE THAT?

24 A. YES.

25 MR. BEANE: OBJECTION, YOUR HONOR,

1 COUNSEL IS READING HEARSAY INTO THE RECORD. IT'S ONE
2 THING TO HAVE HIM READ A DOCUMENT AND ASK HIM HIS
3 OPINION ON THE BASIS OF THAT. BUT TO GO THROUGH AND
4 HAVE HIM READING PAGE-BY-PAGE, BULLET POINT-BY-BULLET
5 POINT, IS ALLOWING HEARSAY EVIDENCE INTO THE RECORD.

6 MR. FINE: YOUR HONOR, THE WITNESS HAS
7 ALREADY TESTIFIED THAT THIS IS A RELIABLE SOURCE OF
8 INFORMATION FROM INDUSTRY PUBLICATION -- FROM A
9 PUBLICATION THAT IS WIDELY USED IN THE INDUSTRY. IT'S A
10 HEARSAY EXCEPTION UNDER THE LEARNED TREATISE RULE.

11 THE COURT: NATURE OF A LEARNED TREATISE,
12 OBJECTION OVERRULED.

13 BY MR. FINE:

14 Q. SO PROFESSOR SMITH, THIS STUDY FOUND THAT A
15 MAJORITY OF INTERNET USERS, 53 PERCENT, SAY THEY HAVE
16 STOPPED GIVING OUT PERSONAL INFORMATION ON THE INTERNET,
17 CORRECT?

18 A. CORRECT.

19 Q. IN YOUR REBUTTAL REPORT, YOU CITE A REPORT BY A
20 COMPANY CALLED JAVELIN ON IDENTITY FRAUD, CORRECT?

21 A. CORRECT.

22 Q. AND THAT STUDY IS FROM 2005, IS THAT RIGHT?

23 A. YES.

24 Q. AND JAVELIN IS A RELIABLE SOURCE OF INFORMATION,
25 CORRECT?

1 A. IT IS.

2 Q. AND THE JAVELIN STUDY THAT YOU CITED ALSO FOUND
3 THAT THERE ARE GROWING FEARS ABOUT IDENTITY THEFT ON THE
4 INTERNET, DIDN'T IT?

5 A. THAT'S CORRECT.

6 Q. FORRESTER RESEARCH IS WIDELY USED IN THE
7 INDUSTRY, CORRECT?

8 A. THAT IS CORRECT.

9 Q. IT'S A RELIABLE SOURCE OF INFORMATION?

10 A. IT IS.

11 Q. I WILL NOW SHOW YOU WHAT HAS BEEN MARKED AS
12 PLAINTIFFS' EXHIBIT 411, NUMBER 411. IT SHOULD BE AT
13 THE BACK OF YOUR BINDER.

14 WHAT'S THE TITLE OF THIS REPORT? FIRST
15 OF ALL, LET ME ASK YOU, DOES THIS INDICATE THAT THE DATE
16 OF THIS REPORT IS APRIL 10TH, 2006?

17 A. I BELIEVE IT DOES. IT'S VERY SMALL.

18 Q. SO THE ANSWER IS YES, IT IS APRIL 10?

19 A. WOULD YOU LIKE TO BLOW IT UP? YES, I CAN SEE
20 THAT.

21 Q. AND WHAT IS THE TITLE OF THIS REPORT?

22 A. ONLINE RETAILERS FACE A TOUGH ROAD AHEAD, WANING
23 CUSTOMER SATISFACTION FORCES RETAILERS TO FORM LOYALTY
24 AND TRUST.

25 Q. AND IF YOU CAN READ THE SECOND SENTENCE UNDER

1 THE HEADING EXECUTIVE SUMMARY, WHAT DID THIS STUDY FIND?

2 A. THE SECOND SENTENCE?

3 Q. YES.

4 A. OVERALL SATISFACTION WITH E-COMMERCE SHOPPING
5 EXPERIENCES AND CREDIT CARD SECURITY TRUST IS DECLINING.
6 CUSTOMERS STILL SHOP ONLINE MOSTLY TO GET LOW PRICES AND
7 THE MAJORITY OF CUSTOMERS PREFER TO SHOP IN STORES.

8 Q. THAT IS FINE. IF YOU CAN NOW TURN TO PAGE 3 OF
9 THIS REPORT. I WANT TO FOCUS YOU ON THE SECTION UNDER
10 THE CAPTION: SHOPPERS DON'T TRUST ONLINE RETAILERS AND
11 THEY PREFER TO SHOP OFF-LINE. DO YOU SEE THAT?

12 A. YES.

13 Q. THE FIRST BULLET POINT, WHAT IS THE CAPTION IN
14 THE FIRST BULLET POINT?

15 A. I DON'T SEE BULLET POINTS HERE.

16 Q. IF IT'S EASIER FOR YOU, THERE IS A HARD COPY IN
17 THE BINDER --

18 A. OKAY.

19 Q. -- IN FRONT OF YOU.

20 A. IF WE CAN LOOK AT IT ON THE SCREEN SO EVERYONE
21 CAN SEE THAT. NOW, THE FIRST BULLET POINT SAYS, CREDIT
22 CARD SECURITY CONCERNS HAVE INTENSIFIED.

23 Q. AND THE NEXT SENTENCE, THAT INDICATES THAT
24 FORRESTER RESEARCH STUDY CONCLUDED THAT WHETHER FOUNDED
25 ON REALITY OR NOT, ALL ONLINE SHOPPERS, EVEN EXPERIENCED

1 BUYERS, WORRY ABOUT CREDIT CARD SECURITY, CORRECT?

2 A. IS THIS 2003 DATA?

3 Q. WHAT IS THE DATE OF THIS REPORT, PROFESSOR
4 SMITH?

5 A. WELL, THE DATE OF PUBLICATION MAY HAVE NOTHING
6 TO DO WITH THE DATA THAT THEY ARE CITING BECAUSE THEY
7 ARE CITING AT THE END OF 2004 AS PART OF THIS PARAGRAPH.

8 Q. SO WHAT IS THE -- SO THE RECORD IS CLEAR, WHAT
9 IS THE DATE OF THE PUBLICATION OF THIS REPORT?

10 A. IT'S APRIL 10, 2006.

11 Q. OKAY.

12 AND SO MY QUESTION TO YOU, I'M NOT SURE
13 WHAT THE QUESTION WAS, BUT THIS STUDY FOUND THAT WHETHER
14 FOUNDED ON REALITY OR NOT, ALL ONLINE SHOPPERS, EVEN
15 EXPERIENCED BUYERS, WORRY ABOUT CREDIT CARD SECURITY,
16 CORRECT?

17 A. I'M SORRY, BUT I WOULD HAVE TO READ THIS TO MAKE
18 THAT SORT OF A STATEMENT. THIS PARAGRAPH SAYS THAT ONLY
19 31 PERCENT OF CONSUMERS WHO HAVE BEEN SHOPPING ONLINE
20 FOR LESS THAN TWO YEARS AGREE THAT THEIR CREDIT CARD
21 INFORMATION -- YES, OKAY, PLEASE REPEAT YOUR QUESTION.
22 I'M SORRY.

23 Q. SURE.

24 THIS APRIL 10, 2006 STUDY FOUND
25 THAT "WHETHER FOUNDED ON REALITY OR NOT, ALL ONLINE

1 SHOPPERS, EVEN EXPERIENCED BUYERS, WORRY ABOUT CREDIT
2 CARD SECURITY," CORRECT?

3 A. THAT IS NOT TRUE.

4 Q. THAT IS NOT WHAT THIS STUDY REPORTED?

5 A. YOUR STATEMENT DOES NOT REPRESENT THE STUDY.

6 Q. AND WHY DON'T YOU READ THE FIRST SENTENCE FOR US
7 THEN? WHAT THIS STUDY SAYS IN THE FIRST SENTENCE.

8 A. THIS SAYS: WHETHER FOUNDED ON REALITY OR NOT,
9 ALL CREDIT CARD SHOPPERS --

10 THE COURT: ALL ONLINE SHOPPERS.

11 THE WITNESS: EXCUSE ME, ALL ONLINE
12 SHOPPERS, EVEN EXPERIENCED BUYERS, WORRY ABOUT CREDIT
13 CARD SECURITY.

14 Q. AND THEN FOCUSING ON THE NEXT SENTENCE: THIS
15 STUDY FOUND THAT ONLY 31 PERCENT OF CONSUMERS WHO HAVE
16 BEEN SHOPPING ONLINE FOR LESS THAN TWO YEARS AGREE THAT
17 WHEN SHOPPING ONLINE, THEIR CREDIT CARD INFORMATION IS
18 VERY SECURE. THAT IS WHAT THIS STUDY FOUND, CORRECT?

19 A. UH-HUH. YES.

20 Q. AND THE STUDY, THE NEXT SENTENCE FOUND THAT
21 NUMBER RISES TO 37 PERCENT FOR EXPERIENCED WEB BUYERS
22 BUT, AS A GROUP, THESE BUYERS ARE LESS CONFIDENT THAN
23 THEY WERE LAST YEAR, DO YOU SEE THAT?

24 A. I DO.

25 Q. AND THAT IS WHAT THIS STUDY FOUND?

1 A. YES.

2 Q. THE LAST SENTENCE SHOWS THAT, AT THE END OF
3 2004, 46 PERCENT OF EXPERIENCED WEB BUYERS FELT THE SAME
4 WAY, RIGHT?

5 A. YES.

6 Q. SO THERE WAS 9 PERCENT LESS OF EXPERIENCED WEB
7 BUYERS FELT CONFIDENT THAN THEY DID THE PREVIOUS YEAR'S
8 STUDY, CORRECT?

9 A. CORRECT.

10 Q. PROFESSOR SMITH, IT IS YOUR OPINION -- WE CAN
11 TAKE THIS DOWN. IT IS YOUR OPINION THAT THE RECENT
12 PUBLICITY ABOUT THEFTS OF PERSONAL INFORMATION ON THE
13 INTERNET HAS HEIGHTENED THE INTERNET USERS' CONCERNS,
14 CORRECT?

15 A. YES. PUBLICITY HAS BEEN IN THE AREA OF PHISHING
16 AND VIRUSES AND THOSE TYPES OF THREATS. THE PUBLICITY
17 HAS NOT BEEN ABOUT STEALING OF CREDIT CARD INFORMATION
18 THROUGH ONLINE SECURE TRANSACTIONS. THERE IS A
19 DIFFERENCE THERE.

20 Q. AND I WANT YOU TO FOCUS ON MY SPECIFIC WORDS.

21 A. OKAY.

22 Q. AND ONLY ANSWER MY SPECIFIC QUESTION.

23 IT'S YOUR OPINION THAT THE RECENT
24 PUBLICITY ABOUT THEFTS OF PERSONAL INFORMATION ON THE
25 INTERNET HAS HEIGHTENED INTERNET USERS' CONCERNS,

1 CORRECT?

2 A. CORRECT.

3 Q. YOU DID NOT MENTION ANY OF THIS EVIDENCE SHOWING
4 THAT USERS ARE INCREASINGLY CONCERNED ABOUT SECURITY ON
5 THE INTERNET IN THE EXPERT REPORT THAT WE WENT OVER THIS
6 MORNING, DID YOU?

7 A. I DON'T BELIEVE THAT THAT WAS DISCUSSED THERE,
8 PRIMARILY BECAUSE THAT WAS DEVELOPED IN RESPONSE TO
9 DONNA HOFFMAN'S REPORT.

10 Q. AND SO IN FORMING YOUR OPINION THAT YOU GAVE THE
11 COURT THIS MORNING ABOUT THE IMPACT OF COPA ON INTERNET
12 USERS, YOU DIDN'T CONSIDER ANY OF THIS EVIDENCE ABOUT
13 INTERNET USERS' CONCERNS ABOUT SECURITY ON THE INTERNET,
14 DID YOU?

15 A. OKAY. ONE MORE TIME.

16 Q. IN FORMING YOUR CONCLUSION THAT YOU TESTIFIED TO
17 THIS MORNING, YOU DIDN'T CONSIDER THE IMPACT OF COPA
18 -- YOU DIDN'T CONSIDER INTERNET USERS' CONCERNS ABOUT
19 INCREASING CONCERNS ABOUT SECURITY ON THE INTERNET IN
20 FORMING YOUR OPINION ABOUT THE IMPACT OF COPA, DID YOU?

21 A. MR. FINE, I HAVE BROAD EXPERIENCE. AND THE
22 THINGS WHICH I PUT IN MY REPORT WOULD NECESSARILY
23 REFLECT ALL ASPECTS OF INTERNET BUSINESS AND BUSINESS
24 MODELS AND WOULD INCLUDE CONSUMER BEHAVIOR ISSUES ALSO
25 RELATED TO FEAR.

1 Q. BUT YOU DIDN'T PUT ANY OF THAT INFORMATION INTO
2 YOUR REPORT?

3 A. I DID NOT CITE ANY INFORMATION RELATED TO THAT,
4 NO, I DID NOT. WE DID NOT DISCUSS IT IN THAT REPORT, IF
5 YOU RECALL.

6 Q. AND YOU AGREE THAT IF THERE WERE TWO IDENTICAL
7 WEBSITES, ONE REQUIRED USE OF A CREDIT CARD NUMBER JUST
8 TO LOOK AT THE SITE AND THE OTHER DIDN'T, THAT USERS
9 WOULD GO TO THE ONE THAT DIDN'T REQUIRE THE CREDIT CARD,
10 CORRECT?

11 A. I BELIEVE YOU ASKED ME THAT IN THE DEPOSITION
12 AND I HAD GREAT TROUBLE WITH THAT PARTICULAR QUESTION
13 BECAUSE, IN REALITY, IT'S IMPOSSIBLE TO HAVE TWO
14 WEBSITES THAT ARE IDENTICAL. IT NEVER HAPPENS.

15 Q. ASSUME MY HYPOTHETICAL IS POSSIBLE. IF THERE
16 WERE TWO IDENTICAL WEBSITES, ONE REQUIRED USE OF A
17 CREDIT CARD NUMBER JUST TO LOOK AT THE SITE AND THE
18 OTHER ONE DID NOT, USERS WOULD GO TO THE ONE THAT DID
19 NOT REQUIRE INPUT OF A CREDIT CARD INFORMATION, IS THAT
20 CORRECT?

21 A. I WOULD EXPECT THAT THAT WOULD BE THE CASE, YES.

22 Q. AND THAT IS BECAUSE THE USER CAN GET THE SAME
23 INFORMATION?

24 A. I'M SORRY?

25 Q. THAT IS BECAUSE THE USER CAN GET THE SAME

1 INFORMATION ON THE OTHER SITE, CORRECT?

2 A. THAT'S RIGHT, WITH MINIMAL TIME DELAYS AND SO

3 FORTH, THE THINGS WE TALKED ABOUT IN THE REPORT.

4 Q. AND IF A USER CAN GET INFORMATION AT ANOTHER

5 PLACE, THE USER IS NOT GOING TO PROVIDE CREDIT CARD

6 INFORMATION, CORRECT?

7 A. IF IT IS IDENTICAL INFORMATION, IF IT'S -- IF

8 THE TWO WEBSITES ARE IDENTICAL. THAT IS THE PREMISE

9 THAT YOU ARE OPERATING ON AND ASKING ME TO OPERATE ON.

10 IF THE WEBSITES ARE IDENTICAL THEN THAT IS THE CASE.

11 Q. THE USER OF -- THE CASE BEING THAT THE USER IS

12 NOT GOING TO PROVIDE CREDIT CARD INFORMATION?

13 A. THAT'S RIGHT.

14 Q. EVEN IF A WEBSITE TAKES THE GREATEST SECURITY

15 MEASURES POSSIBLE, THERE ARE STILL GOING TO BE SOME

16 USERS WHO WILL BE DETERRED FROM ACCESSING WEBSITES BY

17 HAVING TO PROVIDE A CREDIT CARD NUMBER, CORRECT?

18 A. THERE WILL BE SOME, YES.

19 Q. AND YOU HAVE --

20 A. A SMALL NUMBER.

21 Q. YOU HAVE NO OPINION AS TO HOW MANY, WHAT PERCENT

22 OF THE INTERNET USERS WILL BE DETERRED FROM ACCESSING

23 WEBSITES BY HAVING TO PROVIDE A CREDIT CARD NUMBER?

24 A. WE UNDERSTAND RIGHT NOW THAT AROUND 75 PERCENT

25 TO 80 PERCENT OF INTERNET USERS ARE SHOPPERS, MEANING

1 THAT THEY ARE PROVIDING THEIR CREDIT CARD INFORMATION
2 ONLINE. SO IT WOULD BE CERTAINLY LESS THAN 20 TO 25
3 PERCENT, FOR STARTERS. I MEAN, THAT IS JUST ABSOLUTE
4 EVIDENCE THAT THEY ARE PROVIDING THEIR CREDIT CARDS.
5 WHETHER THEY ARE AFRAID OR NOT, THEY ARE STILL PROVIDING
6 THEM.

7 Q. I DON'T THINK YOU ANSWERED MY QUESTION.

8 A. I THINK I DID.

9 Q. DO YOU HAVE AN OPINION AS TO HOW MANY, WHAT
10 PERCENT OF INTERNET USERS WOULD BE DETERRED FROM
11 ACCESSING WEBSITES BY HAVING TO PROVIDE A CREDIT CARD
12 NUMBER?

13 A. THE NUMBER, BY EVIDENCE OF WHO IS SHOPPING
14 ONLINE, AS A STARTING BASE, WOULD HAVE TO BE LESS THAN
15 20 TO 25 PERCENT BECAUSE THEY ARE ALREADY SHOPPING
16 ONLINE. THEY ARE PULLING OUT THEIR CREDIT CARDS AND
17 USING THEM.

18 Q. I'M NOT ASKING YOU FOR PERCENTS.

19 THE COURT: HE ANSWERED THE QUESTION,
20 COUNSEL. GO AHEAD AND ASK ANOTHER ONE.

21 BY MR. FINE:

22 Q. PROFESSOR SMITH, ONE OF THE THINGS THAT YOU
23 WOULD WANT TO KNOW IN ORDER TO SEE WHAT THE IMPACT OF
24 COPA WOULD BE IS HOW MANY WOULD-BE PURCHASERS MIGHT BE
25 DETERRED BY THE COPA BARRIER, CORRECT?

1 A. ONE MORE TIME, PLEASE.

2 Q. SURE. LET ME -- BEFORE WE GET THERE, LET ME ASK
3 YOU THIS QUESTION. YOU JUST REFERRED TO FIGURES ABOUT
4 HOW MANY INTERNET USERS ARE SHOPPING ONLINE.

5 A. YES.

6 Q. YOU DID NOT CITE THOSE STATISTICS IN YOUR
7 REPORT, DID YOU?

8 A. NO, I DID NOT.

9 Q. AND PROFESSOR SMITH, EVEN IF MORE PEOPLE ARE
10 SHOPPING ONLINE, IT'S ALSO POSSIBLE THAT PEOPLE ARE
11 STILL REDUCING THEIR BEHAVIOR ON THE INTERNET BECAUSE OF
12 INTERNET SECURITY CONCERNS, CORRECT?

13 A. THEY REDUCE THEIR BEHAVIORS FOR MANY CONCERNS,
14 ONE OF WHICH IS I OVERSPENT MY BUDGET AT CHRISTMAS SO
15 I'M GOING TO SHOP LESS. I MEAN, SALES ON THE INTERNET
16 ARE CYCLICAL, LIKE ANYTHING ELSE. AND DEPENDING ON WHEN
17 YOU ASK THE QUESTION, YOU MAY GET A RESPONSE THAT I'M
18 REDUCING MY BEHAVIOR.

19 Q. SO EVEN IF MORE PEOPLE ARE SHOPPING ONLINE, IT'S
20 POSSIBLE THAT PEOPLE WILL STILL REDUCE THEIR BEHAVIOR ON
21 THE INTERNET DUE TO SECURITY REASONS?

22 A. FOR A VARIETY OF REASONS NOT LIMITED TO FEAR.

23 Q. AND FEAR IS ONE OF THOSE REASONS?

24 A. IT MAY BE, AND THE REPORTS INDICATE THAT THAT
25 MAY BE THE CASE.

1 Q. AND THE FACT THAT TOTAL SALES ON THE INTERNET
2 ARE INCREASING DOES NOT MEAN THAT PEOPLE HAVE NOT CUT
3 BACK ON THEIR SHOPPING ONLINE, CORRECT?

4 A. THOSE TWO FACTS SOMEWHAT ARGUE IN THE FACE OF
5 EACH OTHER. SOME HAVE INCREASED THEIR SHOPPING, SOME
6 MAY HAVE DECREASED THEIR SHOPPING AND, ON AVERAGE, IT'S
7 INCREASING.

8 Q. THE TOTAL SALES ARE INCREASING?

9 A. THE TOTAL OF SALES. THEY HAVE TO COME FROM
10 SOMEWHERE.

11 Q. BUT THAT DOES NOT MEAN THAT THERE ARE AS MANY
12 SALES TODAY AS THERE COULD HAVE BEEN IF THERE WEREN'T
13 SECURITY CONCERNS, CORRECT?

14 A. THAT IS ENTIRELY POSSIBLE. THAT IS SPECULATION.

15 Q. NOW, ONE OF THE THINGS THAT YOU WOULD WANT TO
16 KNOW IN ORDER TO SEE WHAT THE IMPACT OF COPA WOULD BE IS
17 HOW MANY WOULD-BE PURCHASERS MIGHT BE DETERRED BY HAVING
18 TO INPUT THEIR CREDIT CARD INFORMATION, CORRECT?

19 A. AS I UNDERSTAND COPA, IT DOES NOT REQUIRE CREDIT
20 CARD INFORMATION.

21 Q. PROFESSOR SMITH, LET ME ASK YOU THIS QUESTION.
22 I WILL MAKE IT A LITTLE BROADER FOR YOU.

23 A. OKAY.

24 Q. ONE OF THE THINGS YOU WOULD WANT TO KNOW IN
25 ORDER TO SEE WHAT THE IMPACT OF COPA WOULD BE IS HOW

1 MANY WOULD-BE PURCHASERS MIGHT BE DETERRED BY HAVING TO
2 PASS THROUGH THE COPA VERIFICATION SCREEN, CORRECT?

3 A. THAT IS CORRECT.

4 Q. YOU DON'T HAVE ANY IDEA HOW MANY POTENTIAL
5 PURCHASERS WOULD BE DETERRED BY COPA FROM HAVING TO
6 ACCESS SITES?

7 A. EXACT NUMBERS, HAVE I DONE A STUDY ON THAT? NO,
8 I HAVE NOT.

9 Q. AND YOU HAVE NO IDEA FOR ANY OF THE PLAINTIFFS
10 IN THIS CASE HOW MANY POTENTIAL PURCHASERS WOULD BE
11 DETERRED IF COPA WERE TO GO INTO EFFECT?

12 A. TO THE DEGREE THAT THEY ARE SUBJECT TO COPA
13 REGULATIONS, THERE MAY OR MAY NOT BE AN EFFECT.

14 Q. MY QUESTION TO YOU WAS, YOU DON'T HAVE ANY IDEA
15 FOR ANY OF THE PLAINTIFFS HOW MANY POTENTIAL PURCHASERS
16 WOULD BE DETERRED FROM GOING TO THEIR WEBSITES IF COPA
17 WERE TO GO INTO EFFECT?

18 A. IF A PLAINTIFF WAS NOT SUBJECT TO COPA, IT WOULD
19 HAVE ZERO EFFECT. IF IT WAS SUBJECT TO COPA, DEPENDING
20 ON THE CONTENT, DEPENDING ON WHERE THE COPA BARRIER WAS
21 PLACED, IT WOULD HAVE A RELATIVELY MINOR EFFECT.
22 PERIOD.

23 Q. AND MY QUESTION TO YOU, AND IT'S A YES OR NO
24 QUESTION, YOU EITHER KNOW OR YOU DON'T KNOW --

25 A. YES, I HAVE SOME IDEA.

1 Q. LET ME FINISH MY QUESTION.

2 DO YOU KNOW HOW MANY POTENTIAL PURCHASERS
3 WOULD BE DETERRED FROM -- POTENTIAL PURCHASERS TO THE
4 PLAINTIFFS' WEBSITES WOULD BE DETERRED IF COPA WERE TO
5 GO INTO EFFECT?

6 A. LET ME ANSWER THAT THIS WAY. IF COPA WENT INTO
7 EFFECT, AND IF A WEBSITE WAS NOT SUBJECT TO COPA, THEN I
8 WOULD KNOW IT WOULD HAVE ZERO EFFECT.

9 Q. ASSUME --

10 A. I WOULD KNOW THAT THE EFFECT WOULD BE ZERO.
11 THAT IS ON ONE END OF THE SCALE. THAT WOULD APPLY
12 CERTAINLY TO SOME OF THE PLAINTIFFS' WEBSITES. TO OTHER
13 WEBSITES, I WOULD NOT KNOW THE EXACT NUMBER. IT WOULD
14 DEPEND ON THE DEGREE TO WHICH THE INFORMATION IS SUBJECT
15 TO COPA. IF IT IS A VERY SMALL AMOUNT, THEN THE AMOUNT
16 WOULD BE MINIMAL. OKAY. IT COULD BE ZERO.

17 Q. BUT YOU DON'T HAVE ANY OPINION ONE WAY OR THE
18 OTHER?

19 A. I DO NOT HAVE AN EXACT NUMBER, NO, I DO NOT, FOR
20 THAT SEGMENT OF WEBSITES, THANK YOU.

21 Q. FOR ANY OF THE PLAINTIFF WEBSITES?

22 A. FOR ANY OF THEM, I WOULD, YES. I JUST ANSWERED
23 THAT. I BELIEVE IT WOULD BE ZERO FOR SOME OF THEM.

24 Q. AND SOMEONE WHO IS NOT INTERESTED IN PURCHASING
25 ANYTHING ON A WEBSITE WILL BE LESS LIKELY TO OVERCOME A

1 BARRIER TO ACCESS A WEBSITE THAN SOMEONE WHO WANTS TO
2 PURCHASE SOMETHING, CORRECT?

3 A. GENERALLY, THAT IS TRUE, YES.

4 Q. SOME INTERNET USERS ARE RELUCTANT TO PROVIDE
5 PERSONAL INFORMATION OVER THE INTERNET, CORRECT?

6 A. AS A BROAD STATEMENT, YES. AS A -- BUT IN
7 REALITY, IT DEPENDS ON THE TRUST RELATIONSHIP AND THE
8 VALUE WITH THE WEBSITE.

9 Q. SO THE ANSWER TO MY QUESTION IS YES, THERE ARE
10 SOME INTERNET USERS WHO ARE RELUCTANT TO PROVIDE
11 PERSONAL INFORMATION ON THE INTERNET?

12 A. YES, BUT THAT DOES NOT MEAN THAT THEY DON'T
13 PROVIDE IT. RELUCTANCE IS NOT THE SAME THING AS
14 BEHAVIOR.

15 Q. YOU DON'T KNOW HOW MANY USERS ARE RELUCTANT TO
16 PROVIDE PERSONAL INFORMATION, DO YOU?

17 A. AGAIN, THIS IS CONTINGENT UPON WHAT YOU MEAN BY
18 RELUCTANCE. IF IT IS AN ATTITUDINAL STATEMENT FOR
19 RELUCTANCE, THAT IS VERY DIFFERENT THAN A BEHAVIORAL
20 RELUCTANCE, WHICH IS DIFFERENT FROM I DID NOT ACTUALLY
21 BEHAVE THAT WAY, BUT THE ANSWER IS NO.

22 Q. NO, YOU DO NOT KNOW HOW MANY INTERNET USERS ARE
23 RELUCTANT TO PROVIDE PERSONAL INFORMATION?

24 A. NO, I DO NOT KNOW. I'M ASSUMING THAT YOU ARE
25 TALKING RELUCTANCE IN A BEHAVIORAL CONTEXT, AND I DO NOT

1 KNOW THAT.

2 Q. OKAY. AND YOU HAVE NEVER FORMED AN OPINION AS
3 TO WHETHER INTERNET USERS ARE RELUCTANT TO PROVIDE
4 PERSONAL INFORMATION OVER THE INTERNET, CORRECT?

5 A. AGAIN, CAN YOU BOUND ME IN TERMS OF WHAT YOU
6 MEAN BY RELUCTANCE? ARE YOU TALKING ABOUT AN
7 ATTITUDINAL STATEMENT THAT I AM RELUCTANT, OR THAT I
8 HAVE SOME FEAR, OR ARE YOU TALKING ABOUT MY ACTUAL
9 BEHAVIOR IN TERMS OF BEING RELUCTANT, YOU KNOW, THE
10 DEGREE TO WHICH I DON'T DO IT.

11 Q. I'M GOING TO ASK YOU THIS QUESTION AGAIN. HAVE
12 YOU FORMED AN OPINION AS TO WHETHER INTERNET USERS ARE
13 RELUCTANT TO PROVIDE PERSONAL INFORMATION OVER THE
14 INTERNET?

15 A. IN THE BROADEST SENSE -- OKAY, I WILL SAY YES,
16 OKAY, YES.

17 Q. HAVE YOU EVER WORRIED ABOUT THAT ISSUE?

18 A. OF WHETHER OR NOT THEY ARE RELUCTANT?

19 Q. YES.

20 A. I'M NOT SURE I LIKE THE WORD RELUCTANT BUT IN
21 THE BROADEST SENSE, YES, I HAVE.

22 Q. LET'S PULL UP HIS DEPOSITION, PAGE 59, LINES 11
23 THROUGH 16.

24 WE CAN BLOW UP LINES 11 THROUGH 16.

25 THANKS.

1 QUESTION: OKAY. LET ME ASK YOU. BEFORE
2 I ASK THAT QUESTION, HAVE YOU FORMED AN OPINION AS TO
3 WHETHER INTERNET USERS ARE RELUCTANT TO PROVIDE PERSONAL
4 INFORMATION OVER THE INTERNET?

5 ANSWER: I'M NOT SURE I'VE EVER WORRIED
6 ABOUT THAT ISSUE.

7 THAT WAS YOUR TESTIMONY AT YOUR
8 DEPOSITION, CORRECT?

9 A. THAT'S RIGHT. AND AT THAT POINT, AS I DO NOW, I
10 HAVE TROUBLE WITH THE QUESTION OF RELUCTANT. THAT DOES
11 NOT RESONATE WITH MY -- IT'S NOT A WORD THAT WE USE IN
12 MARKETING AND IN ESTIMATING SHARE OR PERCENTAGE. IF YOU
13 WANT TO TALK ABOUT FEAR, THAT IS SOMETHING DIFFERENT.
14 BUT RELUCTANCE, THAT IS A REALLY SQUISHY WORD, I'M
15 SORRY.

16 Q. OKAY. AND SOME INTERNET USERS WILL NOT BE
17 WILLING TO PROVIDE CREDIT CARD INFORMATION TO WEBSITES
18 SIMPLY TO BROWSE ON A WEBSITE, CORRECT?

19 A. THAT IS CORRECT.

20 Q. SPECIFICALLY, PEOPLE WHO HAVE NO INTENTION OF
21 PURCHASING ANYTHING WILL NOT BE WILLING TO PROVIDE THEIR
22 CREDIT CARD INFORMATION JUST TO BROWSE ON THE SITE,
23 CORRECT?

24 A. I DON'T KNOW THAT THAT IS THE CASE. I DON'T
25 KNOW THAT ANYONE HAS EVER STUDIED THAT OR I'M IN A

1 POSITION TO SPEAK DEFINITELY IN TERMS OF PERCENTAGES
2 OR ANYTHING LIKE THAT. IT IS CONCEIVABLE, BASED ON THE
3 TRUST AND VALUE, IF I UNDERSTAND THE REASON WHY THEY
4 WANT MY INFORMATION, THAT I WOULD PROVIDE THAT
5 INFORMATION. IF I AM GUARANTEED, AND I THINK MAYBE WE
6 WENT OVER THIS IN THE DEPOSITION AND I INDICATED TO YOU,
7 MR. FINE, THAT IF YOU ASKED ME FOR MY CREDIT CARD, I
8 WOULD GIVE IT TO YOU BECAUSE I TRUST YOU AS AN ATTORNEY
9 AND I KNOW THAT YOU WOULD NOT ABUSE IT BECAUSE OF YOUR
10 LEGAL POSITION. IF A WEBSITE WERE TO ASK ME, AND THERE
11 WAS A REASON FOR THAT INFORMATION, IF IT WAS AN IRS
12 WEBSITE, I WOULD PROVIDE THAT. IT DEPENDS ON THE
13 SITUATION, THE LOYALTY AND THE TRUST IN THAT WEBSITE.

14 Q. I'M ASKING YOU FOR YOUR TESTIMONY HERE TODAY.
15 IS IT YOUR POSITION THAT PEOPLE WHO HAVE NO INTENTION OF
16 PURCHASING ANYTHING WILL NOT BE WILLING TO PROVIDE A
17 CREDIT CARD JUST TO BROWSE ON A WEBSITE?

18 A. IT IS NOT -- IT IS MY POSITION THAT NOT EVERYONE
19 WOULD FIT UNDER THAT. THAT IS A VERY BROAD STATEMENT,
20 MR. FINE.

21 Q. SURE.

22 LET'S CALL UP YOUR DEPOSITION, PAGE 96,
23 LINES 15 THROUGH LINE 21.

24 A. OKAY.

25 Q. LET ME ASK YOU THIS. ARE THERE SOME INTERNET

1 USERS WHO WILL NOT BE WILLING TO PROVIDE CREDIT CARD
2 INFORMATION TO WEBSITES SIMPLY TO BROWSE ON THE
3 INTERNET?

4 ANSWER: ABSOLUTELY. SPECIFICALLY, THOSE
5 THAT HAVE NO INTENTION OF PURCHASING AND THOSE WHO ARE
6 UNDER AGE WHO CANNOT.

7 THAT WAS YOUR TESTIMONY AT YOUR
8 DEPOSITION, CORRECT?

9 A. THAT IS CORRECT. AND THE OPERATIVE WORD THERE
10 IS "SOME." SOME INTERNET USERS WOULD NOT PROVIDE IT.

11 Q. AND YOU DON'T KNOW WHAT PERCENT OF INTERNET
12 USERS WOULD NOT PROVIDE THEIR CREDIT CARD INFORMATION,
13 DO YOU?

14 A. I DON'T.

15 Q. EVEN TODAY, SOME PEOPLE ARE STILL NOT WILLING TO
16 PURCHASE THINGS ON THE INTERNET, CORRECT?

17 A. THAT IS CORRECT.

18 Q. SO AROUND 40 PERCENT OF PEOPLE IN THE UNITED
19 STATES DON'T PURCHASE THINGS ON THE INTERNET?

20 A. ABOUT 20 PERCENT RIGHT NOW.

21 Q. TURN TO YOUR DEPOSITION, PAGE 105.

22 A. YES.

23 Q. THE QUESTION -- LET'S START --

24 THE COURT: WHAT PAGE?

25 BY MR. FINE:

1 Q. WHY DON'T WE START ON LINE 15 TO 25, PAGE 105.

2 QUESTION: LET ME ASK YOU. ARE YOU JUST
3 SPECULATING?

4 ANSWER: NO. WHETHER THEY ARE NOT
5 WILLING OR WHETHER THEY DON'T, I THINK THERE IS A SUBTLE
6 DIFFERENCE THERE.

7 QUESTION: OKAY.

8 ANSWER: OKAY. THERE ARE MAYBE 40
9 PERCENT OF PEOPLE IN THE UNITED STATES THAT DO NOT
10 PURCHASE ON THE INTERNET.

11 QUESTION: AND YOU KNOW THAT IT'S AROUND
12 40 PERCENT?

13 ANSWER: I BELIEVE THAT'S A NUMBER THAT I
14 RECALL READING.

15 THAT WAS YOUR TESTIMONY AT THE
16 DEPOSITION, CORRECT?

17 A. THAT'S RIGHT. YOU ASKED ME SOME VERY HARD
18 QUESTIONS AND I HAVE DONE SOME RESEARCH AND I HAD
19 UNDERESTIMATED. THIS IS ACCURATE FOR THE YEAR 2003.

20 Q. SOME INTERNET USERS DO NOT WANT TO GIVE A
21 COMPUTER THEIR CREDIT CARD NUMBER, CORRECT?

22 A. CORRECT.

23 Q. YOU DON'T KNOW HOW MANY PEOPLE THAT IS EITHER,
24 DO YOU?

25 A. I CAN GIVE YOU THE DATA FOR A PARTICULAR YEAR.

1 Q. AS YOU SIT HERE TODAY?

2 A. CURRENTLY, I DON'T KNOW WHAT THAT NUMBER IS FOR
3 2006.

4 Q. YOU DON'T KNOW WHAT THE PERCENT IS?

5 A. NOT FOR 2006, I DON'T.

6 Q. IT COULD BE GREATER THAN 50 PERCENT OF PEOPLE
7 DON'T WANT TO GIVE A COMPUTER THEIR CREDIT CARD NUMBER,
8 CORRECT?

9 A. LET ME QUALIFY THAT. DON'T WANT TO AND WON'T
10 ARE TWO DIFFERENT THINGS. ATTITUDINAL STATEMENTS TEND
11 TO BE OVERSTATEMENTS OF BEHAVIOR. THE FACT THAT 80
12 PERCENT OF INDIVIDUALS ARE BUYING ONLINE LIMITS THAT
13 NUMBER TO AROUND 20 PERCENT THAT DO NOT. AGAIN, WHAT
14 THEY SAY, DON'T WANT TO, BEING DIFFERENT FROM WHAT THEY
15 ACTUALLY DO.

16 Q. AND SO YOU DON'T KNOW IF GREATER THAN 50 PERCENT
17 OF INTERNET USERS DO NOT WANT TO GIVE A COMPUTER THEIR
18 CREDIT CARD NUMBER, DO YOU?

19 A. THAT NUMBER SOUNDS HIGH TO ME, BUT I DON'T KNOW
20 WHAT A 2006 NUMBER WOULD BE.

21 Q. THERE ARE ALSO SOME INTERNET USERS WHO WORRY
22 ABOUT THEIR CREDIT NUMBER BEING STOLEN ON THE INTERNET,
23 CORRECT?

24 A. THAT IS CORRECT.

25 Q. YOU DON'T KNOW HOW MANY PEOPLE THAT IS, DO YOU?

1 A. THAT WORRY ABOUT IT? WORRY IS A BROAD THING. I
2 WORRY ABOUT GETTING IN AN ACCIDENT BUT I STILL DRIVE
3 EVERY DAY. I'M CAREFUL. AND I THINK THE SAME THING
4 APPLIES HERE. AND I DON'T KNOW THE NUMBER THAT WORRY
5 ABOUT IT. MINOR WORRIES, THERE ARE PROBABLY A LOT OF
6 PEOPLE THAT WORRY ABOUT IT, BUT THEY ARE CAREFUL.

7 Q. SO THE ANSWER IS, YOU DON'T KNOW HOW MANY PEOPLE
8 WORRY ABOUT HAVING THEIR CREDIT CARD NUMBER STOLEN ON
9 THE INTERNET?

10 A. NO, I DO NOT.

11 Q. AND THERE ARE SOME INTERNET USERS WHO VISIT
12 COMMERCIAL RETAIL WEBSITES BUT DON'T ACTUALLY MAKE
13 PURCHASES ONLINE, CORRECT?

14 A. THAT'S TRUE.

15 Q. SOME INTERNET USERS WHO LIKE TO SEARCH FOR
16 IMAGES ON THE INTERNET BUT WON'T MAKE PURCHASES ONLINE?

17 A. THAT'S TRUE.

18 Q. THERE ARE ALSO SOME INTERNET USERS WHO LIKE TO
19 LOOK FOR PHOTOGRAPHS ON THE INTERNET BUT WON'T MAKE
20 PURCHASES ONLINE?

21 A. THAT'S TRUE.

22 Q. THERE ARE SOME INTERNET USERS WHO WON'T USE A
23 CREDIT CARD ONLINE FOR ANY PURPOSE, CORRECT?

24 A. THAT IS TRUE.

25 Q. YOU DON'T KNOW HOW MANY PEOPLE THAT IS?

1 A. I HAD A NUMBER IN ONE OF MY STUDIES THAT WERE
2 NONINTERNET. I'D HAVE TO GO BACK AND REVIEW THE STUDY
3 BUT YES, I CAN PULL UP A NUMBER, IF YOU WOULD LIKE TO DO
4 THAT.

5 Q. SO YOU DO KNOW HOW MANY PEOPLE?

6 A. NOT OFF THE TOP OF MY HEAD DO I KNOW AN ACTUAL
7 NUMBER RIGHT NOW. AND I DON'T HAVE A NUMBER THAT IS
8 CURRENT FOR 2006.

9 Q. AND FEAR OF FINANCIAL LOSS DETERS SOME INTERNET
10 USERS FROM SHOPPING ON THE INTERNET, CORRECT?

11 A. I DON'T HAVE DATA IN TERMS OF THE ACTUAL
12 DETERRENCE OF BEHAVIOR. SOME, PERHAPS. THAT WOULD BE A
13 SMALL NUMBER. I DON'T KNOW. OBVIOUSLY YOUR QUESTION
14 WAS DETERRING FROM SHOPPING ON THE INTERNET. AGAIN, WE
15 HAVE 80 PERCENT THAT ARE SHOPPING, SO IT WOULD BE LESS
16 THAN THE 20 PERCENT NUMBER.

17 Q. AND JUST SO WE ARE CLEAR FOR THE RECORD, 80
18 PERCENT THAT YOU ARE TALKING ABOUT IS SHOPPING AT SOME
19 POINT IN TIME, CORRECT?

20 A. NO, THEY ARE SHOPPING IN 2006.

21 Q. I UNDERSTAND. THAT DOESN'T MEAN THAT THEY ARE
22 SHOPPING ON EVERY SINGLE WEBSITE ON THE WORLDWIDE WEB,
23 DOES IT?

24 A. NO, OR SHOPPING EVERY SINGLE MINUTE EITHER.

25 Q. AND IS FEAR OF FINANCIAL LOSS A KEY DETERRENT TO

1 PEOPLE SHOPPING ONLINE?

2 MR. BEANE: OBJECTION, VAGUE.

3 THE COURT: OVERRULED.

4 THE WITNESS: IF ONE WERE TO LOOK AT
5 REASONS ATTITUDINALLY THAT PEOPLE GIVE FOR NOT SHOPPING
6 ONLINE -- WOULD YOU REPEAT YOUR QUESTION ONE MORE TIME?

7 MR. FINE: SURE.

8 BY MR. FINE:

9 Q. IS FEAR OF FINANCIAL LOSS A KEY DETERRENT TO
10 PEOPLE SHOPPING ONLINE?

11 A. IT IS A KEY CONCERN FOR SHOPPING ONLINE.
12 WHETHER IT IS A DETERRENT OR NOT, I DON'T KNOW.

13 Q. PROFESSOR SMITH, NO MATTER WHAT SECURITY STEPS A
14 WEBSITE TAKES, ASKING FOR CREDIT CARD INFORMATION BEFORE
15 THE FINAL CHECK-OUT STEP RISKS LOSING THE CUSTOMER,
16 CORRECT?

17 A. THERE IS A RISK THERE, YES. IT DEPENDS ON HOW
18 WELL THE PROCESS IS HANDLED.

19 Q. BUT NO MATTER WHAT THE PROCESS IS, NO MATTER HOW
20 THE PROCESS IS HANDLED, ASKING FOR CREDIT CARD
21 INFORMATION BEFORE THE FINAL CHECK-OUT STEP RISKS LOSING
22 THE CUSTOMER, CORRECT?

23 A. THERE IS SOME RISK OF LOSING THE CUSTOMER, YES.

24 Q. LET'S TAKE AMAZON.COM AS AN EXAMPLE. AMAZON
25 DOES NOT ASK FOR YOUR CREDIT CARD WHEN YOU FIRST COME ON

1 THE WEBSITE, DOES IT?

2 A. NO, IT DOES NOT.

3 Q. IT DOES NOT ASK FOR A CREDIT CARD WHEN YOU ARE
4 SEARCHING FOR DIFFERENT PRODUCTS, DOES IT?

5 A. NO.

6 Q. EVEN WHEN YOU FIND A PRODUCT YOU WANT AND YOU
7 PUT IT IN YOUR ONLINE SHOPPING CART, AMAZON STILL DOES
8 NOT ASK FOR A CREDIT CARD, CORRECT?

9 A. THAT'S RIGHT.

10 Q. THEY WAIT UNTIL THE VERY LAST STEP, THE
11 CHECK-OUT STEP, TO ASK FOR THE CARD?

12 A. THAT'S CORRECT.

13 Q. AND THAT IS BECAUSE REQUESTING CREDIT CARD
14 INFORMATION EXACERBATES CONSUMER FEARS OF CREDIT CARD
15 THEFT OR MISUSE, CORRECT?

16 A. NOT NECESSARILY. THAT IS THE WAY WE DO
17 BUSINESS. WHEN WE GO TO THE GROCERY STORE, WE PICK UP A
18 CART, WE WALK AROUND THE STORE, THEN WE CHECK-OUT AND
19 PAY, WHEN WE GET READY TO LEAVE, WHEN WE ARE GETTING
20 READY TO LEAVE THE STORE. I MEAN, THAT IS THE NATURAL
21 PLACE TO DO IT.

22 Q. AND IT WOULD NOT MAKE SENSE FOR A SUPERMARKET TO
23 ASK FOR YOUR CREDIT CARD NUMBER WHEN YOU COME IN THE
24 FRONT DOOR TO THE SUPERMARKET?

25 A. ARE YOU FAMILIAR WITH COSTCO AND SAM'S CLUB?

1 Q. IF YOU CAN ANSWER MY QUESTION.

2 A. COSTCO AND SAM'S CLUB ASK YOU FOR YOUR

3 MEMBERSHIP CARD TO COME INTO THE STORE.

4 Q. OKAY. FOR --

5 A. SO SOME BUSINESS MODELS IN FACT, THEY DO DO

6 THAT.

7 Q. BUT MOST THEY DON'T?

8 A. MOST DO NOT.

9 Q. PROFESSOR SMITH, YOU HAVE DONE RESEARCH ON
10 WHETHER INTERNET USERS ARE WILLING TO GIVE A COMPUTER
11 THEIR CREDIT CARD INFORMATION, CORRECT?

12 A. I HAVE.

13 Q. YOU HAVE DONE RESEARCH ON WHETHER USERS ARE
14 CONCERNED ABOUT HAVING THEIR CREDIT CARD STOLEN ON THE
15 INTERNET, CORRECT?

16 A. YES.

17 Q. AND THE RESEARCH THAT YOU HAVE DONE IS
18 COMPLETELY INCONSISTENT WITH YOUR PRESENT OPINION IN
19 THIS CASE, CORRECT?

20 A. NO, IT IS NOT.

21 Q. ALL RIGHT. THE RESEARCH THAT YOU DID SUGGESTS
22 THAT USERS DON'T WANT TO PROVIDE THEIR PERSONAL
23 INFORMATION TO WEBSITES, CORRECT?

24 A. IT INDICATES THAT THEY HAVE CONCERNS ABOUT
25 PROVIDING INFORMATION.

1 Q. AND THAT THEY DON'T WANT TO PROVIDE THE PERSONAL
2 INFORMATION?

3 A. I WOULD HAVE TO LOOK AT THE ACTUAL WORDING OF
4 THE QUESTION, I'M SORRY.

5 Q. OKAY.

6 YOUR RESEARCH ALSO SUGGESTS THAT USERS
7 DON'T WANT TO PROVIDE THEIR CREDIT CARDS ONLINE,
8 CORRECT?

9 A. AGAIN, I DON'T KNOW IF THE WORD "WANT" WAS IN
10 THE QUESTION IN MY RESEARCH, OR IF IT WAS WANT OR IF I
11 HAVE FEAR OR IF I HAVE CONCERNS. I DON'T KNOW THE EXACT
12 WORDING. I WOULD HAVE TO GO BACK AND LOOK AT THAT.

13 Q. WE WILL GET TO THAT IN A SECOND.

14 A. I'M SURE.

15 Q. YOUR RESEARCH ALSO FOUND THAT A SUBSTANTIAL
16 REASON WHY PEOPLE DON'T SHOP ON THE INTERNET IS
17 FINANCIAL FEAR, CORRECT?

18 A. I WOULD HAVE TO LOOK AT THE RESEARCH TO RECALL
19 THAT.

20 Q. OKAY. WHY DON'T WE DO THAT RIGHT NOW.

21 A. OKAY.

22 Q. LET'S TURN TO PLAINTIFFS' EXHIBIT 403, WHICH IS
23 IN YOUR BINDER. PLAINTIFFS' EXHIBIT 403, DO YOU HAVE
24 THAT IN FRONT OF YOU?

25 A. I DO.

1 Q. OKAY. AND DO YOU RECOGNIZE THIS DOCUMENT,
2 PLAINTIFFS' EXHIBIT 403?

3 A. YES. THIS IS THE STUDY THAT WAS CONDUCTED ON
4 PURCHASES IN THE YEAR 2000 OF THE INTERNET.

5 Q. AND WHAT IS THE TITLE OF THIS STUDY?

6 A. WHY PEOPLE DON'T SHOP ONLINE: A LIFESTYLE STUDY
7 OF THE INTERNET CONSUMER.

8 Q. AND THIS IS A STUDY THAT YOU AUTHORED?

9 A. YES, IT IS.

10 Q. AND THIS STUDY WAS PUBLISHED IN THE JOURNAL OF
11 PSYCHOLOGY AND MARKETING, IS THAT CORRECT?

12 A. YES.

13 Q. IT WAS PUBLISHED IN JULY OF 2003?

14 A. THAT IS CORRECT.

15 Q. AND THIS WAS ONE OF THE PEER-REVIEWED ARTICLES
16 THAT YOU DISCUSSED THIS MORNING?

17 A. YES, THAT'S RIGHT.

18 Q. AND WENT THROUGH REVIEW PROCESS?

19 A. IT DID.

20 Q. AND IT'S A RELIABLE PUBLICATION?

21 A. IT IS A RELIABLE PUBLICATION. IT IS GOOD
22 RESEARCH.

23 Q. ALL RIGHT. AND THIS PARTICULAR STUDY
24 CONTRADICTS YOUR PRESENT OPINION IN THIS CASE, CORRECT?

25 A. THIS PARTICULAR STUDY REFLECTS AN OPINION THAT

1 WOULD BE BASED IN THE YEAR 2000. THIS IS 2006. THE
2 INTERNET HAS CHANGED GREATLY SINCE THE YEAR 2000 AS HAS
3 BEEN EVIDENCED IN THIS CASE.

4 Q. LET'S TURN NOW TO BATES MARKED PAGE 28 OF THE
5 STUDY.

6 A. OKAY.

7 Q. I'M GOING TO FOCUS YOU ON 28 AND 29.

8 A. UM-HUM.

9 Q. THE SECTION MARKED CONCLUDING DISCUSSION. DO
10 YOU SEE THAT?

11 A. UM-HUM.

12 Q. NOW, IF YOU CAN TURN THE PAGE TO PAGE 29.

13 A. OKAY.

14 Q. THE FIRST PARAGRAPH, CAN YOU READ THE FIRST TWO
15 SENTENCES?

16 A. UM-HUM. IT SAYS, THIS RESEARCH ALSO EXAMINES
17 WHY PEOPLE DO OR DO NOT SHOP ON THE INTERNET. THE
18 RESULTS SUGGEST THAT A SUBSTANTIAL REASON IS FEAR.

19 Q. OKAY. AND THEN -- IN FACT YOUR STUDY FOUND THAT
20 OVER 70 PERCENT OF THOSE PEOPLE WHO DID NOT SHOP ONLINE
21 AGREED WITH THE STATEMENT THAT "I DON'T WANT TO GIVE A
22 COMPUTER MY CREDIT CARD NUMBER," CORRECT?

23 A. THAT IS CORRECT.

24 Q. AND EVEN A THIRD OF THE SHOPPERS -- OF THE
25 PEOPLE WHO DO SHOP ONLINE, AGREED WITH THE STATEMENT,

1 THAT "I DON'T WANT TO GIVE A COMPUTER MY CREDIT CARD
2 NUMBER," CORRECT?

3 A. YES. THIS PARTICULAR QUESTION WAS ASKED IN AN
4 INTERESTING WAY. THE SCALING ON THE QUESTION WAS, THIS
5 IS EXACTLY LIKE ME, THIS IS SOMEWHAT LIKE ME, BACK TO
6 NOT AT ALL LIKE ME. OKAY. AND SO KEEP THAT IN MIND, I
7 BELIEVE, IN THIS PARTICULAR STUDY BUT YES, YOU ARE
8 CORRECT ON THAT.

9 Q. AND THIS STUDY ALSO FOUND THAT 3-4THS OF THE
10 PEOPLE WHO DON'T SHOP ONLINE AGREED THAT THEY WORRY
11 ABOUT HAVING THEIR CREDIT CARD NUMBER STOLEN ON THE
12 INTERNET, CORRECT?

13 A. THAT'S RIGHT. THESE ARE ATTITUDINAL STATEMENTS.

14 Q. AND EVEN AMONG THOSE WHO DO SHOP ONLINE NEARLY
15 HALF AGREED THAT THEY WORRY ABOUT HAVING THEIR CREDIT
16 CARD NUMBER STOLEN ON THE INTERNET, CORRECT?

17 A. THAT IS CORRECT. RECALL THAT ONLY 40 PERCENT OF
18 THE SAMPLE WAS SHOPPING ONLINE.

19 Q. OKAY. AND IF WE FOCUS ON THE THIRD FULL
20 PARAGRAPH ON PAGE 29, AT THE BOTTOM, THAT BEGINS:
21 WHATEVER THE SECURITY PROVIDED. ON PAGE 29, THE
22 SECOND-TO-LAST PARAGRAPH.

23 A. YES.

24 Q. SO BASED ON WHAT YOU FOUND IN THIS STUDY, YOU
25 STATED THAT WHATEVER THE SECURITY -- YOU FOUND THAT

1 WHATEVER THE SECURITY PROVIDED, VENDORS MUST ACKNOWLEDGE
2 THAT ASKING FOR CUSTOMER CREDIT CARD INFORMATION RISKS
3 LOSING CUSTOMER BEFORE CHECKOUT. CORRECT?

4 A. THAT IS CORRECT.

5 Q. AND THAT IS BECAUSE ASKING FOR CUSTOMER CREDIT
6 CARD INFORMATION EXACERBATES CONSUMER FEARS OF CREDIT
7 CARD THEFT OR MISUSE?

8 A. UM-HUM. IN THE YEAR 2000, THAT IS ABSOLUTELY
9 THE CASE.

10 Q. TURN BACK TO PAGE 6 OF THE DOCUMENT.

11 A. OKAY. PAGE 6?

12 Q. PAGE 6. HALFWAY DOWN THE PAGE, THERE'S A
13 PARAGRAPH BEGINS, MCQUIVEY, M-C-Q-U-I-V-E-Y, DO YOU SEE
14 THAT?

15 A. YES.

16 Q. AND SO HERE IN YOUR STUDY YOU ARE DISCUSSING A
17 REPORT BY SOMEBODY NAMED MCQUIVEY?

18 A. THAT'S CORRECT.

19 Q. AND THE MCQUIVEY STUDY ALSO FOUND THAT CREDIT
20 CARD CONCERN WAS THE MOST IMPORTANT DETERRENT TO ONLINE
21 SHOPPING, CORRECT?

22 A. YES, THAT IS TRUE. NOW THAT WAS PUBLISHED IN
23 2000, MEANING THAT THE DATA MAY HAVE BEEN '96, '97, '98,
24 WHICH IS IN THE EARLY DAYS OF THE INTERNET, BUT THAT IS
25 TRUE.

1 Q. AND YOU AGREE THAT THERE ARE VALUABLE INSIGHTS
2 FOR WEBSITES BASED ON INTERNET USERS' ATTITUDINAL
3 BELIEFS, CORRECT?

4 A. I DO. INSIGHTS.

5 Q. AND YOU WOULD RELY ON USERS' ATTITUDINAL BELIEFS
6 TO MAKE SUGGESTIONS TO COMMERCIAL WEBSITES, CORRECT?

7 A. I WOULD PREFER TO HAVE BEHAVIORAL DATA BUT
8 ATTITUDINAL DATA, IF THAT IS ALL I HAD, THAT WOULD BE
9 FINE.

10 Q. AFTER THIS -- WE CAN TAKE THAT DOWN.

11 AFTER YOU ISSUED THIS STUDY IN JULY OF
12 2003, YOU SUBSEQUENTLY WROTE ANOTHER ARTICLE SUMMARIZING
13 YOUR FINDINGS, CORRECT?

14 A. WHICH ARTICLE ARE YOU REFERRING TO?

15 Q. WHY DON'T WE TURN TO PLAINTIFFS' EXHIBIT 404.

16 A. OKAY. YES, THIS IS A SUMMARY.

17 Q. AND CAN YOU JUST IDENTIFY WHAT IS PLAINTIFFS'
18 EXHIBIT 404?

19 A. THIS IS A SUMMARY OF THE PREVIOUS ARTICLE THAT
20 WAS HACKED UP AND PUT IN THE MARRIOTT SCHOOL OF
21 MANAGEMENT BUSINESS MAGAZINE.

22 Q. AND THIS WAS PUBLISHED IN OCTOBER OF 2003?

23 A. THAT'S CORRECT.

24 Q. AND THIS, AGAIN, SUMMARIZES YOUR FINDINGS FROM
25 YOUR EARLIER STUDY?

1 A. THAT'S RIGHT.

2 Q. AND I WANT TO NOW SHOW YOU WHAT HAS BEEN MARKED
3 AS PLAINTIFFS' EXHIBIT 408. THIS IS ANOTHER STUDY THAT
4 YOU PUBLISHED?

5 A. YES, IT IS.

6 Q. AND THIS ARTICLE APPEARED IN THE INTERNATIONAL
7 BUSINESS AND ECONOMIC RESEARCH JOURNAL?

8 A. YES, IT IS THE SAME DATA.

9 Q. AND IT WAS PUBLISHED IN APRIL OF 2004?

10 A. THAT'S CORRECT, USING THE 2000 DATA.

11 Q. AND YOU DID NOT CHANGE ANY OF THE CONCLUSIONS OF
12 YOUR OTHER STUDY?

13 A. IT IS BASED ON THE SAME DATA, MR. FINE. I DON'T
14 BELIEVE ITS CONCLUSIONS WOULD HAVE CHANGED. IN THIS
15 CASE, WE ARE REPORTING THE DATA OF THAT PARTICULAR
16 STUDY.

17 Q. OKAY. I WANT TO NOW -- ACTUALLY, YOU CAN TURN
18 TO THE SECOND PAGE OF THIS DOCUMENT. THE LAST PARAGRAPH
19 ON THE SECOND PAGE, UNDER THE CAPTION, HYPOTHESIS. THE
20 LAST SENTENCE READS THAT THE FIRST HYPOTHESIS HAS BEEN
21 REPORTED ELSEWHERE (SWINYARD AND SMITH 2003) BUT FORMS A
22 SPRINGBOARD FOR THE TESTING OF THE SUBSEQUENT
23 HYPOTHESIS, CORRECT?

24 A. THAT'S CORRECT.

25 Q. SO IN THIS APRIL 2004 ARTICLE, YOU WERE TESTING

1 YOUR EARLIER HYPOTHESIS, CORRECT?

2 A. NO, WE DIDN'T TEST THE EARLIER HYPOTHESES. IF
3 YOU LOOK AT THIS PARTICULAR ARTICLE, I DON'T BELIEVE
4 THERE IS ANY REFERENCE HERE TO FEAR OR ANYTHING LIKE
5 THAT ON THE INTERNET. THIS IS -- I BELIEVE THIS IS A
6 LIFESTYLE STUDY THAT IS PRIMARILY A PROFILING OF
7 SHOPPERS ON THE INTERNET, SHOPPERS AND NONSHOPPERS.

8 Q. AND IT SHOWS THAT SOME PEOPLE THAT DON'T SHOP ON
9 THE INTERNET DON'T DO SO BECAUSE OF FEAR, FINANCIAL
10 CONCERNS?

11 A. I WOULD HAVE TO LOOK BACK OVER THIS. IT'S
12 OBVIOUSLY BEEN A LONG TIME SINCE I LOOKED AT THIS
13 ARTICLE, BUT I DON'T SEE ANY REFERENCE TO ANY
14 ATTITUDINAL STATEMENTS HERE AT ALL DIRECTED TO FEAR. IF
15 YOU LOOK ON PAGES 8 AND 9, THOSE ITEMIZE THE ATTITUDINAL
16 STATEMENTS THAT ARE THERE, AND I DON'T SEE ANYTHING
17 RELATED TO FEAR. IF YOU COULD POINT THAT OUT, I WOULD
18 BE HAPPY TO CONSIDER THAT.

19 Q. OKAY.

20 BUT THIS ARTICLE RELIED ON YOUR EARLIER
21 DATA THAT WE WERE DISCUSSING FROM YOUR JULY 2003 STUDY,
22 CORRECT?

23 A. IT USED THE SAME DATA FOR A DIFFERENT -- THIS
24 WAS A HUGE SURVEY, LENGTH-WISE. WE JUST TOOK A
25 DIFFERENT CHUNK OF THE QUESTIONS AND ANALYZED THEM HERE.

1 Q. IT USED THE SAME DATA?

2 A. SAME DATA, YES.

3 Q. I'M GOING TO NOW SHOW YOU WHAT HAS BEEN MARKED
4 AS PLAINTIFFS' EXHIBIT 409.

5 A. UH-HUH.

6 Q. DO YOU RECOGNIZE PLAINTIFFS' EXHIBIT 409?

7 A. I DO.

8 Q. WHAT IS IT?

9 A. THIS IS AN ARTICLE THAT WAS ACTUALLY WRITTEN BY
10 THREE AUTHORS THAT ARE IN THE -- IN BELGIUM. THEY USED
11 OUR SURVEY AS THE BASIS FOR THEIR RESEARCH, OUR SURVEY
12 INSTRUMENT. AND THEY IN ESSENCE REPLICATED OUR SURVEY
13 TO SEE WHAT HAPPENED IN EUROPE.

14 Q. AND YOU WERE LISTED AS A CO-AUTHOR OF THIS
15 STUDY?

16 A. LISTED AS A CO-AUTHOR BECAUSE OF OUR
17 CONTRIBUTION OF THE SURVEY INSTRUMENT.

18 Q. OKAY. AND THIS ARTICLE WAS PUBLISHED IN THE
19 YEAR 2005, CORRECT?

20 A. THAT IS CORRECT.

21 Q. AND IT RELIED ON THE SAME DATA FROM YOUR EARLIER
22 STUDY?

23 A. IT RELIED ON THE YEAR 2000 DATA.

24 Q. OKAY. I WANT TO NOW SHOW YOU WHAT HAS BEEN
25 MARKED AS PLAINTIFFS' EXHIBIT 410. TURN TO THAT.

1 A. YES.

2 Q. YOU RECOGNIZE THIS DOCUMENT, DON'T YOU?

3 A. I DO.

4 Q. WHAT IS IT?

5 A. THIS IS A FIRST CUT OF AN ARTICLE THAT UPDATED
6 THE 2000 STUDY. AND THE DATA FOR THIS PARTICULAR STUDY,
7 I BELIEVE, WAS CONDUCTED IN -- I BELIEVE IT WAS
8 CONDUCTED IN 2003.

9 Q. WE WILL GET THERE IN A SECOND. I JUST WANT TO
10 MAKE SURE. THIS IS A STUDY THAT YOU CO-AUTHORED,
11 CORRECT?

12 A. THAT'S CORRECT.

13 Q. AND IT WAS PUBLISHED IN A WELL-RESPECTED
14 JOURNAL?

15 A. IT IS.

16 Q. AND IT WENT THROUGH A PEER-REVIEW PROCESS?

17 A. IT DID.

18 Q. AND IT'S A RELIABLE STUDY?

19 A. IT IS A RELIABLE STUDY.

20 Q. AND THIS ARTICLE IS TITLED: E-SHOPPING LOVERS
21 AND FEARFUL CONSERVATIVES, A MARKET SEGMENTATION
22 ANALYSIS, CORRECT?

23 A. THAT'S CORRECT.

24 Q. AND THIS ARTICLE WAS PUBLISHED IN THE YEAR 2006,
25 CORRECT?

1 A. THAT'S CORRECT.

2 Q. IN FACT, IT WAS PUBLISHED AFTER YOU WROTE YOUR
3 EXPERT REPORT, CORRECT?

4 A. IT WAS PUBLISHED AFTER THE EXPERT REPORT. THE
5 ARTICLE WAS SUBMITTED FOR PUBLICATION A YEAR AND-A-HALF,
6 TWO YEARS AGO.

7 Q. BUT IT WAS PUBLISHED AFTER YOU WROTE YOUR EXPERT
8 REPORT, CORRECT?

9 A. YES. THIS IS ACTUALLY THE FIRST TIME I HAVE
10 SEEN THE PUBLISHED ARTICLE.

11 Q. ALL RIGHT. AND IT WAS PUBLISHED JUST THIS PAST
12 SUMMER, CORRECT?

13 A. TRUE.

14 Q. AND I WANT TO FOCUS YOU NOW ON PAGE 1 OF
15 PLAINTIFFS' EXHIBIT 410. UNDER THE CAPTION, ABSTRACT,
16 IF YOU GO DOWN TO THE THIRD HEADING, IT SAYS, FINDINGS.

17 A. YES.

18 Q. YOUR STUDY FOUND THAT -- FOCUSING ON THE SECOND
19 SENTENCE, THAT THREE OF THE SEGMENTS CHARACTERIZE
20 CUSTOMERS WHO RESIST ONLINE SHOPPING EVEN THOUGH THEY
21 ENGAGE IN OTHER ONLINE ACTIVITIES, CORRECT?

22 A. THAT'S CORRECT. THESE ARE NONSHOPPERS. THEY DO
23 NOT SHOP ON THE INTERNET.

24 Q. AND YOUR STUDY FOUND THAT SECURITY FEARS AND
25 TECHNOLOGICAL INCOMPETENCE TYPICALLY INHIBIT THESE USERS

1 FROM ENGAGING IN ELECTRONIC EXCHANGE, CORRECT?

2 A. YEAH. I THINK TECHNOLOGICAL INCOMPETENCE IS THE
3 KEY THERE. THEY DON'T KNOW HOW TO USE A COMPUTER.

4 Q. RIGHT. AND SECURITY FEARS ALSO INHIBIT THESE
5 USERS -- LET ME STRIKE THAT AND START AGAIN.

6 AND SECURITY FEARS ALSO TYPICALLY INHIBIT
7 THESE USERS FROM ENGAGING IN ELECTRONIC EXCHANGE,
8 CORRECT?

9 A. THEY INDICATED THAT THAT WAS SOMETHING THAT
10 WAS -- THAT THEY AGREED WITH, YES.

11 Q. SO AFTER YOU WROTE YOUR EXPERT REPORT, YOU HAD
12 AN ARTICLE PUBLISHED THAT FOUND THAT THERE ARE CUSTOMERS
13 WHO RESIST ONLINE SHOPPING EVEN THOUGH THEY ENGAGE IN
14 OTHER ONLINE ACTIVITIES, CORRECT?

15 A. AGAIN, THIS IS DATA THAT WAS COLLECTED IN, I
16 BELIEVE, THE END OF THE YEAR 2000. THIS IS OLD DATA.

17 Q. SO YOU ARE SAYING PLAINTIFFS' EXHIBIT 410, THE
18 ARTICLE THAT WAS JUST PUBLISHED THIS PAST SUMMER IN
19 2006, IS BASED ON DATA FROM 2000?

20 A. NO. THIS IS -- THIS IS DATA THAT IS BASED --
21 THERE WAS A FOLLOWUP STUDY AND I BELIEVE THE DATA WAS
22 COLLECTED AT THE END OF 2002 OR THE END OF 2003.

23 Q. AND FOCUSING ON PLAINTIFFS' EXHIBIT 410, THE
24 ARTICLE ENTITLED E-SHOPPING LOVERS AND FEARFUL
25 CONSERVATIVES, JUST SO THE RECORD IS CLEAR, THE DATA

1 THAT YOU RELIED ON IN THIS STUDY WAS FROM THE YEAR 2004,
2 CORRECT?

3 A. NO, THE DATA WOULD HAVE BEEN -- LET ME LOOK TO
4 MAKE SURE. IF IT'S 2003 OR --

5 Q. WHY DON'T YOU LOOK ON PAGE 6.

6 A. 6.

7 OKAY. YES. THE DATA WAS COLLECTED IN
8 2004 AND ASKED THEM ABOUT SHOPPING BEHAVIOR IN 2003.

9 Q. SO JUST SO THE RECORD IS CLEAR, THIS IS
10 COMPLETELY NEW DATA THAT YOU ARE RELYING ON HERE,
11 CORRECT?

12 A. IT IS NOW THREE YEARS OLD. BUT IT WAS AN UPDATE
13 OF THREE YEARS FROM THE PREVIOUS STUDY THAT WE HAVE
14 DISCUSSED.

15 Q. RIGHT. SO THIS IS DIFFERENT DATA FROM WHAT WE
16 WERE DISCUSSING EARLIER?

17 A. DIFFERENT DATA, YES.

18 Q. AND THIS DATA, THIS DIFFERENT DATA IS ALSO
19 INCONSISTENT WITH YOUR CONCLUSIONS IN THE PRESENT CASE,
20 CORRECT?

21 A. ACTUALLY THIS DATA SHOWS AN INTERESTING TREND.
22 IF YOU COMPARE THE TWO STUDIES, THE NUMBER OF ONLINE
23 SHOPPERS JUMPED FROM 40 PERCENT IN THE FIRST STUDY TO 65
24 PERCENT IN THIS STUDY. OKAY. A HUGE SHIFT IN ONLINE
25 SHOPPERS. AND CORRESPONDINGLY, THEIR FEARS HAVE GONE

1 DOWN.

2 Q. WELL, WHY DON'T WE FOCUS ON EXACTLY WHAT YOU
3 FOUND IN THIS STUDY THAT WAS JUST PUBLISHED IN THE
4 SUMMER OF 2006.

5 A. OKAY.

6 Q. TURN TO PAGE 21 OF THE DOCUMENT. PAGE 21.

7 FOCUSING ON THE SECTION UNDER THE
8 HEADING, CONCLUDING DISCUSSION, THE SECOND PARAGRAPH
9 THERE BEGINS, THIS ONLINE STUDY. DO YOU SEE THAT?

10 A. YOU WANT ME TO READ THAT?

11 Q. I'M ASKING, DO YOU SEE THAT.

12 A. YES, I DO SEE THAT.

13 Q. AND SO THIS PRESENT STUDY SHOWED A LOWER LEVEL
14 OF ONLINE SHOPPING FEAR THAN THE SWINYARD AND SMITH 2003
15 STUDY?

16 A. THAT IS CORRECT.

17 Q. BUT IN FACT IT STILL SHOWS THAT THERE IS A
18 SIGNIFICANT FEAR, CORRECT?

19 A. THESE CONSUMERS THAT FILLED THIS OUT INDICATED
20 ATTITUDINALLY THAT THERE WAS FEAR, YES.

21 Q. IN FACT, 48 PERCENT OF THE PEOPLE WHO DON'T SHOP
22 ONLINE AGREED WITH THE STATEMENT THAT "I DON'T WANT TO
23 GIVE A COMPUTER MY CREDIT CARD NUMBER," CORRECT?

24 A. THAT'S CORRECT, BUT THEY DID SHOP ONLINE.

25 Q. WE ARE FOCUSING ON THE 48 PERCENT FIGURE, THAT

1 IS OF PEOPLE WHO DON'T SHOP ONLINE?

2 A. I'M SORRY, YES.

3 Q. AND --

4 A. SO THAT WOULD BE ABOUT -- LET ME SEE WHAT THAT
5 WORKS OUT TO -- ABOUT 20 PERCENT OF THE TOTAL SAMPLE.

6 Q. SO JUST SO WE ARE CLEAR, 48 PERCENT OF
7 NONSHOPPERS STATED THAT THEY DIDN'T WANT TO GIVE THE
8 COMPUTER THEIR CREDIT CARD NUMBER, CORRECT?

9 A. 48 PERCENT OF NONSHOPPERS OR 48 PERCENT OF THE
10 40 PERCENT OF INTERNET USERS. THAT IS ABOUT 20 PERCENT
11 OF INTERNET USERS BUT, YES.

12 Q. I'M A LITTLE CONFUSED I GUESS BY WHAT YOU ARE
13 TRYING TO DO. I'M JUST READING STRAIGHT FROM -- AND
14 YOUR CONCLUDING DISCUSSION.

15 THE COURT: JUST ANSWER THE QUESTION HE
16 ASKS.

17 THE WITNESS: 48 OF NONSHOPPERS, YES,
18 THAT'S CORRECT.

19 BY MR. FINE:

20 Q. AND 26 PERCENT OF THE SHOPPERS, PEOPLE WHO DO
21 SHOP ONLINE, AGREED WITH THE STATEMENT THAT "I DON'T
22 WANT TO GIVE A COMPUTER MY CREDIT CARD NUMBER."
23 CORRECT?

24 A. THAT'S CORRECT.

25 Q. AND 61 PERCENT OF THE NONSHOPPERS AGREED THAT I

1 WORRY ABOUT MY CREDIT CARD NUMBER BEING STOLEN ON THE
2 INTERNET, CORRECT?

3 A. THAT'S CORRECT.

4 Q. AND 47 PERCENT OF THE SHOPPERS AGREED THAT "I
5 WORRY ABOUT MY CREDIT CARD NUMBER BEING STOLEN ON THE
6 INTERNET," CORRECT?

7 A. THAT IS CORRECT.

8 Q. AND THIS DATA THAT YOU RELIED ON IN THIS STUDY
9 THAT WAS PUBLISHED IN 2006 SHOWED YOU THE PERSISTENCE OF
10 THE KEY SHOPPING DETERRENT OF FEAR OF FINANCIAL LOSS,
11 CORRECT?

12 A. ACTUALLY, TO ME, IT SHOWS THAT IT IS DECREASING
13 CONSIDERABLY.

14 Q. WHAT?

15 A. OVER THE THREE-YEAR PERIOD. IT IS PERSISTENT,
16 BUT IT IS PERSISTENTLY LESS. AND GIVEN THE CURRENT
17 STATUS OF THE INTERNET, PEOPLE MAY INDICATE THEY HAVE
18 FEAR BUT THEY ARE BUYING. THIS FEAR LEVEL IS NOT
19 INHIBITING THEM FROM SHOPPING ONLINE.

20 Q. YOU ARE NOT CLAIMING THAT THIS DATA IS TOO OLD
21 TO RELY ON TODAY, ARE YOU?

22 A. NO, I AM NOT. BUT WHAT I'M SAYING IS THAT THERE
23 IS DEFINITELY A TREND THAT IS HERE AND IN SPITE OF THE
24 FACT THAT PEOPLE ARE INDICATING THAT THEY ARE FEARFUL OR
25 THAT THEY HAVE CONCERNS, THEY ARE STILL SHOPPING.

1 Q. AND YOU WOULD NOT HAVE PUBLISHED AN ARTICLE IN
2 THE YEAR 2006 THAT WAS NOT TRUTHFUL, WOULD YOU?

3 A. I WOULD NOT HAVE PUBLISHED AN ARTICLE THAT DID
4 NOT REFLECT THE DATA, AND THE DATA WAS 2003 DATA.

5 Q. AND --

6 A. MR. FINE, SOMETIMES I HAVE ARTICLES THAT HAVE
7 TAKEN FIVE YEARS TO GET THROUGH THE REVIEW PROCESS AND
8 TO BE PUBLISHED. IT IS NOT UNCOMMON FOR ARTICLES TO BE
9 PUBLISHED IN A GIVEN YEAR THAT REFLECT DATA MULTIPLE
10 YEARS IN THE PAST.

11 Q. AND YOU DON'T CITE ANY MORE RECENT DATA IN YOUR
12 EXPERT REPORT, DO YOU?

13 A. NO, THIS IS CITING -- I'M SORRY, CITE --

14 Q. YOU DON'T CITE ANY MORE RECENT DATA THAN WHAT IS
15 INCLUDED IN PLAINTIFFS' EXHIBIT 410 IN YOUR EXPERT
16 REPORT, DO YOU?

17 A. WITH RESPECT TO WHAT?

18 Q. WITH RESPECT TO WHY PEOPLE DO NOT SHOP ON THE
19 INTERNET.

20 A. I DON'T BELIEVE THAT I DO. I DON'T BELIEVE I
21 CITE THIS IN MY EXPERT REPORT.

22 Q. AND YOU DON'T CITE TO ANY MORE RECENT DATA ON
23 USERS' WILLINGNESS TO PROVIDE CREDIT CARD INFORMATION TO
24 WEBSITES IN YOUR EXPERT REPORT, DO YOU?

25 A. I DON'T CITE -- I DON'T DISCUSS -- I DON'T

1 BELIEVE I DISCUSSED THAT IN MY REPORT.

2 Q. SO THE ANSWER IS, YOU DO NOT CITE --

3 A. I DO NOT CITE OF ANY KIND -- DATA OF ANY KIND.

4 Q. PROFESSOR SMITH, YOUR OPINION THAT COPA WON'T
5 HAVE MUCH OF A NEGATIVE IMPACT ON COMMERCIAL WEBSITES IS
6 BASED ON THE ASSUMPTION THAT COPA ONLY COVERS SITES WITH
7 PORNOGRAPHIC MATERIAL, CORRECT?

8 A. THAT IS PART OF THE ASSUMPTIONS, YES.

9 Q. THAT IS ONE OF YOUR ASSUMPTIONS?

10 A. YES, THAT IS ONE OF MY ASSUMPTIONS.

11 Q. ANOTHER ONE OF YOUR ASSUMPTIONS IS THAT --

12 A. I'D INSERT THE WORD COMMERCIAL, COMMERCIAL
13 WEBSITES.

14 Q. THAT IS WHAT I WAS GOING TO GET TO. ANOTHER ONE
15 OF YOUR ASSUMPTIONS IS THAT THE ONLY SITES THAT ARE
16 AFFECTED ARE THOSE WHERE INDIVIDUALS ARE MAKING
17 PURCHASES, CORRECT?

18 A. COMMERCIAL WEBSITES, YES. PURCHASES MAY NOT BE
19 NECESSARY, AS I UNDERSTAND IT, IN THE DEFINITION OF
20 COMMERCIAL.

21 Q. JUST SO I'M CLEAR, YOUR ASSUMPTION, YOUR OPINION
22 IS BASED ON THE ASSUMPTION THAT THE ONLY WEBSITES THAT
23 ARE AFFECTED ARE THOSE WHERE INDIVIDUALS ARE MAKING
24 PURCHASES, CORRECT?

25 A. NO, THAT IS NOT WHAT I SAID.

1 MY DEFINITION OF COMMERCIAL WAS A WEBSITE
2 THAT RECEIVES REVENUE. AND A COMMERCIAL WEBSITE MIGHT
3 INCLUDE ADVERTISING MODELS.

4 Q. OKAY.

5 AND THERE ARE SOME COMMERCIAL WEBSITES
6 THAT OFFER CONTENT FOR FREE TO THE USER, CORRECT?

7 A. YES. UNDER ADVERTISING MODELS.

8 Q. AND THEY -- FOR THOSE SITES THAT OFFER CONTENT
9 FOR FREE, THEY MAKE ALL THEIR MONEY SIMPLY THROUGH
10 ADVERTISEMENTS, CORRECT?

11 A. THAT'S CORRECT.

12 Q. AND FOR THOSE SITES, TRAFFIC IS THE MOST
13 IMPORTANT THING TO THOSE WEBSITES, CORRECT?

14 A. YES.

15 Q. THE MORE VIEWERS THEY GET, THE MORE MONEY THEY
16 TAKE IN?

17 A. THESE ARE TYPICALLY CALLED CONTENT WEBSITES,
18 YES.

19 Q. SO THE ANSWER TO MY QUESTION IS YES?

20 A. THE MORE VIEWERS THEY HAVE, THE MORE MONEY THEY
21 GET, YES.

22 Q. AND IF THE SITE MADE ALL OF ITS MONEY THROUGH
23 ADVERTISEMENTS, A LOSS OF TRAFFIC WOULD IMPOSE A
24 SIGNIFICANT BURDEN ON THAT SITE, CORRECT?

25 A. YES, IF THEY LOST TRAFFIC IT WOULD REDUCE THEIR

1 REVENUES.

2 Q. SIGNIFICANTLY?

3 A. IT DEPENDS ON HOW MUCH TRAFFIC THEY LOST.

4 Q. IF THERE WAS A SIGNIFICANT LOSS OF TRAFFIC?

5 A. IF THERE WAS A SIGNIFICANT LOSS OF TRAFFIC,

6 WHATEVER THAT IS DEFINED AS, THERE WOULD BE A

7 SIGNIFICANT LOSS OF REVENUE. I WOULD ASSUME THAT

8 REVENUE IS PROPORTIONAL TO TRAFFIC.

9 Q. AND IS IT YOUR TESTIMONY THAT TRAFFIC ON A

10 WEBSITE -- WHY DON'T WE STRIKE THAT?

11 ON DIRECT EXAMINATION, YOU TALKED ABOUT

12 SUBSCRIPTION BUSINESS MODEL. I WANT TO FOCUS YOU ON

13 THAT RIGHT NOW.

14 A. DIRECT EXAMINATION, THIS IS WHEN --

15 Q. WHEN MR. BEANE WAS ASKING YOU QUESTIONS.

16 A. THANK YOU.

17 Q. YOU DON'T HAVE ANY IDEA WHAT PERCENT OF

18 COMMERCIAL WEBSITES REQUIRE SUBSCRIPTION TO ACCESS THE

19 WEBSITE, DO YOU?

20 A. I DO NOT.

21 Q. YOU DON'T KNOW IF IT IS MORE THAN FIVE PERCENT?

22 A. I HAVE NO IDEA.

23 Q. AND YOU ARE NOT AWARE OF ANY RESEARCH OR STUDIES

24 ON THE IMPACT ON TRAFFIC TO A WEBSITE WHEN A WEBSITE

25 SWITCHES TO A SUBSCRIPTION MODEL?

1 A. OF TRAFFIC?

2 Q. YES.

3 A. TRAFFIC, NO.

4 Q. SO YOU'RE NOT AWARE OF ANY RESEARCH OR STUDIES
5 ON THE IMPACT OF THE NUMBER OF VIEWERS TO A WEBSITE WHEN
6 A WEBSITE SWITCHES TO A SUBSCRIPTION MODEL?

7 A. I AM NOT. I WOULD ASSUME THAT SALON.COM WOULD
8 KNOW SINCE THEY HAVE SWITCHED TO THAT AND THEY FOUND IT
9 SUCCESSFUL.

10 Q. YOU JUST MENTIONED SALON. ARE YOU AWARE THAT
11 SALON HAS MOVED AWAY FROM A SUBSCRIPTION MODEL?

12 A. NOT AS OF YESTERDAY, THEY HADN'T.

13 Q. AND YOU HAVE NO IDEA WHAT THE IMPACT ON SALON'S
14 TRAFFIC WAS WHEN THEY EXPERIMENTED WITH THE SUBSCRIPTION
15 MODEL?

16 A. THEY ARE STILL DOING SUBSCRIPTIONS.

17 Q. AND YOU DON'T KNOW WHAT THE IMPACT ON THE NUMBER
18 OF VIEWERS TO NERVE HAS BEEN FROM THEIR DECISION TO
19 LIMIT CERTAIN CONTENT TO PAYING CUSTOMERS?

20 A. I DON'T, BUT I KNOW THAT IT HAS INCREASED THEIR
21 REVENUES.

22 Q. AND YOU DON'T KNOW WHAT THE IMPACT ON THE NUMBER
23 OF VIEWERS TO HEATHER CORINNA'S WEBSITES HAS BEEN, DO
24 YOU?

25 A. THAT I DO NOT KNOW.

1 Q. YOU DON'T CITE TO ANY STUDIES IN YOUR REPORT
2 SAYING THAT INTERNET USERS WILL BE WILLING TO SUBSCRIBE
3 TO WEBSITES THAT ARE CURRENTLY OFFERED FOR FREE,
4 CORRECT?

5 A. THE FIRST PART OF YOUR QUESTION AGAIN?

6 Q. YOU DON'T CITE TO ANY STUDIES IN YOUR EXPERT
7 REPORT SAYING THAT INTERNET USERS WILL BE WILLING TO
8 SUBSCRIBE TO WEBSITES THAT ARE CURRENTLY OFFERED FOR
9 FREE, CORRECT?

10 A. NO, I DON'T BELIEVE SO.

11 Q. THE FACT THAT SOME PEOPLE ARE WILLING TO
12 SUBSCRIBE TO A WEBSITE DOES NOT MEAN THAT ALL INTERNET
13 USERS WILL SUBSCRIBE, DOES IT?

14 A. NO.

15 Q. YOU PERSONALLY HAVE DECIDED NOT TO ENTER
16 WEBSITES BECAUSE THEY REQUIRE A SUBSCRIPTION, CORRECT?

17 A. YES, THAT IS CORRECT.

18 Q. I WANT TO ASK YOU NOW ABOUT SITES THAT REQUIRE
19 REGISTRATION.

20 A. OKAY.

21 Q. YOU DON'T KNOW HOW MANY SITES REQUIRE
22 REGISTRATION JUST TO ACCESS A WEBSITE -- THE WEBSITE, DO
23 YOU?

24 A. NO. BY REGISTRATION, CAN YOU DEFINE THAT FOR
25 ME, WHAT WE ARE TALKING ABOUT IN YOUR MIND?

1 Q. LET ME ASK YOU. CAN YOU DEFINE REGISTRATION FOR
2 US?

3 A. WELL, YOU ARE THE ONE ASKING THE QUESTION. I
4 PREFER TO HEAR --

5 THE COURT: LET ME TELL YOU SOMETHING,
6 GENTLEMEN. YOU ANSWERED THE QUESTION. ASK HIM ANOTHER
7 QUESTION. MOVE ALONG.

8 BY MR. FINE:

9 Q. DO YOU KNOW HOW MANY SITES REQUIRE REGISTRATION?

10 A. I DO NOT.

11 Q. DON'T KNOW IF IT'S MORE THAN FIVE PERCENT?

12 A. I HAVE NO KNOWLEDGE OF THAT AT ALL.

13 Q. IF A SITE STARTED TO REQUIRE USERS TO REGISTER
14 BEFORE ACCESSING THE SITE, THERE WOULD BE LESS VIEWERS,
15 WOULDN'T THERE?

16 A. YES.

17 Q. YOU DON'T CITE TO ANY STUDIES IN YOUR EXPERT
18 REPORT SAYING THAT INTERNET USERS WILL BE WILLING TO
19 REGISTER WITH WEBSITES SIMPLY TO ACCESS FREE CONTENT ON
20 THOSE SITES?

21 A. NO, I DON'T ADDRESS THAT ISSUE.

22 Q. DON'T CITE TO ANY STATISTICS?

23 A. NO.

24 Q. MOST WEBSITES DON'T REQUIRE YOU TO PROVIDE A
25 REAL NAME TO REGISTER TO ACCESS CONTENT, DO THEY?

1 A. NOT A REAL NAME. MANY WILL REQUIRE A REAL
2 E-MAIL ADDRESS.

3 Q. YOU CAN ENTER A FAKE NAME, IF YOU WANT?

4 A. YES.

5 Q. YOU CAN ENTER A FAKE ADDRESS?

6 A. YES.

7 Q. AND NO SITES REQUIRE USERS TO ENTER A CREDIT
8 CARD NUMBER JUST TO REGISTER?

9 A. PARDON ME?

10 Q. NO SITES REQUIRE USERS TO ENTER A CREDIT CARD
11 NUMBER JUST TO REGISTER WITH THE SITE?

12 A. NOT THAT I'M AWARE OF. ALTHOUGH -- REQUIRE, NO.
13 SOME SITES, I GUESS, TECHNICALLY COULD ALLOW YOU TO.
14 ONLINE STORES, YOU COULD GO IN AND SET UP AN ACCOUNT.

15 Q. THERE IS A DIFFERENCE BETWEEN REQUIRING SOMEONE
16 GOING INTO A BAR, SHOW YOU A PHYSICAL ID, AND HAVING
17 SOMEONE WRITE DOWN THE INFORMATION ON THAT ID, CORRECT?

18 A. THE QUESTION IS THE DIFFERENCE BETWEEN SHOWING
19 AND WRITING IT DOWN?

20 Q. YES.

21 A. THERE IS A DIFFERENCE, YES.

22 Q. THERE'S A DIFFERENCE TO THE PERSON WHO IS HAVING
23 TO SHOW THE IDENTIFICATION?

24 A. IT DEPENDS ON WHAT THE IDENTIFICATION IS. IF
25 THEY WROTE DOWN MY DRIVER'S LICENSE, I COULD CARE.

1 Q. LET'S SAY IT IS YOUR CREDIT CARD.

2 A. I WOULD ASK THE QUESTION, WHY DID THEY NEED MY
3 CREDIT CARD TO GET ID FOR AGE VERIFICATION.

4 Q. LET ME ASK YOU THIS QUESTION. A PERSON WOULD BE
5 LESS WILLING TO GIVE SOMEONE ELSE THEIR CREDIT CARD
6 INFORMATION IF THEY KNEW THE OTHER PERSON WAS GOING TO
7 WRITE IT DOWN, CORRECT?

8 A. IT DEPENDS ON THE REASON. IT DEPENDS ON THE
9 TRUST RELATIONSHIP THAT I HAVE. AS A GENERAL STATEMENT,
10 SURE, THAT IS PROBABLY THE CASE.

11 Q. AND PEOPLE WOULD BE EVEN LESS WILLING TO GIVE
12 SOMEONE THEIR CREDIT CARD NUMBER IF THEY KNEW THE
13 INFORMATION WAS GOING TO BE STORED?

14 A. YOU ARE GOING SOMEWHERE, AND I'M NOT QUITE SURE
15 I AGREE WITH WHAT YOU ARE TRYING TO GET ME TO DO HERE.

16 IF IT IS STORED AND IF IT IS NOT SECURE
17 AND IF THERE ARE NO REASONS FOR THEM TO HAVE THAT
18 INFORMATION, THEN CERTAINLY, THEY WOULD BE -- I MEAN,
19 THIS IS A MATTER OF PERSONAL JUDGMENT.

20 Q. YOU DECIDED NOT TO ENTER A SITE BECAUSE IT
21 REQUIRES REGISTRATION, CORRECT?

22 A. THAT IS CORRECT.

23 Q. PROFESSOR SMITH, IN YOUR EXPERT REPORT -- THIS
24 MORNING YOU WERE DISCUSSING YOUR CONCEPT THAT QUALITY
25 CONTENT IS MORE VALUED THAN FREE CONTENT. DO YOU

1 REMEMBER THAT?

2 A. YES.

3 Q. YOU DON'T CITE TO ANY STUDIES TO SUPPORT THAT IN
4 YOUR REPORT, TO SUPPORT THAT VIEW, DO YOU?

5 A. I DO NOT.

6 Q. PROFESSOR SMITH, THE MOTIVATIONS OF PEOPLE
7 SEEKING OUT PORNOGRAPHY ARE OUTSIDE YOUR FIELD OF
8 EXPERTISE, CORRECT?

9 A. MOTIVATIONS ARE NOT OUTSIDE OF MY EXPERTISE. I
10 HAVE READ ARTICLES, I HAVE RESEARCHED THIS TOPIC FOR
11 PURPOSES OF PREPARING MY EXPERT REPORTS.

12 Q. LET ME ASK YOU THIS QUESTION.

13 YOU DON'T STUDY THE MOTIVATIONS OF
14 INTERNET USERS SEEKING OUT SEXUALLY EXPLICIT SPEECH
15 ONLINE AS PART OF YOUR REGULAR SCHOLARLY OR PROFESSIONAL
16 ACTIVITIES?

17 A. OF PORNOGRAPHIC USERS?

18 Q. YES.

19 A. PRIOR TO BEING INVOLVED IN THIS LITIGATION, I
20 HAD NOT.

21 Q. NEVER PERSONALLY STUDIED IT?

22 A. I HAVE BEEN INVOLVED IN A COUPLE OF RESEARCH
23 STUDIES, BUT THEY WERE NOT MY RESEARCH. I WAS HELPING
24 OTHER INDIVIDUALS.

25 Q. SO THE ANSWER TO MY QUESTION, YOU'VE NEVER

1 PERSONALLY STUDIED IT?

2 A. I HAVE NEVER PERSONALLY PUBLISHED ANY PAPERS OR
3 OTHER -- BACK UP. I HAVE STUDIED IT IN CONJUNCTION WITH
4 THIS CASE ONLY.

5 Q. AND I WANT TO TURN BACK TO YOUR EXPERT REPORT,
6 DEFENDANT'S EXHIBIT 91. IF YOU WOULD NOT MIND DOING
7 THAT RIGHT NOW.

8 A. OKAY, I'M SORRY. WHICH --

9 Q. DEFENDANT'S IN THE OTHER BINDER. YOUR EXPERT
10 REPORT.

11 A. OKAY. I'M AFRAID THIS IS IN DISARRAY.

12 Q. WE ARE ALMOST DONE HERE.

13 A. OKAY.

14 Q. TURN TO PAGE 14, THE LAST PARAGRAPH.

15 A. OKAY. IF YOU CAN BRING IT UP ON THE SCREEN.
16 THAT IS HELPFUL.

17 Q. YOU CITE TO AN ARTICLE BY SOMEONE NAMED BUZZELL,
18 CORRECT?

19 A. YES.

20 Q. YOU DON'T KNOW WHO HE IS, DO YOU?

21 A. I HAVE GONE OUT AND EXAMINED THE ARTICLE. I
22 HAVE EXAMINED HIS CREDENTIALS, I DON'T RECALL WHAT THEY
23 ARE RIGHT NOW. I LOOKED AT THE JOURNAL. I LOOKED AT
24 THE BOARD OF EDITORS FOR THE JOURNAL.

25 Q. MY QUESTION TO YOU, SIR, IS, DO YOU KNOW WHO HE

1 IS?

2 A. I DON'T KNOW HIM PERSONALLY, NO.

3 Q. YOU'VE NEVER TALKED TO HIM?

4 A. BUZZELL, I HAVE NOT.

5 Q. NEVER HEARD OF HIM BEFORE YOUR INVOLVEMENT IN
6 THIS CASE?

7 A. I BELIEVE I MAY HAVE HEARD HIS NAME, BUT I
8 COULDN'T EVEN ATTEST TO THAT IN CERTAINTY.

9 Q. YOU DON'T KNOW IF HE IS WELL RESPECTED IN THE
10 FIELD?

11 A. OVERALL WELL RESPECTED, THAT I DON'T KNOW. I
12 KNOW HE HAS A PEER REVIEWED -- TWO PEER REVIEWED
13 ARTICLES THAT PASSED MUSTER IN VERY GOOD JOURNALS.

14 Q. YOU DON'T KNOW IF HIS WORK IS PARTICULARLY
15 CONTROVERSIAL, DO YOU?

16 A. I DO NOT -- JUDGING FROM THE NATURE OF THE
17 ARTICLES, I WOULD SAY THEY ARE NOT CONTROVERSIAL AT ALL.

18 Q. YOU DON'T KNOW ONE WAY OR THE OTHER?

19 A. I CAN PUT AN EDUCATED GUESS. THERE IS NO REASON
20 FOR HIS ARTICLES TO BE CONTROVERSIAL. THEY'RE PROBABLY
21 THE LEAST CONTROVERSIAL ARTICLES I HAVE EVER READ.

22 Q. YOU DON'T KNOW ONE WAY OR THE OTHER?

23 A. I DON'T KNOW. PERHAPS SOMEONE HAS WRITTEN A
24 REJOINDER TO THAT. I DID NOT FIND ANYTHING IN THE
25 JOURNALS.

1 MR. FINE: YOUR HONOR, IF I MAY HAVE ONE
2 MOMENT TO CONFER.

3 THE COURT: SURELY.

4 MR. FINE: NO FURTHER QUESTIONS NOW, YOUR
5 HONOR.

6 THE COURT: ANY REDIRECT?

7 MR. BEANE: YES, YOUR HONOR.

8 THE COURT: WHILE YOU ARE WALKING UP,
9 JUST SO I DON'T FORGET IT, IN CONNECTION WITH THE
10 DEFENSE OBJECTION TO THE PLAINTIFFS' COUNSEL ASKING
11 QUESTIONS OF THE WITNESS THAT APPEARED TO ARISE OUT OF
12 THE REBUTTAL REPORT, I SUSTAINED -- I OVERRULED THE
13 OBJECTION. I DIDN'T GIVE ANY REASON. THE REASON IS --
14 IF I DID GIVE ONE, IT DID NOT INCLUDE THIS REASON. THE
15 REASON -- ONE OF THE REASONS WAS THAT THE -- BECAUSE OF
16 THE BREADTH OF THE EXPERIENCE OF THE WITNESS AND THE
17 BREADTH OF HIS REPORT, AND THE GENERAL NATURE OF HIS
18 OPINIONS I BELIEVE THAT THE QUESTIONS ABOUT THE REBUTTAL
19 INFORMATION ARE WITHIN THE SCOPE OF THE DIRECT
20 EXAMINATION, IF YOU LOOK AT THE WHOLE THING. I JUST
21 WANTED TO PUT THAT IN BEFORE I FORGOT IT. THANK YOU.

22 REDIRECT EXAMINATION

23 BY MR. BEANE:

24 Q. PROFESSOR SMITH, WERE YOU ASKED TO MAKE ANY
25 DETERMINATIONS ABOUT WHETHER A COMMERCIAL WEBSITE IS

1 HARMFUL TO MINORS AS DEFINED BY COPA?

2 A. I WAS NOT.

3 Q. WERE YOU ASKED TO CONSIDER THE EFFECT OF COPA ON
4 COMMERCIAL WEBSITES GENERALLY?

5 A. I WAS NOT.

6 Q. DOES YOUR OPINION THAT YOU OFFERED TODAY
7 REGARDING COMMERCIAL WEBSITES APPLY TO ALL COMMERCIAL
8 WEBSITES, INCLUDING SOME WHO ARE PLAINTIFFS IN THIS
9 CASE?

10 A. YES.

11 Q. MR. FINE ASKED QUESTIONS ABOUT THE EFFECT ON A
12 WEBSITE OF REQUIRING VERIFICATION OF SOME KIND ON THE
13 FRONT PAGE.

14 A. UH-HUH.

15 Q. CONSIDER A PORNOGRAPHY WEBSITE. IN YOUR OPINION
16 SHOULD THE OPERATOR OF THAT WEBSITE REQUIRE VERIFICATION
17 ON THE FIRST PAGE?

18 A. NEVER.

19 Q. WHY NOT?

20 A. YOU WANT TO BRING PEOPLE INTO THE WEBSITE. IN
21 ESSENCE, YOU WANT TO GIVE THEM AN EXPERIENCE. YOU WOULD
22 LIKE TO BRING THEM INTO THE DEPARTMENT STORE TO HAVE
23 THEM LOOK AROUND AND SEE WHAT IS THERE. AND WHAT YOU
24 WOULD DO WOULD BE TO PUT MATERIAL THERE THAT QUALIFIES
25 FOR COPA WITHIN THE WEBSITE, AND THEN AFTER THEY HAVE

1 LOOKED AROUND, THEN YOU WOULD MOVE THEM AND REQUIRE
2 COPA.

3 Q. SO IN YOUR OPINION, NO WEBSITE, EVEN IF IT IS
4 PORNOGRAPHIC, SHOULD PUT THE VERIFICATION PAGE ON THE --
5 OR THE VERIFICATION SCREEN ON THE FIRST PAGE?

6 A. THAT'S TRUE, YES.

7 Q. YOU WERE ASKED A SERIES OF QUESTIONS ABOUT
8 WEBSITES THAT PROFIT THROUGH ADVERTISING, AND YOU WERE
9 ASKED ABOUT THE RELATIONSHIP BETWEEN TRAFFIC AND REVENUE
10 FROM ADVERTISING. DO YOU RECALL THAT DISCUSSION?

11 A. I BELIEVE SO. THERE HAS BEEN SO MANY QUESTIONS
12 TODAY I COULD NOT TELL YOU MY NAME.

13 Q. LET'S ASSUME --

14 A. I'M SORRY.

15 Q. LET'S ASSUME THAT A WEBSITE HAS A VERIFICATION
16 WALL, BUT IT'S NOT ON THE FRONT PAGE.

17 A. YES.

18 Q. DOES THE EXISTENCE OF THAT VERIFICATION WALL IN
19 YOUR OPINION HAVE AN EFFECT ON TRAFFIC ON THE PAGES THAT
20 ARE IN FRONT OF THAT VERIFICATION PAGE?

21 A. IT SHOULD NOT.

22 Q. MR. FINE ASKED YOU ABOUT CONSUMER WILLINGNESS TO
23 PROVIDE PERSONAL INFORMATION ON THE INTERNET.

24 A. YES.

25 Q. AND HE POINTED TO A RESPONSE THAT YOU GAVE TO

1 ONE OF HIS QUESTIONS IN THE DEPOSITION. DO YOU RECALL
2 THAT DISCUSSION?

3 A. CAN YOU REPEAT THE QUESTION? I'M SORRY, MR.
4 BEANE.

5 Q. I'M REFERENCING THE DISCUSSION ABOUT THE
6 WILLINGNESS OF CONSUMERS TO PROVIDE PERSONAL INFORMATION
7 ON THE INTERNET.

8 A. OKAY.

9 Q. DO YOU RECALL APPROXIMATELY HOW MANY TIMES
10 MR. FINE ASKED IF YOU ABOUT CONSUMER WILLINGNESS TO
11 PROVIDE PERSONAL INFORMATION ON THE INTERNET DURING YOUR
12 DEPOSITION?

13 A. 15 TO 20.

14 Q. HOW MANY TIMES -- HOW MANY PORTIONS OF THAT
15 DEPOSITION TRANSCRIPT DID HE PUT UP DURING YOUR
16 TESTIMONY TODAY?

17 A. I THINK ONE.

18 Q. I WOULD LIKE TO PUT UP -- REFERENCE YOUR
19 DEPOSITION, PAGE 57. I'M NOT SURE IF THE SCREEN IS ON
20 THE DEFENDANT'S SIDE NOW OR THE PLAINTIFFS'.

21 THE COURT: I DON'T KNOW WHAT YOU WANT
22 HIM TO PUT UP WHAT HERE.

23 MR. BEANE: PLEASE FOCUS IN, MR.
24 BYRDSONG, ON LINES 4 THROUGH 14.

25 THE COURT: DO WE HAVE THE DEFENDANT ON?

1 MR. BEANE: YES, WE DO, YOUR HONOR. ON
2 PAGE 57, AND WE'RE FOCUSING ON LINES 4 THROUGH 14.

3 BY MR. BEANE:

4 Q. CAN YOU READ THAT FOR THE COURT?

5 A. IF THEY DON'T NEED YOUR INFORMATION, SHOULDN'T
6 AN INTERNET USER BE RELUCTANT TO PROVIDE PERSONAL
7 INFORMATION ON THE INTERNET?

8 ANSWER: MAYBE THE DIRECT ANALOGY IS IF
9 SOMEONE ON THE STREET ASKED YOU FOR PERSONAL
10 INFORMATION, YOU PROBABLY WOULD NOT PROVIDE THAT.

11 QUESTION: OKAY. AND WHAT IS A
12 SUFFICIENT REASON FOR PROVIDING PERSONAL INFORMATION ON
13 THE INTERNET?

14 ANSWER: THE MOST BASIC IS YOU HAVE
15 SOMETHING THAT I NEED, AND I'LL PROVIDE MY INFORMATION
16 SO THAT I CAN GET IT.

17 Q. WE CAN TAKE THAT DOWN. DO YOU RECALL ALSO BEING
18 ASKED ABOUT CONSUMER WILLINGNESS TO PROVIDE CREDIT CARD
19 INFORMATION ON THE INTERNET?

20 A. YES.

21 Q. AND WERE YOU ASKED THAT QUESTION MULTIPLE TIMES
22 DURING THE DEPOSITION?

23 A. YES.

24 Q. AND HOW MANY RESPONSES DID MR. FINE PUT ON THE
25 SCREEN FROM YOUR DEPOSITION?

1 A. I BELIEVE ONE.

2 Q. PLEASE TURN TO PAGE 95 OF THE DEPOSITION. IF
3 YOU CAN, IT'S GOING TO RUN FROM PAGE 95, LINE 19 THROUGH
4 PAGE 96, LINE 8. CAN YOU READ THE HIGHLIGHTED PORTION
5 FOR THE COURT, PLEASE?

6 A. YES.

7 QUESTION: IS IT YOUR TESTIMONY THAT
8 PEOPLE ARE WILLING TO PROVIDE -- LET ME ASK YOU THIS
9 QUESTION.

10 ARE PEOPLE WILLING TO PROVIDE CREDIT CARD
11 INFORMATION -- IS IT YOUR OPINION THAT PEOPLE ARE
12 WILLING TO PROVIDE CREDIT CARD INFORMATION SIMPLY TO
13 BROWSE ON A WEBSITE?

14 ANSWER: OKAY. TO THE DEGREE THAT THE
15 WEBSITE IS SECURE AND THAT THERE IS A PURPOSE FOR DOING
16 THAT, PROVIDING THE INFORMATION, IF THERE ARE PERSONAL
17 GUARANTEES. COPA, FOR EXAMPLE, PROVIDES A GUARANTEE OF
18 SECURITY, THAT INFORMATION CANNOT BE SHARED. IF THOSE
19 ARE REPUTABLE BUSINESSES THAT PROVIDE SECURE SITES FOR
20 PROVIDING THAT INFORMATION, THEN YES, I BELIEVE THAT
21 THEY WILL DO THAT.

22 Q. YOU CAN TAKE THAT DOWN. I WOULD LIKE TO FOCUS
23 ON TWO DIFFERENT THINGS THAT YOU MENTIONED THERE. ONE
24 IS THE SECURITY OF THE TRANSACTIONS. WHAT STEPS CAN A
25 WEBSITE TAKE TO MAKE A CONSUMER MORE TRUSTING BASED ON

1 SECURITY OF THE TRANSACTIONS?

2 A. ONE THING THEY CAN DO IS TO PUT THE LOGO UP FOR
3 THE SECURING COMPANY.

4 Q. WHAT IS A SECURING COMPANY?

5 A. SOMEONE LIKE VERISIGN WHO PROVIDES THE SECURE
6 ENCRYPTION THAT TRANSFERS DATA BETWEEN THE INDIVIDUAL'S
7 COMPUTER AND THE WEBSITE. IT'S THE THING THAT BRINGS --
8 YOU HAVE THE LOGO AND THEN THE ACTUAL SECURITY MECHANISM
9 IS WHAT BRINGS UP THE LITTLE LOCK ON THE BOTTOM OF YOUR
10 SCREEN WHEN YOU ARE IN A SECURE SITE.

11 Q. HOW DOES THAT PROTECT A CONSUMER?

12 A. THE LOGO ITSELF DOES NOT PROTECT THEM. IT'S
13 SIMPLY AN EVIDENCE OF THAT PROTECTION.

14 Q. WHAT SERVICE DOES VERISIGN TO PROVIDE -- WHAT
15 SERVICE DOES VERISIGN PROVIDE TO WEBSITES THAT HAVE THAT
16 LOGO ON THEIR WEBSITES?

17 A. THEY PROVIDE THEM WHAT IS CALLED A SECURE
18 CERTIFICATE. IT ENABLES THE ENCRYPTION OF THE DATA THAT
19 IS TRANSFERRED TO THE WEBSITE.

20 Q. I'D LIKE TO DRAW YOUR ATTENTION TO PLAINTIFFS'
21 EXHIBIT 403. AND I DON'T BELIEVE WE WILL BE ABLE TO
22 CALL THIS TO THE SCREEN SO IF YOU DON'T MIND REFERENCING
23 THE BINDER IN FRONT OF YOU.

24 A. 403.

25 Q. THAT'S RIGHT. AND THIS IS -- FOR THE RECORD,

1 THIS IS -- I'M TRYING TO DRAW YOUR ATTENTION TO THE
2 ARTICLE WHY PEOPLE DON'T SHOP ONLINE? I BELIEVE THAT IS
3 EXHIBIT 403.

4 A. OKAY.

5 Q. CAN YOU TURN TO PAGE 29?

6 A. OKAY.

7 Q. LOOK AT THE LAST FULL PARAGRAPH ON PAGE 29. IT
8 BEGINS WITH THE PHRASE, WHATEVER THE SECURITY PROVIDED.

9 A. YES.

10 Q. MR. FINE ASKED YOU TO READ THIS PARAGRAPH, BUT
11 HE DIDN'T ASK YOU TO READ THE LAST SENTENCE THAT BEGINS,
12 SHOPPERS' CREDIT CARD INFORMATION. CAN YOU READ THAT --
13 DO YOU SEE WHICH SENTENCE I'M REFERRING TO?

14 A. YES.

15 Q. READ THAT SENTENCE TO THE COURT, PLEASE.

16 A. SHOPPERS' CREDIT CARD INFORMATION COULD BE
17 VISIBLY INSULATED FROM THE ONLINE VENDOR, AND IT IS
18 CLEAR FROM THIS STUDY THAT VENDORS WHO SHOP -- WHO
19 SHOPPERS ASSOCIATE WITH FINANCIAL SECURITY WILL BE
20 PREFERRED OVER OTHER VENDORS.

21 Q. WHAT WERE YOU REFERRING TO WHEN YOU WERE TALKING
22 ABOUT ASSOCIATIONS WITH FINANCIAL SECURITY?

23 A. I THINK WHAT WE WERE SUGGESTING HERE IS THAT IF
24 YOU CAN PROVIDE EVIDENCE TO THE SHOPPER THAT THEIR DATA
25 IS SECURE, THEN THEY WILL PREFER YOUR SITE OVER OTHER

1 SITES.

2 Q. DO YOU KNOW OF ANY REASON THAT A COMMERCIAL
3 WEBSITE COULDN'T UTILIZE THE SERVICES OF A COMPANY LIKE
4 VERISIGN IN ORDER TO DEMONSTRATE TO CONSUMERS THAT THE
5 INFORMATION -- THAT THE TRANSACTION OF INFORMATION IS
6 SECURE?

7 A. THERE IS NO REASON TECHNOLOGICALLY THAT THEY
8 COULDN'T.

9 Q. WHILE WE ARE LOOKING AT THIS DOCUMENT, PLEASE
10 LOOK AT THE FIRST FULL PARAGRAPH. IT BEGINS, THIS
11 RESEARCH ALSO EXAMINES.

12 A. OKAY.

13 Q. I BELIEVE YOU DID READ THIS ENTIRE PARAGRAPH.
14 THIS DISCUSSION WAS ABOUT THE PERCENTAGES OF PEOPLE WHO
15 AGREED WITH CERTAIN STATEMENTS. AND ONE OF THE
16 STATEMENTS BEGINS, I DON'T WANT TO GIVE AND THE OTHER
17 BEGINS, I WORRY ABOUT. YOU MENTIONED THAT THIS -- THESE
18 TYPES OF QUESTIONS WERE GETTING AT ATTITUDINAL ISSUES.
19 AND YOU DISTINGUISHED THAT IN THE DISCUSSION FROM
20 BEHAVIORAL ISSUES.

21 A. YES.

22 Q. WHEN YOU ARE MEASURING CONSUMER BEHAVIOR, DO YOU
23 HAVE AN OPINION ABOUT WHICH IS THE BETTER MEASURE,
24 ATTITUDINAL OR BEHAVIORAL INFORMATION?

25 A. ABSOLUTELY BEHAVIORAL, IF YOU CAN FIND OUT WHAT

1 THEY ARE MAKING CHOICES AND WILLING TO DO.

2 Q. I BELIEVE YOU ALSO SAID SOMETHING ABOUT THERE IS
3 A DISTINCTION BETWEEN WHAT PEOPLE SAY AND WHAT THEY DO.
4 WHICH OF THOSE TWO IS THE BETTER MEASURE OF ACTUAL
5 CONSUMER BEHAVIOR?

6 A. WHAT THEY DO IS THE BEHAVIOR ITSELF.

7 Q. IS E-COMMERCE GROWING?

8 A. YES.

9 Q. ARE MORE AND MORE PEOPLE SHOPPING ONLINE?

10 A. THEY ARE.

11 Q. THE SECOND THING THAT YOU MENTIONED IN THAT
12 PORTION OF THE DEPOSITION WAS ASSURANCES OF SECURITY.
13 YOU SAID COPA PROVIDES A GUARANTEE OF SECURITY. ARE YOU
14 REFERRING TO A PROVISION IN COPA ADDRESSING CONSUMERS'
15 PERSONAL INFORMATION?

16 A. YES.

17 Q. WHAT'S YOUR UNDERSTANDING OF THAT PROVISION?

18 A. MY UNDERSTANDING IS THAT UNDER COPA, WEBSITES
19 ARE OBLIGATED NOT TO SHARE THAT INFORMATION AT ALL. IT
20 IS TO BE SECURE.

21 Q. DO YOU HAVE AN OPINION ABOUT THE EFFECT OF A
22 PRIVACY PROVISION?

23 A. OBVIOUSLY, FROM THE RESEARCH THAT WE REVIEWED,
24 SECURITY IS VERY IMPORTANT, AND ANYTHING THAT CAN BE
25 DONE TO ENHANCE THAT SECURITY OR GUARANTEE PRIVACY OF

1 THE CUSTOMER WOULD BE BENEFICIAL TO THE WEBSITE.

2 Q. YOU WERE ASKED QUESTIONS ABOUT DIFFERENT STUDIES
3 THAT YOU CONDUCTED. I THINK THERE WERE MORE ARTICLES
4 ADDRESSING THE DATA FROM THOSE STUDIES THEN THERE WERE
5 ACTUAL STUDIES. I WOULD LIKE TO KNOW YOUR CURRENT
6 OPINION NOW. WHAT TRENDS CAN YOU REPORT BASED ON YOUR
7 EXPERIENCE WITH STUDYING CONSUMER WILLINGNESS TO SHOP
8 ONLINE?

9 MR. FINE: OBJECTION. THIS GOES WAY
10 BEYOND THE SCOPE OF THE WITNESS' EXPERT REPORT.

11 THE COURT: LET ME LOOK AT THE QUESTION.

12 MR. BEANE: IF I MAY WHEN YOU ARE
13 FINISHED READING, YOUR HONOR.

14 THE COURT: I READ THE QUESTION AND
15 FRANKLY IT'S VERY HARD TO UNDERSTAND. I'LL TRY TO READ
16 IT.

17 QUESTION: YOU WERE ASKED QUESTIONS ABOUT
18 DIFFERENT STUDIES THAT YOU CONDUCTED. I THINK THERE
19 WERE MORE ARTICLES ADDRESSING THE DATA FROM THOSE
20 STUDIES THAN THERE WERE ACTUAL STUDIES. I WOULD LIKE TO
21 KNOW YOUR CURRENT OPINION NOW. WHAT TRENDS CAN YOU
22 REPORT BASED ON YOUR EXPERIENCE WITH STUDYING CONSUMER
23 WILLINGNESS TO SHOP ONLINE. THAT IS THE QUESTION. NOW,
24 WHAT'S THE OBJECTION.

25 MR. FINE: THE OBJECTION IS, THIS IS NOW

1 CALLING FOR OPINIONS ABOUT FUTURE TRENDS THAT ARE
2 NOWHERE TO BE FOUND IN THE WITNESS'S EXPERT REPORT.

3 MR. BEANE: YOUR HONOR --

4 THE COURT: IT TALKED ABOUT HIS
5 CURRENT -- THE CURRENT, THIS DATE, HIS OPINION TODAY.
6 THAT IS HOW I READ THE QUESTION.

7 MR. FINE: AND THE CURRENT TRENDS AND
8 THERE IS NO DISCUSSION ABOUT CURRENT TRENDS AT ALL IN
9 HIS EXPERT REPORT.

10 THE COURT: THIS IS REDIRECT. IT'S
11 WITHIN THE SCOPE OF THE CROSS. OBJECTION IS OVERRULED.

12 MR. BEANE: OKAY.

13 THE WITNESS: WOULD YOU REPEAT THE
14 QUESTION.

15 BY MR. BEANE:

16 Q. MY QUESTION ESSENTIALLY IS WHAT IS YOUR CURRENT
17 OPINION ABOUT CONSUMER WILLINGNESS TO SHOP ONLINE BASED
18 ON YOUR AWARENESS OF TRENDS?

19 A. TRENDS INDICATE THAT SHOPPING ONLINE IS
20 INCREASING. WE LOOKED AT DATA HERE FROM 2000, 2003.
21 THE NUMBERS WENT FROM 40 PERCENT SHOPPING ONLINE TO 60
22 PERCENT, 65 PERCENT SHOPPING ONLINE. CURRENT NUMBERS
23 ARE ESTIMATED TO BE 75 TO 80 PERCENT SHOPPING ONLINE.
24 AT SOME POINT THAT WILL ASYMPTOTE. IT'S GOING TO DROP
25 OFF SIMPLY BECAUSE THERE ARE SOME PEOPLE THAT WILL NEVER

1 SHOP ONLINE. THERE IS SOME THAT WILL NEVER USE
2 COMPUTERS. I BELIEVE IT WILL CONTINUE TO GROW OVER THE
3 NEXT FEW YEARS. THERE ARE ADOPTION CURVES FOR ALL
4 TECHNOLOGY, WHETHER IT IS T.V., TELEPHONES, AND THOSE
5 TYPES OF THINGS. THE INTERNET HAS THE HIGHEST GROWTH
6 RATE OF ANY MODERN APPLIANCE THAT HAS EVER BEEN
7 INTRODUCED, AND IT WILL CONTINUE TO GROW. PEOPLE
8 WILL COME AND PEOPLE WILL SHOP. PEOPLE WILL USE THE
9 INTERNET.

10 MR. BEANE: YOUR HONOR, MAY I CONFER
11 BRIEFLY WITH COUNSEL?

12 THE COURT: OF COURSE.

13 MR. BEANE: YOUR HONOR, I HAVE NO MORE
14 QUESTIONS FOR THIS WITNESS.

15 THE COURT: ANY NECESSARY RECROSS?

16 MR. FINE: NO, YOUR HONOR.

17 THE COURT: PROFESSOR, YOU ARE EXCUSED
18 FROM THE STAND, SIR.

19 THE WITNESS: THANK YOU, YOUR HONOR.

20 THE COURT: LEAVE BEHIND ANYTHING YOU
21 DON'T OWN. TAKE ONLY WHAT YOU OWN. LET THE LAWYERS
22 WORRY ABOUT IT.

23 DEFENDANT HAVE ANY OTHER WITNESSES OR
24 EVIDENCE TO OFFER?

25 MR. GOMEZ: NO, YOUR HONOR. EXCUSE ME,

1 WE HAVE EVIDENCE, EXCUSE ME. NO MORE WITNESSES.

2 THE COURT: WHAT EVIDENCE?

3 MR. GOMEZ: WE HAVE EXHIBITS THAT WE
4 WOULD LIKE TO MOVE IN, GENERAL EXHIBITS.

5 THE COURT: LET'S TAKE OUR RECESS,
6 PLEASE, 10 MINUTES. WE WILL BE BACK IN 10 MINUTES. OFF
7 THE RECORD. 10-MINUTE RECESS.

8 (BREAK TAKEN.)

9 THE CLERK: ALL RISE.

10 THE COURT: YOU ARE WELCOME TO BE SEATED.
11 THE DEFENDANT HAD EXHIBITS TO OFFER?

12 MR. SEALLS: YES, YOUR HONOR. KEN SEALLS
13 ON BEHALF OF THE DEFENDANT. MAY I TENDER THE COPIES TO
14 THE LAW CLERK?

15 YOUR HONOR, THERE ARE 13 EXHIBITS I
16 DISCUSSED WITH MR. HANSEN AND THERE ARE OBJECTIONS TO
17 TWO OF THEM. SHOULD I BEGIN WITH THE UNOBJECTED ONES?

18 THE COURT: THAT SOUNDS LIKE THE EASIEST
19 PLACE TO START.

20 MR. SEALLS: THE UNOBJECTED ONES, YOUR
21 HONOR, BEGIN WITH D 275.

22 THE COURT: BEAR WITH ME A SECOND,
23 PLEASE.

24 IDENTIFY THAT FOR THE RECORD, PLEASE.

25 MR. SEALLS: YES, YOUR HONOR. THAT'S

1 EXHIBIT A TO --

2 THE COURT: PARDON. GO RIGHT AHEAD.

3 MR. SEALLS: EXHIBIT A TO THE CONTENTION
4 INTERROGATORIES.

5 THE COURT: BE CAREFUL WITH YOUR
6 LANGUAGE. THE INTERROGATORIES OR THE RESPONSES?

7 MR. SEALLS: COURT'S INDULGENCE.

8 THE INTERROGATORIES, YOUR HONOR.

9 THE COURT: THEY ARE PLAINTIFFS'
10 CONTENTION INTERROGATORIES DIRECTED TO THE DEFENDANT?

11 MR. SEALLS: THAT'S CORRECT.

12 THE COURT: OKAY. AND NO OBJECTION?

13 MR. HANSEN: NO OBJECTION, YOUR HONOR.

14 THE COURT: D 275 IS RECEIVED INTO
15 EVIDENCE.

16 (DEFENDANT'S EXHIBIT 275 RECEIVED INTO
17 EVIDENCE.)

18 MR. HANSEN: I WOULD SAY FOR THIS ENTIRE
19 SEQUENCE I THINK MANY OF THEM ARE DUPLICATIVE OF
20 EXHIBITS THAT THE PLAINTIFFS HAVE MOVED INTO EVIDENCE
21 BUT I DON'T HAVE A PROBLEM WITH PUTTING THEM IN AGAIN.

22 THE COURT: WELL, I HAVE A PROBLEM WITH
23 THAT. IT JUST MAKES FOR ANOTHER BOX OF RECORDS THAT
24 SOMEBODY HAS TO HAUL AROUND. HAVE YOU DONE ANY WORK TO
25 SEE IF THEY ARE ALREADY IN EVIDENCE? SOMETIMES EVEN

1 DEFENDANT -- A DEFENDANT PUT IN EXHIBITS IN THE MIDDLE
2 OF THE PLAINTIFFS' CASE, SPRINKLED ALONG THERE ALSO.

3 MR. SEALLS: YOUR HONOR, WE KNOW THAT THE
4 PLAINTIFFS HAVE PUT THESE IN INTO EVIDENCE, BUT WE ARE
5 NOT SURE IF THERE ARE COLOR COPIES IN THE RECORD. MR.
6 HANSEN BELIEVES THERE ARE. BUT OUT OF AN ABUNDANCE OF
7 CAUTION, WE ARE ASKING THAT THE COLOR COPIES WHICH ARE
8 IN --

9 THE COURT: I DID NOT REALIZE THAT THAT
10 MIGHT BE A FACTOR. WE HAVE TO BE CAREFUL HERE.

11 IT'S THE RESPONSE OF THESE CONTENTION
12 INTERROGATORIES THAT HAD THE CONTRABAND IN IT, IS THAT
13 CORRECT?

14 MR. SEALLS: YOUR HONOR, THERE IS ONE OF
15 THEM THAT HAS WHAT WE DEEM CONTRABAND.

16 THE COURT: I ALREADY PUT THAT UNDER
17 SEAL.

18 IT IS IDENTIFIED IN THE SEALING ORDER AS
19 AN EXHIBIT.

20 MR. SEALLS: YES, YOUR HONOR. THAT IS
21 EXHIBIT D 278, WHICH WE ALSO SEEK TO ENSURE THAT A COLOR
22 COPY IS IN THE RECORD OF COURSE UNDER SEAL.

23 THE COURT: D 275 I JUST ADMITTED, AND WE
24 WILL KEEP IT IN ON THE BASIS THAT WE ARE NOT SURE THAT
25 ALL THE PAGES THAT HAVE COLOR MATERIAL ON THEM ARE IN

1 THE OTHER EXHIBITS. SO WE WILL KEEP THAT IN.

2 THE NEXT ONE, PLEASE.

3 MR. SEALLS: THE NEXT ONE IS D 278 FROM
4 THE EXACT SAME RESPONSES TO CONTENTION INTERROGATORIES.
5 THIS IS EXHIBIT B.

6 PARDON. IT IS AN EXHIBIT TO THE
7 INTERROGATORIES.

8 THE COURT: YOU SAID RESPONSES?

9 MR. SEALLS: EXHIBIT TO THE
10 INTERROGATORIES.

11 THIS IS EXHIBIT D 276, EXHIBIT B.

12 THE COURT: I THOUGHT YOU JUST SAID D
13 278.

14 MR. SEALLS: I DID. BUT THAT WAS IN THE
15 CONTEXT OF WHAT THE COURT CALLED THE CONTRABAND. I WAS
16 REFERENCING THAT.

17 THE COURT: I THOUGHT IT WAS THE NEXT
18 EXHIBIT YOU WANTED TO OFFER. I'M SORRY.

19 WHAT IS THE NEXT EXHIBIT YOU WANT TO
20 OFFER?

21 MR. SEALLS: EXHIBIT D 277.

22 THE COURT: CHARACTERIZE IT FOR THE
23 RECORD, PLEASE.

24 MR. SEALLS: YES, YOUR HONOR. IT IS OUR
25 EXHIBIT TO CONTENTION INTERROGATORY 4.

1 THE COURT: THOSE ARE CONTENTION
2 INTERROGATORIES OF THE PLAINTIFFS DIRECTED TO THE
3 DEFENDANT?

4 MR. SEALLS: IT'S A RESPONSE, YOUR HONOR.

5 THE COURT: YOU HAVE TO BE VERY CAREFUL
6 WHAT YOU ARE DOING. SOMETIMES YOU SAY IT IS AN
7 INTERROGATORY, SOMETIMES YOU SAY IT'S EXHIBIT, SOMETIMES
8 RESPONSE. YOU HAVE TO BE VERY CAREFUL SO WE CAN GET THE
9 RECORD STRAIGHT. THIS IS A RESPONSE OF THE DEFENDANT TO
10 PLAINTIFFS' CONTENTION INTERROGATORIES, EXHIBIT 4
11 THERETO, CORRECT?

12 MR. SEALLS: THAT IS CORRECT. THAT IS
13 WHAT EXHIBIT D 277 IS.

14 THE COURT: LOOKS LIKE IT CONSISTS OF 11
15 PAGES, IF ALL THE NUMBERS ARE THERE.

16 MR. SEALLS: THAT'S CORRECT, YOUR HONOR.

17 THE COURT: ANY OBJECTION TO THIS?

18 MR. HANSEN: LIKE ALL OF THIS IN THE
19 SERIES, I THINK THEY ARE DUPLICATIVE BUT I DON'T OBJECT
20 TO THEM.

21 THE COURT: D 277 IS RECEIVED INTO
22 EVIDENCE.

23 (DEFENDANT'S EXHIBIT 277 RECEIVED INTO
24 EVIDENCE.)

25 MR. SEALLS: YOUR HONOR, MAY I GO BACK TO

1 D 276 JUST FOR CLARITY ON WHETHER THE COURT HAS ADMITTED
2 THAT ONE INTO EVIDENCE.

3 THE COURT: I DON'T THINK I HAVE. 276 IS
4 EXHIBIT B?

5 MR. SEALLS: YES, YOUR HONOR.

6 THE COURT: EXHIBIT B TO WHAT?

7 MR. SEALLS: TO THE INTERROGATORIES,
8 PLAINTIFFS' CONTENTION INTERROGATORIES.

9 THE COURT: IT CONSISTS OF SIX PAGES,
10 CORRECT?

11 MR. SEALLS: SIX PAGES, YOUR HONOR.

12 THE COURT: D 276 IS RECEIVED INTO
13 EVIDENCE.

14 (DEFENDANT'S EXHIBIT D 276 IS RECEIVED
15 INTO EVIDENCE.)

16 THE COURT: NEXT.

17 MR. SEALLS: THE NEXT IS EXHIBIT D 278.
18 THAT IS THE ONE I MENTIONED OUT OF ORDER IN THE CATEGORY
19 OF CONTRABAND, THAT DEFENDANT IS REQUESTING BEING
20 SUBMITTED UNDER SEAL.

21 THE COURT: IT IS ALREADY UNDER SEAL. IT
22 IS IN EVIDENCE ALREADY AND IT'S UNDER SEAL, UNDER A
23 SEALING ORDER. THAT CHARACTERIZES THE EVIDENCE OF
24 SOMETHING LIKE EVIDENCE OF CRIMINAL ACTIVITY OR SOME
25 GENERAL STATEMENT LIKE THAT TO KEEP PEOPLE FROM GETTING

1 TOO INTRIGUED ABOUT IT.

2 SO I'M NOT GOING TO RECEIVE D 278 INTO
3 EVIDENCE AGAIN. IT IS ALREADY IN. IT MAY HAVE ANOTHER
4 NUMBER. IT MAY HAVE A PLAINTIFFS' NUMBER. LET'S BE
5 SURE. WITH THE COVER PAGE, IT'S 11 PAGES, AND IT'S --

6 MR. SEALLS: THAT'S CORRECT, YOUR HONOR.

7 THE COURT: -- EVIDENCE AS TO WHICH THE
8 DEFENDANT IS CONFIDENT IS EVIDENCE OF CRIMINAL ACTIVITY,
9 IS THAT CORRECT?

10 MR. SEALLS: THAT'S CORRECT, YOUR HONOR.

11 THE COURT: OKAY. NEXT ONE?

12 MR. SEALLS: THE NEXT ONE, YOUR HONOR, IS
13 D 279.

14 THE COURT: DEFENDANT'S SUPPLEMENTAL
15 RESPONSES TO PLAINTIFFS' INITIAL INTERROGATORIES.

16 MR. SEALLS: YES, YOUR HONOR.

17 THE COURT: CONSISTING OF FOUR PAGES AND
18 DATED JANUARY 27TH, 2006.

19 MR. SEALLS: YES.

20 THE COURT: D 279 IS RECEIVED INTO
21 EVIDENCE.

22 (DEFENDANT'S EXHIBIT D 279 IS RECEIVED
23 INTO EVIDENCE.)

24 MR. SEALLS: THE NEXT IS 280, YOUR HONOR,
25 WHICH IS DEFENDANT'S SUPPLEMENTAL RESPONSE TO

1 PLAINTIFFS' INITIAL INTERROGATORIES.

2 THE COURT: CONSISTING OF TWO PAGES AND
3 DATED MARCH 11 -- SORRY, MARCH 13, 2006.

4 MR. HANSEN: YOUR HONOR, I DON'T OBJECT
5 TO THIS BUT IT IS AN EXACT DUPLICATE THAT SOMETHING THAT
6 HAS ALREADY BEEN ADMITTED.

7 THE COURT: IT'S ALREADY IN EVIDENCE. I
8 DON'T KNOW WHY YOU ARE OFFERING IT. I'M NOT SURE AS TO
9 THIS ENTIRE LIST WHICH ONES ARE IN AND WHICH ARE NOT, SO
10 I'M JUST GOING TO PUT THEM ALL IN.

11 (DEFENDANT'S EXHIBIT D 280 RECEIVED IN
12 EVIDENCE.)

13 NEXT ITEM, PLEASE.

14 MR. SEALLS: THE NEXT ONE, YOUR HONOR, IS
15 D 281, DEFENDANT'S SUPPLEMENTAL RESPONSE TO PLAINTIFFS'
16 INITIAL INTERROGATORIES, TWO PAGES, MARCH 16, 2006.

17 THE COURT: D 281 IS RECEIVED INTO
18 EVIDENCE.

19 (DEFENDANT'S EXHIBIT D 281 IS RECEIVED
20 INTO EVIDENCE.)

21 MR. SEALLS: THE NEXT, YOUR HONOR, IS
22 EXHIBIT D 282, WHICH IS DEFENDANT'S SUPPLEMENTAL
23 RESPONSE TO THE PLAINTIFFS' FIRST SET OF CONTENTION
24 INTERROGATORIES, DATED AUGUST 14TH, 2006. IT'S A
25 19-PAGE DOCUMENT, YOUR HONOR.

1 THE COURT: D 282 IS RECEIVED INTO
2 EVIDENCE.

3 (DEFENDANT'S EXHIBIT D 282 IS RECEIVED
4 INTO EVIDENCE.)

5 MR. SEALLS: THE NEXT IS DEFENDANT'S
6 EXHIBIT 283, YOUR HONOR, WHICH IS DEFENDANT'S SECOND
7 SUPPLEMENTAL RESPONSE TO PLAINTIFFS' FIRST SET OF
8 CONTENTION INTERROGATORIES, DATED SEPTEMBER 27, 2006.
9 IT'S A 16-PAGE DOCUMENT.

10 THE COURT: D 283 IS RECEIVED INTO
11 EVIDENCE.

12 (DEFENDANT'S EXHIBIT D 283 IS RECEIVED
13 INTO EVIDENCE.)

14 MR. SEALLS: THE NEXT EXHIBIT, YOUR
15 HONOR, IS EXHIBIT D 284, WHICH IS A LETTER FROM ERIC
16 BEANE TO THE COURT, DATED SEPTEMBER 5TH, 2006, AND IT'S
17 A LETTER MOTION, NINE PAGES LONG.

18 THE COURT: IT'S A LETTER RESPONSE?

19 MR. SEALLS: TO A LETTER MOTION.

20 THE COURT: MAYBE MR. LANG WILL KNOW
21 THIS. DO YOU WANT TO TAKE A LOOK AT THIS?

22 THE CLERK: SURE.

23 THE COURT: SOME OF MY ORDERS DURING THE
24 TRIAL I ATTACHED THE LETTER AND HAD THEM FILED.

25 THE CLERK: I SUSPECT IT IS BUT I WOULD

1 HAVE TO LOOK, WHICH I CAN GO DO.

2 THE COURT: IT TAKES LESS TIME TO ADMIT
3 IT. IT'S A LETTER ON THE LETTERHEAD OF THE DEFENDANT
4 DEPARTMENT OF JUSTICE LAWYERS SIGNED BY MR. BEANE, D
5 284, CONSISTING OF NINE PAGES, DATED SEPTEMBER 5, 2006.
6 AND IT'S DEFENDANT'S LETTER IN RESPONSE TO PLAINTIFFS'
7 AUGUST 29, 2006 LETTER MOTION. D 284 IS RECEIVED INTO
8 EVIDENCE. IT'S FASTER TO DO THAT THAN TO SEE WHETHER IT
9 IS IN EVIDENCE.

10 (DEFENDANT'S EXHIBIT D 284 RECEIVED INTO
11 EVIDENCE.)

12 MR. SEALLS: THE FINAL UNOBJECTED ONE,
13 YOUR HONOR, IS D 405, WHICH IS EXHIBIT 9 TO THE MANN
14 DEPOSITION, M-A-N-N, DATED AUGUST 8, 2006 DEPOSITION
15 EXHIBIT, 29 PAGES IN TOTAL, WHICH IS A QUESTIONNAIRE
16 FORM.

17 THE COURT: PLAINTIFFS HAVE ANY OBJECTION
18 TO THIS EXHIBIT?

19 MR. HANSEN: NO, YOUR HONOR, WE DON'T.

20 THE COURT: D 405 IS RECEIVED INTO
21 EVIDENCE.

22 (DEFENDANT'S EXHIBIT D 405 IS RECEIVED
23 INTO EVIDENCE.)

24 MR. SEALLS: YOUR HONOR, CAN WE GO BACK
25 FOR A MINUTE TO D 280? IT APPEARS THAT THIS ONE HAS NOT

1 BEEN MOVED INTO EVIDENCE.

2 THE COURT: MY NOTES SHOW THAT IT IS. I
3 WRITE DOWN 280 RECD. THAT IS MY NOTE THAT TELLS ME I
4 SPOKE THE MANTRA.

5 MR. SEALLS: YES, YOUR HONOR.

6 THE TWO THAT HAVE BEEN OBJECTED TO, YOUR
7 HONOR, I WOULD START WITH EXHIBIT 80, FIRST.

8 THE COURT: D 80?

9 MR. SEALLS: YES.

10 THE COURT: IDENTIFY IT FOR THE RECORD,
11 PLEASE.

12 MR. SEALLS: YES, YOUR HONOR. IT IS AN
13 INDICTMENT IN THE CASE, UNITED STATES OF AMERICA VERSUS
14 BETON, B-E-T-O-N, SPORTS, PLC AND OTHERS. IT'S FROM THE
15 U.S. DISTRICT COURT, EASTERN DISTRICT OF MISSOURI. AND
16 THE CASE NUMBER IS 4:06 CR 337 CEJMLM, A 27-PAGE
17 DOCUMENT, YOUR HONOR.

18 THE COURT: HAS IT BEEN MENTIONED DURING
19 THE TRIAL SO FAR?

20 MR. HANSEN: IT HAS NOT, YOUR HONOR.

21 THE COURT: THEN I ASK FOR AN OFFER OF
22 PROOF. WHY DO YOU WANT TO PUT IT IN?

23 MR. SEALLS: THIS IS ONE, YOUR HONOR,
24 THAT IS IN THE DEFENDANT'S PROPOSED FINDINGS OF FACT,
25 WHICH HAS PUT PLAINTIFFS ON NOTICE. IT'S ONE THAT WE

1 WANT TO PUT IN FOR THE RELEVANCY OF AN OVERSEAS
2 PROSECUTION OF EVENTS WHICH OCCURRED OUTSIDE OF THE
3 UNITED STATES CONCERNING INTERNET WEBSITES WHERE THE
4 WAGERERS GAMBLED ALMOST EXCLUSIVELY FROM THE UNITED
5 STATES. THAT IS ON PAGE D 80-0010. THE RELEVANCE, YOUR
6 HONOR, IS TO OUR CLAIM OF OVERSEAS APPLICATION OF COPA.
7 AND ON PAGE D 080-0010, PARAGRAPH 24 ON THAT PAGE IS THE
8 LANGUAGE WHICH IS A SITUATION WHICH WE PRESENT AS ALMOST
9 ANALOGOUS TO THE TYPE OF LAW THAT COPA IS INSOFAR THAT
10 COPA'S OVERSEAS REACH, WE SUBMIT, WOULD GOVERN
11 OUT-OF-THE-COUNTRY INTERNET WEBSITES WHERE THE ACTIVITY
12 IS CONDUCTED FROM PERSONS IN THE UNITED STATES.

13 THIS IS, YOUR HONOR, SOMETHING THAT SHOWS
14 THAT THE DEPARTMENT COULD EXTEND OVERSEAS THE
15 APPLICATION OF COPA.

16 WE FURTHER ARGUE THAT THIS IS RELEVANT,
17 YOUR HONOR, RELEVANT EVIDENCE NOT HAVING THE HIGHEST
18 THRESHOLD BUT BEING SUCH EVIDENCE THAT WOULD MAKE ANY
19 TENDENCY, OR WOULD TEND TO MAKE ANY EVIDENCE OF FACT
20 THAT IS OF CONSEQUENCE TO THE DETERMINATION OF THE
21 ACTION MORE PROBABLE OR LESS PROBABLE.

22 IT'S ALSO SOMETHING, YOUR HONOR, THAT CAN
23 BE SELF-AUTHENTICATED. IT IS A PUBLIC RECORD UNDER 901.
24 AND, IF NEED BE, IF THE COURT LEFT THE RECORD OPEN, WE
25 COULD GET A CERTIFIED COPY OF IT.

1 FINALLY, YOUR HONOR, UNDER THE RULE 807
2 RESIDUAL EXCEPTION, IT IS BEING OFFERED AS EVIDENCE OF A
3 MATERIAL FACT. THAT IS, OVERSEAS APPLICATION OF A LAW
4 CONCERNING OUT-OF-COUNTRY INTERNET WHICH HAS CONNECTION
5 TO USERS IN THE UNITED STATES. IT'S MORE PROBATIVE ON
6 THE POINT OF OVERSEAS APPLICATION OF COPA THAN OTHER
7 EVIDENCE THAT WE HAVE.

8 AND FINALLY, UNDER RULE 807, IN THE
9 INTEREST OF JUSTICE, THE COURT, WE SUBMIT, SHOULD ALLOW
10 THIS INTO THE RECORD.

11 MR. HANSEN: YOUR HONOR, THERE ARE TWO
12 PROBLEMS WITH THIS INDICTMENT. FIRST, IT'S A STATUTE
13 THAT HAS NOTHING TO DO WITH COPA. IT HAS TO DO WITH THE
14 GAMBLING STATUTES. AND SO IT DOES NOT PROVE ANYTHING
15 WITH RESPECT TO THE ABILITY OF THE GOVERNMENT TO ENFORCE
16 COPA OVERSEAS.

17 THE SECOND PROBLEM IS THAT IT'S AN
18 INDICTMENT, NOT A CONVICTION, NOT A GUILTY PLEA, AND NO
19 COURT HAS EVER RULED ON THE VALIDITY OF THIS INDICTMENT.
20 IT, THEREFORE, HAS NO PROBATIVE VALUE WHATSOEVER ON WHAT
21 IS ESSENTIALLY A LEGAL ARGUMENT THAT THE GOVERNMENT
22 WANTS TO MAKE THAT THEY THINK THEY CAN SOMEHOW USE THE
23 SAME SORTS OF ARGUMENTS THEY USE IN THIS INDICTMENT TO
24 MAYBE POSSIBLY IN AN ENTIRELY DIFFERENT STATUTE TRY TO
25 CONVICT SOMEONE OVERSEAS UNDER COPA. BECAUSE IT IS BOTH

1 JUST AN INDICTMENT AND BECAUSE IT'S AN ENTIRELY
2 DIFFERENT STATUTE WE THINK ITS RELEVANCE IS ZERO.

3 THE COURT: YOU DON'T HAVE ANY PROBLEM
4 WITH THE AUTHENTICITY?

5 MR. HANSEN: I DO NOT CONTEST THE
6 AUTHENTICITY OF IT, YOUR HONOR.

7 MR. SEALLS: MAY I RESPOND BRIEFLY, YOUR
8 HONOR?

9 THE COURT: SURE.

10 MR. SEALLS: YOUR HONOR, IT SHOWS THE
11 SAME GOVERNMENT WHICH WOULD PROSECUTE --

12 THE COURT: TRY TO ANSWER THE PLAINTIFFS'
13 CONTENTION. THAT IS, THIS IS MERELY AN INDICTMENT, NOT
14 AN ADJUDICATION AND THE STATUTE LANGUAGE IS NOT
15 IDENTICAL.

16 MR. SEALLS: THAT'S CORRECT, YOUR HONOR.

17 THE COURT: THOSE ARE FACTUAL PREDICATES,
18 IF YOU WANT TO CALL THEM THAT, THAT THE PLAINTIFFS THINK
19 INTERDICTS YOUR ABILITY TO GET THIS IN THE RECORD.

20 MR. SEALLS: THAT'S CORRECT, YOUR HONOR.
21 BUT IT REALLY GOES TO THE WEIGHT, NOT THE ADMISSIBILITY,
22 INSOFAR THAT THE INDICTMENT MEANS THAT THERE WAS A
23 PROSECUTION BROUGHT. IT'S NOT THAT WE ARE OFFERING THIS
24 FOR WHAT WILL HAPPEN IN TERMS OF CONVICTION, BUT IT DOES
25 SHOW AN OVERSEAS REACH OF A CRIMINAL STATUTE. IT'S NOT

1 THE COPA STATUTE. BUT THE OVERSEAS REACH OF A CRIMINAL
2 STATUTE CONCERNING THE USE OF THE INTERNET BY PERSONS IN
3 THE UNITED STATES WHEN THE TRANSMISSION IS COMING FROM
4 OVERSEAS. AND IT HAS RELEVANCE IN TERMS OF CONSIDERING
5 WHETHER COPA WOULD ALSO HAVE AN OVERSEAS APPLICATION.
6 THIS IS ONE LAW, AND I'M NOT MIXING APPLES AND ORANGES.
7 BUT THE POINT IS, THAT THERE IS ALREADY A PROSECUTION
8 FOR CONDUCT WHICH ORIGINATES OUTSIDE OF THE UNITED
9 STATES AND IS AFFECTING PERSONS IN THE UNITED STATES.
10 AND THAT CERTAINLY IS FOR CONSIDERATION BY THE COURT.

11 THE COURT: THE MOST BIZARRE WAY TO PROVE
12 A LEGAL ARGUMENT. ALL IT PROVES IS THAT THE DEPARTMENT
13 OF JUSTICE -- THE UNITED STATES OF AMERICA, RATHER, HAS
14 BROUGHT SUCH A CLAIM IN ITS PROSECUTORIAL ROLE IN THE
15 UNITED STATES. THAT IS ALL THAT IT HAS PROVED. THERE
16 IS NO BINDING EFFECT. IT HAS NO LEGAL -- YOU COULD NOT
17 RELY ON IT IN AN ARGUMENT BEFORE THE COURT OF APPEALS.
18 IT'S NOT BINDING ON ANYBODY. IT'S NOT A PUBLISHED
19 OPINION. I FAIL TO FIGURE OUT THE RELEVANCE.

20 MR. SEALLS: YOUR HONOR, THE RELEVANCE,
21 AS WE CONTEND, IS THE COURSE OF CONDUCT THAT HAS BEEN
22 TAKEN WITH A LAW, WHILE NOT COPA, AFFECTING THE
23 INTERNET. AND I WON'T REHASH THE ARGUMENT. BUT I THINK
24 THAT THE COURSE OF CONDUCT THAT HAS BEEN TAKEN, IN TERMS
25 OF PROSECUTING THIS CASE, IS ONE THAT THE COURT SHOULD

1 CONSIDER IN TERMS OF THE WEIGHT OF THE EVIDENCE AS TO
2 COPA'S OVERSEAS APPLICABILITY IN THIS CASE.

3 THE COURT: I'M RELUCTANT TO TURN DOWN
4 ANY EVIDENCE THAT MAY BE HELPFUL BUT I CAN'T FIGURE WHAT
5 IN THE WORLD I WOULD DO WITH IT, QUITE FRANKLY. I'M NOT
6 ANNOYED IN ANY WAY. I JUST -- I DON'T KNOW THAT THE
7 COURSE OF CONDUCT OF THE DEPARTMENT OF JUSTICE IS AN
8 ISSUE IN THIS CASE. THAT IS WHAT YOU JUST SAID, IT
9 SHOWED A COURSE OF CONDUCT. THE OFFER OF THIS EXHIBIT
10 IS DECLINED. THE OBJECTION IS SUSTAINED. DEFENDANT'S
11 EXHIBIT 080 IS NOT RECEIVED INTO EVIDENCE ON THE GROUND
12 OF RELEVANCY.

13 NEXT ONE, SIR.

14 MR. SEALLS: THE NEXT ONE, YOUR HONOR, IS
15 EXHIBIT D 81, WHICH IS AN INSTITUTE OF EDUCATION
16 SCIENCES -- NATIONAL CENTER FOR EDUCATION STATISTICS,
17 COMPUTER AND INTERNET USE BY STUDENTS IN 2003. A
18 STATISTICAL ANALYSIS REPORT, DATED SEPTEMBER 2006. IT
19 IS 72 PAGES LONG, YOUR HONOR.

20 THE COURT: WHO IS THE PURPORTED
21 PUBLISHER OR AUTHOR OF THIS?

22 MR. SEALLS: THE U.S. DEPARTMENT OF
23 EDUCATION. WE SUBMIT, YOUR HONOR, THAT IT IS RELEVANT.
24 IT'S A SEPTEMBER 2006 REPORT REFLECTING THE NUMBER OF
25 UNITED STATES CHILDREN WHO ARE USING THE INTERNET.

1 THERE WAS NO AUTHENTICITY OBJECTION TO IT. IT'S A
2 PUBLIC RECORD UNDER RULE 8038. THE DATA WAS COMPILED BY
3 AN ENTITY OF THE U.S. DEPARTMENT OF EDUCATION. I DIRECT
4 THE COURT'S ATTENTION TO D 081-0002, THE FIRST FULL
5 PARAGRAPH, AND THE SECOND SENTENCE IN IT SAYS THAT THE
6 -- I WILL START WITH THE FIRST SENTENCE. THE NATIONAL
7 CENTER FOR EDUCATION STATISTICS, NCES, IS THE PRIMARY
8 FEDERAL ENTITY FOR COLLECTING, ANALYZING AND REPORTING
9 DATA RELATED TO EDUCATION IN THE UNITED STATES AND OTHER
10 NATIONS. IT FULFILLS A CONGRESSIONAL MANDATE TO
11 COLLECT, COLLATE, ANALYZE AND REPORT FULL AND COMPLETE
12 STATISTICS ON THE CONDITION OF EDUCATION IN THE UNITED
13 STATES; CONDUCT AND PUBLISH REPORTS AND SPECIAL ANALYSES
14 OF THE MEANING AND SIGNIFICANCE OF SUCH STATISTICS;
15 ASSIST STATE AND LOCAL EDUCATION AGENCIES IN IMPROVING
16 THEIR STATISTICAL SYSTEMS; AND REVIEW AND REPORT ON
17 EDUCATION ACTIVITIES IN FOREIGN COUNTRIES.

18 I READ ALL THAT FOR THE POINT THAT THIS
19 REPORT, MORE THAN PRESUMABLY, IT'S DONE -- AND THE
20 ENTITY ITSELF IS UNDER A CONGRESSIONAL MANDATE TO DO THE
21 --

22 THE COURT: WHERE IN THIS REPORT IS THE
23 OPERATIVE MATERIAL THAT YOU WANT TO BRING TO THE
24 ATTENTION OF THE COURT?

25 MR. SEALLS: YOUR HONOR, THE ARGUMENT IS,

1 THE ENTITY, WHICH IS THE PRIMARY FEDERAL ENTITY FOR
2 COLLECTING, ANALYZING AND REPORTING DATA --

3 THE COURT: EXCUSE ME, SIR. I DON'T
4 THINK YOU UNDERSTOOD WHAT I WAS TRYING TO SAY. THE
5 ORGANIZATION IS IDENTIFIED ON ITS FACE AND ITS TASK IS
6 IDENTIFIED IN THE MATERIAL THAT YOU READ. THE DEFENDANT
7 IS OFFERING IT TO PROVE SOMETHING. WHERE IN THE REPORT
8 IS THE MATERIAL THAT YOU WANT TO PROVE BY HAVING IT
9 ADMITTED INTO EVIDENCE?

10 MR. SEALLS: YOUR HONOR, 0003 UNDER THE
11 HIGHLIGHTS CONTAINS --

12 THE COURT: MINE IS NOT HIGHLIGHTED, SO
13 --

14 MR. SEALLS: YES, YOUR HONOR.

15 THE COURT: OH, THE WORD HIGHLIGHT, OKAY.
16 THAT ENTIRE PARAGRAPH?

17 MR. SEALLS: YES, YOUR HONOR. IT TELLS
18 US THAT --

19 THE COURT: LET ME JUST READ IT TO
20 MYSELF, PLEASE.

21 YOU OFFER IT TO PROVE FOR THE TRUTH OF
22 THE MATTER THE FACTS SET FORTH IN PARAGRAPH 1 -- THE
23 FIRST PARAGRAPH UNDER HIGHLIGHTS ON PAGE 0003?

24 MR. SEALLS: CONTINUING, YOUR HONOR, TO
25 THE BULLET ON THAT PAGE. MOST STUDENTS USE COMPUTERS.

1 THE MAJORITY USE THE INTERNET.

2 THE COURT: YOU WANT TO INCLUDE THAT IN
3 YOUR OFFER?

4 MR. SEALLS: YES, YOUR HONOR. IT
5 REFERENCES A TABLE. AND THEN THERE IS THE LANGUAGE ON
6 THAT PAGE, I'M QUOTING, ABOUT 91 PERCENT, 53 MILLION
7 PERSONS OF CHILDREN AGE 3 AND OVER AND IN NURSERY SCHOOL
8 THROUGH GRADE 12 USE COMPUTERS AND ABOUT 59 PERCENT, 35
9 MILLION PEOPLE, USE THE INTERNET.

10 THE NEXT --

11 THE COURT: IDENTIFY EVERYTHING YOU ARE
12 OFFERING TO PROVE. I'M NOT SAYING THAT IF IT'S
13 ADMISSIBLE THE WHOLE REPORT DOES NOT GO IN. BUT I'M
14 JUST SAYING I NEED TO KNOW WHAT YOU OFFER TO PROVE BY
15 IT.

16 MR. SEALLS: THAT'S CORRECT, YOUR HONOR,
17 THE VERY NEXT PAGE --

18 THE COURT: HOW ABOUT THE FOOTNOTE ON
19 PAGE 0003? IS THAT CITED IN THE MATERIAL?

20 MR. SEALLS: THAT IS REFERRED TO BY THE
21 BULLET POINT THAT I JUST READ, YOUR HONOR. THAT IS --

22 THE COURT: I SEE THAT NOW. THANK YOU.
23 ANYTHING FROM PAGE 0004?

24 MR. SEALLS: YES, YOUR HONOR. PAGE 0004
25 CONTAINS INFORMATION ON WHEN USE BEGINS, THE FIRST FULL

1 PARAGRAPH.

2 THE COURT: HOW MUCH OF THE PAGE ARE YOU
3 FOCUSING ON?

4 MR. SEALLS: THE FIRST FULL PARAGRAPH ON
5 THE VERY TOP OF 0004, YOUR HONOR.

6 THE COURT: ANYTHING ELSE ON PAGE 004?

7 MR. SEALLS: NO, YOUR HONOR.

8 THEN ON PAGE 5, THE VERY LAST BULLET
9 WHICH BEGINS, USE OF HOME COMPUTERS --

10 THE COURT: YES.

11 MR. SEALLS: -- IS COMMON FOR PLAYING
12 GAMES, WORKING ON SCHOOL ASSIGNMENTS, AND CONNECTING TO
13 THE INTERNET. THAT PARAGRAPH, YOUR HONOR, WE ALSO OFFER
14 AS OUR PROOF OF WHAT THIS DOCUMENT IS RELEVANT FOR.

15 THE COURT: THE OFFER FOR RELEVANCY, TOP
16 OF PAGE 0006, CONTINUATION OF THE BULLET?

17 MR. SEALLS: YES, IT CONTINUES THROUGH
18 THAT PAGE, YOUR HONOR. THE ENTIRE PAGE AND --

19 THE COURT: OF 0006?

20 MR. SEALLS: YES. THOSE ARE THE
21 REMAINING PARTS OF THE HIGHLIGHTS OF THE REPORT. THE
22 DIFFERENCES IN HOW COMPUTERS ARE USED OFTEN ARE LARGER
23 THAN OVERALL DIFFERENCE IN RATES OF USE. THAT BULLET,
24 AND THE PARAGRAPH ASSOCIATED WITH IT, HOME AND SCHOOL
25 ARE COMMON LOCATIONS FOR INTERNET ACCESS, THAT BULLET

1 AND THE PARAGRAPH ASSOCIATED WITH IT. THE NEXT BULLET,
2 CONSIDERING ALL LOCATIONS, USE OF THE INTERNET IS COMMON
3 FOR WORK ON SCHOOL ASSIGNMENTS, E-MAIL AND GAMES. THAT
4 ENTIRE PARAGRAPH, YOUR HONOR. AND THERE IS A TABLE THAT
5 IS REFERENCED, TABLE 8A.

6 THE COURT: WHERE IS THE TABLE? I
7 THOUGHT YOU ONLY WENT AS FAR AS 0006?

8 MR. SEALLS: I DID, YOUR HONOR, BUT THE
9 TABLE IS REFERENCED ON THAT PAGE SO I DIRECT THE COURT'S
10 ATTENTION TO PAGE --

11 THE COURT: WELL, 0006 HAS TABLE 8A
12 MENTIONED.

13 MR. SEALLS: YES, ON PAGE 32.

14 THE COURT: LET ME TAKE A LOOK AT IT.
15 IS THAT THE EXTENT OF THE OFFER?

16 MR. SEALLS: YES, YOUR HONOR.

17 THE COURT: ANY OBJECTION?

18 MR. HANSEN: YES, YOUR HONOR. PLAINTIFFS
19 OBJECT ON TWO GROUNDS. FIRST, THE REPORT, ON ITS FACE,
20 WAS ISSUED AFTER THE CLOSE OF DISCOVERY IN THIS CASE AND
21 THEREFORE SHOULD NOT BE ADMITTED.

22 SECOND, THE TABLES TO WHICH THE BULLET
23 POINTS REFER ARE TABLES THAT CONTAIN LITERALLY HUNDREDS
24 AND HUNDREDS OF NUMBERS IN THEM. IF THE COURT WERE TO
25 LOOK FOR, JUST, FOR EXAMPLE, AT TABLE 1, WHICH IS ON

1 PAGE 0016, YOU CAN SEE THAT THERE ARE LITERALLY OVER 100
2 NUMBERS CONTAINED ON THAT PAGE. I THINK PUTTING IN AN
3 EXHIBIT WITH HUNDREDS AND HUNDREDS OF STATISTICS WITHOUT
4 ANY WITNESS IS INAPPROPRIATE AND DEPRIVES THE PLAINTIFFS
5 OF THE OPPORTUNITY TO CROSS EXAMINE ON THE NATURE OF
6 THIS DATA.

7 SO BOTH BECAUSE IT'S UNTIMELY AND BECAUSE
8 IT REQUIRES THAT A WITNESS BE PRESENT IN ORDER TO
9 EXPLAIN THE DATA AND JUSTIFY THE DATA AND JUSTIFY THE
10 METHODOLOGY, WE OBJECT.

11 MR. SEALLS: MAY I RESPOND BRIEFLY, YOUR
12 HONOR?

13 THE COURT: SURE.

14 MR. SEALLS: THE FACT THAT IT WAS
15 SUBMITTED -- OR PREPARED IN SEPTEMBER IS WHY IT'S EVEN
16 MORE RELEVANT TO THE COURT. THIS IS VERY RECENT
17 INFORMATION.

18 WITH RESPECT TO THE CONCERN THAT THERE IS
19 NO WITNESS HERE THAT THEY CAN EXAMINE THE DOCUMENT BY,
20 YOUR HONOR, THIS DOCUMENT COULD BE SELF-AUTHENTICATED IF
21 THE COURT LEFT THE RECORD OPEN FOR US TO DO THAT.

22 THE COURT: THE OBJECTION IS NOT TO
23 AUTHENTICITY. THE OBJECTION IS TO THE IMPOSSIBILITY OF
24 THE COURT TO INTERPRET IT IN THE ABSENCE OF A WITNESS.
25 CORRECT, MR. HANSEN?

1 MR. HANSEN: THAT'S CORRECT, YOUR HONOR.
2 I DON'T OBJECT ON AUTHENTICITY.

3 MR. SEALLS: YOUR HONOR, THE DOCUMENT IS
4 -- IF WE WENT TO RULE 807, THE RESIDUAL EXCEPTION, IT IS
5 ONE THAT HAS AN INDICIA OF RELIABILITY. IT'S A
6 GOVERNMENT REPORT. IT'S NOT ONE THAT IS MADE BY A
7 PERSON OR AN ENTITY WHO DOES NOT HAVE THE CREDIBILITY
8 AND RELIABILITY THAT THE COURT SHOULD CONSIDER. AND
9 THAT IS THE EXTENT OF THE RESPONSE I HAVE TO MR. HANSEN.

10 THE COURT: WHAT IS THE SECTION UNDER
11 WHICH THE OFFICIAL REPORTS ARE ALLOWED IN EVIDENCE, 803
12 OR 804?

13 MR. SEALLS: YES, IT'S 803(8), YOUR
14 HONOR.

15 THE COURT: WHEN DID THE -- I ASSUME THE
16 GOVERNMENT GAVE A COPY OF THIS REPORT TO THE PLAINTIFFS'
17 COUNSEL AT SOME POINT. IS THAT CORRECT?

18 MR. SEALLS: YES, YOUR HONOR.

19 THE COURT: WHEN DID THAT HAPPEN?

20 MR. SEALLS: THAT WAS IN OCTOBER WHEN WE
21 EXCHANGED EXHIBITS. I THINK OCTOBER 12TH.

22 THE COURT: DOES THAT SEEM CORRECT TO THE
23 FOLKS ON THE PLAINTIFFS' SIDE?

24 MR. HANSEN: I BELIEVE THAT'S CORRECT,
25 YES, YOUR HONOR.

1 THE COURT: THE REPORT IS DATED SEPTEMBER
2 2006. I FIND THAT THE REPORT IS QUALIFIED UNDER FEDERAL
3 RULE OF EVIDENCE 803(8) AND THERE IS NO INDICATION THAT
4 IT LACKS TRUSTWORTHINESS. I DON'T VIEW THE OBJECTION TO
5 THE PROLIX NATURE OF THE DATA IN THERE TO BE ONE OF
6 TRUSTWORTHINESS. IT'S A MATTER OF INTERPRETATION.
7 THERE HAS BEEN TIME SINCE THE 12TH OF OCTOBER FOR THE
8 PLAINTIFFS TO CONSIDER ADDRESSING THIS REPORT BY ANY OF
9 THEIR EXPERTS THAT THEY PUT ON, OR CROSS EXAMINING
10 DEFENSE EXPERTS. AND THERE IS NO SHOWING THAT THERE IS
11 ANY WOEFUL TARDINESS ON THE PART OF THE DEFENDANTS.
12 THEY PROVIDED IT AS SOON AS IT WAS AVAILABLE.

13 I FINALLY FIND THAT THE MATERIAL IN THE
14 REPORT IS RELEVANT. I LEAVE FOR -- ACCORDINGLY, I
15 RECEIVE INTO EVIDENCE DEFENDANT'S EXHIBIT 81, BEING THE
16 DOCUMENT THAT WAS IDENTIFIED BY COUNSEL FOR THE
17 DEFENDANT. I LEAVE TO THE ARGUMENT AND REQUEST FOR
18 FINDINGS BY PLAINTIFFS WHO CRITICIZE THIS REPORT IN ANY
19 APPROPRIATE MANNER THAT THEY DEEM FIT. IT'S IN
20 EVIDENCE. I JUST WANT TO SAY, AS A FACTFINDER, IF IT IS
21 CONFUSING, I DON'T UNDERSTAND IT, IT AIN'T GOING
22 ANYWHERE. THAT IS THE BEST I CAN TELL YOU. I AM A
23 JUROR IN A BLACK ROBE. IF THE JURY DOES NOT UNDERSTAND
24 WHAT THE LAWYERS ARE GIVING THEM, THEY ARE NOT GOING TO
25 RELY ON IT VERY MUCH. I'M NOT SUGGESTING I WILL OR I

1 REPORTER.

2 THE GOMEZ: THE COURT HAD -- AT THE
3 REQUEST OF THE PLAINTIFFS, HAD PERMITTED THE PLAINTIFFS,
4 I BELIEVE, TO ADDRESS THREE DOCUMENTS THAT ARE REFERRED
5 TO AS RULESPACE DOCUMENTS UNDER THE BUSINESS EXCEPTION.

6 THE COURT: BUSINESS RECORDS EXCEPTION.

7 MR. GOMEZ: BUSINESS RECORDS EXCEPTION.

8 AND THE DEFENDANT IS PROVIDING ITS RESPONSE AT THIS
9 POINT.

10 THE COURT: RIGHT. I HAVE NOT CONSIDERED
11 THE ISSUE. WE WILL HAVE TO DO THAT. THE EVIDENTIARY
12 RECORD WILL REMAIN OPEN.

13 THANK YOU.

14 I THINK WE CAN COVER SOME CASE MANAGEMENT
15 ISSUES NOW AND PLAN OUR ACTIVITIES FOR THE NEXT FEW
16 DAYS.

17 IS THERE ANYTHING ELSE ON THE SUBSTANCE
18 OF THE CASE THAT WE SHOULD REFER TO NOW, THE EVIDENTIARY
19 RECORD?

20 MR. GOMEZ: I DON'T BELIEVE SO, YOUR
21 HONOR.

22 MR. HANSEN: NOT FROM THE PERSPECTIVE OF
23 THE PLAINTIFFS.

24 THE COURT: EXCEPT FOR THE THREE
25 DOCUMENTS THAT WE JUST TALKED ABOUT LEFT OPEN.

1 MR. GOMEZ: NO.

2 THE COURT: IF I NEED ARGUMENT ON THAT,
3 WE WILL HAVE IT. IF NOT, WE WON'T.

4 I HAVE A MODEST LIST OF ITEMS TO COVER,
5 IN NO ORDER OF IMPORTANCE.

6 LET ME BRING TO YOUR ATTENTION AN ORDER
7 OF THIS COURT DATED 12TH OF OCTOBER, 2006, ENTITLED,
8 ORDER APPROVING THE FINAL PRETRIAL ORDER. DO YOU
9 RECALL -- YOU MAY RECALL A PAGE AND-A-HALF ORDER. WHAT
10 I'M BRINGING TO YOUR ATTENTION NOW IS THAT THE COURT,
11 HAVING REVIEWED THE RECORD AND THE PLEADINGS AND THE
12 POSITIONS OF THE PARTIES REGARDING THE LEGAL ISSUES AND
13 CITING TO THE RECORD, THE COURT CONCLUDED THE LEGAL
14 ISSUES IN THE CASE ARE AS FOLLOWS. AND I HAVE A LIST OF
15 EIGHT PARAGRAPHS COVERING MY DETERMINATION OF THE LAW
16 APPLICABLE TO THE CASE. WHAT I NEED TO KNOW IS IS THERE
17 ANY OBJECTION TO THAT LIST. YOU MAY NOT BE ABLE TO DO
18 IT AT THIS MOMENT, BUT SOMEBODY HAS TO DO SOMETHING. WE
19 HAVE TO DO IT BEFORE WE HAVE OUR CLOSINGS BECAUSE
20 CRAFTING OF THE CLOSING IS GOING TO HAVE SOMETHING TO DO
21 WITH THE LANGUAGE IN THE RULES, THE LAW APPLICABLE. I
22 DON'T HAVE A READY REFERENCE TO THE DOCUMENT NUMBER BUT
23 I THINK YOU SHOULD BE ABLE TO FIND THIS ORDER. IT'S
24 DATED THE 12TH OF OCTOBER.

25 MR. GOMEZ: I BELIEVE IT'S DOCKET NUMBER

1 309, YOUR HONOR.

2 THE COURT: 309?

3 MR. GOMEZ: I BELIEVE THAT'S IT.

4 THE COURT: I WILL JUST MARK IT.

5 THINGS WE HAVE TO DO INCLUDE FORMALIZING
6 THE TASK OF HOW COUNSEL ARE GOING TO ORGANIZE THE TRIAL
7 EXHIBITS AND LIST THE ITEMS TO BE DONE. WE WILL TRY TO
8 PRIORITIZE IN TERMS OF WHEN THEY NEED TO GET DONE.

9 WE HAVE TO DECIDE WHAT, IF ANY, SPECIAL
10 FORM FOR THE CLOSING STATEMENTS THERE MAY NEED TO BE OR
11 THE COURT MAY WANT AND THE PARTIES MAY WANT. WE HAVE TO
12 FORMALIZE A PROCESS FOR UPDATING THE FINDINGS OF FACTS
13 AND CONCLUSIONS OF LAW, THE PROPOSED FINDINGS OF FACT
14 AND CONCLUSIONS OF LAW BY REFERENCE TO THE TRIAL RECORD
15 AS OPPOSED TO ANTICIPATED TRIAL RECORD. I'M HOPING THAT
16 IS NOT A MONSTROUS TASK, ALTHOUGH THERE IS GOING TO BE
17 SOME -- HAVING BEEN IN THAT POSITION MYSELF AND PRESIDED
18 OVER A LOT OF NON-JURY CASES, THERE ARE GOING TO BE SOME
19 TWEAKING OF THOSE STATEMENTS OF WHAT WITNESSES
20 SUPPOSEDLY -- WERE SUPPOSED TO PROVE IN ORDER TO MAKE IT
21 CRYSTAL CLEAR THAT YOU ARE ASKING THE COURT TO CONSIDER
22 WHAT THEY ACTUALLY SAID.

23 I'M HOPING THAT THE TASK OF PREPARING
24 THOSE PROPOSED FINDINGS WILL BE THE LION'S SHARE OF THE
25 WORK YOU'VE ALREADY DONE. IT'S A MATTER OF UPDATING IT

1 TO THE ACTUAL TESTIMONY AND EXHIBITS.

2 AND WE HAVE TO DECIDE WHEN WE ARE GOING
3 TO HAVE CLOSING AND THE FORM OF THE CLOSINGS. I DON'T
4 SEE THE -- I HAVE A SUGGESTION FOR THE ORGANIZATION OF
5 THE TRIAL EXHIBITS. WE HAVE AT LEAST ONE FULL SET OF
6 TRIAL EXHIBITS IN CHAMBERS. RIGHT ACROSS THE HALL, WE
7 SHOULD BE ABLE TO GET ACCESS TO A LARGE ROOM WHERE BOXES
8 CAN BE MANIPULATED AND MOVED AROUND AND SORTED OUT. I
9 SHOULD BE ABLE TO CAPTURE THAT ROOM FOR A TIME WHEN WE
10 ALL DECIDE IT'S A GOOD TIME TO DO IT. I DON'T KNOW
11 WHETHER THAT IS NECESSARY TO BE DONE BEFORE THE
12 CLOSINGS. IF ANYONE THINKS IT IS, WE WILL TALK ABOUT
13 IT.

14 MR. GOMEZ, DO YOU THINK IT HAS TO BE DONE
15 BEFORE THE CLOSINGS?

16 MR. GOMEZ: YOUR HONOR, I DON'T THINK
17 IT'S NECESSARY THAT WE HAVE IT RESOLVED BY THE CLOSINGS.
18 HOWEVER, OBVIOUSLY IF EITHER SIDE IS GOING TO USE AN
19 EXHIBIT, WE BETTER -- I WOULD REQUEST THAT THOSE
20 DOCUMENTS BE RESOLVED. I'M NOT TALKING ABOUT
21 DEMONSTRATIVE EXHIBITS. I'M TALKING ABOUT THE ACTUAL
22 PLAINTIFF OR DEFENDANT'S TRIAL EXHIBIT.

23 THE DEFENDANT IS GOING TO ATTEMPT TO TRY
24 TO RESOLVE THE EXHIBIT ISSUE, AT LEAST IN THE FIRST RUN
25 BY FRIDAY. BUT THERE IS GOING TO BE QUALITY CONTROL

1 REVIEW THAT IS GOING TO HAVE TO BE DONE. AND IN SOME
2 INSTANCES, I THINK FRANKLY, WHAT MAY BE EASIER TO DO
3 SINCE WE REALLY -- THE EXHIBITS THE COURT HAS, OR MANY
4 OF THE MAJOR PROBLEMS, I THINK, THAT HAD ARISEN ARE
5 CONFIDENTIALITY ISSUES OF THIRD PARTIES. AND WHEN BOTH
6 PARTIES SENT IN ON OCTOBER 12TH THE EXHIBITS IT HAD
7 REDACTIONS IN VARIOUS EXHIBITS. HOWEVER, AS WE
8 PROCEEDED THROUGH THE TRIAL AND RESOLVED THE
9 CONFIDENTIALITY ISSUES, WE WERE PROVIDING -- BOTH SIDES
10 WERE PROVIDING THE COURT WITH EXHIBITS THAT HAD --

11 THE COURT: NO REDACTIONS.

12 MR. GOMEZ: -- NO REDACTIONS, OR HAD
13 MAYBE A COUPLE HERE OR THERE, BUT GENERALLY NO
14 REDACTIONS. SO WHAT WE WOULD PROPOSE DOING IS, AT LEAST
15 FROM THE DEFENDANT'S POINT OF VIEW, IS WE WOULD GO
16 THROUGH THE DEFENDANT'S SET AND MAKE SURE THAT EACH OF
17 THEM CORRESPOND TO THE MASTER LIST THAT WE HAVE AND
18 MATCH THE EXHIBITS THAT WE HAVE. IF THERE IS -- IF
19 THERE IS A DISCREPANCY THEN I THINK WE NEED TO ACTUALLY
20 TALK TO -- WE WOULD REQUEST TO TALK TO JOEL LANG ABOUT
21 ANY DISCREPANCY.

22 THE COURT: YOU MIGHT START WITH TALKING
23 TO THE PLAINTIFFS.

24 MR. GOMEZ: AND THE PLAINTIFFS, YOUR
25 HONOR.

1 THE COURT: THEY WOULD BE ABLE TO SOLVE
2 IT, IF IT IS A MINOR ADMINISTRATIVE OVERSIGHT OR
3 SOMETHING.

4 MR. GOMEZ: IN MOST INSTANCES, I THINK WE
5 ARE GOING TO BE ABLE TO -- HOPEFULLY THE SET IS AS
6 COMPLETE AS WE THINK IT IS. WE WILL BE ABLE TO
7 SUBSTITUTE EXHIBITS AND BE ABLE TO RESOLVE IT FAIRLY
8 QUICKLY AND THEN PROVIDE THE COURT WITH AN ELECTRONIC
9 SET OF JUST THE ADMITTED DOCUMENTS.

10 THE COURT: I'M NOT SO CONCERNED ABOUT ME
11 HAVING THEM BUT THE CLERK'S OFFICE HAS TO HAVE A HARD
12 COPY OF THE EXHIBITS. IF YOU WANT TO PUT CDS OR DVDS
13 WITH THEM TO AUGMENT THEM, THAT IS FINE. BUT I KNOW OF
14 NO RULE OF COURT YET THAT SAYS THAT TRIAL EXHIBITS CAN
15 BE SUBMITTED FOR RECORDING PURPOSES THE SAME WAY AS
16 PLEADINGS AND OTHER PAPERS ARE. I THINK THEY HAVE TO BE
17 HARD COPY. IF ANYBODY IS AWARE OF ANY OTHER RULE, I
18 WOULD LIKE TO KNOW ABOUT IT.

19 MR. HANSEN: I'M NOT SURE, YOUR HONOR.
20 AND WE SHARE MR. GOMEZ'S APPROACH TO THIS. WE WOULD
21 LIKE TO DO IT MONDAY AFTER THE CLOSINGS. AND IT MAY
22 REQUIRE TUESDAY AS WELL, RATHER THAN TRY TO DO IT THIS
23 WEEK. BUT THE GENERAL APPROACH, I THINK, IS RIGHT. WE
24 SHOULD EACH STRAIGHTEN OUT OUR OWN RECORDS. WHEN WE
25 THINK WE'VE GOT A PERFECT SET OF OUR OWN EXHIBITS, WE

1 OUGHT TO SHARE THEM WITH EACH OTHER AND IF THERE ARE
2 DISPUTES WE OUGHT TO TALK ABOUT THEM AND ELIMINATE THE
3 DISPUTES. IF WE CAN'T RESOLVE THE DISPUTES AMONG
4 OURSELVES WE NEED TO BRING IT TO THE COURT.

5 MR. GOMEZ: AND I WOULD JUST ADD ONE
6 OTHER ITEM, AND I THINK WE ARE BOTH IN AGREEMENT ON
7 THIS, WE WOULD PROVIDE, OBVIOUSLY, AND I THINK THE COURT
8 HAD INDICATED, A MASTER LIST OF EACH OF THE EXHIBITS,
9 WITH A BRIEF DESCRIPTION.

10 THE COURT: YOU DO NEED A COVER PAGE.

11 MR. GOMEZ: AND WHEN IT WAS ADMITTED, WE
12 WOULD TRY TO PROVIDE ALL THAT INFORMATION ON ONE
13 DOCUMENT.

14 THE COURT: DO BETTER THAN I COULD. THE
15 ONLY WAY I CAN DO THAT IS LOOK AT MY NOTES AND THEY
16 DON'T HAVE TIME AND DATE STAMPS ON IT.

17 MR. HANSEN: I DO HAVE ONE QUESTION WITH
18 RESPECT TO THE VERY LAST THING THAT MR. GOMEZ SAID, YOUR
19 HONOR, AND THAT IS, EXHIBITS THAT WERE REFERRED TO BUT
20 NOT ADMITTED OR EXHIBITS THAT WERE MOVED INTO EVIDENCE
21 BUT WERE NOT ADMITTED.

22 THE COURT: THEY HAVE TO BE IN THE
23 RECORD.

24 MR. HANSEN: THAT IS WHAT I THOUGHT.

25 THE COURT: BOTH.

1 MR. GOMEZ: YES, YOUR HONOR.

2 THE COURT: I THINK IF WE ORGANIZE THEM
3 AFTER -- IF WE ARE THINKING OF HAVING CLOSINGS ON MONDAY
4 MORNING AND YOU ARE GOING TO WORK ON THE EXHIBITS IN THE
5 AFTERNOON, HOPEFULLY YOU WILL HAVE DONE SOME WORK ON IT
6 BEFORE THEN. THEN IF THE PARTIES RECOGNIZE THE PROBLEM
7 IN THE CLOSING, IF THE OPPOSING PARTY HEARS AN OPPOSING
8 LAWYER MAKING AN ARGUMENT ABOUT AN EXHIBIT THAT WAS NOT
9 ADMITTED OR DECLINED TO BE ADMITTED BY THE COURT OR
10 SOMEHOW THE ARGUING LAWYER HAS A BOTCHED UP COPY AND THE
11 RESPONDING LAWYER SITS THERE AND SAYS, THIS IS GOOFY, I
12 DON'T THINK THAT WILL HAPPEN. BUT IF IT DOES, THEN THE
13 LAWYER THAT WANTS TO MAKE SOME REFERENCE TO IT WILL WAIT
14 TILL THEIR TIME TO -- EITHER IN REBUTTAL FOR THE
15 PLAINTIFF OR IN DEFENSE BY THE DEFENDANT WILL MENTION IN
16 THE CLOSING LIKE HE WOULD IN ANY CASE, COUNSEL FOR THE
17 OTHER SIDE USED A BOGUS EXHIBIT. WHETHER IT WAS BY
18 MISTAKE OR ON PURPOSE, I HOPE NEITHER, BUT IT'S WRONG,
19 AND I WILL HAVE TO DEAL WITH THAT. THAT IS WHAT WOULD
20 HAPPEN IF WE HAD A JURY.

21 ALTHOUGH TYPICALLY WHAT WOULD HAPPEN IS,
22 THE JURY WOULD GO OUT AND WE'D SORT THE MATTER OUT AND
23 GET THE RIGHT ONE.

24 I WILL GET THE RIGHT ONE OUT OF YOU GUYS
25 ANYWAY.

1 IF WE HAVE CLOSINGS ON MONDAY, WHEN WOULD
2 THE PARTIES PROPOSE THAT THEY SUPPLY THEIR UPDATED,
3 SO-TO-SPEAK, AMENDED REQUESTS FOR FINDINGS AND
4 CONCLUSIONS? DEPENDS ON AVAILABILITY OF TRANSCRIPTS AND
5 SO FORTH. HAVE YOU DISCUSSED THIS AT ALL?

6 MR. HANSEN: WE HAVE DISCUSSED IT, YOUR
7 HONOR, YES. THE PLAINTIFFS DO HAVE TRANSCRIPTS. WE
8 HAVE NOT BEEN GETTING REALTIME TRANSCRIPTS, BUT WE HAVE
9 BEEN GETTING DAILY TRANSCRIPTS.

10 THE COURT: WELL, YOU PROBABLY WILL WANT
11 TO TAKE A PEEK AT THE CLOSING STATEMENTS IN WRITING.
12 THEY PROBABLY WILL BE AVAILABLE IN 24 OR 48 HOURS AFTER
13 THE CLOSING SPEECHES ARE GIVEN. STRANGELY ENOUGH, I
14 DON'T HAVE A CALENDAR. I PROBABLY HAVE ONE ON THE
15 COMPUTER HERE. I THINK SOMETIME IN THE WEEK AFTER
16 THANKSGIVING WEEKEND.

17 MR. HANSEN: I THINK WE WERE GOING TO
18 SUGGEST TWO WEEKS AFTER THE DATE OF THE CLOSING, SO TWO
19 WEEKS FROM MONDAY.

20 THE COURT: ALL RIGHT.

21 MR. GOMEZ: YES, ONE OF THE DIFFICULTIES
22 IS THAT WITH THE THANKSGIVING WEEK, AFTER THE CLOSINGS,
23 THERE MAY BE SOME DIFFICULTY IN TERMS OF HAVING --

24 THE COURT: TWO WEEKS --

25 MR. GOMEZ: I THINK IF -- WHAT DATE ARE

1 WE ACTUALLY TALKING ABOUT?

2 THE COURT: THAT IS WHAT I STARTED OUT
3 WITH.

4 MR. GOMEZ: THE 4TH IS THE -- THE 27TH IS
5 THE MONDAY AFTER THANKSGIVING AND THEN THE 4TH IS THE
6 FOLLOWING MONDAY.

7 MR. HANSEN: EITHER WOULD BE FINE WITH
8 ME.

9 MR. GOMEZ: WE WOULD -- THE 27TH IS --
10 FROM THE DEFENDANT'S POINT OF VIEW IS NOT.

11 MR. HANSEN: EITHER WOULD NOT BE FINE
12 WITH ME. I AGREE WITH HIM.

13 THE COURT: THE 5TH OF DECEMBER IS A
14 MONDAY.

15 MR. GOMEZ: YES, YOUR HONOR, BUT --

16 THE COURT: THAT IS TWO WEEKS FROM THIS
17 COMING MONDAY?

18 MR. GOMEZ: I HONESTLY THINK DECEMBER 7TH
19 WOULD BE A MORE REALISTIC DATE. I THINK WE HAVE A LOT
20 OF WORK THAT WE MAY NEED TO DO.

21 THE COURT: IS MONDAY THE 5TH OF
22 DECEMBER?

23 MR. GOMEZ: MONDAY IS DECEMBER 4TH. AND
24 I WAS GOING TO PROPOSE THURSDAY, DECEMBER 7TH.

25 THE COURT: FINE.

1 MR. HANSEN: FINE.

2 THE COURT: NOW, LET'S TALK ABOUT -- WE
3 ARE BACKING INTO THE NOTION THAT WE ARE NOT GOING TO BE
4 WORKING TOGETHER IN COURT WITH A COURT REPORTER TOMORROW
5 OR FRIDAY?

6 MR. HANSEN: YES, WE ARE, YOUR HONOR.

7 THE COURT: THAT IS WHAT WE JUST DECIDED
8 WITHOUT SAYING IT. THESE CLOSINGS BETTER BE PERFECT.
9 OFTEN WHEN YOU GET TOO MUCH TIME IT'S WORSE THAN WHEN
10 YOU DON'T HAVE ENOUGH. WE HAVE TO GET THE LEGAL ISSUES
11 RESOLVED, WHETHER MY ORDER OF OCTOBER 12TH IS
12 SATISFACTORY TO MANAGE THE LEGAL ISSUES IN THIS CASE.
13 IT'S SORT OF LIKE A CHARGING CONFERENCE IN A SENSE.
14 THIS IS THE LAW I'M GOING TO APPLY TO THE CASE, AND WE
15 DID IT IN SINGLE LINES INSTEAD OF ANY OTHER FORM, AND WE
16 HAVE TO HAVE THAT RESOLVED IN ORDER FOR YOU TO APPLY THE
17 FACTS TO THE LAW WHEN YOU DO YOUR CLOSING, HOW ARE WE
18 GOING TO DO THAT DONE? WE CAN DO IT THIS AFTERNOON, IF
19 YOU WANT TO.

20 MR. HANSEN: WELL, IF WE CAN SEND YOU A
21 LETTER BY THE END OF THE DAY TOMORROW INDICATING THAT WE
22 THINK THOSE ARE FINE OR WE WOULD SUGGEST A TWEAKING THIS
23 WAY OR THE OTHER.

24 THE COURT: IT SHOULDN'T BE TOO HARD.

25 MR. GOMEZ: I WOULD SUGGEST THAT WE DO IT

1 BY NOON TOMORROW IF WE ARE GOING TO -- IF WE ARE GOING
2 TO DO A LETTER. IF WE ARE NOT RESOLVING IT TODAY, THEN
3 I THINK WE OUGHT TO TRY TO HAVE IT --

4 THE COURT: IF YOU HAVE A PROBLEM, SEE, I
5 TOOK WHAT YOUR SUBMISSIONS WERE, AND GIVE ME THIS LEEWAY
6 IN THIS RESPECT. DO WHAT I DID. LOOK AT THE
7 SUBMISSIONS OF EACH SIDE. AND LOOK WHAT I DID AND SEE
8 IF IT IS A FAIR REPRESENTATION OF WHAT THE PARTY -- THE
9 PARTIES WERE SO CLOSE ON THE LANGUAGE THAT I DON'T THINK
10 YOU ARE GOING TO HAVE ANY DISAGREEMENT WITH WHAT I
11 WROTE. BUT LIKE A CHARGING CONFERENCE, I WOULD BE
12 WILLING TO HEAR WHAT YOU HAVE TO SAY. I WILL MAKE THE
13 FINAL DECISION, AND IF YOU DON'T LIKE IT YOU EXCEPT TO
14 IT AND WE GO OFF AND GO TO WORK.

15 MR. GOMEZ: YES, YOUR HONOR.

16 THE COURT: I HOPE WITH THE PASSAGE OF
17 TIME AND THE FAMILIARITY WITH THIS AREA OF THE LAW THAT
18 THE PARTIES WILL BE ABLE TO TAKE WHAT I HAVE SAID, OR
19 ABLE TO TWEAK IT IN SOME WAY TO MAKE IT AGREEABLE TO
20 BOTH SIDES. AND I WILL WORRY ABOUT ME WHEN I HEAR WHAT
21 YOU HAVE TO SAY. SO GIVE ME A LETTER IN CHAMBERS
22 TOMORROW BY ONE O'CLOCK IN THE AFTERNOON.

23 MR. GOMEZ: IS THAT IF WE HAVE PROPOSED
24 CHANGES OR IF WE --

25 THE COURT: WELL, A LETTER THAT TELLS ME

1 THAT WE HAVE A TRIAL MEMORANDUM, I THINK THE COURT HAD
2 INDICATED, AT LEAST EARLIER, THAT WE WOULD NOT BE HAVING
3 A POST-TRIAL MEMORANDUM, AND WE WOULD HAVE ANNOTATIONS
4 TO THE FINDINGS OF FACT.

5 THE COURT: I THINK IT IS ADEQUATE.

6 MR. GOMEZ: THE DEFENDANT WOULD THINK
7 THAT WOULD BE ADEQUATE. I THINK WE HAVE ADDRESSED THIS.

8 MR. HANSEN: I THINK NOW THAT THE
9 EVIDENCE IS ALL IN, THE POST-TRIAL MEMORANDUM MIGHT
10 BENEFIT. I HAVE NOT REALLY THOUGHT IT COMPLETELY
11 THROUGH. AS LONG AS IT IS UP TO THE PARTIES TO DECIDE
12 BY DECEMBER 7TH WHETHER WE WANT TO DO IT OR NOT, I DON'T
13 SEE -- WE ARE ONLY ASSUMING A BURDEN WE ARE ASSUMING.

14 THE COURT: RIGHT. I WILL TELL YOU THIS.
15 I WOULD LIKE TO HAVE ONE. I'M ALWAYS PLEASED TO HAVE
16 IT. I'M NOT GOING TO ORDER YOU TO DO ONE BECAUSE IT'S A
17 BIG BURDEN AND WE DO HAVE PRETRIAL TRIAL MEMOS.

18 MR. GOMEZ: YES, YOUR HONOR.

19 THE COURT: I MUST SAY THIS. IF ONE SIDE
20 IS NOT ABLE TO PERSUADE THE OTHER TO THEIR POSITION OF
21 WHETHER OR NOT TO HAVE ONE, AND THE PARTY THAT WANTS TO
22 PERSIST WANTS TO FILE A MEMO, THEN THE OTHER SIDE BETTER
23 FILE ONE. IT DOES NOT MAKE ANY SENSE OTHERWISE. IF IT
24 WOULD ASSIST IN ANY WAY FOR THE COURT TO ISSUE AN ORDER
25 THAT YOU DO IT, JUST LET ME KNOW THAT, TOO. THERE MAY

1 BE A REASON THAT ESCAPES ME. HOPEFULLY I WILL NEVER
2 HAVE TO WORRY ABOUT IT. SOMEBODY MAY NEED AN ORDER.

3 OKAY. LET'S TALK A LITTLE BIT ABOUT THE
4 FORM OF THE CLOSINGS. I'M NOT GOING TO ISSUE -- I
5 THOUGHT MORE ABOUT THIS. I'M NOT GOING TO ISSUE ANY
6 PLENARY OR OMNIBUS QUESTIONS TO GUIDE THE FORMALIZATION
7 OF THE ARGUMENT. I'M GOING TO LET YOU BE AS IMAGINATIVE
8 AS YOU CAN AND STILL BE HELPFUL TO YOUR CLIENT AND THE
9 COURT. BUT I WILL, UNLIKE WITH A JURY TRIAL, WHERE I
10 RARELY INTERRUPT A CLOSING, IF I'VE GOT A PROBLEM WITH
11 WHAT'S GOING ON, I'M GOING TO PROBABLY STOP YOU AND ASK
12 YOU A QUESTION. I DON'T HAVE ANY WRITTEN DOWN NOW. IF
13 I DEVISE ANY, YOU WILL BE THE RECIPIENT OF THEM AT THE
14 RIGHT TIME.

15 I WANT TO FOCUS -- I WANT YOU TO FOCUS ON
16 THE DIFFERING -- THE DIFFERENT RULES OF THE COURT HERE.
17 THE COURT IS A FACTFINDER AND YOU KNOW HOW IMPORTANT
18 FINDINGS OF FACT ARE IN A NON-JURY PROCEEDING. THE
19 SCOPE OF REVIEW IS VERY NARROW. SO IT'S EXTRAORDINARILY
20 IMPORTANT TO YOUR CLIENTS THAT YOU GET THE COURT TO MAKE
21 FINDINGS OF FACT IN YOUR FAVOR OBVIOUSLY. BUT YOU HAVE
22 TO FOCUS ON THAT.

23 AND LET ME POINT OUT WHAT I MEAN BY THAT.

24 DURING THE TRIAL, WHILE I COULD READ
25 SNIPPETS OF EXPECTED TESTIMONY AND PROFFERS IN THE

1 RECORD, AND I COULD READ EXPERT REPORTS, BE DAZZLED BY
2 THEM OR CONFUSED BY THEM OR WHATEVER, I HEARD THE
3 TESTIMONY. I CAN SHARE WITH YOU THAT OFTEN DURING THE
4 TESTIMONY, I WONDERED WHY THE WITNESS WAS CALLED, NOT
5 THAT THE WITNESS BACKFIRED OR ANYTHING LIKE THAT. BUT A
6 LOT OF THIS EXPERT MATERIAL IS MODESTLY SUBTLE TO
7 SOMEONE WHO IS NOT CERTAIN WHY A WITNESS WAS CALLED.
8 YOU MAY HAVE A NICHE FOR THAT WITNESS TO FILL, A FACTUAL
9 NICHE THAT I HAVE NOT FIGURED OUT YET. YOU HAVE TO DEAL
10 WITH THAT IN YOUR CLOSINGS SOMEHOW, BECAUSE I REALLY
11 CALL OUT FOR THAT KIND OF ASSISTANCE IN FOCUSING ON EVEN
12 SUCH MUNDANE THINGS AS, YOUR HONOR, YOU RECALL WE CALLED
13 MARY JONES OR GROUP THE LIBRARIANS TOGETHER OR WHATEVER
14 THE WITNESS MAY HAPPEN TO BE, AND WE CALLED THEM TO
15 PROVE THUS AND SO AND THEY DID IT. I MEAN, TO BE AS
16 BLUNT AS THAT IS GOING TO HELP ME FOCUS ON THE
17 FACTFINDING JOB. YOU ARE GOING TO LOOK AT YOUR REQUEST
18 FOR FINDINGS AND THAT WILL HELP YOU DECIDE HOW MUCH
19 STUFF YOU HAVE TO GIVE ME TO GO WITH THAT KIND OF A
20 CLOSING.

21 I JUST -- I HAD A TRUNCATED SHORT EXAMPLE
22 THAT I DIDN'T EVEN THINK UP UNTIL I -- MANY SECONDS AGO.
23 IT'S MUCH MORE COMPLICATED THAN I'M SUGGESTING HERE NOW,
24 AND IT'S UP TO YOU TO SORT OUT THE COMPLICATED NATURE OF
25 IT AND MAKE IT WORK FOR YOU.

1 SOME OF THESE EXPERTS WERE ON THE STAND
2 FOR HOURS AND HOURS AND HOURS. AND OFTEN THERE WAS AN
3 HOUR OF QUALIFICATIONS THAT HAVE NOTHING TO DO WITH THE
4 PARTICULAR SUBSTANTIVE TESTIMONY, EXCEPT AS TO ITS
5 WEIGHT FROM SOMEONE WHO IS WELL QUALIFIED OR LESS
6 QUALIFIED OR WHATEVER, MAY BE INTERESTING.

7 MANY OF THE EXPERTS TESTIFIED FOR LONG
8 PERIODS OF TIME. AND I CAN ASSURE YOU, I COULD NOT --
9 OFTEN I COULD NOT DETERMINE ANY PLAN FOR THE QUESTIONING
10 EXCEPT FREQUENTLY ACROSS LAWYERS WOULD SAY, LET'S MAKE A
11 LIST OF WHAT YOU DIDN'T DO. THEN I CAN TELL HOW TO
12 PLAN.

13 SO I URGE YOU TO FOCUS ON THE FACTUAL
14 FINDING JOB OF THE COURT. AND QUITE FRANKLY, SINCE I
15 HAVE -- SINCE WE WILL HAVE THE LEGAL ISSUES -- THE
16 ULTIMATE LEGAL ISSUES IDENTIFIED, AND WE HAVE PRETRIAL
17 TRIAL MEMOS, AND UPDATED REQUESTS FOR FINDINGS, I DON'T
18 KNOW HOW MUCH LEGAL ARGUMENT THERE HAS TO BE. THE FACTS
19 ARE REALLY IMPORTANT TO YOU FOLKS, I'M TELLING YOU.
20 YOU'VE GOT TO SORT THEM OUT CORRECTLY. I'M NOT TELLING
21 YOU THAT IT IS SOMETHING YOU DON'T KNOW. BUT I WANT TO
22 WORK WITH YOU. AND THE QUALITY OF THE LAWYERING IN THIS
23 CASE HAS BEEN SUPERB AND TRYING TO KEEP UP WITH YOU, AND
24 THE QUALITY OF THE DECISIONMAKING IS DIRECTLY RELATED TO
25 THE QUALITY OF THE ADVOCACY. SO DO YOUR BEST TO

1 STRAIGHTEN ME OUT.

2 DO YOU HAVE ANY OTHER QUESTIONS?

3 MR. HANSEN: WHAT TIME DO YOU WANT TO
4 START ON MONDAY, YOUR HONOR?

5 THE COURT: OH, I HAVE A COUPLE OF ISSUES
6 ON THAT. HOW LONG DO WE START AND HOW LONG DO WE WANT
7 TO SET ASIDE FOR EACH SIDE? LET'S NOT WORRY ABOUT WHEN
8 WE ARE GOING TO START. LET'S TALK ABOUT HOW LONG --
9 HAVE YOU DISCUSSED THIS AMONG YOURSELVES?

10 MR. HANSEN: WE HAVE NOT YET DISCUSSED
11 THIS AMONG OURSELVES. I FEAR THAT THE HALF-HOUR WE HAD
12 FOR OPENING MAY BE A LITTLE TOO SHORT FOR CLOSING.

13 THE COURT: I THINK IT IS TOO SHORT.

14 MR. HANSEN: I FEAR ASKING FOR AN HOUR
15 BECAUSE I'M NOT SURE I CAN KEEP GOING FOR A FULL HOUR.
16 BUT I THINK AN HOUR FOR EACH SIDE IS PROBABLY ABOUT
17 RIGHT.

18 THE COURT: PROBABLY AN HOUR IS ADEQUATE.

19 MR. GOMEZ, WHAT DO YOU THINK?

20 MR. GOMEZ: GIVEN THE NUMBER OF
21 WITNESSES, I THINK AN HOUR IS PROBABLY A MINIMUM. IT
22 COULD EASILY TAKE AN HOUR AND-A-HALF.

23 THE COURT: IT COULD.

24 MR. GOMEZ: I WOULD HATE TO HAVE -- I
25 WOULD PREFER HAVING A RANGE AS OPPOSED TO JUST --

1 THE COURT: I DON'T MIND -- WE CAN DO ONE
2 CLOSING AND -- WELL, WE HAVE TO DO TWO THINGS. WE CAN
3 HAVE THE PLAINTIFFS' CLOSING, THEN TAKE A RECESS, AND
4 HAVE A DEFENSE CLOSING. DEPENDING HOW LONG THAT GOES,
5 IF WE ARE INTO THE MID-DAY BY THAT TIME, WE'VE GOT TO
6 GET TO THE PLAINTIFFS' REBUTTAL. LET'S SEE. IF WE WANT
7 TO GET DONE BY MID-DAY WE HAVE TO START AT NINE O'CLOCK
8 TO BE SAFE. IF YOU NEED AN HOUR AND-A-HALF FOR BOTH
9 SIDES, THAT IS THREE HOURS. SO 9 AND 3 ARE 12, AND A
10 15-MINUTE REBUTTAL OR SOMETHING, THEN WE ARE INTO THE
11 END OF THE MORNING SESSION. PROBABLY WE OUGHT TO START
12 AT NINE O'CLOCK. IS THAT ALL RIGHT WITH EVERYBODY?

13 MR. HANSEN: THAT'S FINE, YOUR HONOR.

14 MR. GOMEZ: YES, YOUR HONOR.

15 I JUST WANT TO ADD ONE THING. AT OUR
16 CLOSING, THE DEFENDANT IS INTENDING TO HAVE -- TO SPLIT
17 THE CLOSING BETWEEN TWO COUNSEL.

18 THE COURT: AS LONG AS YOU LABEL IT.

19 MR. GOMEZ: WE WILL MAKE IT VERY CLEAR.

20 THE COURT: ARE PLAINTIFFS GOING TO DO
21 THAT OR IS MR. HANSEN GOING TO HANDLE ALL THAT?

22 MR. HANSEN: I'M GOING TO DO IT MYSELF,
23 YOUR HONOR.

24 THE COURT: DO YOU HAVE ANY GROUP THAT IS
25 GOING TO PASS THE LITTLE STICKIES --

1 MR. HANSEN: I THINK YOU CAN VERY SAFELY
2 ASSUME THAT IS GOING TO OCCUR, YOUR HONOR.

3 THE COURT: I'M GOING TO HAVE TO GET
4 YOU -- I'M HOPEFUL THAT YOU WILL RESOLVE ANY PROBLEMS
5 ABOUT THE LANGUAGE IN THE LAW APPLICABLE TO THE CASE.
6 BUT IF I HAVE TO DO ANYTHING ON THAT, I'M GOING TO HAVE
7 TO COMMUNICATE BACK TO YOU PROMPTLY TOMORROW AFTERNOON
8 SO THAT YOUR CLOSING CAN BE PREPARED IN LIGHT OF THAT
9 LANGUAGE. OKAY. HOW ARE WE DOING SO FAR?

10 WE ARE GOING TO HAVE OUR ERSTWHILE COURT
11 REPORTER, MISS WHITE, DO OUR CLOSINGS FOR US. AND SHE
12 IS READY, WILLING AND ABLE, SHE SAID.

13 MR. HANSEN: I THINK THERE IS ONLY ONE
14 OTHER THING I KNOW OF, YOUR HONOR. AND THAT IS, YOUR
15 HONOR SUGGESTED THAT IF EITHER PARTY WERE TO USE
16 DEMONSTRATIVE EXHIBITS AT THE CLOSING, WE SHOULD
17 EXCHANGE THOSE IN ADVANCE. WE MAY NEED TO SET A TIME BY
18 WHICH THOSE NEED TO BE EXCHANGED.

19 THE COURT: SOME OF THE THEM -- EACH SIDE
20 HAS COPIES BUT THEY HAVEN'T BEEN DESIGNATED TO BE USED
21 IN THE CLOSING SO YOU MAY NOT HAVE TO SHUFFLE PAPERS
22 AROUND.

23 MR. HANSEN: BUT THE PARTIES MAY BE
24 INTENDING TO USE DIFFERENT DEMONSTRATIVES. I DON'T
25 KNOW. BUT AT LEAST WE OUGHT TO SET A TIME BY WHICH

1 THOSE GET EXCHANGED, IT SEEMS TO ME, SOMETIME DURING THE
2 DAY ON FRIDAY.

3 THE COURT: IF THIS WERE A JURY TRIAL I
4 WOULD INSIST ON SEEING THEM BEFORE THEY WERE USED. BUT
5 IF YOU USE A GOOFY DEMONSTRATIVE AND I DON'T LIKE IT I'M
6 NOT GOING TO LOOK AT IT. I WON'T BE CONFUSED BY IT
7 HOPEFULLY.

8 MR. GOMEZ: I THINK -- THE DEFENDANT, I
9 THINK, WOULD PREFER HAVING SOMETIME SATURDAY AS OPPOSED
10 TO FRIDAY FOR THE DEMONSTRATIVES. MAYBE WE CAN JUST SAY
11 NOON SATURDAY OR SOMETHING.

12 MR. HANSEN: I WOULD LIKE TO PUSH FOR
13 CLOSE OF DAY FRIDAY, YOUR HONOR.

14 THE COURT: CLOSE OF THE DAY ON FRIDAY.

15 MR. GOMEZ: YES, YOUR HONOR.

16 THE COURT: TWO WHOLE DAYS OF WORKING AND
17 TWO WHOLE EVENINGS. I'M NOT GOING TO GET INVOLVED IN
18 THAT.

19 BY THE WAY, THE COMPUTER HAS A CNN STORY
20 TODAY, THE INTERNET DOES, WHICH REMINDS ME, BOTH SIDES
21 OF THIS CASE ARE GOING TO USE STATISTICS OF SOME KIND.
22 SO BE CAREFUL. YOU MAY NEED SOME PLACARDS TO PUT THOSE
23 ON OR SOMETHING LIKE THAT. IT'S GOING TO BE VERY
24 IMPORTANT FOR ME TO UNDERSTAND THEM. SO ADD THAT TO
25 YOUR BURDENS.

1 OKAY. THE COURT DAY IS CONCLUDED. WE
2 ARE OFF THE RECORD. COUNSEL ARE EXCUSED. SEE YOU IN
3 PERSON ON MONDAY MORNING AT NINE O'CLOCK.

4 MR. HANSEN: THANK YOU, YOUR HONOR.

5 MR. GOMEZ: THANK YOU, YOUR HONOR.

6 ALL COUNSEL: THANK YOU, YOUR HONOR.

7 (COURT ADJOURNED AT 4:35 P.M.)

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|----|--|--------|-------|----------|-------------------------|
| 1 | | | | | INDEX |
| 2 | WITNESS | DIRECT | CROSS | REDIRECT | RECROSS |
| 3 | SCOTT M. SMITH | 3 | 104 | 178 | |
| 4 | | | | | |
| 5 | DEFENDANT'S EXHIBITS | | | | ADMITTED |
| 6 | D 91 | | | | 103 |
| 7 | D 275 | | | | 192 |
| 8 | D 277 | | | | 195 |
| 9 | D 276 | | | | 196 |
| 10 | D 279 | | | | 197 |
| 11 | D 280 | | | | 198 |
| 12 | D 281 | | | | 198 |
| 13 | D 282 | | | | 199 |
| 14 | D 283 | | | | 199 |
| 15 | D 284 | | | | 200 |
| 16 | D 405 | | | | 200 |
| 17 | D 81 | | | | 215 |
| 18 | | | | | - - - |
| 19 | I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT | | | | |
| 20 | FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED | | | | |
| 21 | MATTER. | | | | |
| 22 | | | | | |
| 23 | | | | | |
| 24 | | | | | |
| 25 | DATE | | | | OFFICIAL COURT REPORTER |