

0= UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA  
1= BEFORE THE HONORABLE WILLIAM H. ORRICK, JUDGE AMERICAN BOOKSELLERS )  
2=ASSOCIATION, INC., ET AL., )  
3= PLAINTIFFS, )  
4= VS. ) NO. C 98-1059 WHO )  
5=BARNES & NOBLE, INC., )  
6=ET AL., )  
7= )  
8= DEFENDANTS. )  
9= )

10= SAN FRANCISCO, CALIFORNIA  
11= WEDNESDAY, APRIL 11, 2001

12= TRANSCRIPT OF COURT TRIAL - VOL. 3

13=APPEARANCES:

14=FOR PLAINTIFFS: FARELLA, BRAUN & MARTEL LLP  
15= 235 MONTGOMERY STREET, 30TH FLOOR  
16= SAN FRANCISCO, CALIFORNIA 94104

17= BY: DOUGLAS R. YOUNG  
18= ADAM DAWSON  
19= CLAUDIA LEWIS  
20= HOLLY SUTTON

21= (APPEARANCES CONTINUED ON FOLLOWING PAGE.)

22=REPORTED BY: LEO T. MANKIEWICZ, CSR 5297 RMR, CRR  
23= RAYNEE MERCADO, CSR 8258 RMR, CRR  
24= OFFICIAL REPORTERS

25=APPEARANCES: (CONTINUED)FOR PLAINTIFFS: JENNER & BLOCK

26= 601 13TH STREET N.W. WASHINGTON, D.C. 20005

27= BY: DAVID W. DEBRUIN BRUCE V. SPIVA

28= DANIEL MACH JANIS KESTENBAUM

29= WILLIAM HOHENGARTEN KEVIN STACK

30= SHILPA SATOSKARFOR DEFENDANTS: O'MELVENY & MYERS LLP

31=(BARNES & NOBLE) 1999 AVENUE OF THE STARS, 7TH FLOOR LOS ANGELES,  
CALIFORNIA 90067-6035

32= BY: DANIEL M. PETROCELLI DAVID R. GARCIA

33= ALAN RADER PILLSBURY WINTHROP LLP  
34= 50 FREMONT STREET POST OFFICE BOX 7880

35= SAN FRANCISCO, CALIFORNIA 94120-7880 BY: PAUL R. GRIFFIN

36= SUSAN WHITECOTTON

37=FOR DEFENDANTS: SKJERVEN, MORRILL, MAC PHERSON

38=(BORDERS GROUP) FRANKLIN & FRIEL

39= THREE EMBARCADERO CENTER, 28TH FLOOR

40= SAN FRANCISCO, CALIFORNIA 94111

41= BY: REGINALD D. STEER

42= ANDREW D. MASTIN

43= RICHARD J. NELSON

44= MORRISON & FOERSTER

45= 425 MARKET STREET

46= SAN FRANCISCO, CALIFORNIA 94105-2482

47= BY: PENELOPE PEOVOLOS

48= JUDSON LOBDELL

49= (APPEARANCES CONTINUED ON FOLLOWING PAGE.)

50=

51= THE COURT: PLEASE BE SEATED. GOOD MORNING,

52=COUNSEL.

53= MR. PETROCELLI: GOOD MORNING, YOUR HONOR.

54= MR. WELSH: GOOD MORNING, YOUR HONOR.

55= THE COURT: SMALL HOUSEKEEPING MATTER. THANK YOU

56=VERY MUCH FOR SENDING ME A BONA-FIDE STIPULATION I HAVE ALSO

57=SIGNED, AND I WANT, IF YOU PLEASE, TO CHANGE THE TIME OF

58=GETTING THE DAILY MEMO TO 3:00 O'CLOCK INSTEAD OF 5:00 O'CLOCK.

59= AND NOW, WITH RESPECT TO MS. SEE'S TESTIMONY, AFTER

60=OUR SESSION YESTERDAY AFTERNOON, AS I INDICATED, I THOUGHT I

61=SHOULD MAKE A CLEARER STATEMENT.

62= NOW, AS I'VE INDICATED, THE COURT NEEDS ASSISTANCE

63=IN INTERPRETING THE DOCUMENTS IN THE CASE, AND THE INVOICES AND

64=OTHER DOCUMENTS DON'T SPEAK FOR THEMSELVES BECAUSE THEIR

65=MEANING IS NOT CLEAR TO A LAY PERSON.

66= NOW, I'VE ALREADY FOUND THAT MS. SEE QUALIFIES AS AN

67=EXPERT IN THE BOOK INDUSTRY, AND YESTERDAY AFTERNOON, FOR

68=EXAMPLE, HER EXPLANATION OF THE HOLIDAY FEATURE PROGRAM

69=DOCUMENTS WAS HELPFUL TO THE COURT, AND SO SHE MAY, OF COURSE,

70=TESTIFY, PURSUANT TO RULE 702 OF THE FEDERAL RULES OF EVIDENCE,  
71=ABOUT HER EXPERT OPINIONS FORMED FROM REVIEWING SUCH DOCUMENTS.  
72= THE DIFFICULTY THAT THE COURT HAS HAD IS THAT THE  
73=PLAINTIFFS ARE PRESENTING EXPERT TESTIMONY ABOUT DOCUMENTS FROM  
74=

75=THE DEFENDANTS WHICH ARE NOT YET IN EVIDENCE, AND MS. SEE  
76=CAN'T, OF COURSE, LAY THE FOUNDATION FOR THE ADMISSIBILITY OF  
77=THE HOLIDAY FEATURE PROGRAM DOCUMENTS.

78= IN THE ADVISORY COMMITTEE NOTES TO 703, AND I QUOTE  
79=IT, "THE UNDERLYING INFORMATION IS NOT ADMISSIBLE SIMPLY  
80=BECAUSE THE OPINION OR THE INFERENCE IS ADMITTED," AND YET, IF  
81=SHE DOES TESTIFY IN THE ABSTRACT, WHICH SHE'S BEEN DOING,  
82=WITHOUT REFERENCE TO ANY OF THE SPECIFIC DOCUMENTS UPON WHICH  
83=SHE RELIES, THE COURT HAS GREAT DIFFICULTY UNDERSTANDING THE  
84=BASIS FOR HER OPINIONS.

85= NOW, UNDER RULE 703, MS. SEE'S OPINION CAN BE  
86=ADMITTED EVEN IF THE FACTS OR THE DATA THAT SHE RELIES UPON ARE  
87=NOT ADMISSIBLE, AND UNDER RULE 705, THE EXPERT MAY TESTIFY  
88=ABOUT HER OPINION WITHOUT FIRST TESTIFYING TO THE UNDERLYING  
89=FACTS OR DATA, UNLESS THE COURT REQUIRES OTHERWISE.

90= AND THE COURT NEEDS MS. SEE TO TESTIFY ABOUT SOME OF  
91=THE DOCUMENTS UPON WHICH SHE RELIED IN FORMING HER EXPERT  
92=OPINION IN ORDER TO EVALUATE THE OPINION, AND THE COURT CAN, OF  
93=COURSE, GIVE SUCH WEIGHT, IF ANY, TO THE OPINION AS IT DEEMS  
94=PROPER.

95= SO I WILL PERMIT HER TO EXPLAIN HER OPINIONS BY  
96=REFERENCE TO SPECIFIC DOCUMENTS IN ORDER TO ALLOW THE  
97=PLAINTIFFS TO SHOW THE COURT THAT HER OPINION, QUOTE, QUOTING  
98=FROM RULE 702, "IS BASED UPON SUFFICIENT FACTS AND DATA,"  
99=UNQUOTE, AND QUOTE, "IS THE PRODUCT OF RELIABLE PRINCIPLES AND

100=METHODS," UNQUOTE.

101= HOWEVER, I WANT TO EMPHASIZE, THERE'S NO NEED FOR  
102=MS. SEE TO TESTIFY AT LENGTH ABOUT LARGE NUMBERS OF DOCUMENTS,  
103=AS LONG AS HER TESTIMONY SHOWS THE BASIS FOR HER EXPERT  
104=OPINION, AND I PRESUME THAT THE PLAINTIFFS, OF COURSE, WILL  
105=HAVE OTHER WITNESSES WHO WILL PROVIDE THE FOUNDATION FOR  
106=ADMITTING THE DOCUMENTS THAT MS. SEE RELIES UPON INTO EVIDENCE.

107= SO I'M GOING TO PERMIT HER DIRECT TESTIMONY TO  
108=CONTINUE, AND I THINK WE FINISHED THE CROSS-EXAMINATION ON  
109=WHICH SHE TESTIFIED TO YESTERDAY, AND SO SHE CAN GO ON, FINISH  
110=UP HER DIRECT TODAY, AND WE'LL HAVE CROSS-EXAMINATION ON THAT.

111= MS. SEE, WILL YOU PLEASE TAKE THE STAND.

112= MR. PETROCELLI: YOUR HONOR?

113= THE COURT: YES.

114= MR. PETROCELLI: JUST SO I DON'T HAVE TO INTERRUPT  
115=THE EXAMINATION, I NOTICED IN THE NOTEBOOK THAT WAS HANDED OUT  
116=TODAY, UNDER TAB 1, WHICH IS WHY I BRING IT UP NOW, THE  
117=PLAINTIFFS' NOTEBOOK OF EXHIBITS, THE FIRST TAB INCLUDES A  
118=NUMBER OF DOCUMENTS OF THE DEFENDANTS, OF BARNES & NOBLE, FOR  
119=1999 AND 2000, WHICH DOCUMENTS, YOUR HONOR, HAD BEEN PRODUCED  
120=PRIOR TO MS. SEE'S REPORT AND TO HER DEPOSITION LAST YEAR, BUT  
121=WHICH WERE NOT USED BY HER IN RENDERING HER REPORT, AND OF  
122=COURSE, THE DOCUMENTS WERE NOT USED IN THE DEPOSITION OF  
123=MS. SEE BECAUSE THEY WERE NOT PART OF HER WORK PRODUCT; AND  
124=MS. PREVOLOS CAN SPEAK TO THAT BECAUSE SHE HANDLED THE

125=DEPOSITION, AND WE'RE CONCERNED ABOUT NOW HER USING ADDITIONAL  
126=DOCUMENTS THAT WE NEVER HAD ANY OPPORTUNITY TO QUESTION HER  
127=ABOUT AT HER DEPOSITION.

128= THE COURT: WELL, I PRESUME THAT WON'T BE NECESSARY,  
129=MR. SPIVA.

130= MR. SPIVA: YOUR HONOR, IF I MIGHT RESPOND, THE  
131=DOCUMENTS HE REFERS TO CAME VERY LATE AFTER THE CLOSE OF  
132=DISCOVERY, THEY WERE ELECTRONIC DOCUMENTS, AND THEY ARE THE  
133=SAME TYPE, THOUGH, OF OTHER DOCUMENTS THAT MS. SEE DID IDENTIFY  
134=IN HER REPORT.

135= THE COURT: THAT WON'T WORK. THE OTHER SIDE MUST  
136=HAVE THE OPPORTUNITY TO EXAMINE HER WITH RESPECT TO THOSE  
137=DOCUMENTS, ANYTHING THAT SHE USES IN HER REPORT OR ANYTHING  
138=THAT SHE'S TESTIFYING HERE TO, AND THAT'S THE WHOLE POINT OF  
139=HAVING THE EXPERT REPORT, SO SPECIFICALLY LAID OUT IN RULE 26.

140= MR. SPIVA: ONE OTHER THING, YOUR HONOR. WE HAD  
141=THESE ON THE LIST THAT WE PROVIDED THEM ON SATURDAY, AND THERE  
142=WAS NO OBJECTION MADE. IT SEEMS LIKE THIS IS A WAIVED  
143=ARGUMENT.  
144= THE COURT: DO YOU WANT TO --  
145= MR. PETROCELLI: NO, YOUR HONOR, THAT'S ALL RIGHT.  
146=WE GOT THIS GIGANTIC LIST OF DOCUMENTS AND WE WORKED ALL NIGHT  
147=TO PREPARE FOR THEM AND NOW WE'RE DOWN TO, YOU KNOW,  
148=SUBSTANTIALLY FEWER, AND THEY STAND OUT, AND I DON'T THINK IT'S  
149=APPROPRIATE FOR THEM TO BE USING DOCUMENTS THAT WE HAVEN'T HAD

150=A CHANCE TO --  
151= THE COURT: DO YOU HAVE A QUESTION ABOUT THAT?  
152= MR. DEBRUIN: IF I COULD JUST -- I WANT TO MAKE SURE  
153=THE COURT UNDERSTANDS. THESE WERE DOCUMENTS THAT BARNES &  
154=NOBLE DIDN'T PRODUCE TO US. WE HAD BEEN FIGHTING FOR THESE  
155=DOCUMENTS, YOUR HONOR, REPEATEDLY. WE HAD TO GO TO MR. THACHER  
156=TO GET THESE DOCUMENTS. WE FINALLY GOT THEM, LITERALLY, AS THE  
157=COURT KNOWS, YOU ALLOWED THEM TO TAKE DISCOVERY LAST WEEK. WE  
158=FINALLY GOT THESE DOCUMENTS. ALL THEY ARE ARE THE MOST RECENT  
159=VERSIONS OF THE SAME TERMS PROFILES THAT THEY HAD PRODUCED FOR  
160=US IN THE HARD COPY PREVIOUSLY. THEY ARE THE SAME KINDS OF  
161=DOCUMENTS SHE HAS REVIEWED, THAT THEY HAVE DEPOSED HER ABOUT.  
162=WHAT THESE ARE, YOUR HONOR, ARE TERMS PROFILES.  
163= THE COURT: MR. DEBRUIN, IF YOU'LL PARDON ME, I AM  
164=NOT CLEAR THAT I MADE A RULING, BUT PRESIDENT JOHNSON USED TO  
165=HAVE A FAVORITE EXPRESSION ABOUT, THAT DOG WON'T HUNT, AND I'M  
166=SORRY THAT I MUST PUT YOUR ARGUMENT IN THE SAME CATEGORY.  
167= MR. DEBRUIN: VERY WELL.  
168= THE COURT: AND I HAVE RULED ON IT, AND SHE MAY NOT  
169=TESTIFY WITH RESPECT TO THOSE DOCUMENTS. THAT'S A FUNDAMENTAL  
170=PRINCIPLE IN THE TRIAL OF A LAWSUIT.  
171= MR. SPIVA: VERY WELL, YOUR HONOR. WE WILL PROCEED  
172=WITH THE DOCUMENTS THAT DON'T FALL INTO THAT CATEGORY, WHICH I,  
173=JUST FOR MS. SEE'S BENEFIT -- YOU MAY NOT KNOW ALL THE INS AND  
174=OUTS OF THE DISCOVERY -- THAT SHE SHOULD NOT TESTIFY REGARDING

175=THE DOCUMENTS IN TABS 1, 2, AND 3 AND 4.  
176= GAIL S. SEE,  
177=CALLED AS A WITNESS FOR THE PLAINTIFFS, HAVING BEEN PREVIOUSLY  
178=DULY SWORN, TESTIFIED FURTHER AS FOLLOWS:  
179= DIRECT EXAMINATION (RESUMED)  
180=Q. GOOD MORNING, MS. SEE.  
181=A. GOOD MORNING.  
182=Q. AS AN EXPERT IN THE BOOKSELLING FIELD, HAVE YOU FORMED ANY  
183=OPINION REGARDING THE DISCOUNT TERMS THAT DEFENDANTS HAVE  
184=RECEIVED AND HOW THEY COMPARE TO STANDARD INDUSTRY TERMS, AS  
185=YOU UNDERSTAND THEM, BASED ON YOUR 30 YEARS OF EXPERIENCE IN  
186=THE BOOKSELLING FIELD?  
187=A. I HAVE FORMED AN OPINION.  
188=Q. WHAT IS THAT OPINION?  
189=A. WELL, BASED ON MANY OF THE DOCUMENTS THAT I'VE SEEN -- AND  
190=I REVIEWED MANY DOCUMENTS IN THIS CATEGORY -- I BELIEVE -- MY  
191=OPINION IS THAT THE DEFENDANTS RECEIVED TERMS THAT WERE VERY  
192=DIFFERENT FROM THE ESTABLISHED STANDARD TERMS IN THE INDUSTRY.  
193= THE COURT: YOU SEE, THIS IS THE VERY THING THAT --  
194= THE WITNESS: -- THAT YOU DON'T WOULDND'T WANT.  
195= THE COURT: -- THAT I OBJECTED TO YESTERDAY. I  
196=CAN'T UNDERSTAND IT. IT IS PULLING AN EXPERT OPINION OUT OF  
197=THE CLOUDS. I DON'T KNOW WHAT SHE'S TALKING ABOUT --  
198= MR. SPIVA: JUST LAYING FOUNDATION.  
199= THE COURT: DON'T INTERRUPT ME.

200= MR. SPIVA: I APOLOGIZE.  
201= THE COURT: WHEN SHE'S GOING TO TESTIFY ON HER  
202=OPINION, I WANT HER TO SAY THAT SHE'S EXAMINED -- GIVEN THIS  
203=VOLUMINOUS OPINION, WORLDWIDE OPINION, AND I WANT TO KNOW  
204=PRECISELY WHAT SHE BASES IT ON, NOT JUST THAT, "I BASE IT ON A  
205=LOT OF DEFENDANTS' DOCUMENTS" AND SO ON. THAT'S -- WHEN I  
206=SAY -- TALK ABOUT THE TRIER OF THE FACT GIVING WITNESSES'  
207=TESTIMONY SUCH WEIGHT, IF ANY, THAT I GIVE NO WEIGHT AT ALL TO,  
208=AND I DON'T WANT TO SIT HERE ALL MORNING WHERE I DON'T GET  
209=SOLID OPINION.

210= MR. SPIVA: YOUR HONOR, WE'RE GOING TO PROCEED.  
211= THE COURT: I'M NOT BLAMING MS. SEE. I'M BLAMING  
212=COUNSEL.  
213= MR. SPIVA: THANK YOU, YOUR HONOR. WE ARE GOING TO  
214=PROCEED IMMEDIATELY TO THE SPECIFIC DATA, AND FACTS UPON WHICH  
215=SHE BASED HER OPINION.  
216= THE COURT: ALL RIGHT. WELL, NOW YOU KNOW WHAT  
217=BOTHERS ME.  
218= MR. SPIVA: THAT'S MY NEXT QUESTION.  
219=Q. MS. SEE, WHAT ARE THE FACTS OR DATA UPON WHICH YOU BASE  
220=YOUR OPINION?  
221=A. WELL, IF YOU TURN TO TAB 5, YOU SEE SOMETHING CALLED AN  
222="AVON TERMS PROFILES." NOW, THESE TERMS PROFILES, I HAVE  
223=REVIEWED MANY, MANY, MANY OF THE TERMS PROFILES, AND THESE ARE  
224=BARNES & NOBLE DOCUMENTS THAT THEIR EXECUTIVES HAVE SAID LIST  
  
225=THE TERMS FROM -- BY WHICH THEY BUY BOOKS FROM VARIOUS VENDORS.  
226= AND IF YOU LOOK AT THIS TERMS PROFILE, YOU'LL SEE --  
227=Q. WHICH TAB IS THAT UNDER, MS. SEE?  
228=A. FIVE.  
229=Q. AND THIS, JUST FOR THE RECORD, THAT IS A PAGE FROM  
230=PLAINTIFFS' EXHIBIT 433-C.  
231=A. AND AT THE TOP OF THE PAGE IT SAYS, "1995 TERMS PROFILE,  
232=AVON BOOKS," AND IT LISTS THE TERMS UNDER WHICH THEY ARE BUYING  
233=BOOKS FROM AVON, AND IF YOU LOOK AT THE FIRST LIST, THAT'S  
234=WHAT'S CALLED A DROP SHIP TERM. THOSE ARE THE TERMS THAT THEY  
235=GET WHEN THE BOOKS ARE DROP SHIPPED TO THE STORES.  
236= THE NEXT COLUMN, RDC, IS THE RETAIL DISTRIBUTION  
237=CENTER DISCOUNT, AND IF YOU LOOK UNDER THAT, YOU'LL SEE A  
238=50 PERCENT DISCOUNT PLUS A 4 PERCENT INCENTIVE.  
239= AND JUST SO YOU UNDERSTAND WHAT I BASED MY OPINION  
240=ON, I THEN LOOKED -- TOOK THOSE BARNES & NOBLE'S TERMS PROFILES  
241=AND COMPARED IT WITH THE DOCUMENT THAT IS UNDER TAB 6, AND THAT  
242=IS THE PUBLISHED AVON TERMS, AND IF YOU LOOK --  
243= THE COURT: I'M SORRY, I DON'T -- ALL RIGHT, OKAY.  
244= THE WITNESS: AND YOU SEE, ON THIS PAGE, ON THE  
245=SECOND COLUMN, ABOUT HALFWAY DOWN, IT SAYS, "DISCOUNT  
246=SCHEDULE," AND IT SAYS, "ANY QUANTITY" -- THE MASS MARKET --  
247=AND IT GIVES A NUMBER OF DIFFERENT IMPRINTS -- ANY QUANTITY,  
248=44 PERCENT. AND THAT IS THE DROP SHIP DISCOUNT.  
249= THEN IF YOU GO DOWN, RIGHT UNDER THAT, AND IT'S VERY  
  
250=HARD TO SEE BECAUSE IT'S IN VERY SMALL PRINT, IT SAYS,  
251="RETAILERS WITH PREAPPROVED DISTRIBUTION CENTER." THAT MEANS A  
252=RETAIL DISTRIBUTION CENTER CAN RECEIVE A 48 PERCENT DISCOUNT,  
253=AND THAT'S THE PUBLISHED TERMS. AND I COMPARED THAT WITH THE  
254=AVON TERMS PROFILE, WHERE I COULD SEE THEY WERE RECEIVING  
255=54 PERCENT, AND I'VE NEVER HEARD OF A TERM SUCH AS THAT, AND  
256=THAT'S WHAT I BASED MY OPINION ON.  
257=BY MR. SPIVA:  
258=Q. NOW, MS. SEE, BASED ON YOUR EXPERIENCE -- AND AFTER I ASK  
259=YOU THIS QUESTION I'LL ASK YOU TO TURN TO THE DOCUMENT WHICH  
260=SUPPORTS THIS OPINION -- HAVE YOU FORMED AN OPINION ABOUT  
261=WHETHER BORDERS RECEIVES AN RDC DISCOUNT ON CONDITIONS WHICH  
262=DIFFER FROM INDUSTRY STANDARD TERMS, AND IF SO, WHAT ARE THE  
263=FACTS OR DATA UPON WHICH YOU BASE YOUR OPINION?  
264=A. WELL, I WAS LOOKING AT -- IT WAS THE BARNES & NOBLE TERMS  
265=PROFILE. I'M SORRY -- DID YOU SAY --  
266=Q. I'M SORRY, I'M CONFUSING YOU. I THINK I JUMPED AHEAD. DID  
267=YOU HAVE ANY OTHER FACTS OR DATA UPON WHICH YOU BASED YOUR  
268=OPINION REGARDING THE AVON TERMS?  
269=A. YES. JUDGE, IF YOU'LL TURN TO THE TAB 7, I JUST WANTED TO  
270=EXPLAIN SOMETHING ELSE ABOUT THIS, BECAUSE I'VE READ OUT TO YOU  
271=AND YOU SAW THE AVON TERMS PROFILE, AND IT SAID 50 PERCENT PLUS  
272=AN INCENTIVE, AND I JUST WANTED TO EXPLAIN WHAT THAT INCENTIVE  
273=WAS, WHERE IT CAME FROM.  
274=Q. WHICH TAB ARE YOU REFERRING TO, MS. SEE?  
  
275=A. I'M LOOKING AT TAB 7, AND UNDER TAB 7, IF YOU GO TO PAGE  
276=3 --  
277=Q. MS. SEE, JUST FOR THE RECORD, WHAT EXHIBIT NUMBER IS THAT?  
278=A. I'M SORRY, I'M SORRY, IT'S EXHIBIT 1819. AND THIS IS AN  
279=INTEROFFICE MEMO, AND -- ABOUT -- FROM SOMEBODY IN THE

280=DISTRIBUTION CENTER TO SOME OF THE EXECUTIVES, AND IT HAS  
281=ATTACHED TO IT A LETTER FROM THIS WOMAN WHO'S AN INVENTORY  
282=MANAGER TO AN EXECUTIVE AT AVON BOOKS, AND THE FIRST LINE  
283=REFERS TO THE "DISTRIBUTION (SIC) DISCOUNT INCENTIVE PLAN."  
284=  
285=Q. PARDON ME, MS. SEE, DID YOU SAY "DISTRIBUTION DISCOUNT"?  
286=A. DISTRIBUTOR, I'M SORRY, "DISTRIBUTOR DISCOUNT INCENTIVE  
287=PLAN." AND IN THE TRADE, "DISTRIBUTOR" AND "WHOLESALE" ARE  
288=USED ALMOST SYNONYMOUSLY, AND SO BASICALLY, MY OPINION WAS THAT  
289=BARNES & NOBLE WAS RECEIVING A WHOLESALE INCENTIVE ON TOP OF  
290=THEIR MORE ADVANTAGEOUS TERMS FOR THE RDC, RETAIL DISTRIBUTION  
291=CENTER.

292=  
293=AND AGAIN, I THINK WE WENT OVER THIS YESTERDAY, THAT  
294=WE DISCUSSED THE DIFFERENCE BETWEEN WHOLESALE DISCOUNTS AND  
295=RETAILER DISCOUNTS.

296=Q. MS. SEE, ASIDE FROM THE AVON TERMS PROFILE THAT YOU HAVE  
297=DISCUSSED, WERE THERE OTHER -- ANY OTHER INSTANCES BESIDES AVON  
298=OF DISCOUNTS THAT YOU FOUND THAT BARNES & NOBLE RECEIVED THAT  
299=WERE MORE FAVORABLE THAN STANDARD INDUSTRY TERMS?

300=A. I FOUND MANY INSTANCES, AND I DID THE SAME EXERCISE. I

301=TOOK THE TERMS PROFILES THAT I WAS REVIEWING AND I LOOKED AT  
302=THE RED BOOK AND I COMPARED THE TWO, AND THAT'S WHERE MY -- I  
303=BASED MY OPINION ON THOSE FACTS, AND AS I SAY, THIS IS VERY  
304=DIFFERENT FROM ANYTHING THAT IS STANDARD INDUSTRY PRACTICE.  
305=Q. OKAY. MS. SEE, NOW, WHY DON'T WE TURN TO THE THING THAT I  
306=STARTED TO JUMP AHEAD ON, WHICH IS, BASED YOUR EXPERIENCE, HAVE  
307=YOU FORMED AN OPINION ABOUT WHETHER BORDERS RECEIVES RDC  
308=DISCOUNTS ON CONDITIONS WHICH DIFFER FROM STANDARD INDUSTRY  
309=TERMS, AND IF SO, WHAT ARE THE FACTS OR THE DATA UPON WHICH YOU  
310=BASE YOUR OPINION?

311=A. WELL, FIRST OF ALL, MY OPINION IS THAT, YES, THEY DID  
312=RECEIVE -- THEY RECEIVED, AGAIN, PURCHASES WITHOUT MEETING THE  
313=STANDARD PUBLISHED TERMS. THIS REFERS TO THE RETAIL  
314=DISTRIBUTION CENTER, AND YESTERDAY WE SPENT A LOT OF TIME  
315=TALKING GENERALLY ABOUT RETAIL DISTRIBUTION CENTERS, AND THE  
316=REQUIREMENTS THAT A BOOKSTORE HAS TO MEET IN ORDER TO QUALIFY  
317=FOR A RETAIL DISTRIBUTION CENTER DISCOUNT, AND ONE OF THE --  
318=ONE OF THOSE REQUIREMENTS WAS CARTON QUANTITY, AND I EXPLAINED  
319=THAT A CARTON IS A BOX WITH -- FILLED WITH THE SAME TITLE. SO  
320=WHEN YOU GET A CARTON, ALL BOOKS IN THERE ARE THE SAME. AND WE  
321=EXPLAINED THAT THAT'S DIFFICULT FOR SOME BOOKSTORES TO MEET  
322=THAT REQUIREMENT.

323= IF YOU WILL NOW TURN TO TAB 8 --

324=Q. FOR THE RECORD, MS. SEE, WHAT EXHIBIT NUMBER --

325=A. I WAS JUST GOING TO SAY, EXHIBIT 1206. THIS IS A LETTER

326=FROM THE VICE PRESIDENT OF MERCHANDISING AT BORDERS TO STEVE  
327=LEWERS AT HOUGHTON MIFFLIN, AND THE FIRST HIGHLIGHTED PARAGRAPH  
328=REFERS TO "CARTON QUANTITY RESTRICTIONS."

329=AND THE GIST OF THIS PARAGRAPH IS THAT ROBIN WAGNER  
330=IS TELLING THE SALES MANAGER AT HOUGHTON MIFFLIN THAT, IF YOU  
331=LOOK AT THE BOTTOM OF THAT PARAGRAPH, LAST FOUR LINES, "ALL  
332=MAJOR PUBLISHERS, INCLUDING RANDOM HOUSE, SIMON & SCHUSTER,  
333=LITTLE BROWN, HAVE RECOGNIZED THAT SUCH RESTRICTIONS,"  
334="RESTRICTIONS" MEANING BUYING IN CARTON QUANTITIES, "ARE  
335=ANATHEMA TO OUR EFFICIENT ORDERING PRACTICES," AND THESE  
336=PUBLISHERS HAVE BEEN FLEXIBLE ON THIS ISSUE.

337=AGAIN, THIS IS VERY UNUSUAL, BECAUSE THE CARTON  
338=QUANTITY REQUIREMENT IS ALMOST ALWAYS PART OF WHAT YOU HAVE TO  
339=HAVE TO QUALIFY FOR THESE RETAIL DISTRIBUTION CENTER DISCOUNTS,  
340=WHICH ARE MUCH HIGHER THAN -- ALMOST ALWAYS MUCH HIGHER THAN  
341=THE PUBLISHED STANDARD DISCOUNTS.

342=Q. MS. SEE, DOES THE DOCUMENT GO ON TO SAY THOSE PUBLISHERS  
343=HAVE WAIVED THE CARTON QUANTITY REQUIREMENT FOR BORDERS?

344=A. YES.

345=Q. LET ME ASK YOU ANOTHER QUESTION ABOUT THAT DOCUMENT. AS  
346=YOU POINTED OUT, IT SAYS THAT CARTON QUANTITY ORDERING IS  
347=ANATHEMA TO BORDERS' INVENTORY MANAGEMENT. IN YOUR OPINION AS  
348=AN EXPERT --

349=MR. STEER: OBJECTION, MISCHARACTERIZES THE  
350=DOCUMENT, YOUR HONOR.

350= MR. SPIVA: I'LL WITHDRAW THE QUESTION AND JUST  
351=QUOTE DIRECTLY FROM IT.  
352=Q. IT SAYS, "...HAVE RECOGNIZED SUCH RESTRICTIONS ARE AND  
353=ANATHEMA TO OUR EFFICIENT ORDERING PRACTICES," AND MY QUESTION  
354=FOR YOU, MS. SEE, IS, IS CARTON QUANTITY ORDERING ANATHEMA TO  
355=MOST BOOKSTORES' EFFICIENT ORDERING PRACTICES?  
356=A. YES. THIS GETS BACK TO WHAT WE WERE TALKING ABOUT  
357=YESTERDAY, WITH MANAGING YOUR INVENTORY, SO THAT YOU HAVE THE  
358=FEWEST COPIES OF A PARTICULAR BOOK IN ORDER TO MEET THE DEMANDS  
359=OF YOUR CUSTOMERS, BUT IF YOU HAVE TO BUY 20 COPIES, FOR MANY  
360=STORES THAT IS A SUPPLY THAT GOES WELL BEYOND WHAT YOU WOULD  
361=NEED FOR A PARTICULAR TIME PERIOD. AND SO THAT'S WHY THE  
362=CARTON QUANTITIES REQUIREMENT IS VERY DIFFICULT FOR MOST STORES  
363=TO MEET.  
364=Q. WOULD IT BE AN ADVANTAGE, MS. SEE, FOR A BOOKSTORE TO BE  
365=ABLE TO RECEIVE THE HIGHER RDC DISCOUNT WITHOUT HAVING TO MEET  
366=THE CARTON QUANTITY REQUIREMENT?  
367=A. WELL, OF COURSE IT WOULD BE AN ADVANTAGE, BECAUSE THEN YOU  
368=WOULD HAVE THE BOOKS COMING IN IN THE NUMBERS THAT MEET YOUR  
369=INVENTORY CONTROL SYSTEM RATHER THAN HAVING TO BUY 20 COPIES  
370=WHEN YOU ONLY MIGHT NEED THREE.  
371=Q. DOES THIS RELATE TO THE TRADEOFF YOU WERE TALKING ABOUT  
372=YESTERDAY?  
373=A. RIGHT, RIGHT, AND THE TRADEOFF THAT PEOPLE ARE MAKING, THE  
374=BUYERS MAKE ALL THE TIME WHEN THEY'RE MAKING BUYING DECISIONS.

375=Q. SO IS IT YOUR OPINION, BASED ON YOUR REVIEW OF THIS AND  
376=OTHER DOCUMENTS, THAT BORDERS WAS NOT REQUIRED TO MAKE THAT  
377=TRADEOFF?  
378=A. WELL, THAT WAS MY OPINION, DEFINITELY.  
379=Q. MS. SEE, I WANT TO TURN BACK TO THE SUBJECT OF STOCK  
380=OFFERS, AND I'M GOING TO ASK YOU THE SAME QUESTION, BUT THEN  
381=AGAIN ASK YOU TO PROCEED TO THE FACTS AND DATA UPON WHICH YOU  
382=RELIED.  
383= BASED ON YOUR EXPERIENCE, HAVE YOU FORMED AN OPINION  
384=ABOUT WHETHER THE DEFENDANTS HAVE RECEIVED STOCK OFFERS ON  
385=TERMS THAT DIFFER FROM STANDARD INDUSTRY TERMS, AND IF SO, CAN  
386=YOU PROVIDE ANY EXAMPLES OF THE FACTS OR DATA UPON WHICH YOU  
387=BASE YOUR OPINION?  
388=A. I HAVE FORMED AN OPINION THAT, AGAIN, THE DEFENDANTS HAVE  
389=RECEIVED TERMS THAT HAVE DIFFERED IN VERY GREAT MEASURE FROM  
390=THE STANDARD INDUSTRY TERMS, AND IF YOU TURN TO THE NEXT TAB --  
391=EXCUSE ME -- I THINK IT'S TAB 11, AND THIS IS EXHIBIT 671, AND  
392=THIS IS AN EXHIBIT, BARNES & NOBLE ACCOUNTS PAYABLE REPORT,  
393=MAY, 1994, AND THIS IS AN INTERNAL DOCUMENT THAT TRACKS, AMONG  
394=OTHER THINGS, PURCHASES AND RETURNS SUMMARY, RETURNS ANALYSIS,  
395=CASH DISCOUNTS, AND SPECIAL DEALS, AND THIS DOCUMENT, ON THE  
396=FRONT PAGE YOU CAN SEE IS CIRCULATED TO THE -- REALLY TOP  
397=EXECUTIVES OF BARNES & NOBLE, PATRICIA BOSTELMAN, DAVID CULLY  
398=STEVE RIGGIO, BOB WIETRAK.  
399= AND AGAIN, I'D LIKE TO TURN YOUR ATTENTION IN

400=THIS -- THESE SERIES OF PAGES, TO PAGE 22, AND ON PAGE 22, THIS  
401=IS A DEFINITION OF "SPECIAL DEALS," AND "SPECIAL DEALS" REFERS  
402=TO STOCK OFFERS.  
403= PATRICIA BOSTELMAN SAID IN HER DEPOSITION THAT  
404=SPECIAL DEALS AND STOCK OFFERS -- IS HOW THEY REFER TO STOCK  
405=OFFERS, AND YOU CAN SEE, UNDER THE SECOND PARAGRAPH, TALKS  
406=ABOUT EXTRA DISCOUNT, DELAYED BILLING, MANY OF THE CONDITIONS  
407=THAT WE ENUMERATED YESTERDAY THAT ARE PART OF STOCK OFFERS, AND  
408=THE IMPORTANT PART IN THAT SECOND PARAGRAPH IS THE LAST LINE,  
409=BEGINNING, "ADDITIONALLY, WHERE PROVIDED, WE KNOW WHETHER THIS  
410=DEAL IS MADE INDUSTRY-WIDE OR JUST TO BARNES & NOBLE," AND IT  
411=WAS UPON THAT DOCUMENT THAT I MADE -- CAME TO THE CONCLUSION,  
412=MADE MY OPINION, THAT THEY WERE RECEIVING A SPECIAL DEAL.  
413= I SAW THE SUPPORTING DATA --  
414=Q. BEFORE YOU GO INTO THAT, MS. SEE, MAY I JUST ASK YOU A  
415=QUESTION? WHAT, IF ANYTHING, IS UNUSUAL ABOUT THAT --  
416=A. BECAUSE WE'VE BEEN TALKING ABOUT THE FACT THAT IT MAY BE --  
417=THAT THE TERMS ARE AVAILABLE IN THE INDUSTRY, AND THIS IS AN  
418=INSTANCE WHERE, AS I WILL SHOW YOU, SPECIFIC OFFERS WERE MADE  
419=ONLY TO BARNES & NOBLE.  
420= IF YOU TURN TO THE NEXT PAGE, IT IS PAGE 23, AND AT

421=THE TOP OF THAT PAGE -- IT'S HARD TO READ, BECAUSE EVERYTHING  
422=IS SMALL PRINT -- THE TOP OF THAT PAGE, STARTING WITH THE  
423=SECOND ENTRY UNDER THE THIRD COLUMN IN, IT SAYS, "VENDOR NAME,"  
424=AND THERE ARE THREE ENTRIES -- THERE ARE FOUR ENTRIES UNDER

425=THAT, BANTAM, DOUBLEDAY, DELL. I'M REFERRING TO THE FIRST  
426=THREE OF THOSE FOUR. AND IT SAYS, IN THE NEXT COLUMN, "BDB,"  
427=AND THAT REFERS TO BARNES & NOBLE.  
428=Q. HOW DO YOU KNOW THAT, MS. SEE?  
429=A. BECAUSE I READ TESTIMONY FROM -- I THINK IT WAS PATRICIA  
430=BOSTELMAN IN HER DEPOSITION THAT BARNES & NOBLE -- THIS REALLY  
431=WAS B. DALTON BOOKSELLERS, BUT IT MEANT BARNES & NOBLE.  
432= AND THEN YOU GO ACROSS UNDER THE COLUMN HEADED  
433="NEGOTIATED STOCK," IT SAYS, "4 PERCENT OFF NET DATING. AND  
434=THEN, TO MAKE THE COMPARISON -- AND THE REASON I CAME TO THIS  
435=OPINION IS THAT IN THOSE COLUMNS YOU WILL SEE, IF YOU GO DOWN  
436=UNDER THE "OFFER TYPE" IN THE COLUMN, YOU'LL SEE OTHER ENTRIES  
437=THAT SAY "BDB," MEANING BARNES & NOBLE, AND "IND," MEANING  
438=INDUSTRY-WIDE. SO THOSE WERE STOCK OFFERS THAT WERE OFFERED TO  
439=EVERYONE IN THE INDUSTRY, AND THERE ARE OTHER EXAMPLES.  
440= THERE'S, AT THE BOTTOM OF THAT PAGE, AND THE TOP OF  
441=THE NEXT PAGE, THERE ARE TWO BDB, BARNES & NOBLE-ONLY STOCK  
442=OFFERS FROM INGRAM, ADDITIONAL 1 PERCENT DISCOUNTS, AND THEN  
443=FINALLY, ON THE NEXT PAGE, PAGE 24, ABOUT -- JUST NOT QUITE  
444=HALFWAY DOWN, THERE IS AN ENTRY FOR PENGUIN, AGAIN, BDB,  
445=MEANING BARNES & NOBLE, STOCK OFFER, ADDITIONAL 2 PERCENT.  
446= NOW, FIRST OF ALL, THEY'RE BEING OFFERED DEALS,  
447=SPECIAL DEALS, STOCK OFFERS, NOT GENERALLY AVAILABLE.  
448=Q. MS. SEE, DID YOU IDENTIFY ANYTHING ON PAGE 25 IN THAT  
449=REGARD?

450=A. I WAS JUST -- 25, PAGE 25. THERE WAS ANOTHER PENGUIN STOCK  
451=OFFER.  
452=Q. I'LL TELL YOU WHAT. IT IS SMALL PRINT AND I THINK YOU'VE  
453=EXPLAINED WHAT -- HOW TO READ IT. LET ME ASK YOU, MS. SEE, WAS  
454=THIS THE ONLY ACCOUNTS PAYABLE REPORT FROM 1994 THAT YOU  
455=REVIEWED IN FORMING YOUR OPINION?  
456=A. NO, I REVIEWED OTHER ACCOUNTS PAYABLE REPORTS, BUT THIS WAS  
457=ONE -- THIS IS TYPICAL OF WHAT I FOUND IN THE ACCOUNTS PAYABLE  
458=REPORT, AND AGAIN, THESE WERE SPECIAL OFFERS OFFERED TO BARNES  
459=& NOBLE, AND OTHERS THAT WERE INDICATED THAT WERE OFFERED TO  
460=BOTH BARNES & NOBLE AND THE INDUSTRY.  
461=Q. OTHER THAN THE ACCOUNTS PAYABLE REPORT EXAMPLE, WERE THERE  
462=OTHER FACTS OR DATA THAT YOU RELIED UPON IN FORMING YOUR  
463=OPINION THAT THE DEFENDANTS RECEIVED STOCK OFFERS NOT GENERALLY  
464=AVAILABLE?  
465=A. THERE WERE OTHER DOCUMENTS THAT I REVIEWED. IN MANY OF THE  
466=DEPOSITIONS THEY TALKED ABOUT THIS KIND OF SPECIAL.  
467=Q. ARE THERE ANY OTHER DOCUMENTS THAT YOU HAVE WITH YOU HERE  
468=TODAY THAT YOU CAN TELL THE JUDGE ABOUT?  
469=A. I HAVE TO SEE. JUST A MOMENT. I'M SORRY.  
470=Q. TAKE YOUR TIME. TAKE YOUR TIME.  
471=A. I AM.  
472=Q. JUST TO REFRESH YOUR RECOLLECTION, I WOULD ASK YOU TO TURN  
473=TO TAB 12, THE LAST PAGE.  
474=A. THE LAST PAGE ON TAB 12. NOW, ON TAB 12, THE LAST PAGE,

475=WHICH IS EXHIBIT 945, AND ON PAGE 14, WE TOUCHED ON THIS  
476=YESTERDAY, ABOUT THE BANTAM, DOUBLEDAY, DELL FLEX STOCK OFFER,  
477=AND THIS WAS AN UNUSUAL OFFER, AS I MENTIONED YESTERDAY. THIS  
478=WAS AN OFFER THAT ACTUALLY EXTENDED FOR ONE YEAR, AND IN THIS  
479=INSTANCE, THIS IS A DOCUMENT THAT SHOWED ME, AGAIN, THAT BARNES  
480=& NOBLE WAS CREATING TERMS OUTSIDE OF THE STANDARD PUBLISHED  
481=TERMS, BECAUSE IN THE SECOND LINE IT SAYS, "AN ACCOUNT CAN  
482=PLACE UP TO FOUR ORDERS," OVER THIS YEAR-LONG PERIOD, AND IN  
483=HANDWRITING --  
484=Q. EXCUSE ME. LET ME JUST ASK YOU, IS THE PRINTED PART OF  
485=THIS, DOES THAT --  
486=A. YES.  
487=Q. WHAT DOES THAT REPRESENT?  
488=A. THE PRINTED PART REPRESENTS A STANDARD BANTAM DOUBLEDAY  
489=FLEX STOCK OFFER THAT IS DISTRIBUTED, PUBLISHED, FOR EVERYBODY.  
490=SO IT'S EITHER GIVEN, AS WE SAID YESTERDAY, BY THE SALES REP

491=THROUGH THE MAIL, PUBLISHED IN PUBLISHER'S WEEKLY, BUT IT'S  
492=GENERALLY AVAILABLE, AND THIS ONE IS OBVIOUSLY FROM BARNES &  
493=NOBLE, AND IT'S SIGNED BY THAT PATRICIA BOSTELMAN.  
494=Q. AND CAN YOU DESCRIBE GENERALLY THE STANDARD OFFER IN THE  
495=PRINTED FORM?  
496=A. THE STANDARD OFFER SAYS YOU CAN PLACE UP TO FOUR ORDERS OF  
497=A CERTAIN NUMBER OF BOOKS, 200 BOOKS PER ORDER, AND IT SAYS,  
498=BETWEEN JULY 1, 1997 AND JUNE 30TH, 1998. AND WHAT MAKES  
499=THIS -- WHAT LED ME TO BELIEVE, AGAIN, THAT WHAT BARNES & NOBLE

500=IS RECEIVING IS VERY MUCH OUT OF THE ORDINARY WAS THE  
501=HANDWRITTEN NOTE, "FIVE PURCHASE ORDERS OVER FOUR WEEKS PER  
502=OFFER," AND THAT IS WELL BEYOND THE TERMS OF THE PUBLISHED  
503=OFFER.

504=Q. DID YOU REVIEW ANYTHING ELSE THAT PROVIDED YOU WITH  
505=CONFIRMATION OF YOUR OPINION IN THAT REGARD?  
506=A. YES. THERE WAS TESTIMONY THAT THIS WAS NECESSARY FOR THEM  
507=TO USE IN ORDER TO KEEP THEIR INVENTORY IN THEIR -- TO MANAGE  
508=THEIR INVENTORY. AND ANYBODY WOULD LIKE TO BE ABLE TO DO THAT,  
509=BUT THIS IS VERY UNUSUAL.

510=Q. SO MS. SEE, COULD YOU EXPLAIN HOW MANY OFFERS OR ORDERS  
511=BARNES & NOBLE IS BEING PERMITTED TO PLACE PURSUANT TO THE  
512=STOCK OFFER?

513=A. RIGHT. WELL, RATHER THAN BEING ABLE TO PLACE THE FOUR  
514=ORDERS THAT THE STOCK OFFER UNDER THE -- AS DEFINED UNDER THE  
515=PUBLISHED STOCK OFFER, THEY'RE OBVIOUSLY GOING TO BE ABLE TO  
516=PLACE 20 ORDERS.

517=Q. AND HAVE YOU READ TESTIMONY IN ADDITION TO REVIEWING THIS  
518=DOCUMENT THAT SUGGESTS THAT THEY WERE ABLE TO EXTEND THE TIME  
519=WINDOWS BY PLACING THEM OVER THE FOUR WEEKS?

520=A. CORRECT, I DID. I READ THE DEPOSITION TESTIMONY, AND AS I  
521=SAY, THIS IS, TO ME, A DISCRIMINATORY PRACTICE BECAUSE THIS WAS  
522=NOT AVAILABLE, AND THIS RELATES TO WHAT WE WERE TALKING ABOUT  
523=YESTERDAY WITH YOUR INVENTORY MANAGEMENT. IT GIVES YOU A  
524=TREMENDOUS ADVANTAGE. INSTEAD OF TAKING ALL YOUR BOOKS IN FOUR

525=ORDERS, HAVING TO HAVE THEM IN YOUR INVENTORY, PAY FOR THEM ALL  
526=AT ONE TIME, YOU SPREAD THOSE ORDERS OUT.

527=Q. LET ME TURN TO A DIFFERENT TOPIC, MS. SEE. I WANT TO ASK  
528=YOU ABOUT SHORTAGE ALLOWANCES AND DAMAGE ALLOWANCES, AND  
529=SPECIFICALLY STATISTICAL RESERVES, OR R.O.G. ALLOWANCES, AS THE  
530=DEFENDANTS REFER TO THEM.

531= BASED ON YOUR EXPERIENCE, HAVE YOU FORMED AN OPINION  
532=ABOUT WHETHER THE DEFENDANTS HAVE RECEIVED SHORTAGE AND DAMAGE  
533=ALLOWANCES ON TERMS THAT DIFFER FROM STANDARD INDUSTRY TERMS,  
534=AND IF SO, WOULD YOU PROCEED TO INFORM THE COURT WHAT THE FACTS  
535=OR DATA ARE UPON WHICH YOU BASE YOUR OPINION?

536=A. YES, I HAVE AN OPINION THAT THEY DID RECEIVE STATISTICAL  
537=RESERVES, AND WE TALKED ABOUT THIS YESTERDAY WHEN WE WERE  
538=TALKING ABOUT SHORTAGES AND BOOKS COMING IN AND THE TIME IT  
539=TAKES TO MAKE CERTAIN THAT THE BOOKS YOU'VE RECEIVED MATCH THE  
540=BOOKS YOU'VE BEEN INVOICED FOR, AND THIS IS VERY IMPORTANT,  
541=BECAUSE OTHERWISE, YOU END UP PAYING FOR BOOKS YOU DIDN'T GET.  
542=YOU MAY HAVE DAMAGED BOOKS AND OTHER THINGS.

543= BARNES & NOBLE, ACCORDING TO THE DOCUMENTS THAT I  
544=HAVE READ, HAS MADE AN ARRANGEMENT WITH THE PUBLISHERS WHERE  
545=THEY TAKE SOMETHING CALLED A STATISTICAL RESERVE, AND I'D LIKE  
546=TO REFER YOU BACK TO THE AVON TERMS PROFILE WITH BARNES &  
547=NOBLE, BECAUSE --

548=Q. WHAT TAB IS THAT UNDER, MS. SEE?

549=A. I'M SORRY, IT'S TAB 5, IS THE TERMS PROFILE WE LOOKED AT IN

550=THE VERY BEGINNING, AND THAT HAD A STATISTICAL RESERVE, SECOND  
551=FROM THE LAST. IT HAD A STATISTICAL RESERVE LINE. I JUST  
552=WANTED TO NOTE THAT.

553=Q. WHAT IS A STATISTICAL RESERVE?

554=A. THE STATISTICAL RESERVE IS A PERCENTAGE THAT BARNES & NOBLE  
555=HAS -- TAKES ON THEIR INVOICES TO MAKE UP FOR THESE SHORTAGES,  
556=DAMAGED BOOKS, AND ANYTHING SUCH AS THAT. AND SO IT'S A  
557=TREMENDOUS ADVANTAGE, BECAUSE YOU HAVE, RIGHT OFF YOUR INVOICE,  
558=YOU TAKE THIS, IN THE AVON INSTANCE, 1.1 PERCENT. SO YOU DON'T  
559=HAVE TO GO THROUGH THE TIME OF FIGURING OUT, WELL, HOW MANY  
560=BOOKS YOU WERE SHORTED OR HOW MANY BOOKS WERE DAMAGED.

561= AND THEN --  
562=Q. MS. SEE -- GO AHEAD.  
563=A. AND THEN, EXCUSE ME, I JUST WANT TO GO BACK TO TAB 3, AND  
564=THIS IS A --  
565=Q. JUST FOR THE RECORD, MS. SEE, THAT'S PLAINTIFF'S EXHIBIT  
566=824?  
567=A. 824. AND THIS IS, AS YOU CAN SEE AT THE TOP, THIS IS A  
568=DOCUMENT THAT I REFERRED TO, AND IT WAS ONE OF THE REASONS I  
569=CAME TO THE OPINION THAT BARNES & NOBLE WAS OBVIOUSLY GETTING  
570=THE STATISTICAL RESERVES, BECAUSE IT'S A DOCUMENT THAT, AMONG  
571=OTHER THINGS, IN THE FOURTH COLUMN AT THE TOP, IT HAS A  
572=NOTATION, A HEADER, AND IT SAYS, "STATISTICAL RESERVES," AND  
573=THESE, BY THE WAY, ARE THE TOP 50 VENDORS, THE TOP 50 VENDORS  
574=FROM WHOM BARNES & NOBLE BUYS BOOKS, AND AS YOU NOTE, THE  
  
575=STATISTICAL RESERVES, GOING DOWN THAT COLUMN, RANGE FROM 1.5 --  
576=THEY RANGE UP AND DOWN -- EXCUSE ME -- THEY RANGE FROM 1.5 TO  
577=.3, .7. THEY ARE DIFFERENT STATISTICAL RESERVES FOR THEIR  
578=DIFFERENT VENDORS.  
579=Q. NOW, MS. SEE, DO THESE STATISTICAL RESERVES, IN YOUR  
580=OPINION, MERELY COMPENSATE BARNES & NOBLE FOR THE ACTUAL  
581=SHORTAGES AND DAMAGES THAT IT HAS FROM PUBLISHERS, AND IF NOT,  
582=CAN YOU TELL THE BASIS FOR YOUR OPINION?  
583=A. YES. IN MY EXAMINATION OF THE DOCUMENTS, IT'S MY OPINION  
584=THAT THESE STATISTICAL RESERVES ARE NOT BASED IN FACT, AND IF  
585=YOU WOULD -- AND AS YOU NOTED ON THE CHARTS THAT WE JUST LOOKED  
586=AT, THE STATISTICAL RESERVES ARE NOT CONSISTENT. THEY'RE  
587=DIFFERENT FOR DIFFERENT VENDORS. AND IF YOU WILL LOOK AT  
588=TAB -- UNDER TAB 14, EXHIBIT 967, AT THE BOTTOM OF -- THESE ARE  
589=E-MAILS, AND THIS PARTICULAR E-MAIL, THE SECOND ON THIS PAGE  
590=FROM --  
591=Q. PARDON ME, MS. SEE, WHOSE E-MAILS ARE THESE?  
592=A. I WAS GOING TO SAY, THIS IS FROM PATRICIA BOSTELMAN TO  
593=DAVID CULLY, WHO AT THAT POINT IS PRESIDENT OF THE RANDOM --  
594=EXCUSE ME -- BARNES & NOBLE DISTRIBUTION CENTER. IN THAT  
595=E-MAIL --  
596= THE COURT: I'M SORRY, WHICH TAB IS IT?  
597= THE WITNESS: IT'S TAB 14. TAB 14.  
598= MR. SPIVA: THIS IS PLAINTIFF'S 967, YOUR HONOR.  
599= THE WITNESS: AND IN THIS E-MAIL FROM PATRICIA  
  
600=BOSTELMAN TO DAVID CULLY, SHE SAYS, IN THE FOURTH LINE DOWN --  
601=SHE'S REFERRING TO THE MACMILLAN STATISTICAL RESERVE, AND AN  
602=EXECUTIVE FROM MACMILLAN HAS OBVIOUSLY ASKED TO HAVE THE  
603=STATISTICAL RESERVE REDUCED, AND SHE RESPONDS THAT, "I DO  
604=BELIEVE THAT THE 1.5 PERCENT IS TOO HIGH AT THIS POINT,  
605=ALTHOUGH I WOULDN'T TELL HIM," AND THAT INDICATES TO ME THAT  
606=THEY KNEW THAT THE STATISTICAL RESERVES WERE ARBITRARY.  
607= AND THEN THE OTHER -- AMONG THE OTHER DOCUMENTS THAT  
608=I LOOKED AT, IF YOU WOULD TURN TO TAB 15, THIS IS PLAINTIFF  
609=EXHIBIT 952, AND ON THIS -- IN THIS EXHIBIT, I WANT TO REFER TO  
610=THE SECOND E-MAIL, FROM RICHARD RODD, AND THERE ARE TWO THINGS  
611=IN HERE.  
612= HE AGAIN -- EXCUSE ME. HE HERE IS AGAIN TALKING  
613=ABOUT THE STATISTICAL RESERVE PERCENTAGE. AS YOU SEE IN THE  
614=THIRD LINE, IT SAYS -- WE'RE TALKING ABOUT STATISTICAL RESERVE  
615=PERCENTAGES, AND THEN ABOUT HALFWAY DOWN THAT PARAGRAPH, THERE  
616=IS A LINE THAT BEGINS, "THE BOOK --" THAT SAYS, "THE BOOK  
617=PUBLISHERS' PERCENTAGES ARE NOT CURRENTLY FACT-BASED." AND IT  
618=WAS UPON THIS DOCUMENT THAT I CAME TO THE OPINION THAT THESE  
619=WERE ARBITRARY STATISTICAL RESERVES.  
620= AND FROM MY EXPERIENCE IN THE INDUSTRY, THIS IS A  
621=VERY, VERY IMPORTANT TERM THAT BARNES & NOBLE HAS BEEN ABLE TO  
622=NEGOTIATE FROM THE PUBLISHERS. I REMEMBER WHEN WE WERE WORKING  
623=WITH THE PUBLISHER PLANNING COMMITTEE WITH THE AMERICAN  
624=BOOKSELLERS ASSOCIATION, I MENTIONED YESTERDAY, AND ONE OF --  
  
625=WHEN WE WOULD TALK TO PUBLISHERS, WE WERE TALKING ABOUT  
626=POLICIES AND PRACTICES IN THE INDUSTRY AND TRYING TO MAKE IT  
627=BETTER FOR EVERYBODY, AND THIS WAS ONE OF THE SUBJECTS THAT WE  
628=DISCUSSED, AND WE WERE SUGGESTING THAT PUBLISHERS COULD GO THIS  
629=ROUTE, BECAUSE IT WOULD SAVE EVERYBODY. IT WOULD SAVE THE  
630=PUBLISHERS ALL OF THE DIFFICULTY OF THE PAPERWORK. IT WOULD

631=CERTAINLY SAVE THE BOOKSELLERS.  
632= SO THIS WAS SOMETHING THAT REALLY STRUCK ME, BECAUSE  
633=I REMEMBERED HOW MUCH WE HAD HOPED TO BE ABLE TO ACHIEVE THIS,  
634=FOR ALL BOOKSELLERS.  
635= (CONTINUED ON FOLLOWING LINE. NOTHING OMITTED.)  
636=  
637=  
638=  
639=  
640=  
641=  
642=  
643=  
644=  
645=  
646=  
647=  
648=  
649=  
  
650=BY MR. SPIVA:  
651=Q. DID THE PUBLISHERS PROVIDE THAT IN RESPONSE --  
652=A. WELL, WE WERE --  
653=Q. -- QUESTION?  
654=A. -- SOMEHOW NEVER ABLE TO PERSUADE THEM.  
655=Q. NO, HAVE YOU SEEN -- GO AHEAD.  
656=A. EXCUSE ME. IT HAS NOT BECOME INDUSTRY STANDARD.  
657=Q. HAVE YOU SEEN ANY PUBLISHED --  
658= LET ME ASK QUESTION AGAIN. HAVE YOU SEEN ANY  
659=PUBLISHED STATISTICAL RESERVE OR SHORTAGE ALLOWANCE --  
660=ALLOWANCES OR DAMAGE ALLOWANCES?  
661=A. NO. I HAVE NOT.  
662=Q. HAS ST. MARTINS?  
663=A. OH, WAIT A MINUTE. YOU'RE RIGHT. I'M SORRY. ST. MARTINS  
664=PRESS IS -- DOES HAVE A STATISTICAL RESERVE NOW, BUT IT IS NOT  
665=AN INDUSTRY-WIDE PRACTICE. STANDARD PRACTICE --  
666=Q. OTHER THAN ST. MARTINS, ARE YOU AWARE OF ANY OTHER  
667=PUBLISHER --  
668=A. NO.  
669=Q. -- STATISTICAL RESERVE?  
670=A. NO, I AM NOT.  
671=Q. I KNOW IT'S DIFFICULT. JUST TRY TO WAIT FOR THE WHOLE  
672=QUESTION GETS OUT, JUST FOR THE COURT REPORTER'S SAKE.  
673= MISS SEE, YOU DISCUSSED BARNES & NOBLE'S STATISTICAL  
674=RESERVE. DOES BORDERS AND WALDEN HAVE A SIMILAR PROGRAM OR  
  
675=ALLOWANCE?  
676=A. YES, BORDERS AND WALDEN HAVE A PROGRAM CALLED RECEIPT OF  
677=GOODS, ROG, WHICH IS STRUCTURED THE SAME WAY.  
678=Q. WANT TO ASK YOU JUST A FEW MORE QUESTIONS, MISS SEE, AND I  
679=WANT TO ASK YOU ON THE SUBJECT OF INGRAM BOOK COMPANY. YOU  
680=DISCUSSED THAT SOME YESTERDAY.  
681= AND, AGAIN, I'D LIKE TO ASK YOU BASED ON YOUR  
682=EXPERIENCE, YOU HAVE FORMED AN OPINION ABOUT WHETHER THE  
683=DEFENDANTS HAVE RECEIVED DISCOUNTS AND OTHER TERMS FROM INGRAM  
684=BOOK COMPANY THAT ARE NOT AVAILABLE ON THEIR STANDARD  
685=INDUSTRY-WIDE TERMS, AND IF SO, IF YOU COULD PROCEED TO THE  
686=FACTS AND DATA UPON WHICH YOU BASE THAT OPINION.  
687=A. WELL, I HAVE FORMED AN OPINION THAT HERE, ONCE AGAIN, THE  
688=DEFENDANTS WERE RECEIVING TERMS THAT WERE VERY DIFFERENT FROM  
689=THE INDUSTRY STANDARD -- STANDARD TERMS.  
690= AND IF YOU -- IF YOU'LL TURN TO -- I'M GOING TO BE  
691=REFERRING TO TABS 16 AND 17. THE FIRST TAB, 16, IS THE 1998  
692=PUBLISHED -- INGRAM PUBLISHED TERMS. AND ON THE SECOND PAGE OF  
693=THIS, YOU'LL SEE ABOUT HALFWAY DOWN UNDER THEIR DISCOUNT  
694=SCHEDULE -- WE WENT OVER ALL THIS YESTERDAY. ONE COPY IS  
695=40 PERCENT AND FIVE COPIES IS 41 PERCENT, AND THAT MEANS FIVE  
696=COPIES OF THE SAME TITLE.  
697= AND IN ORDER -- I ALSO KNOW FROM MY OWN EXPERIENCE  
698=THAT IN ORDER TO RECEIVE THE FIVE COPIES AT 41 OR THE TEN COPIES  
699=AT 42, YOU HAVE TO MEET A MINIMUM UNIT QUANTITY IN ORDER TO  
  
700=QUALIFY. SO --

701=Q. WHEN YOU SAY "UNIT," ARE YOU -- ARE YOU CONTRASTING THAT  
702=WITH --  
703=A. TO TITLES.  
704=Q. COPIES. TO TITLES. THANK YOU.  
705=A. THERE'S A DIFFERENCE BETWEEN THE UNITS OR THE NUMBER OF  
706=BOOKS, AND THE TITLES REFERS TO A PARTICULAR SINGLE INDIVIDUAL  
707=TITLE.  
708=Q. SO, MISS SEE, JUST TO MAKE SURE THAT THIS IS CLEAR, YOU'RE  
709=SAYING THAT THERE'S BOTH A UNIT MINIMUM THAT THE BOOK STORE HAS  
710=TO MEET AND A MINIMUM -- TITLE MINIMUM?  
711=A. YES, YOU HAVE TO MEET A PARTICULAR MINIMUM. IT'S DIFFERENT  
712=FOR ELECTRONIC AND TELEPHONE ORDERS. AND THEN ONCE YOU'VE MET  
713=THAT MINIMUM, YOU HAVE TO MEET THE TITLE MINIMUMS.  
714= AND THEN I'D LIKE TO REFER TO TAB 17, AND THIS --  
715=THIS IS SOMETHING CALLED A --  
716=Q. FOR THE RECORD, MISS SEE, WHAT'S THE EXHIBIT NUMBER ON THAT?  
717=A. 1894. AND THIS IS A MEMORANDUM OF UNDERSTANDING, BORDERS  
718=BOOK COMPANY, AND THIS IS THE 1998 MEMORANDUM OF UNDERSTANDING.  
719=Q. WHAT --  
720=A. AND --  
721=Q. WHAT IS A MEMORANDUM OF UNDERSTANDING, MISS SEE?  
722=A. IT'S A CONTRACT BETWEEN BORDERS AND INGRAM, AND IT SETS  
723=FOR THE TERMS UNDER WHICH BORDERS BUYS BOOKS FROM INGRAM.  
724=WE'VE BEEN TALKING THIS MORNING ABOUT TERMS. THIS IS THE  
  
725=BORDERS TERMS WITH INGRAM. AND IF YOU TURN TO PAGE 7 UNDER THIS  
726=TAB 17, YOU'LL SEE THAT THEY HAVE LISTED THERE THE DISCOUNT  
727=SCHEDULE. AND IT SAYS UNDER "TRADE BOOKS, MASS MARKET,"  
728=ET CETERA, "TELEPHONE ORDERS, 41 PERCENT. ELECTRONIC ORDERS  
729=42 PERCENT," AND THAT -- THERE ARE NO MINIMUMS, EITHER UNITS OR  
730=TITLES, REQUIRED.  
731= AND THEN, I ALSO --  
732=Q. MISS SEE, HAVE YOU REVIEWED ANYTHING ELSE THAT CONFIRMS  
733=THAT --  
734=A. OH.  
735=Q. -- BORDERS IS NOT --  
736=A. YES.  
737=Q. -- SUBJECT TO MINIMUM ORDER?  
738=A. I READ -- I READ DEPOSITIONS AND OTHER DOCUMENTS THAT  
739=CONFIRM THAT THESE WERE THE TERMS FOR BORDERS FROM INGRAM.  
740=Q. CAN I JUST PAUSE THERE FOR A MINUTE?  
741= NOW, THAT'S WHAT THE DOCUMENT -- THAT'S THE TECHNICAL  
742=REQUIREMENT, BUT ISN'T THE CASE THAT BORDERS PROBABLY ALWAYS  
743=MEETS THE MINIMUM ANYHOW?  
744=A. NO. BECAUSE I -- I SAW ELECTRONIC TRANSCRIPTS (SIC) OF --  
745=THE ELECTRONIC ORDERS FROM BORDERS, AND THERE WERE MANY  
746=INSTANCES WHERE THERE WERE ORDERS PLACED WITH FEWER THAN FIVE  
747=BOOKS. SO THAT ALSO LED -- GAVE -- LED ME TO MY OPINION THAT  
748=THIS WAS AN ARRANGEMENT THAT WAS VERY DIFFERENT FROM THE  
749=STANDARD TERMS.  
  
750=Q. OKAY. PLEASE PROCEED TO EXPLAIN --  
751=A. AND --  
752=Q. -- THE REST OF YOUR --  
753=A. -- ON PAGE 8 --  
754= MR. STEER: YOUR HONOR, I MUST OBJECT TO HEARSAY AND  
755=MOVE TO STRIKE THE TESTIMONY INSOFAR AS IT MAY BE OFFERED FOR  
756=THE TRUTH OF WHAT THE WITNESS HAS STATED.  
757= THE COURT: WELL, NONE OF THESE ARE OFFERED FOR THE  
758=TRUTH. THE DOCUMENT'S NOT -- HASN'T BEEN ADMITTED INTO  
759=EVIDENCE. AND WHEN YOU MAKE YOUR OBJECTIONS, PLEASE RISE SO I  
760=CAN --  
761= MR. STEER: I APOLOGIZE, YOUR HONOR.  
762= THE COURT: ALL RIGHT. YOU MAY PROCEED.  
763=BY MR. SPIVA:  
764=Q. YOU CAN PROCEED, MISS SEE.  
765=A. AND TURNING TO PAGE 8 OF THIS DOCUMENT I'VE BEEN REFERRING  
766=TO, THE MEMORANDUM OF UNDERSTANDING, THERE IS SOMETHING CALLED  
767=AN INCENTIVE REBATE.  
768= AND AS YOU SEE THERE IN THE THIRD LINE, BORDERS IS  
769=RECEIVING AN ADDITIONAL 1 PERCENT DISCOUNT AS AN INCENTIVE, AND  
770=THEN IF THEY REACH A CERTAIN THRESHOLD, THEY RECEIVE ANOTHER  
771=1 PERCENT INCENTIVE. AND THEN THE LAST PARAGRAPH, SHORT

772=DISCOUNT PURCHASES.  
773= NOW, SHORT DISCOUNT PURCHASES ARE PURCHASE -- BOOKS,  
774=OFTEN TEXTBOOKS, UNIVERSITY PRESS BOOKS, SOME -- BUT ANYWAY,  
775=THEY ARE BOOKS THAT YOU PURCHASE -- USUALLY A SHORT DISCOUNT IS  
776=20 PERCENT. AND HERE IT SAYS SHORT DISCOUNT PURCHASES ORDERED  
777=ELECTRONICALLY WILL HAVE A 3 PERCENT INCENTIVE.  
778= NOW, I'VE NEVER HEARD OF WHOLESALER INCENTIVES. I  
779=KNOW INGRAM DOES OFFER SOMETHING CALLED REBATE DOLLARS BECAUSE  
780=I'VE EXAMINED ALSO THE INGRAM BROCHURES THAT ARE SENT TO THE  
781=BOOKSTORES, BUT THE REWARD DOLLARS ARE REALLY NOT DOLLARS.  
782=THEY'RE CREDITS THAT THE BOOK STORE CAN USE AGAINST OTHER INGRAM  
783=PURCHASES SUCH AS THEIR MICROFICHE OR THEIR CD-ROM OR SOMETHING  
784=LIKE THAT, BUT THEY'RE NOT ACTUAL DOLLARS THAT THE BOOKSTORE  
785=RECEIVES.  
786=Q. CAN THEY USE THE REWARD DOLLARS TO BUY ADDITIONAL INGRAM  
787=BOOKS?  
788=A. NO, I WAS TRYING TO MAKE THAT CLEAR. IT IS NOT ANY KIND OF  
789=A CREDIT AGAINST PURCHASES. SO IT DOESN'T INCREASE YOUR --  
790= THE COURT: I'M SORRY. I -- I DON'T FOLLOW THAT.  
791= THE WITNESS: OH, INCENTIVES?  
792= THE COURT: YEAH.  
793= THE WITNESS: ON PAGE --  
794= THE COURT: ARE YOU ON PAGE 6?  
795= THE WITNESS: 8 -- I'M SORRY. ON PAGE 8.  
796= THE COURT: OH, YEAH.  
797= THE WITNESS: YOU SEE THE 1 PERCENT ON THE THIRD --  
798=ON THE THIRD LINE.  
799= THE COURT: YEAH.  
800= THE WITNESS: AND ON THE SECOND PARAGRAPH, AN  
801=ADDITIONAL 1 PERCENT, AND THEN 3 PERCENT.  
802= THE COURT: ALL RIGHT.  
803=BY MR. SPIVA:  
804=Q. AND THAT INCENTIVE, THOUGH, ON PAGE 8, MISS SEE, THAT  
805=INCENTIVE IS ACTUAL DOLLARS?  
806=A. THAT -- CORRECT.  
807=Q. AND WAS THEIR INCENTIVE PUBLISHED IN RED BOOK IN 1998?  
808=A. NO. NO.  
809=Q. IN ANY OF THE TERMS PROFILES THAT YOU REVIEWED, WAS THERE AN  
810=INCENTIVE PROGRAM?  
811=A. YOU MEAN FOR BOOKS -- GENERALLY PUBLISHED TERMS, NO. THAT'S  
812=WHAT I WAS MAKING THE POINT WITH THE INGRAM BROCHURES THAT THEY  
813=SEND TO BOOKSTORES.  
814=Q. UM-HMM.  
815=A. THEN, FINALLY, I WOULD LIKE TO TURN YOUR ATTENTION TO TAB  
816=18.  
817=Q. OH, MISS SEE, BEFORE YOU TURN TO THAT, ARE THERE ANY OTHER  
818=TERMS THAT BORDERS --  
819=A. OH.  
820=Q. -- RECEIVES THAT ARE NOT IN THE STANDARD INDUSTRY TERMS?  
821=A. YES. I'M SORRY. THERE'S A VERY IMPORTANT TERM.  
822=Q. THAT'S ALL RIGHT. TAKE YOUR TIME.  
823=A. THERE'S ONE OTHER WAY THAT BORDERS WAS RECEIVING TERMS THAT  
824=WERE DIFFERENT. WE TALKED YESTERDAY ABOUT RETURNS, YOU KNOW,  
825=BOOKS BEING SENT BACK.  
826= AND UNDER BORDERS' (SIC) PUBLISHED TERMS, IF YOU BUY  
827=YOUR BOOK -- THE STORE BUYS THE BOOK AT 41 PERCENT AND THEY SEND  
828=THE BOOK BACK, THEY GET A 50 PERCENT CREDIT, THEREFORE THEY'VE  
829=LOST 9 PERCENT.  
830= AND ALSO IN INGRAM PUBLISHED TERMS -- MAY HAVE SAID  
831=BORDERS -- IN THE INGRAM PUBLISHED TERMS, THERE'S A CAP THAT  
832=MEANS THERE -- I THINK IT'S 5 OR 10 PERCENT OF YOUR ANNUAL  
833=PURCHASES AND YOU CAN RETURN BOOKS -- NO MORE BOOKS THAN THAT.  
834=SO THAT'S WHAT THE PUBLISHED TERMS ARE. THERE'S A PENALTY AND A  
835=CAP.  
836= WHEN YOU --  
837=Q. IF YOU WANT TO REFRESH YOUR RECOLLECTION, IT'S ON PAGE 3?  
838=A. 3.  
839=Q. THE PARTICULAR BORDERS TERMS --  
840=A. RIGHT. AND NOW IF WE TURN BACK TO -- AGAIN, THIS IS THE  
841=BORDERS MEMORANDUM OF UNDERSTANDING WITH INGRAM. ON PAGE 3,

842=THERE IS A HALFWAY DOWN, RETURNS CREDIT, AND YOU CAN SEE THAT  
843=THEY CAN RETURN UP TO 5 PERCENT OF THE TOTAL YEAR'S -- OF THE  
844=TOTAL YEAR PURCHASES, AND THEY -- THEY HAVE NO PENALTY.  
845= UNDER THAT, THERE'S A VENDOR OF RECORD ENTRY, AND  
846=THEY CAN RETURN 20 PERCENT OF THOSE TOTAL YEAR PURCHASES. SO  
847=THEY GET THIS BENEFIT OF NO RETURNS PENALTY ON UP TO 5 PERCENT  
848=OF THEIR PURCHASES. WHEREAS THE STANDARD PUBLISHED TERMS IS YOU  
849=GET A PENALTY ON ANY BOOKS RETURNED, AND YOU CAN ONLY RETURN UP

850=TO 5 PERCENT. IT'S VERY COMPLICATED. I --

851=Q. MISS SEE, I DON'T THINK YOU MENTIONED ANYTHING ABOUT PAYMENT  
852=TERMS. IS THERE ANY WAY IN WHICH IN YOUR OPINION BORDERS HAS  
853=RECEIVED PAYMENT TERMS WHICH DIFFER FROM INDUSTRY STANDARD

854=PAYMENT TERMS --

855=A. YES.

856=Q. -- FROM INGRAM?

857=A. YES. I ALSO BASE MY OPINION THAT BORDERS WAS RECEIVING

858=SPECIAL TERMS -- I EXAMINED THE DOCUMENTS --

859=Q. AND -- EXCUSE ME.

860=A. -- THEY --

861=Q. I'M SORRY. I WANT TO REPHRASE THE QUESTION BECAUSE I SAID

862="PAYMENT TERMS."

863=A. YES.

864=Q. WHAT I MEANT TO SAY, HAVE YOU FORMED AN OPINION BASED ON OF

865=WHETHER BORDERS HAS RECEIVED A CASH DISCOUNT WHICH IS NOT

866=AVAILABLE TO -- ON THE INDUSTRY --

867=A. RIGHT.

868=Q. -- STANDARD TERMS.

869=A. WE DISCUSSED YESTERDAY THAT WITH INGRAM'S PUBLISHED TERMS,

870=YOU CAN TAKE A 2 PERCENT -- YOU TAKE 2 PERCENT OFF OF YOUR

871=STATEMENT IF YOU PAY YOUR BILLS BY THE 10TH DAY OF THE MONTH.

872=AND UNDER THE BORDERS MEMORANDUM OF UNDERSTANDING, BORDERS WAS

873=ALLOWED TO TAKE THE 2 PERCENT IF THEY PAID BY THE 25TH DAY OF

874=THE MONTH, GIVING BORDERS 15 MORE DAYS BEFORE THEY HAD TO PAY.

875=Q. WHAT -- IF A BOOKSTORE PURCHASING UNDER INDUSTRY STANDARD

876=TERMS PAID AT 25 DAYS EOM, WHAT CASH DISCOUNT WOULD THEY

877=RECEIVE?

878=A. THEY WOULD RECEIVE NO CASH DISCOUNT.

879=Q. OKAY. MISS SEE, HAVE YOU REVIEWED SIMILAR MOU'S FOR

880=BARNES & NOBLE?

881=A. YES, I HAVE. I'VE RECEIVED -- I'VE REVIEWED MANY MOU'S FROM

882=I THINK THE EARLY '90'S ON.

883=Q. OKAY. AND DO THEY CONTAIN SUBSTANTIALLY THE SAME TERMS AS

884=THOSE THAT YOU REVIEWED --

885=A. YES.

886=Q. -- FOR THE COURT.

887=A. IN THE EARLY DAYS, THEY HAD A WALDEN MOU AND A BORDERS, AND

888=THEN I THINK IT WAS IN '97, BORDERS AND WALDEN MERGED, AND SO AT

889=THAT POINT, THEY HAD ONE MOU.

890=Q. OKAY. SO YOU --

891=A. AND THE TERMS -- EXCUSE ME. EXCUSE ME.

892=Q. SURE. EXCUSE ME.

893=A. THE TERMS WERE -- THEY WENT ALONG WITH THE TERMS THAT I HAD

894=USED HERE AS AN EXAMPLE. I WAS JUST USING THESE TERMS AS AN

895=EXAMPLE TO SHOW YOU WHAT I BASED MY OPINION ON.

896=Q. THERE MAY HAVE BEEN SOME MINOR DIFFERENCES --

897=A. MINOR DIFFERENCES.

898=Q. OKAY.

899=A. BUT --

900=Q. NOW, YOU WERE TESTIFYING REGARDING BORDERS/WALDEN, DID YOU

901=ALSO REVIEW MOU'S OF BARNES & NOBLE?

902=A. OH, YES. I ALSO REVIEWED THE MOU'S OF BARNES & NOBLE, AGAIN

903=FOR THE SAME TIME PERIOD.

904=Q. AND DID THEY SHOW THE SAME OR SUBSTANTIALLY THE SAME TERMS

905=THAT YOU'VE REVIEWED --

906=A. YES.

907=Q. -- FOR THE COURT TODAY?

908=A. YES. THERE WERE SOME DIFFERENCES IN CAPS ON RETURNS AND

909=SOMETHING LIKE THAT. BUT IN GENERAL, THE TERMS WERE THE SAME.

910=AND --

911=Q. FINALLY, REGARDING THE INCENTIVES THAT YOU TESTIFIED ABOUT

912=REGARDING BORDERS, WAS THERE ANY OTHER FACT OR DATA THAT YOU  
913=RELIED UPON IN REACHING YOUR CONCLUSION THAT THIS WAS SOMETHING  
914=THAT WAS NOT MADE AVAILABLE TO THE INDUSTRY?  
915=A. YES. AND IF YOU'LL TURN TO TAB 18, AND THIS IS PLAINTIFF'S  
916=EXHIBIT 2470.  
917=Q. OKAY.  
918=A. AND THIS IS, AGAIN, COUPLE OF E-MAILS. AND I'D LIKE TO  
919=REFER TO THE SECOND E-MAIL FROM JEFF BETHKE TO SOME OF THE  
920=BARNES & NOBLE (SIC) EXECUTIVES.  
921=Q. PARDON ME, MISS SEE. DID YOU SAY BARNES & NOBLE?  
922=A. I MEANT BORDERS. I'M VERY SORRY. BORDERS.  
923=Q. JUST SO THE RECORD IS CLEAR, CAN YOU SAY WHO THOSE  
924=EXECUTIVES ARE FROM?  
  
925=A. JEFF BETHKE AND EXECUTIVES FROM BORDERS.  
926= AND THE SUBJECT IS -- UNDER THE SUBJECT, "INGRAM  
927=DISCOUNT." AND THE FIRST LINE OF THIS E-MAIL REFERS TO SUE  
928=FLASTER, WHO IS WITH INGRAM. AND SHE HAS SAID THEY NEED TO GIVE  
929=US THIS EXTRA POINT, THIS INCENTIVE "AS AN INCENTIVE BASED ON  
930=VOLUME RATHER THAN AN UPFRONT DISCOUNT BECAUSE TO DO OTHERWISE  
931=WOULD VIOLATE ROBINSON-PACTMAN (SIC) ACT." AND I THINK SHE  
932=MEANS ROBINSON-PATMAN.  
933= AND THAT IS A DOCUMENT THAT LED ME TO BELIEVE THAT  
934=THEY UNDERSTOOD THAT THESE INCENTIVES WERE OUT OF THE ORDINARY,  
935=TO SAY THE LEAST. AND --  
936=Q. MISS SEE, DOES THE DOCUMENT -- DOES THE NEXT SENTENCE  
937=FURTHER SUPPORT YOUR OPINION?  
938=A. RIGHT. AND IT SAYS "WITH THIS UPFRONT DISCOUNT, THEY ARE  
939=SELLING TO US," AND PRESUMABLY TO BARNES & NOBLE, "AT A RATE  
940=DIFFERENT THAN THE RATE AT WHICH THEY SELL TO EVERY OTHER  
941=BOOKSTORE IN THE COUNTRY."  
942= MR. SPIVA: THANK YOU, MISS SEE. I HAVE NO FURTHER  
943=QUESTIONS.  
944= THE COURT: ALL RIGHT. I THINK WE'LL TAKE THE FIRST  
945=MORNING BREAK NOW UNTIL 10:00 O'CLOCK.  
946= THE CLERK: ALL RISE.  
947= (RECESS TAKEN AT 9:42 A.M.)  
948= (PROCEEDINGS RESUMED AT 10:05 A.M.)  
949= THE COURT: CROSS-EXAMINATION.  
  
950= MR. WELSH: THANK YOU, YOUR HONOR.  
951= THE COURT: MR. WELSH.  
952= CROSS-EXAMINATION  
953= MR. WELSH: THANK YOU, YOUR HONOR.  
954=Q. GOOD MORNING, MISS SEE.  
955=A. GOOD MORNING.  
956=Q. NOW, YESTERDAY WHEN WE WERE TALKING, YOU MADE IT CLEAR THAT  
957=YOUR EXPERIENCE AS A BOOKSELLER IS AS THE OPERATOR OF A -- I  
958=GUESS WHAT, BY TODAY'S TERMS, MIGHT BE CALLED A SMALL  
959=SINGLE-STORE OPERATION, CORRECT?  
960=A. YES. BUT WHEN YOU'RE OPERATING A SINGLE STORE, YOU ALSO  
961=UNDERSTAND THE TERMS OF THE TRADE.  
962=Q. NOW, WE'RE GOING TO GET INTO TALKING ABOUT THE TERMS OF THE  
963=TRADE. BUT I JUST WANTED TO GET A LITTLE BIT MORE OF AN  
964=UNDERSTANDING ABOUT YOUR BOOKSELLING EXPERIENCE, AND IT COMES  
965=OUT OF YOUR OPERATION OF THE BOOKCASE, CORRECT?  
966=A. IT DOES. BUT ALSO I'VE BEEN IN THIS BUSINESS FOR ALMOST 30  
967=YEARS. I KNOW A LOT OF OTHER BOOKSELLERS, AND I -- WE DISCUSS  
968=THESE ISSUES.  
969=Q. OKAY. I'M SURE THAT YOU HAVE LOTS OF CONVERSATIONS WITH  
970=OTHER FOLKS. BUT I'M REALLY JUST FOCUSING RIGHT NOW ON YOUR  
971=EXPERIENCE IN TERMS OF BEING A BOOKSELLER AS OPPOSED TO TALKING.  
972= THE COURT: JUST ANSWER HIS QUESTIONS --  
973= THE WITNESS: THANK YOU.  
974= THE COURT: -- MS. SEE.  
  
975= MR. WELSH: THANK YOU. I'D APPRECIATE THAT.  
976=Q. AND YOUR EXPERIENCE IN TERMS OF THE -- AS A BOOKSELLER NOW,  
977=AS WE'RE FOCUSING ON, DOES NOT EXTEND TO LARGE NATIONAL  
978=BOOKSELLING CHAINS, DOES IT? I MEAN -- BY THAT QUESTION, I  
979=MEAN, YOU'VE NOT WORKED FOR A LARGE NATIONAL BOOKSELLING CHAIN,  
980=HAVE YOU?  
981=A. NO, I'VE NOT WORKED FOR A LARGE --

982=Q. OKAY.  
983=A. -- NATIONAL BOOKSELLING CHAIN.  
984=Q. AND AS A RESULT, YOU HAVE NO DIRECT PERSONAL EXPERIENCE OF  
985=THE BOOKSELLING WORLD AS SEEN THROUGH THE EYES OF A LARGE  
986=NATIONAL BOOKSELLING CHAIN, CORRECT?  
987=A. THAT'S -- THAT'S CORRECT.  
988=Q. OKAY. AND, LIKEWISE, YOU'VE MADE IT CLEAR IN YOUR TESTIMONY  
989=THAT OTHER THAN REVIEWING THE DOCUMENTS THAT YOU'VE BEEN  
990=PROVIDED BY -- BY COUNSEL, YOU'VE NOT GONE OUT AND SPOKEN TO,  
991=FOR EXAMPLE, PUBLISHERS, CORRECT?  
992=A. UM, CORRECT. I'VE NOT SPOKEN --  
993=Q. OKAY. YOU'VE CONDUCTED NO INDEPENDENT INVESTIGATION ON YOUR  
994=OWN WITH REGARD TO THE OPINIONS THAT YOU FORMED AND THAT YOU'VE  
995=TESTIFIED TO HERE TODAY, CORRECT?  
996=A. HMM, THAT'S CORRECT.  
997=Q. OKAY. SO, FOR EXAMPLE, YOU DON'T KNOW FROM ANY FIRSTHAND  
998=EXPERIENCE WHAT THE WORLD LOOKS LIKE FROM THE PERSPECTIVE OF A  
999=PUBLISHER WHO'S DEALING WITH A LARGE NATIONAL CHAIN, FOR  
  
1000=EXAMPLE?  
1001=A. WELL, I AM A PUBLISHER. I --  
1002=Q. THAT'S TRUE.  
1003= AND -- WELL, YOU HAVE HAD ONE EXPERIENCE THAT YOU  
1004=TESTIFIED TO IN YOUR DEPOSITION REGARDING DEALINGS WITH A LARGE  
1005=NATIONAL CHAIN. DO YOU RECALL THAT, MS. SEE?  
1006=A. YES, AS A PUBLISHER, I SPOKE TO THE BARNES & NOBLE --  
1007=Q. AND YOU ALSO TESTIFIED IN YOUR DEPOSITION THAT YOU HAD SOME  
1008=DEALINGS WITH REGARD TO PROVIDING CO-OP TO BORDERS. DO YOU  
1009=RECALL THAT?  
1010=A. YES. YES.  
1011=Q. IN FACT, RUMINATOR PRESS, THAT'S THE PRESS THAT YOU OWN,  
1012=CORRECT?  
1013=A. YES.  
1014=Q. RUMINATOR PRESS DOESN'T HAVE A CO-OP POLICY, DOES IT?  
1015=A. IT DOES NOT HAVE A WRITTEN CO-OP.  
1016=Q. THAT'S RIGHT. AND THE BOOKS DISTRIBUTED BY RUMINATOR PRESS  
1017=GO OUT UNDER -- THROUGH A -- CONSORTIUM, CORRECT?  
1018=A. YES, THEY DO.  
1019=Q. AND CONSORTIUM DOES NOT HAVE A PUBLISHED CO-OP TERMS,  
1020=CORRECT?  
1021=A. YES, THAT'S CORRECT.  
1022=Q. YET YOU'VE TESTIFIED THAT YOU WERE CONSULTED AND YOU AGREED  
1023=TO PROVIDE CO-OP FUNDS TO BORDERS, DESPITE THE FACT THAT NEITHER  
1024=RUMINATOR PRESS NOR CONSORTIUM HAVE ANY PUBLISHED TERMS  
  
1025=REGARDING THE PROVISION OF CO-OP, CORRECT?  
1026=A. YES. WE DID THAT ON --  
1027=Q. SO THAT WOULD BE ONE?  
1028= MR. SPIVA: OBJECTION, YOUR HONOR, SHE HAD NOT  
1029=COMPLETED HER ANSWER.  
1030= THE COURT: ALL RIGHT. HAVE YOU -- WOULD YOU FINISH  
1031=YOUR ANSWER.  
1032= THE WITNESS: I WAS JUST SAYING THAT IT WAS AN  
1033=EXPERIMENTAL CO-OP WHEN WE FIRST STARTED OUR BUSINESS.  
1034= THE COURT: ALL RIGHT.  
1035=BY MR. WELSH:  
1036=Q. SO THAT WOULD BE ONE EXPERIENCE THAT YOU'VE HAD AS A  
1037=PUBLISHER DEALING WITH A LARGE NATIONAL CHAIN, CORRECT?  
1038=A. THAT IS ONE. I ALSO --  
1039=Q. OKAY.  
1040=A. -- AS A PUBLISHER HAVE --  
1041=Q. I WAS JUST --  
1042= MR. SPIVA: OBJECTION, YOUR HONOR. SHE HAS NOT  
1043=FINISHED HER ANSWER.  
1044= THE COURT: YES. DON'T YELL IN MY COURTROOM.  
1045= MR. SPIVA: I APOLOGIZE, YOUR HONOR.  
1046= THE WITNESS: MAY I FINISH MY ANSWER?  
1047= THE COURT: YES.  
1048= THE WITNESS: I HAD ALSO WORKED WITH BARNES & NOBLE  
1049=ON MARKETING PLANS FOR RUMINATOR PRESS BOOKS AND FOR SMALL PRESS  
  
1050=BOOKS.  
1051=BY MR. WELSH:

1052=Q. DID THAT INVOLVE THE PROVISION OF CO-OP FUNDS?  
1053=A. NO, IT DID NOT.  
1054=Q. NOW, PRIOR TO BEING RETAINED BY THE PLAINTIFFS, YOU HAD  
1055=NEVER SEEN THE DOCUMENTS THAT YOU LOOKED AT TODAY, CORRECT?  
1056=A. THAT'S CORRECT.  
1057=Q. OKAY. AND, IN FACT, BECAUSE YOU'VE NOT WORKED FOR ANY LARGE  
1058=NATIONAL BOOK SELLING CHAIN, YOU WEREN'T -- YOU HAVE NO  
1059=FIRSTHAND EXPERIENCE IN TERMS OF HOW THOSE DOCUMENTS WERE  
1060=PREPARED, CORRECT?  
1061=A. THE INTERNAL DOCUMENTS.  
1062=Q. YES.  
1063=A. THE TERMS, PROFILES AND THINGS --  
1064=Q. YES.  
1065=A. -- LIKE THAT.  
1066=Q. YOU HAVE NO FIRSTHAND EXPERIENCE FROM HAVING WORKED AT A  
1067=LARGE NATIONAL BOOKSELLING CHAIN REGARDING HOW SUCH DOCUMENTS  
1068=ARE PREPARED, CORRECT?  
1069=A. NO, I'VE NOT HAD ANY FIRSTHAND EXPERIENCE.  
1070=Q. OKAY.  
1071= AND OTHER THAN WHAT YOU HAVE READ, YOU HAVE NO DIRECT  
1072=FIRSTHAND KNOWLEDGE AS TO HOW THOSE DOCUMENTS WERE USED BY  
1073=INDIVIDUALS WITHIN BARNES & NOBLE, CORRECT?  
1074=A. THAT IS CORRECT, BUT I'VE RUN A BUSINESS, AND MY SENSE IS  
  
1075=THAT THESE ARE DOCUMENTS THESE EXECUTIVES WERE USING TO FIND OUT  
1076=WHAT THEIR TERMS WERE AND THEN -- ET CETERA.  
1077=Q. BUT --  
1078=A. OKAY.  
1079=Q. BUT AS WE DISCUSSED YESTERDAY, MISS SEE, AND AS YOU AGREED  
1080=WITH ME YESTERDAY, THE EXPERIENCE OF SOMEONE LIKE A BARNES &  
1081=NOBLE OPERATING A LARGE NATIONAL THOUSAND-STORE CHAIN, IS GOING  
1082=TO BE DIFFERENT THAN THE EXPERIENCE YOU HAD OPERATING A SINGLE  
1083=STORE, THE BOOKCASE, CORRECT?  
1084=A. THE EXPERIENCE IS DIFFERENT, BUT I THINK THERE'S CERTAIN  
1085=THINGS YOU LEARN IN BUSINESS THAT TRANSCEND WHETHER YOU'RE LARGE  
1086=OR SMALL.  
1087=Q. SO YOUR TESTIMONY IS SOME THINGS MAY BE SIMILAR AND SOME  
1088=THINGS WILL BE DIFFERENT, CORRECT?  
1089=A. YES.  
1090=Q. YES. OKAY.  
1091= AND AS A RESULT, YOU DON'T KNOW HOW PUBLISHERS VIEW  
1092=LARGE NATIONAL CHAINS AND THE SPECIFIC ISSUES THAT THEY HAVE TO  
1093=CONFRONT IN DEALING WITH LARGE NATIONAL CHAINS, CORRECT?  
1094=A. I DON'T HAVE ANY -- ANY SPECIFIC EXPERIENCE, NO.  
1095=Q. OKAY. NOW, CAN YOU TELL ME, MISS SEE, TODAY, APPROXIMATELY  
1096=WHAT PERCENTAGE OF BOOKS ARE SOLD THROUGH MEMBERS OF THE  
1097=AMERICAN BOOKSELLERS ASSOCIATION?  
1098=A. I BELIEVE THE LAST PERCENTAGE I SAW WAS 18 PERCENT.  
1099=Q. 18 PERCENT.  
  
1100= NOW, SO -- SO JUST DOING A QUICK BIT OF MATH AND IT'S  
1101=THE LAST BIT OF MATH I'LL TRY TO DO TODAY, I TAKE IT THAT MEANS  
1102=THAT ABOUT 82 PERCENT OF THE BOOKS SOLD ARE NOT SOLD THROUGH  
1103=MEMBERS OF THE AMERICAN BOOKSELLERS ASSOCIATION, CORRECT?  
1104=A. CORRECT.  
1105=Q. THE VAST MAJORITY, CORRECT?  
1106=A. CORRECT.  
1107=Q. AND YOU'RE AWARE, ARE YOU NOT, MISS SEE, THAT THE SO-CALLED  
1108=RED BOOK, THE ABA'S HANDBOOK, IS ONLY MADE AVAILABLE TO ABA  
1109=MEMBERS, YOU AWARE OF THAT?  
1110=A. I BECAME AWARE OF THAT YESTERDAY.  
1111=Q. YES, IN FACT, IF YOU LOOK AT TAB 2 OF YOUR BINDER --  
1112= YOUR HONOR, WE PROVIDED A BINDER THAT YOU HAVE.  
1113=A. I HAVE TWO BINDERS.  
1114= MR. WELSH: MAY I APPROACH THE WITNESS, YOUR HONOR?  
1115= THE COURT: YES.  
1116= MR. WELSH: THANK YOU.  
1117= THE WITNESS: OH, SORRY. THAT'S MINE.  
1118= THIS IS MINE (INDICATING)?  
1119=BY MR. WELSH:  
1120=Q. YES.  
1121=A. THANK YOU.  
1122=Q. AND IF YOU GO -- WE CAN GO ON ALMOST ANY ONE, BUT IF YOU

1123=WANT TO TAKE THE MOST RECENT, THAT'S FINE, WHICH IS THE LAST  
1124=ENTRY IN HERE.

1125=A. EXCUSE ME.

1126=Q. IT IS FOR THE ABA BOOK BUYER'S HANDBOOK FOR THE YEAR 2000.

1127=IT IS THE LAST PART OF -- OF TAB 2, RIGHT BEFORE TAB 3.

1128=A. (REVIEWING DOCUMENTS.)

1129=Q. DO YOU HAVE THAT?

1130=A. I HAVE THAT.

1131=Q. AND IF YOU GO TO -- IF YOU GO TO PAGE -- WELL -- THE LAST

1132=PAGE THAT'S COLLECTED HERE, I THINK IT BEARS PAGE 8, AND ON THE

1133=TOP, IT SAYS FOR "ABA MEMBERS ONLY."

1134=A. YES. I -- THAT PAGE.

1135=Q. ALL RIGHT. AND IF YOU LOOK DOWN TO THE SECOND PARAGRAPH

1136=UNDER "FOR ABA MEMBERS ONLY," DO YOU SEE IT SAYS "THE ABA BOOK

1137=BUYERS HANDBOOK IS FOR ABA MEMBERS ONLY. WE DO NOT SELL, LEND

1138=OR GIVE IT TO NON-MEMBERS UNDER ANY CIRCUMSTANCES, NOR MAKE

1139=ANYONE ELSE DO SO. THE HANDBOOK IS NOT FOR RESALE. ADDITIONAL

1140=COPIES ARE AVAILABLE TO ABA MEMBERS FOR \$75 EACH."

1141= SEE THAT?

1142=A. I DO.

1143=Q. OKAY. AND YOU UNDERSTAND THAT TO BE THE TERMS AND POLICIES

1144=GOVERNING THE ABA HANDBOOK, CORRECT?

1145=A. YES.

1146=Q. OKAY.

1147= NOW, YOU'RE AWARE, ARE YOU NOT, MISS SEE, THAT THERE

1148=ARE A NUMBER OF LARGE NATIONAL BOOKSELLERS BESIDES BARNES &

1149=NOBLE AND BORDERS, CORRECT?

1150=A. I AM AWARE OF THAT. THEY'RE NOT AS MANY AS THERE USED TO

1151=BE.

1152=Q. THERE'S -- THERE'S BOOKS-A-MILLION, FOR EXAMPLE?

1153=A. CORRECT.

1154=Q. OKAY. BUT FIRST BEFORE WE GO ON TO THOSE, DO YOU HAVE AN

1155=UNDERSTANDING AS TO WHETHER BARNES & NOBLE OR BORDERS ARE

1156=MEMBERS OF THE ABA?

1157=A. THEY ARE NOT MEMBERS, NO.

1158=Q. THAT'S CORRECT. AND, THEREFORE, THEY'RE NOT ENTITLED TO A

1159=COPY OF THE ABA HANDBOOK NOT BEING MEMBERS UNDER THE TERMS AS

1160=SET FORTH -- THAT WE JUST READ, CORRECT?

1161=A. YES, IT IS. AND IT PUZZLES ME BECAUSE IN ONE OF THE

1162=DEPOSITIONS I READ -- I DON'T KNOW WHETHER IT WAS PATRICIA

1163=BOSTELMAN OR ONE OF THE DEPOSITIONS, ONE OF THE DEFENDANTS'

1164=EXECUTIVES REFERRED TO THE RED BOOK.

1165=Q. NOW -- AS I WAS SAYING, THERE ARE A NUMBER OF OTHER LARGE

1166=NATIONAL CHAINS BESIDES BORDERS AND BARNES & NOBLE. FOR

1167=EXAMPLE, THERE'S BOOKS-A-MILLION?

1168=A. RIGHT.

1169=Q. FAMILIAR WITH THAT?

1170=A. YES, I AM.

1171=Q. ARE THEY MEMBERS OF THE ABA?

1172=A. I DO NOT BELIEVE THEY ARE.

1173=Q. NO. THERE'S HASTINGS. ARE YOU FAMILIAR WITH THAT CHAIN?

1174=A. YES, I AM.

1175=Q. I BELIEVE THEY HAVE APPROXIMATELY 125 STORES OR SO?

1176=A. RIGHT.

1177=Q. BOOKS-A-MILLION, APPROXIMATELY 150 STORES OR SO? THEY'RE

1178=NOT MEMBERS OF ABA EITHER, ARE THEY?

1179=A. I DON'T BELIEVE THEY ARE.

1180=Q. OKAY. THERE'S CROWN OR SUPER CROWN, AS IT'S SOMETIMES

1181=CALLED. YOU FAMILIAR WITH THAT CHAIN?

1182=A. YES, BUT I'M NOT SURE THEY'RE STILL IN BUSINESS.

1183=Q. THEY WERE -- THERE HAS BEEN A BANKRUPTCY FILING THAT YOU'RE

1184=REFERRING TO, I TAKE IT; IS THAT CORRECT?

1185=A. CORRECT.

1186=Q. AND -- BY THERE ARE STILL SOME CROWNS IN OPERATION. ARE YOU

1187=FAMILIAR WITH THAT?

1188=A. I HAVEN'T BEEN IN ANY CROWNS RECENTLY.

1189=Q. OKAY. HAVE YOU HEARD OF A COMPANY CALLED MEDIA PLAY?

1190=A. MEDIA PLAY IS BASED IN THE TWIN CITIES.

1191=Q. UM-HMM. AND THAT'S A LARGE CHAIN, CORRECT?

1192=A. CORRECT.

1193=Q. HAVE YOU HEARD OF WAL-MART?  
1194=A. BE HARD NOT TO HEAR ABOUT WAL-MART.  
1195=Q. IT WOULD BE, WOULDN'T IT? THEY'RE SORT OF EVERYWHERE,  
1196=AREN'T THEY?  
1197= WAL-MART SELLS BOOKS, TOO, DON'T THEY?  
1198=A. YES, WAL-MART SELLS BOOKS.  
1199=Q. WAL-MART'S NOT A MEMBER OF THE ABA?  
  
1200=A. NOT TO MY KNOWLEDGE.  
1201=Q. YOU'VE HEARD OF COSTCO?  
1202=A. OH, YES.  
1203=Q. OKAY. COSTCO SELLS BOOKS, DOESN'T IT?  
1204=A. IT DOES.  
1205=Q. COSTCO'S NOT A MEMBER OF THE ABA?  
1206=A. NO, COSTCO IS NOT.  
1207=Q. OKAY. HAVE YOU HEARD OF K-MART?  
1208=A. YES.  
1209=Q. OKAY. K-MART SELLS BOOKS, DOESN'T IT?  
1210=A. THEY CERTAINLY DO.  
1211=Q. K-MART'S NOT A MEMBER OF THE ABA, CORRECT?  
1212=A. THAT'S CORRECT.  
1213=Q. WHEN YOU ADD UP ALL OF THESE VARIOUS COMPANIES, AND YOU --  
1214=NATIONAL CHAINS, AND YOU TALK ABOUT THE VOLUME OF BOOKS THAT  
1215=THEY SELL, DOES IT EXCEED THE VOLUME OF BOOKS SOLD BY THE  
1216=MEMBERS OF THE ABA?  
1217=A. YES, IT DOES. I THINK I'VE SEEN FIGURES ON THAT.  
1218=Q. AND IN ADDITION TO THAT, THERE ARE OTHER INDEPENDENT BOOK  
1219=STORES THAT FOR WHATEVER REASON HAVE ELECTED NOT TO JOIN THE  
1220=ABA, CORRECT?  
1221=A. YES.  
1222=Q. AND THEN THERE'S AMAZON, CORRECT? THEY SELL BOOKS?  
1223=A. THEY CERTAINLY DO.  
1224=Q. NOT MEMBERS OF THE ABA?  
  
1225=A. THAT'S A DIFFERENT WAY OF SELLING BOOKS.  
1226=Q. NOW, MS. SEE, YOU DON'T KNOW THE TERMS UNDER WHICH COSTCO  
1227=PURCHASES ITS BOOKS, CORRECT?  
1228=A. THAT IS CORRECT.  
1229=Q. YOU DON'T KNOW THE TERMS UNDER WHICH WAL-MART PURCHASES ITS  
1230=BOOKS, CORRECT?  
1231=A. THAT IS CORRECT.  
1232=Q. YOU DON'T KNOW THE TERMS UNDER WHICH -- LET'S SEE, DID I --  
1233=COSTCO, WAL-MART -- K-MART PURCHASES ITS BOOKS, CORRECT?  
1234=A. THAT IS CORRECT.  
1235=Q. YOU DON'T KNOW THE TERMS UNDER WHICH BOOKS-A-MILLION  
1236=PURCHASES ITS BOOKS, CORRECT?  
1237=A. THAT IS CORRECT.  
1238=Q. YOU DON'T KNOW THE TERMS UNDER WHICH SUPER CROWN PURCHASES  
1239=ITS BOOKS?  
1240=A. THAT'S CORRECT.  
1241=Q. IN FACT, OTHER THAN THE DOCUMENTS YOU'VE EXAMINED IN THIS  
1242=CASE, YOU DON'T KNOW THE TERMS AND CONDITIONS UNDER WHICH ANY OF  
1243=THE NATIONAL CHAINS PURCHASED BOOKS FROM PUBLISHERS, CORRECT?  
1244=A. THAT IS CORRECT.  
1245=Q. NOW, I WANTED TO TAKE A MOMENT AND JUST GO OVER A BIT THE  
1246=DOCUMENTS THAT YOU'VE DISCUSSED TODAY IN YOUR DIRECT  
1247=EXAMINATION.  
1248= FIRST, I WANTED TO JUST SORT OF DATE THESE DOCUMENTS  
1249=AS -- BY MY TALLY, AND PLEASE INDICATE IF I'M INCORRECT, THE  
  
1250=FIRST BARNES & NOBLE DOCUMENT THAT YOU DISCUSSED I BELIEVE WAS  
1251=IN TAB 5, THAT'S A 1995 TERMS PROFILE; IS THAT CORRECT?  
1252=A. THAT IS CORRECT, BUT I HAVE EXAMINED MANY, MANY, MANY BARNES  
1253=& NOBLES TERMS PROFILE.  
1254=Q. BUT --  
1255=A. I ALSO HAVE EXAMINED TERMS PROFILES FOR LATER YEARS. I WAS  
1256=NOT ALLOWED TO TESTIFY ABOUT WHAT I'VE EXAMINED.  
1257= (CONTINUED NEXT PAGE; NOTHING OMITTED.)  
1258=  
1259=  
1260=  
1261=  
1262=

1263=  
1264=  
1265=  
1266=  
1267=  
1268=  
1269=  
1270=  
1271=  
1272=  
1273=  
1274=

1275=BY MR. WELSH:

1276=Q. YOU ALSO EXAMINED TERMS FOR '96, '97, '98, CORRECT?

1277=A. AND EARLIER YEARS, YES.

1278=Q. AND EARLIER YEARS. THOSE DOCUMENTS ARE NOT IN THIS BINDER,  
1279=ARE THEY?

1280=A. NO.

1281=Q. OKAY.

1282=A. HOWEVER, I HAVE BEEN THROUGH THEM.

1283=Q. NOW, THE NEXT DOCUMENT I SEE IN HERE IS A 1995 MEMO, AND

1284=THAT IS IN TAB 7. CORRECT? THAT WOULD BE THE DATE FOR TAB 7,  
1285=1995?

1286=A. CORRECT.

1287=Q. THEN I THINK WE MOVE ON TO TAB 11. THAT'S A 1994 DOCUMENT,  
1288=CORRECT?

1289=A. THAT IS CORRECT, BUT AGAIN, I HAVE SEEN MANY SIMILAR

1290=DOCUMENTS. OBVIOUSLY, WE COULDN'T BING IN ALL THE DOCUMENTS

1291=THAT I'VE READ.

1292=Q. BUT YOU DID NOT INCLUDE AND DISCUSS SPECIFICALLY IN YOUR

1293=DIRECT EXAMINATION -- JUST LET ME FINISH THE QUESTION --

1294=ACCOUNTS PAYABLE REPORTS FOR '99, '98, '97, '96 OR '95,

1295=CORRECT?

1296=A. I DID NOT INCLUDE THEM IN MY REPORT, FOR MY DIRECT

1297=EXAMINATION. HOWEVER, I HAVE REVIEWED THEM.

1298=Q. NOW, THE NEXT DOCUMENT WE HAVE HERE IS -- I THINK IS IN TAB

1299=12, A SERIES OF 1997 DOCUMENTS, IS THAT CORRECT?

1300=A. THAT'S RIGHT.

1301=Q. OKAY. AND THEN MOVING ON TO TAB 13, THE TOP VENDOR REPORT,  
1302=THAT'S A SERIES OF 1996 DOCUMENTS, CORRECT?

1303=A. I'M TRYING TO FIND THE DATE. YES, THAT IS RIGHT.

1304=Q. GOING BACK FOR A MOMENT TO TAB 11, WHICH IS THE MAY, 1994

1305=ACCOUNTS PAYABLE REPORT, YOU MENTIONED THAT YOU HAD REVIEWED

1306=OTHER SUCH REPORTS, IS THAT CORRECT?

1307=A. YES, IT IS.

1308=Q. AND IS IT NOT TRUE, MS. SEE, THAT THERE ARE NO ACCOUNTS

1309=PAYABLE REPORTS BY BARNES & NOBLE AFTER THE SPRING OF 1995 THAT

1310=REFER OR REPORT ON ANY SO-CALLED SPECIAL DEALS?

1311=A. YES, I REALIZE THAT.

1312=Q. THANK YOU.

1313=A. HOWEVER, IT JUST MEANS THEY HAD STOPPED REPORTING. MY

1314=UNDERSTANDING MIGHT BE THAT THEY HAD JUST STOPPED REPORTING.

1315= MR. WELSH: I WOULD MOVE TO STRIKE AS WITHOUT

1316=FOUNDATION, YOUR HONOR. IT'S PURE SPECULATION.

1317= THE COURT: THE MOTION TO STRIKE IS GRANTED.

1318=BY MR. WELSH:

1319=Q. WE MOVE ON NOW TO TAB 14, AND THAT IS A 1997 E-MAIL,

1320=CORRECT?

1321=A. YES, IT IS.

1322=Q. AND THEN I THINK WE FINISH OFF HERE WITH TAB 16, WHICH IS A

1323=SET OF -- WHICH IS A 1996 E-MAIL, CORRECT?

1324=A. TAB 16 ACTUALLY IS A 1998 RED BOOK.

1325=Q. I APOLOGIZE. THERE'S A TAB 15. TAB 15. EXCUSE ME.

1326=A. YES.

1327=Q. 1996.

1328=A. CORRECT.

1329=Q. AND I BELIEVE THAT ROUNDS OUT THE DOCUMENTS INCLUDED IN

1330=THIS NOTEBOOK PERTAINING TO BARNES & NOBLE, IS THAT CORRECT?

1331=A. THAT IS CORRECT, BUT I WOULD JUST LIKE TO REITERATE THAT I

1332=DID REVIEW MANY, MANY DOCUMENTS.

1333=Q. I UNDERSTAND, YOU'VE SAID THAT REPEATEDLY, BUT I'D  
1334=APPRECIATE IT, JUST SO WE CAN GET THROUGH THIS, IF I'VE GOT A  
1335=QUESTION OUT THERE AND YOU CAN ANSWER IT YES OR NO, I'D  
1336=APPRECIATE IT IF YOU DID THAT. THANK YOU.  
1337= NOW, LET'S TURN FIRST TO TAB 5. THIS IS A 1995 AVON  
1338=TERM -- SO-CALLED TERMS PROFILE, CORRECT?  
1339=A. YES, IT IS A TERMS PROFILE.  
1340=Q. NOW, YOU INTERPRET THIS DOCUMENT AS PROVIDING AN ADDITIONAL  
1341=DISCOUNT TO BARNES & NOBLE WITH REGARD TO ITS RDC THAN IS  
1342=STATED IN THE RED BOOK, CORRECT?  
1343=A. THAT IS CORRECT.  
1344=Q. OKAY. YOU DON'T QUARREL WITH THE FACT THAT THE RETAIL DROP  
1345=SHIPMENT PERCENTAGES THAT ARE THERE, 44 AND 46, ARE WHAT'S IN  
1346=THE RED BOOK, CORRECT?  
1347=A. THAT IS CORRECT.  
1348=Q. OKAY. NOW, DO YOU RECALL IN YOUR REPORT THAT YOU SIMILARLY  
1349=CONCLUDED THAT THERE WAS A 2 PERCENT VARIATION BETWEEN WHAT WAS  
  
1350=IN THE RED BOOK AND WHAT WAS ON A BARNES & NOBLE'S TERM PROFILE  
1351=WITH REGARD TO MACMILLAN?  
1352= MR. SPIVA: OBJECTION, YOUR HONOR. HE HAS  
1353=MISCHARACTERIZED THE TESTIMONY AND THE DOCUMENT.  
1354= MR. WELSH: WE WILL GO TO IT, YOUR HONOR, AND WE'LL  
1355=SEE.  
1356= THE COURT: ALL RIGHT.  
1357=BY MR. WELSH:  
1358=Q. DO YOU RECALL IN YOUR REPORT YOU IDENTIFIED A 2 PERCENT  
1359=DIFFERENCE --  
1360=A. YES.  
1361=Q. -- WITH REGARD TO MACMILLAN?  
1362=A. YES, I DO.  
1363=Q. OKAY. AND I'D LIKE YOU TO TURN TO TAB 4 OF THE BINDER, AND  
1364=THAT'S -- DO YOU HAVE THAT?  
1365=A. I DO, BUT EXCUSE ME, I WAS NOT ALLOWED TO USE THIS, THIS  
1366=MORNING. THIS IS THE 19 -- THIS IS THE YEAR 2000.  
1367=Q. NO, NO, I'M SORRY, YOU'RE IN THE WRONG BOOK.  
1368= MAY I APPROACH THE WITNESS?  
1369=A. SORRY, YOU DIDN'T EXPLAIN TO ME I HAD THE WRONG BOOK.  
1370=Q. WE'RE GOING TO BE USING MY BOOK.  
1371=A. ALL RIGHT.  
1372=Q. THANK YOU. I APOLOGIZE FOR NOT MAKING THAT CLEAR. OKAY,  
1373=DO YOU HAVE THAT IN FRONT OF YOU?  
1374=A. I DO.  
  
1375=Q. OKAY. AND DURING YOUR DEPOSITION IT WAS POINTED OUT TO YOU  
1376=THAT THE 2 PERCENT VARIATION OR DIFFERENCE THAT YOU HAD  
1377=REPORTED IN YOUR REPORT COULD --  
1378= MR. SPIVA: OBJECTION, YOUR HONOR. WE WOULD REQUEST  
1379=THE PAGE AND LINE BE PROVIDED.  
1380= THE COURT: YOU REFERRED TO TAB 4.  
1381= MR. SPIVA: HE'S REFERRING TO HER DEPOSITION NOW,  
1382=YOUR HONOR.  
1383= MR. WELSH: I'M SIMPLY SETTING IT UP IN TERMS OF,  
1384=THIS WAS SOMETHING SHE WENT OVER IN HER DEPOSITION.  
1385= MR. SPIVA: I KNOW YOU'RE SETTING IT UP, BUT I THINK  
1386=SHE SHOULD BE PERMITTED TO SEE THE PAGE AND LINE NUMBER.  
1387= THE COURT: CAN YOU PHRASE YOUR QUESTION ANOTHER  
1388=WAY?  
1389= MR. WELSH: LET ME REPHRASE IT.  
1390=Q. DO YOU RECALL BEING SHOWN AT YOUR DEPOSITION THE LINE AT  
1391=THE BOTTOM OF THE MACMILLAN PUBLISHING TERM SHEET?  
1392=A. OH, I DO RECALL.  
1393=Q. AND THAT LINE SAYS, "MACMILLAN RETAIL DISCOUNT INCLUDES  
1394=ADDITIONAL 2 PERCENT FOR ELECTRONIC ORDERS." DO YOU RECALL  
1395=THAT?  
1396=A. YES, I DO REMEMBER THIS.  
1397=Q. AND YOU RECALL LOOKING AT THE RDC -- OR, EXCUSE ME -- THE  
1398=RED BOOK ENTRY FOR MACMILLAN FOR 1995, WHICH IS PROVIDED IN THE  
1399=NEXT --  
  
1400=A. RIGHT.  
1401=Q. -- EXHIBIT. AND DO YOU RECALL LOOKING AT THE SECTION ON  
1402=ELECTRONIC ORDERING, WHICH STATES, "CONTACT MGR SALES REP FOR

1403=DETAILS"? YOU SEE THAT?  
1404=A. I DO SEE THAT.  
1405=Q. OKAY. NOW, I'M SORRY TO DO THIS TO YOU, MS. SEE, BUT I DO  
1406=NEED YOU TO GO BACK TO THE OTHER BOOK. I'M SORRY.  
1407=A. THAT'S ALL RIGHT, AS LONG AS I KNOW.  
1408=Q. THAT'S RIGHT, AND I'LL TRY TO MAKE CLEAR WHICH BOOK WE'RE  
1409=IN, BECAUSE I KNOW IT'S CONFUSING.  
1410= AND WHEN YOU LOOK TO THE RED BOOK ENTRY FOR AVON  
1411=BOOKS, IT REFERENCES ELECTRONIC ORDERING, DOESN'T IT?  
1412=A. EXCUSE ME, ARE YOU IN TAB 6?  
1413=Q. YES, I AM.  
1414=A. YES, I SEE THE ELECTRONIC ORDER.  
1415=Q. AS YOU SIT HERE TODAY, YOU DON'T KNOW WHETHER THE  
1416=ADDITIONAL 2 PERCENT THAT BARNES & NOBLE RECEIVED WITH REGARD  
1417=TO -- OR THAT IS IDENTIFIED ON THE TERMS PROFILE SHEET THAT  
1418=YOU'VE LOOKED AT, IS ACCOUNTED FOR IN TERMS OF A 2 PERCENT  
1419=ELECTRONIC ORDERING DISCOUNT OF THE SAME KIND THAT MACMILLAN  
1420=PROVIDED BARNES & NOBLE IN THE SAME YEAR, CORRECT?  
1421=A. CORRECT, BUT THE 2 PERCENT -- ARE YOU REFERRING TO THE  
1422=RETAIL DROP SHIP? BECAUSE I WAS REFERRING TO THE RETAIL  
1423=DISTRIBUTION CENTER DISCOUNT WHEN I WAS REFERRING TO THE AVON  
1424=TERMS PROFILE.  
  
1425=Q. I UNDERSTAND, BUT THERE LIKEWISE COULD BE A 2 PERCENT  
1426=DISCOUNT PROVIDED FOR ELECTRONIC ORDERING WITH REGARD TO THE  
1427=RDC.  
1428=A. AND I WAS ALSO REFERRING TO THE 4 PERCENT INCENTIVE.  
1429=Q. LET'S -- I'M SORRY, BUT WE'LL DEAL WITH THAT IN JUST A  
1430=SECOND. OKAY. I JUST WAS FOCUSING ON 50 PERCENT. OKAY.  
1431= NOW, LET'S TURN TO THE 4 PERCENT INCENTIVE. THAT'S  
1432=A VOLUME INCENTIVE, ISN'T IT?  
1433=A. IT IS A DISTRIBUTOR DISCOUNT INCENTIVE.  
1434=Q. MS. SEE, WOULD YOU TURN TO YOUR -- THE DIRECT --  
1435=PLAINTIFFS' TAB 7, AND TO THE SECOND DOCUMENT, I BELIEVE IT IS,  
1436=IN THAT TAB, BEARING BATES NUMBER BN 0151087. DO YOU HAVE  
1437=THAT?  
1438=A. I DO HAVE THAT.  
1439=Q. AND IT STATES THERE -- THAT'S THE AVON, "PLUS 4 PERCENT,  
1440=BASED ON VOLUME OF," DO YOU SEE THAT?  
1441=A. I DO SEE THAT.  
1442=Q. OKAY.  
1443=A. BUT THE POINT I WAS MAKING IN MY TESTIMONY, IN MY  
1444=EXPLANATION THIS MORNING, WAS THAT THE LATTER LETTER TO AVON  
1445=FROM AVON -- EXCUSE ME -- TO AVON FROM BARNES & NOBLE, REFERS  
1446=TO AVON'S DISTRIBUTOR DISCOUNT INCENTIVE, AND MY POINT IS THAT  
1447=THERE'S A DIFFERENCE. A DISTRIBUTOR MEANS WHOLESALER.  
1448=Q. DID YOU SPEAK TO ANYONE AT AVON TO CONFIRM YOUR  
1449=INTERPRETATION OF THIS?  
  
1450=A. NO, BUT I THINK I KNOW THE MEANING OF THE TERM  
1451="DISTRIBUTOR."  
1452=Q. IT'S TRUE, THOUGH, IS IT NOT, THAT THE SAME 4 PERCENT --  
1453=ADDITIONAL 4 PERCENT DISCOUNT IS LISTED ON THIS PAGE AS BASED  
1454=ON VOLUME, THAT WE'VE JUST REFERRED TO, CORRECT?  
1455=A. YES.  
1456=Q. OKAY.  
1457=A. AND DISTRIBUTOR INCENTIVES ARE BASED ON VOLUME.  
1458=Q. AND IT IS COMMON IN THE BOOKSELLING INDUSTRY TO PROVIDE  
1459=DISCOUNTS BASED ON VOLUME. YOU TESTIFIED TO THAT YESTERDAY,  
1460=CORRECT?  
1461=A. YOUR DISCOUNT SCHEDULE IS BASED ON VOLUME, AND INCENTIVE IS  
1462=A LITTLE DIFFERENT.  
1463=Q. BUT INCENTIVES ARE COMMONLY BASED ON VOLUME, AS WELL,  
1464=CORRECT?  
1465=A. YES.  
1466=Q. THANK YOU. NOW, IN YOUR TESTIMONY YESTERDAY YOU REFERRED  
1467=TO WHOLESALERS, AND I'D LIKE TO JUST READ A BRIEF EXCHANGE,  
1468=WHERE YOU DESCRIBE THE FUNCTIONS PERFORMED BY A WHOLESALER.  
1469=QUESTIONS POSED BY -- AND THIS IS FROM YESTERDAY'S TRANSCRIPT,  
1470=AT PAGE 331, LINE 25, THROUGH 332, LINE 3:  
1471= "Q. MS. SEE, WHEN A PUBLISHER SELLS TO A  
1472= WHOLESALER, WHAT IS YOUR UNDERSTANDING OF  
1473= ESSENTIALLY HOW THAT ARRANGEMENT NORMALLY WORKS?

1474= "A. WHEN A PUBLISHER SELLS TO A WHOLESALER, THE  
1475= WHOLESALER RECEIVES THE BOOKS, PUTS THOSE BOOKS IN  
1476= THE INVENTORY, AND THEN SELLS THOSE BOOKS TO  
1477= BOOKSTORES AT THEIR WHOLE-", AND THEN THERE'S A  
1478= DASH, "THEIR WHOLESALER DISCOUNT."  
1479= IN THAT TESTIMONY, MR. SEE, YOU IDENTIFIED  
1480=BASICALLY, AS I SEE IT, THREE FUNCTIONS: RECEIVING THE BOOKS,  
1481=INVENTORYING THE BOOKS, AND THEN DISTRIBUTING THE BOOKS TO  
1482=RETAIL OUTLETS, CORRECT?  
1483=A. SELLING THE BOOKS TO RETAIL OUTLETS.  
1484=Q. IN TERMS OF THE FUNCTIONS PERFORMED BY A WHOLESALER, FROM A  
1485=PUBLISHER'S PERSPECTIVE, THE ARRANGEMENT BETWEEN A WHOLESALER  
1486=AND A RETAIL OUTLET IS NOT THE PUBLISHER'S CONCERN, FOR  
1487=EXAMPLE. IF A WHOLESALER WANTED TO GIVE EXTRAORDINARY  
1488=DISCOUNTS, NEVER HEARD OF BEFORE, THAT WOULD BE UP TO THE  
1489=WHOLESALER, AND THE PUBLISHER COULD NOT PREVENT IT, CORRECT?  
1490=A. THAT IS CORRECT.  
1491=Q. OKAY. SO THE RELATIONSHIPS BETWEEN WHOLESALERS AND  
1492=RETAILERS ARE BASICALLY TO BE DETERMINED BY WHOLESALERS AND  
1493=RETAILERS, NOT BY PUBLISHERS, CORRECT?  
1494=A. YES.  
1495=Q. OKAY. THE PUBLISHER PROVIDES A DISCOUNT TO WHOLESALERS FOR  
1496=THE FUNCTIONS THAT THE WHOLESALER PERFORMS IN THE DISTRIBUTION  
1497=PROCESS, CORRECT?  
1498=A. YES.  
1499=Q. AND LOOKING AT IT FROM A DISTRIBUTION PERSPECTIVE, THOSE  
  
1500=FUNCTIONS ARE RECEIVING THE BOOKS, INVENTORYING THE BOOKS AT  
1501=THE WHOLESALER'S WAREHOUSE, AND THEN DISTRIBUTING THOSE BOOKS  
1502=OUT TO THE RETAIL OUTLETS, CORRECT?  
1503=A. YES.  
1504=Q. OKAY. AND IS IT NOT TRUE, MS. SEE, THAT ALL THREE OF THOSE  
1505=FUNCTIONS THAT WE'VE JUST DISCUSSED ARE PERFORMED BY BARNES &  
1506=NOBLE'S RETAIL DISTRIBUTION CENTER?  
1507= MR. SPIVA: OBJECTION, LACKS FOUNDATION, YOUR HONOR.  
1508= THE COURT: ACTUALLY, SHE'S TESTIFYING AS YOUR  
1509=EXPERT.  
1510= THE WITNESS: I DON'T KNOW HOW THE BARNES & NOBLE  
1511=RETAILERS' RETAIL DISTRIBUTION CENTER WORKS.  
1512=BY MR. WELSH:  
1513=Q. I WILL REPRESENT TO YOU, THEN, MS. SEE, THAT ALL THREE OF  
1514=THOSE FUNCTIONS ARE PERFORMED BY THE BARNES & NOBLE RETAIL  
1515=DISTRIBUTION CENTER.  
1516= COULD YOU LOOK AT ME, PLEASE? THANK YOU.  
1517= ALL RIGHT. I WILL REPRESENT THAT ALL THREE OF THOSE  
1518=FUNCTIONS ARE PERFORMED BY THE BARNES & NOBLE RETAIL  
1519=DISTRIBUTION CENTER AND THAT'S WHAT THE EVIDENCE SHOWS.  
1520= SO ACCEPTING MY REPRESENTATION, SINCE YOU DON'T KNOW  
1521=AND HAVE NO OPINION ON THE BARNES & NOBLE RETAIL DISTRIBUTION  
1522=CENTER AND HOW IT OPERATES, BUT ACCEPTING MY REPRESENTATION,  
1523=THEN, YOU WOULD AGREE THAT THE VERY FUNCTIONS YOU IDENTIFIED AS  
1524=BEING PERFORMED BY A WHOLESALER ARE BEING PERFORMED BY A BARNES  
  
1525=& NOBLE RETAIL DISTRIBUTION CENTER, CORRECT?  
1526=A. YES, IF THAT'S YOUR REPRESENTATION.  
1527=Q. THANK YOU. I'D NOW LIKE TO TALK A LITTLE BIT ABOUT STOCK  
1528=OFFERS, AND IN PARTICULAR, THE ONE STOCK OFFER THAT YOU  
1529=MENTIONED IN YOUR DIRECT EXAMINATION.  
1530= FORGIVE ME, MS. SEE, BUT IS THERE A TAB RELATING TO  
1531=THAT PARTICULAR STOCK OFFER?  
1532=A. JUST A MOMENT. I'LL TELL YOU. IT WAS TAB 12, THE BANTAM  
1533=DOUBLEDAY FLEX STOCK OFFER.  
1534=Q. YES, THANK YOU. NOW, I WANTED TO JUST CLARIFY SOMETHING.  
1535=LET'S TURN TO THE STOCK OFFER ITSELF. I BELIEVE THAT'S ON PAGE  
1536=14.  
1537= I LISTENED -- I TRIED TO LISTEN CAREFULLY TO YOUR  
1538=DISCUSSION OF THE STOCK OFFER, AND WHAT I HEARD YOU SAY WAS  
1539=THAT THE STOCK OFFER PERMITTED SOMEONE TO -- A BOOKSELLER TO  
1540=PLACE FOUR ORDERS UP TO 200 BOOKS PER ORDER, BUT THAT'S NOT  
1541=WHAT THE STOCK OFFER SAYS, IS IT?  
1542=A. AT LEAST 200.  
1543=Q. THERE'S NO LIMITS ON HOW MANY BOOKS CAN BE PURCHASED UNDER

1544=THIS STOCK OFFER.  
1545=A. CORRECT, AND I MISSPOKE.  
1546=Q. AND I WANT TO GIVE YOU A HYPOTHETICAL. SUPPOSE YOU'RE A  
1547=PUBLISHER, AND YOU HAVE A STOCK OFFER SIMILAR TO THE ONE BY  
1548=BDB. AND AS YOU TESTIFIED YESTERDAY, THE PURPOSE OF STOCK  
1549=OFFERS IS TO SELL BOOKS, RIGHT?

1550=A. CORRECT.  
1551=Q. ALL RIGHT. YOU WANT TO SELL AS MANY AS YOU CAN IN AS SHORT  
1552=A PERIOD OF TIME AS YOU CAN, RIGHT?  
1553=A. YES.  
1554=Q. OKAY. NOW, LET ME GIVE YOU THIS HYPOTHETICAL. SUPPOSE  
1555=YOU'RE STILL OPERATING THE BOOKCASE AND YOU PLACE AN ORDER FOR  
1556=THESE BOOKS, AND YOU GET A CALL FROM BDD AND IT SAYS, "WE'VE  
1557=GOT SOME GOOD NEWS FOR YOU, MS. SEE. YOU'RE NUMBER 11 ON THE  
1558=LIST, BUT THE BAD NEWS IS, LET ME TELL YOU THE TEN CUSTOMERS  
1559=THAT ARE AHEAD OF YOU. BARNES & NOBLE, BORDERS, HASTINGS,  
1560=MEDIA PLAY, BOOKS-A-MILLION, SUPER CROWN, COSTCO, K-MART,  
1561=WALMART AND AMAZON. AND WE'VE GOT TO FULFILL ALL OF THOSE  
1562=ORDERS BEFORE WE CAN GET TO YOURS. AND BECAUSE THESE LARGE  
1563=NATIONAL CHAINS HAVE RETAIL DISTRIBUTION CENTERS AND THEY CAN  
1564=INVENTORY AN AWFUL LOT OF BOOKS, THEY HAVE PLACED LITTER --  
1565=THEY HAVE PLACED ORDERS FOR LITERALLY TENS OF THOUSANDS OF  
1566=BOOKS. SO IT'S GOING TO TAKE US AWHILE TO GET TO YOUR ORDER."  
1567=OKAY?  
1568= THE ANALOGY IS SORT OF TRYING TO PUT A PIG THROUGH A  
1569=SNAKE, IF YOU WILL, MS. SEE. DO YOU HAVE ANY FAMILIARITY WITH  
1570=THE PROBLEMS THAT PUBLISHERS CONFRONT WHEN THEY RECEIVE FROM  
1571=ALL THESE NATIONAL CHAINS THESE HUGE, VOLUMINOUS ORDERS? DO  
1572=YOU HAVE ANY PERSONAL EXPERIENCE WITH THAT?  
1573=A. NO.  
1574=Q. DO YOU HAVE ANY PERSONAL EXPERIENCE IN DEALING WITH THE

1575=LOGISTICAL ISSUES THAT RECEIVING THOSE KINDS OF ORDERS ENTAIL?  
1576=A. NO.  
1577=Q. IT WOULD BE RATIONAL, IT WOULD BE A SOUND BUSINESS DECISION  
1578=FOR A PUBLISHER TO SAY TO THE CHAINS, "LOOK, GUYS, WE JUST  
1579=CAN'T PROCESS THESE ORDERS IN THIS NUMBER. DO US A FAVOR.  
1580=FIGURE OUT HOW MANY BOOKS YOU WANT TO BUY, ACCORDING TO A STOCK  
1581=OFFER, AND THEN BREAK THEM DOWN INTO SMALLER ORDERS, SO THAT WE  
1582=CAN TRY TO PROCESS THEM THROUGH OUR NORMAL SYSTEM, WITHOUT JUST  
1583=RUNNING AMOK, IN TERMS OF OUR DISTRIBUTION SYSTEM."  
1584= THAT WOULD BE A RATIONAL RESPONSE BY A PUBLISHER,  
1585=WOULDN'T IT?  
1586=A. IT MIGHT BE A RATIONAL RESPONSE BY THE PUBLISHER, BUT THEN  
1587=IF THEY'RE GOING TO DO THAT, THAT SHOULD BE PART OF THE STOCK  
1588=OFFER. THERE ARE --  
1589=Q. BUT SINCE, UNDER THE TERMS OF THIS OFFER, AS WE'VE  
1590=ESTABLISHED, THE CHAINS CAN BUY AS MANY BOOKS AS THEY WANT  
1591=UNDER THESE OFFERS, RIGHT? THERE'S NO LIMITATION HERE,  
1592=CORRECT?  
1593=A. CORRECT, BUT WE --  
1594=Q. BUT JUST FOLLOW ME. STAY WITH ME HERE. THERE'S NO  
1595=LIMITATION. SO THEY COULD ORDER A HUNDRED THOUSAND UNITS UNDER  
1596=THIS OFFER AND STILL KEEP WITHIN THE TERMS OF THE STOCK OFFER,  
1597=CORRECT?  
1598=A. THAT IS CORRECT, BUT WE KNOW THAT THE CHAINS USE  
1599=JUST-IN-TIME INVENTORY. THEY'RE NOT -- IT WOULD BE MY OPINION

1600=THAT THEY WOULD NOT BE ORDERING THOUSANDS OF BOOKS AT ONE  
1601=POINT.  
1602=Q. DO YOU HAVE ANY UNDERSTANDING OF WHAT -- WELL, NO, YOU  
1603=DON'T HAVE UNDERSTANDING ABOUT WHAT THE RDC IS FOR, CORRECT, AS  
1604=YOUR --  
1605=A. I DO -- EXCUSE ME --  
1606=Q. YOUR COUNSEL OBJECTED ON LACK OF FOUNDATION, SO I WON'T --  
1607= MR. SPIVA: OBJECTION, YOUR HONOR. HE'S NOT  
1608=ALLOWING THE WITNESS TO FINISH HER ANSWER.  
1609=BY MR. WELSH:  
1610=Q. IT IS POSSIBLE FOR CHAINS TO USE THEIR NATIONAL -- THEIR  
1611=RETAIL DISTRIBUTION CENTERS TO HOUSE BOOKS SO THAT THEY CAN  
1612=THEN DELIVER THOSE BOOKS TO THEIR RETAIL STORES JUST IN TIME AS  
1613=THEY NEED THEM, CORRECT?

1614=A. I UNDERSTAND THAT. YES.  
1615=Q. OKAY, GOOD. GOOD. SO IT MAKES SENSE, THEN, FOR  
1616=PUBLISHERS, OR FOR NATIONAL CHAINS, TO TAKE ADVANTAGE OF THESE  
1617=STOCK OFFERS AND BUY A LOT OF BOOKS.  
1618=A. AND THERE ARE OTHER STORES THAT MIGHT ALSO BE ABLE TO DO  
1619=THIS. THE TATTERED COVER, POWELL'S, THERE ARE OTHERS WHO HAVE  
1620=RETAIL DISTRIBUTION CENTERS. THIS WAS SIGNED JUST FOR BARNES &  
1621=NOBLE.  
1622=Q. NOW, YOU HAVE NO KNOWLEDGE, AS YOU SIT HERE TODAY, YOU  
1623=WOULD BE PURELY SPECULATING IF YOU WERE TO SAY THAT TATTERED  
1624=COVERS DIDN'T RECEIVE THE SAME DEAL, ISN'T THAT RIGHT? YOU'D  
  
1625=BE PURELY SPECULATING.  
1626=A. THAT IS TRUE.  
1627=Q. OKAY. AND WE DON'T WANT YOU TO DO THAT.  
1628=A. NO.  
1629=Q. OKAY, BUT LET'S SEE IF WE CAN MOVE FROM SPECULATION TO  
1630=TESTIMONY, AND HERE I'D LIKE YOU TO GO TO TAB 11 IN MY BINDER.  
1631=SORRY.  
1632=A. THANK YOU.  
1633=Q. AND I'D LIKE YOU TO GO TO THE VERY END, WHERE THERE IS A  
1634=PORTION OF THE DEPOSITION TESTIMONY OF PATRICIA BOSTELMAN, AND  
1635=LET ME READ THE TESTIMONY I'M INTERESTED IN. IT BEGINS ON PAGE  
1636=550, AND GOES OVER TO 551.  
1637= NOW, JUST TO EXPLAIN, PAGE 550 IS THE SMALLER PAGE  
1638=ON THE UPPER RIGHT-HAND QUADRANT AND THEN IT MOVES DOWN TO 551  
1639=BELOW, AND MS. BOSTELMAN SAYS -- I WON'T QUOTE THE FIRST PART  
1640=OF HER -- FIRST PARAGRAPH OF HER ANSWER, BUT SHE SAYS,  
1641= "MANY -- TO FULLY TAKE ADVANTAGE OF AN OFFER LIKE  
1642= THIS, UNDER THE TIME FRAME AS THE WRITTEN POLICY,  
1643= BARNES & NOBLE WOULD HAVE TO SPEND OUR ORDERING FOR  
1644= SOME PERIOD OF TIME TO INCREASE THE SIZE OF THOSE  
1645= ORDERS TO ACHIEVE THAT -- TO ACHIEVE ANY BENEFIT OF  
1646= THEM, AND BDD AGREED WITH BARNES & NOBLE IN  
1647= DISCUSSIONS THAT IT WOULD BE DISRUPTIVE TO BDD'S  
1648= BUSINESS, AS WELL AS BARNES & NOBLE'S BUSINESS, TO  
1649= HAVE TO STRUCTURE OUR ORDERING PATTERN THAT WAY, TO  
  
1650= TAKE COMPARABLE ADVANTAGE OF THOSE STOCK OFFERS AS  
1651= THEY AGREE TO A FREQUENCY APPROACH."  
1652= DO YOU SEE THAT?  
1653=A. I DO, AND I'M READING FURTHER ON, THAT IT SAYS --  
1654= THE COURT: WELL, LET YOUR COUNSEL PROCEED.  
1655= THE WITNESS: THANK YOU.  
1656=BY MR. WELSH:  
1657=Q. YOU HAVE NO PERSONAL KNOWLEDGE THAT BARNES & NOBLE, BY  
1658=AGREEING WITH BDD TO ADOPT A FREQUENCY APPROACH WITH REGARD TO  
1659=THIS STOCK OFFER, WAS ABLE TO PURCHASE ANY MORE BOOKS THAN IT  
1660=OTHERWISE WOULD HAVE PURCHASED HAD IT SIMPLY PLACED LARGER  
1661=ORDERS, CORRECT?  
1662=A. CORRECT. THERE WERE NO LIMITS ON THE NUMBER OF BOOKS.  
1663=Q. THAT'S RIGHT. NOW, LET'S MOVE ON AND -- I THINK THAT'S ALL  
1664=YOU HAD ON STOCK OFFERS. LET'S MOVE ON AND TALK ABOUT  
1665=STATISTICAL RESERVE, AND I BELIEVE THAT'S IN TAB 14 AND TAB 15.  
1666=WE CAN BEGIN WITH TAB 14.  
1667= NOW, YOU REFERRED TO THIS CORRESPONDENCE FOR THE  
1668=PURPOSE OF INDICATING THAT.... I'M SORRY. WAIT, LET ME STOP.  
1669=A. THE TAB I HAVE IS A DEPOSITION --  
1670=Q. I'M SORRY, I APOLOGIZE. WE'RE BACK IN THE OTHER BINDER.  
1671=I'M VERY SORRY. LET ME GIVE YOU A MOMENT TO GET TO TAB 14.  
1672=A. OKAY.  
1673=Q. NOW, YOU REFERRED TO THIS CORRESPONDENCE AS INDICATING TO  
1674=YOU THAT BARNES & NOBLE WAS TAKING A STATISTICAL RESERVE IN  
  
1675=EXCESS OF WHAT IT KNEW IT WAS ALLOWED TO TAKE. THAT'S YOUR  
1676=INTERPRETATION OF THESE DOCUMENTS?  
1677=A. NO. EXCUSE ME. COULD YOU REPEAT THAT? IT WAS ALLOWED TO  
1678=TAKE...?  
1679=Q. THAT BARNES & NOBLE WAS TAKING A STATISTICAL RESERVE --  
1680=A. RIGHT.  
1681=Q. -- IN EXCESS OF WHAT IT KNEW IT SHOULD BE ABLE TO TAKE.  
1682=A. WELL, PERHAPS IT WASN'T CLEAR IN MY TESTIMONY. I WAS  
1683=TRYING TO ESTABLISH THAT BARNES & NOBLE ESTABLISHED THE

1684=STATISTICAL RESERVE PERCENTAGES, AND THAT THIS CORRESPONDENCE  
1685=REFERRED TO THE MACMILLAN STATISTICAL RESERVES, AND MY  
1686=UNDERSTANDING FROM THIS E-MAIL WAS THAT TERRY DWYER, WHO WAS  
1687=WITH MACMILLAN, WAS ASKING BARNES & NOBLE TO REDUCE THE  
1688=STATISTICAL RESERVE.  
1689=Q. OKAY.  
1690=A. AND MY UNDERSTANDING WAS, AND I MAYBE WASN'T CLEAR THIS  
1691=MORNING, BUT --  
1692=Q. I THINK YOU --  
1693=A. -- BUT THAT BARNES & NOBLE ESTABLISHES THESE STATISTICAL  
1694=RESERVES, AND TELLS THE PUBLISHERS WHAT THOSE STATISTICAL  
1695=RESERVES WILL BE.  
1696=Q. SO IN YOUR TESTIMONY, THEN, BARNES & NOBLE DICTATED THE  
1697=TERMS TO THE PUBLISHERS, CORRECT, ON STATISTICAL RESERVES?  
1698=A. THEY NEGOTIATED WITH THE PUBLISHERS.  
1699=Q. SO THEY DIDN'T DICTATE, THEY JUST NEGOTIATED. WHICH IS IT?  
  
1700=A. I BELIEVE THAT THEY -- FROM THE OTHER CORRESPONDENCE, NOT  
1701=JUST WITH THIS, I SAW A NUMBER OF E-MAILS ON THIS PARTICULAR  
1702=TOPIC, AND --  
1703=Q. IS IT DICTATED OR NEGOTIATED? THAT'S MY QUESTION.  
1704=A. I BELIEVE THAT BARNES & NOBLE SET THE STATISTICAL RESERVES.  
1705=Q. SO IT DICTATED TERMS.  
1706=A. YES.  
1707=Q. THAT'S YOUR OPINION?  
1708=A. THAT WILL BE MY TESTIMONY.  
1709=Q. NOW, GOING BACK TO TAB 13, WHICH LISTS A VARIETY OF  
1710=STATISTICAL RESERVES, CORRECT?  
1711=A. YES.  
1712=Q. AND AS YOU POINTED OUT IN YOUR DIRECT TESTIMONY, FOR EACH  
1713=PUBLISHER THERE'S A DIFFERENT STATISTICAL RESERVE, CORRECT?  
1714=A. YES.  
1715=Q. OKAY. SO SOME ARE AS LOW AS .10.  
1716=A. CORRECT.  
1717=Q. CORRECT? AND THEN SOME -- AND THEN OTHERS GO UP FROM  
1718=THERE. IS IT YOUR TESTIMONY THAT WITH REGARD TO, SAY, PACIFIC  
1719=PIPELINE, WHICH HAS A STATISTICAL RESERVE OF .10, THAT BARNES &  
1720=NOBLE TOLD PACIFIC PIPELINE THAT IT'S 1.0 (SIC) AND IT'S NOT  
1721=HIGHER THAN THAT? IS THAT YOUR TESTIMONY?  
1722=A. I DON'T QUITE UNDERSTAND THE QUESTION.  
1723=Q. WELL, FOR EXAMPLE, THERE ARE HIGHER STATISTICAL RESERVES  
1724=THAN THE .10.  
  
1725=A. WELL, THE REASON IT'S -- EXCUSE ME, BUT THE REASON THAT  
1726=IT'S LOWER FOR PACIFIC PIPELINE IS THAT THEY ARE A WHOLESALER,  
1727=AND IN THE BUSINESS THE WHOLESALERS USUALLY HAVE MORE EFFICIENT  
1728=AND EFFECTIVE FULFILLMENT, AND SO IT MAKES SENSE TO ME THAT THE  
1729=PACIFIC PIPELINE STATISTICAL RESERVE WOULD BE LOWER.  
1730=Q. BUT WITH REGARD TO, SAY, BAKER & TAYLOR, IT'S .60.  
1731=A. AND I SAW THEM, THAT -- YES, IT IS.  
1732=Q. OKAY, THAT'S MY QUESTION. I'M JUST ASKING YOU. AGAIN, IF  
1733=WE CAN HAVE A YES OR NO, WE CAN REALLY GET THROUGH THIS A LOT  
1734=FASTER. THANK YOU VERY MUCH.  
1735= SO IS IT YOUR TESTIMONY, THEN, MS. SEE, THAT BARNES  
1736=& NOBLE DICTATED TO PACIFIC PIPELINE IT'S GOING TO BE .10 AND  
1737=NOTHING MORE, AND THEN WENT AROUND TO BAKER & TAYLOR AND SAID,  
1738=IT'S GOING TO BE .60? IS THAT YOUR OPINION?  
1739=A. THAT IS MY OPINION, AND I KNOW BAKER & TAYLOR THOUGHT IT  
1740=WAS TOO HIGH.  
1741=Q. AND SOMEHOW HERE, FOR EACH OF THESE PUBLISHERS, IT IS YOUR  
1742=TESTIMONY THAT BARNES & NOBLE DICTATED A DIFFERENT STATISTICAL  
1743=RESERVE; THAT THIS WAS NOT THE SUBJECT OF NEGOTIATION, THAT  
1744=THIS WAS NOT THE SUBJECT OF ORDINARY BUSINESS GIVE-AND-TAKE,  
1745=BUT BARNES & NOBLE MADE A CONSCIOUS DECISION TO DICTATE  
1746=DIFFERENT STATISTICAL RESERVES FOR DIFFERENT PUBLISHERS. IS  
1747=THAT YOUR TESTIMONY?  
1748=A. YES, I BELIEVE THAT'S WHAT THEY WERE DOING.  
1749=Q. OKAY. NOW, TURNING TO THE NEXT TAB, TAB 14 AND TAB 15 --  
  
1750=A. WE'RE STILL IN MY NOTEBOOK.  
1751=Q. WE'RE STILL IN YOUR NOTEBOOK. I NEED TO MAKE THAT CLEAR,  
1752=AND I APOLOGIZE.  
1753=A. EXCUSE ME, 14 AND 15?

1754=Q. WE'LL START WITH 14. NOW, THE LINE YOU READ FROM THIS WHEN  
1755=YOU WERE QUESTIONED BY PLAINTIFFS' COUNSEL WAS THE LAST TWO  
1756=LINES ON THE BOTTOM OF THE PAGE.

1757=A. RIGHT.

1758=Q. OKAY. THE LINE ABOVE THAT, WHICH YOU DIDN'T READ, SAYS, "I  
1759=WOULD LIKE TO AUDIT FIRST, THEN CHANGE THE SR LATER IN '98."

1760= NOW, THAT INDICATES, DOES IT NOT, THAT BARNES &

1761=NOBLE WANTED TO CONDUCT AN AUDIT TO DETERMINE WHAT THE

1762=APPROPRIATE STATISTICAL RESERVE WOULD BE, AND THEN CHANGE THE

1763=STATISTICAL RESERVE DEPENDING UPON THE OUTCOME OF THE AUDIT?

1764=A. THAT IS WHAT --

1765=Q. IS THAT WHAT THAT INDICATES?

1766=A. THAT IS WHAT IT INDICATES, BUT EXCUSE ME, I ALSO REMEMBER,

1767=AS I RECALL FROM SOME OF THE DOCUMENTS I READ, I'M NOT SURE

1768=THOSE AUDITS WERE EVER CONDUCTED.

1769=Q. THOSE DOCUMENTS ARE NOT BEFORE US HERE, ARE THEY?

1770=A. OH, ALL RIGHT, BUT I JUST WANT TO EXPLAIN THAT I WAS -- I

1771=DIDN'T PRESENT ALL THE DOCUMENTATION THAT LED TO MY OPINION.

1772=BUT I READ IT ALL.

1773=Q. NOW, LET'S TURN TO TAB 15. NOW, I BELIEVE HERE YOU SAID --

1774=THE PORTION OF THIS DOCUMENT THAT YOU READ ON DIRECT

1775=EXAMINATION --

1776=A. YES.

1777=Q. -- WAS THE PORTION THAT SAID, "THE BOOK PUBLISHER

1778=PERCENTAGES ARE NOT CURRENTLY FACT-BASED." CORRECT?

1779=A. YES.

1780=Q. OKAY. YOU DIDN'T GO ON AND READ THE REST OF THE SENTENCE,

1781=DID YOU? WHY DON'T YOU DO THAT NOW, FOR US.

1782=A. ALL RIGHT.

1783= "THAT IS WHY ONE OF EILEEN'S 1997 OBJECTIVES IS

1784= TO WORK WITH THE DC TO ESTABLISH A DEADLINE TO PULL

1785= OFF FREIGHT AND PERFORM STATISTICAL CONCEALED

1786= SHORTAGE AUDITS."

1787=Q. YES.

1788=A. EXCUSE ME, BUT I REALIZE THAT, BUT AS I SAID BEFORE, I HAD

1789=SEEN DOCUMENTS THAT INDICATED THAT THOSE AUDITS WERE NEVER

1790=CONDUCTED.

1791=Q. THOSE, AGAIN --

1792= THE COURT: NEVER MIND --

1793= THE WITNESS: I'M SORRY.

1794= THE COURT: MS. SEE, FROM HERE ON OUT, KINDLY ANSWER

1795=THE QUESTION, AND WE KNOW THAT YOU'RE READ LOTS OF DOCUMENTS,

1796=AND I DON'T WANT ANYTHING REPEATED. JUST ANSWER THE QUESTION,

1797=AND THEN WE'LL GET THROUGH WITH THIS.

1798= THE WITNESS: THANK YOU. I'LL TRY TO....

1799=

1800=BY MR. WELSH:

1801=Q. THAT BARNES & NOBLE EXPRESSED IN THESE DOCUMENTS A

1802=WILLINGNESS AND A DESIRE TO CONDUCT AUDITS IS INCONSISTENT WITH

1803=YOUR CONCLUSION THAT BARNES & NOBLE WAS MERELY DICTATING TERMS

1804=TO THE PUBLISHERS OF WHATEVER STATISTICAL RESERVE THEY WANTED,

1805=CORRECT?

1806=A. YES.

1807=Q. I'D NOW LIKE TO TURN TO A NEW SUBJECT, MS. SEE.

1808= AND WITH THE COURT'S PERMISSION, THE DOCUMENTS THAT

1809=I WANT TO REFER TO ARE IN THE NOTEBOOK, BUT BECAUSE OF THE

1810=TO-ING AND FRO-ING, WE HAVE PROVIDED THESE IN A LOOSELEAF

1811=FASHION, SO THAT THEY CAN BE VIEWED MORE EASILY.

1812= THE COURT: THANK YOU.

1813=BY MR. WELSH:

1814=Q. NOW, MS. SEE, THE FIRST DOCUMENT THAT IS IN THIS FOLDER

1815=IS -- APPEARS LIKE THIS, WITHOUT ANY RED INK ON IT, AND IT

1816=BEARS THE NOTATION, "PLAINTIFFS' EXHIBIT 2547."

1817=A. I'M SORRY, THAT'S NOT THE FIRST DOCUMENT IN MY --

1818=Q. CAN YOU LOCATE THAT ONE?

1819=A. MAYBE IT'S IN THE MIDDLE. I'VE LOCATED IT.

1820=Q. OKAY. YOU'VE SEEN THIS DOCUMENT BEFORE?

1821=A. I HAVE SEEN THIS DOCUMENT.

1822=Q. OKAY. I BELIEVE YOU OFFERED SOME TESTIMONY ON THIS

1823=DOCUMENT BEFORE?

1824=A. YES, I DID.

1825=Q. YES.  
1826=A. YES.  
1827=Q. OKAY. WHAT I'D LIKE TO DO IS TO -- YOU NOTICE THAT THIS  
1828=TALKS ABOUT "INGRAM TERMS COMPARISON, BARNES & NOBLE 1998."  
1829=SINCE WE'RE IN THE YEAR 2001, I'D LIKE TO TRY TO UPDATE THIS A  
1830=LITTLE BIT WITH YOU.  
1831= MR. SPIVA: YOUR HONOR, I'M SORRY TO INTERRUPT, BUT  
1832=THE INFORMATION ON THIS -- ON THE CORRECTED SHEET THAT THEY'RE  
1833=PROVIDING CONTAINS INFORMATION THAT IS SUBJECT TO A PROTECTIVE  
1834=ORDER IN A DIFFERENT JURISDICTION, CONCERNING A DEPOSITION THAT  
1835=WAS TAKEN JUST LAST WEEK.  
1836= THE COURT: SO?  
1837= MR. SPIVA: WELL, FIRST OF ALL, MS. SEE HAS NOT HAD  
1838=THE OPPORTUNITY TO FULLY REVIEW THAT, AND SECOND OF ALL, SHE'S  
1839=PREVENTED FROM FULLY ANSWERING BASED ON THAT PROTECTIVE ORDER.  
1840=SHE'S PRECLUDED.  
1841= THE COURT: NOT IN MY COURT SHE'S NOT. THAT WAS IN  
1842=ANOTHER JURISDICTION.  
1843= MR. SPIVA: I JUST WANTED TO CLARIFY YOUR HONOR WAS  
1844=GIVING HER PERMISSION TO RESPOND.  
1845= THE COURT: YES.  
1846= MR. WELSH: THANK YOU.  
1847=Q. NOW, FIRST OF ALL, MS. SEE, DID YOU PREPARE THIS DOCUMENT,  
1848=PLAINTIFF'S EXHIBIT 2547?  
1849=A. THE TERMS COMPARISON FOR '98?  
  
1850=Q. YES.  
1851=A. I WORKED THROUGH THIS, YES.  
1852=Q. OKAY.  
1853=A. OF COURSE.  
1854=Q. WELL, LET'S FIRST START ON THE LEFT SIDE, HERE, UNDER  
1855="PUBLISHED TERMS." IN TRUTH, MS. SEE, WHAT YOU HAVE ON EXHIBIT  
1856=2547 ARE NOT THE PUBLISHED TERMS OFFERED BY INGRAM, ISN'T THAT  
1857=TRUE?  
1858=A. THE PUBLISHED TERMS OFFERED BY INGRAM?  
1859= (CONTINUED ON FOLLOWING PAGE. NOTHING OMITTED.)  
1860=  
1861=  
1862=  
1863=  
1864=  
1865=  
1866=  
1867=  
1868=  
1869=  
1870=  
1871=  
1872=  
1873=  
1874=  
  
1875=BY MR. WELSH:  
1876=Q. YES.  
1877=A. I BELIEVE THOSE ARE THE PUBLISHED TERMS.  
1878=Q. WELL, IN YOUR TESTIMONY, MISS SEE, FOR EXAMPLE, YOU -- YOU  
1879=ACKNOWLEDGE THAT INGRAM PUTS OUT BROCHURES ADVISING BOOKSELLERS  
1880=OF TERMS, CORRECT?  
1881=A. CORRECT.  
1882=Q. AND THOSE -- THOSE ARE PUBLISHED TERMS, CORRECT?  
1883=A. CORRECT.  
1884=Q. AND THOSE TERMS AREN'T ON PLAINTIFF'S EXHIBIT 2547, ARE  
1885=THEY?  
1886=A. NO, THOSE ARE, LIKE, STOCK OFFERS, SPECIAL TERMS.  
1887=Q. WELL, THEY'RE NOT ALL STOCK OFFERS --  
1888=A. NO.  
1889=Q. -- AND SPECIAL TERMS, ARE THEY?  
1890=A. VENDOR OF RECORD PROGRAMS.  
1891=Q. THAT'S NOT A STOCK OFFER OR A SPECIAL TERM EITHER, AND IT'S  
1892=A PUBLISHED TERM, ISN'T IT?  
1893=A. YES, IT IS.  
1894=Q. AND IT WASN'T ON YOUR EXHIBIT, WAS IT?

1895=A. NO.  
1896=Q. SO LET'S TRY TO UPDATE THAT PORTION AND REALLY GET THE  
1897=PUBLISHED TERMS OUT. OKAY?  
1898= SO ONE OF THE PUBLISHED TERMS OFFERED BY INGRAM IS  
1899=VENDOR OF RECORD OR VOR, CORRECT?

1900=A. CORRECT.  
1901=Q. ALL RIGHT. AND VENDOR OF RECORD OR VOR WILL OFFER A  
1902=DISCOUNT OF BETWEEN 42 AND 43 PERCENT DEPENDING UPON THE  
1903=QUANTITY ORDERED, CORRECT?  
1904=A. THAT IS CORRECT. BUT THERE ARE CONDITIONS THAT YOU MEET FOR  
1905=THE VENDOR OF RECORD PROGRAM.  
1906=Q. THE VENDOR OF RECORD PROGRAM IS OFFERED WITH REGARD TO  
1907=CERTAIN PUBLISHERS.  
1908=A. CORRECT. AND YOU HAVE TO BUY ALL YOUR BOOKS FROM THAT  
1909=PUBLISHER THROUGH THE VENDOR OF RECORD PROGRAM.  
1910=Q. NOW, AS YOU TESTIFIED IN YOUR DEPOSITION, MANY INDEPENDENT  
1911=BOOKSELLERS BUY ALMOST ALL OF THEIR BOOKS THROUGH WHOLESALERS,  
1912=RIGHT?  
1913=A. SOME.  
1914=Q. SOME DO, CORRECT?  
1915= BUT FOR EVERY BOOK, EVERY INDEPENDENT BOOKSELLER AS  
1916=YOU TESTIFIED -- AS YOU STATED IN YOUR DEPOSITION AND AS YOU  
1917=STATED IN YOUR REPORT, EVERY INDEPENDENT BOOKSELLER RELIES  
1918=HEAVILY ON WHOLESALERS, CORRECT?  
1919=A. CORRECT.  
1920=Q. NOW, IN ADDITION TO HAVING A PUBLISHED VOR PROGRAM, INGRAM  
1921=ALSO OFFERS AN OPENING STORE DISCOUNT. YOU FAMILIAR WITH THAT?  
1922=A. THE ROSI.  
1923=Q. YES.  
1924=A. I AM FAMILIAR WITH THAT.

1925=Q. OKAY. THAT'S A PUBLISHED TERM, IS IT NOT?  
1926=A. NOT ON --  
1927=Q. WASN'T ON YOUR LIST, THOUGH, CORRECT.  
1928=A. CORRECT.  
1929=Q. THAT OFFERS 42 PERCENT, CORRECT?  
1930=A. YES.  
1931=Q. AND YOU HEARD MR. ROSS TESTIFY YESTERDAY THAT WHEN HE OPENED  
1932=THE FOURTH STREET STORE, HE RECEIVED SOME ADDITIONAL DISCOUNTS,  
1933=CORRECT?  
1934=A. YES.  
1935=Q. NOW, THERE'S ANOTHER PROGRAM THAT INGRAM OFFERS AND WAS  
1936=TESTIFIED TO BY MR. CHANDLER AT HIS DEPOSITION CALLED SCHEDULED  
1937=DELIVERY. YOU FAMILIAR WITH THAT ONE?  
1938=A. YES, I AM FAMILIAR WITH THAT ONE.  
1939=Q. OKAY. SO THAT'S ANOTHER TERM OFFERED BY INGRAM THAT --  
1940=A. UM-HMM.  
1941=Q. -- THAT WAS NOT ON PLAINTIFF'S EXHIBIT 2547, CORRECT?  
1942=A. NOT -- IS THAT PROGRAM OFFERED -- EXCUSE ME FOR -- I'M NOT  
1943=CERTAIN IF THAT PROGRAM IS OFFERED TO ALL BOOKSELLERS.  
1944=Q. WELL, I BELIEVE MR. CHANDLER DID SAY IT WAS OFFERED TO ALL  
1945=BOOKSELLERS.  
1946= MR. SPIVA: OBJECTION, YOUR HONOR, STILL A  
1947=MISCHARACTERIZATION OF THE TESTIMONY. HE SHOULD PROVIDE THE  
1948=PAGE AND LINE NUMBER RATHER THAN MISCHARACTERIZING --  
1949= IN FACT, MR. CHANDLER TESTIFIED DIRECTLY THE

1950=OPPOSITE, YOUR HONOR.  
1951=BY MR. WELSH:  
1952=Q. WELL, LET'S CONTINUE ON.  
1953= MR. SPIVA: YOUR HONOR, MAY I HAVE A RULING ON MY  
1954=OBJECTION, PLEASE?  
1955= MR. WELSH: I'M GOING TO PROVIDE IT. I'M JUST GOING  
1956=TO MOVE ON TO ANOTHER SUBJECT. BUT WE'LL COME BACK TO IT AND  
1957=I'LL GIVE YOU A PAGE AND LINE NUMBER FROM THE CHANDLER  
1958=DEPOSITION. OKAY?  
1959= THE COURT: ALL RIGHT.  
1960=BY MR. WELSH:  
1961=Q. ALL RIGHT. NOW, THE SCHEDULED DELIVERY PROGRAM ALSO OFFERS  
1962=FREE FREIGHT; ISN'T THAT CORRECT?  
1963=A. YES, IT DID, YES.  
1964=Q. AND -- AND IT'S UNDERSTOOD IN THE BUSINESS THAT FREE FREIGHT

1965=AMOUNTS TO ABOUT AN EXTRA POINT IN DISCOUNT, CORRECT?  
1966=A. YES.  
1967=Q. OKAY. SO A 41 PERCENT SCHEDULED DELIVERY AND AN  
1968=ADDITIONAL -- AND FREE FREIGHT AMOUNTS TO THE EFFECTIVENESS OF  
1969=LIKE A 42 PERCENT DISCOUNT, RIGHT?  
1970=A. YES.  
1971=Q. ALL RIGHT. NOW, SCHEDULED DELIVERY IS A CONCEPT THAT WE  
1972=DISCUSSED YESTERDAY. REMEMBER WHEN I ASKED YOU ABOUT THE  
1973=TRADEOFF BETWEEN HOW QUICKLY BOOKS ARRIVE AND WHAT THE DISCOUNT  
1974=IS, AND YOU AGREED THAT THERE IS A TRADEOFF, AND SCHEDULED  
  
1975=DELIVERY REFLECTS THAT TRADEOFF, DOESN'T IT?  
1976=A. YES, IT DOES.  
1977=Q. BECAUSE WHAT INGRAM DOES IS IT SAYS TO BOOKSELLERS THAT ARE  
1978=WILLING TO ACCEPT A SCHEDULED DELIVERY TO GO UNDER A SCHEDULED  
1979=DELIVERY PROGRAM AS OPPOSED TO BEING ABLE TO ORDER WILLY-NILLY  
1980=AND JUST EXPECT TO GET THE BOOKS THE NEXT DAY, IF YOU'RE WILLING  
1981=TO ORDER YOUR BOOKS AND THEN RECEIVE THE BOOKS ON A SCHEDULED  
1982=BASIS, YOU WILL GET 41 PERCENT ON ALL YOUR ORDERS PLUS FREE  
1983=FREIGHT, CORRECT?  
1984=A. CORRECT.  
1985=Q. NOW, IN ADDITION, SCHEDULED DELIVERY OFFERS AN ADDITIONAL  
1986=INCENTIVE OF 1 PERCENT. WERE YOU AWARE OF THAT?  
1987=A. BELIEVE THESE ARE SOME NEW TERMS, AND AS I SAID, I HADN'T  
1988=HAD A CHANCE TO REVIEW --  
1989=Q. OKAY.  
1990=A. -- ALL OF MR. CHANDLER'S DEPOSITION.  
1991=Q. ALL RIGHT. WELL, AGAIN, OUR POINT HERE --  
1992=A. RIGHT.  
1993=Q. -- IS TO TRY TO UPDATE THIS A LITTLE BIT.  
1994= OKAY. NOW, ARE YOU FAMILIAR WITH SUMMARY BILLING?  
1995=A. UM, I AM SLIGHTLY FAMILIAR WITH SUMMARY BILLING.  
1996=Q. FOR BOOKSELLERS WHO AGREE --  
1997=A. RIGHT.  
1998=Q. -- TO TAKE SCHEDULED DELIVERY --  
1999=A. RIGHT.  
  
2000=Q. -- ONE OF THE ADDITIONAL BENEFITS THEY COULD GET IS WHAT'S  
2001=CALLED SUMMARY BILLING. AND SUMMARY BILLING PROVIDES A CASH  
2002=DISCOUNT OF 2 PERCENT FOR PAYMENT WITHIN 25 DAYS OF THE END OF  
2003=THE MONTH?  
2004=A. UM-HMM.  
2005=Q. NOW, TO -- TO QUALIFY FOR SUMMARY BILLING, BASICALLY YOU  
2006=HAVE TO HAVE GOOD CREDIT RATING, AND THEN -- THEN THIS IS --  
2007=THIS IS MADE AVAILABLE TO YOU.  
2008= AND, IN FACT, MR. CHANDLER TESTIFIED THAT A --  
2009=BOOKSELLERS CAN ELECT TO TAKE ON SUMMARY BILLING --  
2010= MR. SPIVA: YOUR HONOR, I HAVE TO OBJECT AGAIN. HE'S  
2011=CONTINUING TO DO THE SAME THING. HE'S MISCHARACTERIZING THE  
2012=DEPOSITION WITHOUT PROVIDING THE CITE.  
2013= MR. WELSH: MISS SEE HAS INDICATED, YOUR HONOR, THAT  
2014=SHE'S REVIEWED PORTIONS OF THE CHANDLER DEPOSITION, AND SO TO  
2015=THE EXTENT THAT IF SHE WILL CONFIRM THAT SHE'S READ THAT  
2016=PORTION, THEN THAT'S FINE. OTHERWISE, I WILL --  
2017= THE COURT: ALL RIGHT. WELL, LET'S CLEAR UP THE  
2018=FIRST OBJECTION. MR. PETROCELLI'S WORKING ON THAT.  
2019= HAVE YOU FOUND THE PAGE AND LINE NUMBER?  
2020= MR. PETROCELLI: HE'S LOOKING FOR IT, YOUR HONOR.  
2021=WE'LL GET YOU THAT. THE -- MR. RADER CONDUCTED THE DEPOSITION  
2022=AND THE SUBSTANCE OF HIS TESTIMONY WAS THAT IT WAS OFFERED TO  
2023=BOOKSELLERS --  
2024= MR. SPIVA: YOUR HONOR, I'M SORRY TO --  
  
2025= MR. DE BRUIN: JUST LET HIM FINISH.  
2026= MR. SPIVA: OKAY. SORRY.  
2027= MR. PETROCELLI: -- 250 TO 500 BOOKS PER WEEK WHO  
2028=HAVE GOOD CREDIT, HAVE THE ABILITY TO ORDER BOOKS AND RECEIVE  
2029=BILLS ELECTRONICALLY. THAT WAS THE SUBSTANCE, AND NOW WE'RE  
2030=GETTING YOU THE CITES.  
2031= MR. SPIVA: YOUR HONOR, THAT'S A SUMMARY. THAT'S NOT  
2032=THE TESTIMONY.  
2033= THE COURT: WELL, BEFORE THE END OF THE SESSION,  
2034=COUNSEL WILL TRY AND ADVISE YOU WITH RESPECT TO WHAT THE

2035=REPORTER TOOK DOWN IN THE DEPOSITION.  
2036= SUMMARY USUALLY IS MADE BY A LAWYER OR A VERY GOOD  
2037=LAW CLERK, AND USUALLY IT'S CORRECT IT'S BEEN MY EXPERIENCE. SO  
2038=I AM NOT PARTICULARLY DETERMINED BY WHAT HAS BEEN STATED SO FAR,  
2039=BUT WE'LL TRY AND GET TO THE ACTUAL PAGE AND LINE NUMBER.  
2040= NOW, WHAT IS YOUR OBJECTION TO THIS ONE, WHAT WE'RE  
2041=DOING NOW?  
2042= MR. WELSH: I'LL REPHRASE THE QUESTION, YOUR HONOR.  
2043=WE'LL JUST MOVE ON THAT WAY.  
2044= THE COURT: ALL RIGHT.  
2045=BY MR. WELSH:  
2046=Q. I'M SORRY 'CAUSE I'M NOT SURE THE RECORD IS CLEAR. ARE YOU  
2047=FAMILIAR WITH THE FACT, MISS SEE, THAT WITH SUMMARY BILLING,  
2048=BOOKSELLERS WHO QUALIFY FOR SUMMARY BILLING ARE ENTITLED TO  
2049=2 PERCENT CASH DISCOUNT, 25 DAYS END OF THE MONTH?  
  
2050=A. WAS -- EXCUSE ME. WAS THE QUESTION WAS I FAMILIAR?  
2051=Q. YES. WERE YOU FAMILIAR WITH THAT AS A TERM THAT IS NOW  
2052=OFFERED BY INGRAM TO BOOKSELLERS WHO QUALIFY FOR SUMMARY  
2053=BILLING?  
2054=A. I HAD NOT BEEN FAMILIAR WITH THAT, AND I HAVE NOT HAD A  
2055=CHANCE AT THE READ MR. CHANDLER'S TOTAL DEPOSITION.  
2056=Q. NOW, IT'S BEEN, WHAT, 11 YEARS SINCE YOU'VE PURCHASED BOOKS  
2057=FROM INGRAM?  
2058=A. YES.  
2059=Q. CORRECT?  
2060=A. YES.  
2061=Q. NOW, LET'S MOVE DOWN TO RETURNS CREDIT. WITH REGARD TO  
2062=OPENING STORE AND VENDOR OF RECORD PROGRAMS OR WITH REGARD TO  
2063=OPENING STORE, IT -- THERE ARE PENALTY-FREE RETURNS NOW BEING  
2064=PROVIDED BY INGRAM. ARE YOU AWARE OF THAT?  
2065=A. I HAD NOT SEEN THAT DOCUMENT.  
2066=Q. ARE YOU AWARE THAT WITH REGARD TO VENDOR OF RECORD PROGRAMS,  
2067=THAT BOOKSELLERS CAN RETURN BETWEEN 5 AND 15 PERCENT OF THEIR  
2068=PURCHASES PENALTY FREE?  
2069=A. I WAS AWARE OF THAT, BUT --  
2070=Q. ARE YOU AWARE, TOO, THAT WITH REGARD TO BOOKSELLERS WHO  
2071=ELECT SUMMARY BILLING, THAT THEY ARE ENTITLED TO A SHORTAGE  
2072=ALLOWANCE OF 1 PERCENT OR GREATER BASED ON HISTORICAL  
2073=EXPERIENCE? YOU AWARE OF THAT?  
2074=A. THAT IS A NEW TERM I'M AWARE OF.  
  
2075=Q. OKAY. SO THESE ARE ALL -- OR MOST OF THESE -- I THINK THERE  
2076=WAS ONE IN HERE YOU WEREN'T AWARE OF -- BUT AS WE'VE GONE  
2077=THROUGH THESE TERMS, THESE ARE TERMS THAT YOU ARE AWARE OF THAT  
2078=ARE NOW BEING PROVIDED BY INGRAM TO BOOKSELLERS, CORRECT?  
2079=A. CORRECT.  
2080=Q. OKAY.  
2081= THE COURT: AND WHAT DO YOU MEAN WHEN YOU SAY THIS IS  
2082=A NEW TERM?  
2083= THE WITNESS: I BELIEVE THESE ARE VERY RECENTLY  
2084=PUBLISHED TERMS.  
2085= AND YOU SEE, IT'S -- EXCUSE ME. IT'S 1999-2000, AND  
2086=I THINK THEY'RE PUBLISHED IN THE NEW INGRAM BROCHURES.  
2087= THE COURT: ALL RIGHT.  
2088=BY MR. WELSH:  
2089=Q. NOW, MISS SEE, ARE YOU AWARE OF SOME ADDITIONAL PROGRAMS  
2090=THAT ARE OFFERED BY INGRAM THAT ARE MENTIONED DOWN HERE, THE  
2091=VISITING --  
2092=A. OH --  
2093=Q. -- AUTHOR PROGRAM. THE BACK LIST PLUS PROGRAM AND THE  
2094=COMPUTER BOOKS PROGRAMS?  
2095=A. I AM AWARE OF THOSE PROGRAMS. THEY'RE VERY SPECIALIZED.  
2096=THE BACK LIST PLUS IS ONE THAT I WAS SAYING IS LIKE THE STOCK  
2097=OFFER, AND THE COMPUTER BOOKS IS A SPECIFIC SET OF TITLES.  
2098=Q. RIGHT. YES. I MEAN, AS THE TITLE INDICATES --  
2099=A. RIGHT.  
  
2100=Q. -- IT IS -- BUT GENERAL BOOK STORES DO, IN FACT, ORDER  
2101=COMPUTER BOOKS, DON'T THEY?  
2102=A. YES, THEY DO.  
2103=Q. AND IT'S A GROWING AREA OF INTEREST AMONG BOOK BUYERS, WOULD  
2104=YOU AGREE?

2105=A. YES.  
2106=Q. OKAY. SO WE'VE NOW BEEN ABLE TO UPDATE THE TERMS OFFERED BY  
2107=INGRAM. NOW, LET US TRY TO UPDATE THE TERMS BETWEEN INGRAM AND  
2108=BARNES & NOBLE. AND HERE, MISS SEE, I WOULD REFER YOU --  
2109= (PAUSE IN THE PROCEEDINGS.)  
2110=BY MR. WELSH:  
2111=Q. IT'S EXHIBIT 7360. EXCUSE ME.  
2112=A. OH.  
2113=Q. MY CONTACTS ARE FAILING ME.  
2114= THIS I WILL REPRESENT TO YOU, MISS SEE, IS THE 1999  
2115=MEMORANDUM OF UNDERSTANDING BETWEEN BARNES & NOBLE AND INGRAM.  
2116=A. MINE DOESN'T HAVE A EXHIBIT NUMBER ON IT.  
2117=Q. WELL, IT --  
2118=A. I'M WITH YOU.  
2119=Q. YEAH, YOU WITH ME. OKAY. I WAS CONFUSED, TOO, BUT THE  
2120=FIRST FOUR NUMBERS DOWN THERE, 7360, IF YOU SEE THAT, THAT'S  
2121=REFERENCING THE EXHIBIT NUMBER. OKAY.  
2122= HAVE YOU EVER REVIEWED THIS DOCUMENT BEFORE?  
2123=A. I HAVE REVIEWED THIS DOCUMENT.  
2124=Q. OKAY. NOW, THIS DOCUMENT MAKES SIGNIFICANT CHANGES TO THE  
  
2125=TERMS BETWEEN INGRAM AND BARNES & NOBLE AS OPPOSED TO THE TERMS  
2126=THAT EXISTED IN 1998, CORRECT?  
2127=A. THAT IS CORRECT.  
2128=Q. OKAY. SO LET'S NOW UPDATE THE RIGHT-HAND PORTION OF THIS.  
2129= ONE OF THE -- AGAIN, SINCE THIS BRACKET HERE IS  
2130=DEALING WITH ELECTRONIC AND OPENING STORE PURCHASES, IF YOU LOOK  
2131=TO THE FIRST PAGE OF THE '99 MOU, YOU WILL SEE THAT UNDER  
2132=ELECTRONIC STORE ORDERS, THAT IT -- IT INDICATES -- AND OPENING  
2133=STORE, IT INDICATES WHO PAYS FREIGHT. DO YOU SEE THAT?  
2134=A. I DO SEE THAT.  
2135=Q. OKAY. AND BARNES & NOBLE PAYS THE FREIGHT, CORRECT?  
2136=A. RIGHT.  
2137=Q. SO WHEREAS UNDER A PROGRAM SUCH AS SCHEDULED DELIVERY, A  
2138=BOOKSELLER WOULD HAVE INGRAM PAY THE FREIGHT, BARNES & NOBLE IS  
2139=NOW PAYING THE FREIGHT, CORRECT?  
2140=A. CORRECT.  
2141=Q. AND BARNES & NOBLE RECEIVES ITS BOOKS FROM INGRAM UNDER A  
2142=SCHEDULED DELIVERY, DOESN'T IT?  
2143=A. I DO NOT KNOW THAT.  
2144=Q. NOW, WITH REGARD TO AUDIO BOOKS, WE TURN TO PAGE 2, THE  
2145=DISCOUNT ON AUDIO BOOKS HAS BEEN LOWERED FROM 46 TO 45 PERCENT.  
2146=SEE THAT?  
2147=A. I DO.  
2148=Q. AND NOW, UNDER INCENTIVES AND REBATES, THERE'S BEEN A CHANGE  
2149=HERE IN WHICH THE ADDITIONAL 1 PERCENT INCENTIVE WHICH WAS  
  
2150=PROVIDED FOR ALL STORES WHICH USE INGRAM AS THEIR PRIMARY SOURCE  
2151=OF SUPPLY WAS MODIFIED TO HOL -- ONLY HOLIDAY WEST COAST  
2152=REPLENISHMENT, YOU SEE THAT ON PAGE 2?  
2153=A. I SEE THAT.  
2154=Q. OKAY.  
2155= MR. PETROCELLI: YOUR HONOR, THOSE CITATIONS FROM THE  
2156=CHANDLER DEPOSITION, PAGE 174, BEGINNING LINE 21 THROUGH 176,  
2157=LINE ONE, AND THEN 176, LINES 20 TO 23.  
2158= THE COURT: ALL RIGHT. THANK YOU.  
2159= WELL, I THINK I'LL GIVE MR. SPIVA A CHANCE TO LOOK AT  
2160=THE DEPOSITION AND SATISFY HIMSELF AND MAKE SUCH PETITION TO THE  
2161=COURT AS HE WISHES IN ORDER TO CORRECT ANY POSSIBLE  
2162=MISUNDERSTANDING. AND WE'LL DO THAT AFTER THE RECESS.  
2163= THE COURT IS NOW IN RECESS.  
2164= THE CLERK: ALL RISE.  
2165= (RECESS TAKEN AT 11:21 A.M.)  
2166= (PROCEEDINGS RESUMED AT 11:45 A.M.)  
2167= THE COURT: FURTHER CROSS-EXAMINATION. YOU MAY  
2168=PROCEED, MR. WELSH.  
2169= MR. WELSH: THANK YOU, YOUR HONOR.  
2170=Q. MISS SEE.  
2171= OKAY. I'D LIKE YOU TO GO TO OUR BINDER, PLEASE.  
2172=AND --  
2173=A. EXCUSE ME.  
2174=Q. -- TURN TO THE EXHIBIT THAT IS MARKED 6368.

2175=A. UNDER WHAT TAB?  
2176=Q. IT'S -- ACTUALLY IT SAYS TAB 6368.  
2177=A. OH, I'M SORRY.  
2178=Q. IT'S IN THE BACK.  
2179=A. 6-3-6-7, 6-8.  
2180=Q. OKAY.  
2181= (PAUSE IN THE PROCEEDINGS.)  
2182= THE COURT: MR. WELSH, WHAT IS IT AGAIN?  
2183= MR. WELSH: I'M SORRY, YOUR HONOR. IT IS 6368. IT'S  
2184=AT THE VERY BACK, AND -- IN OUR BINDER, WE HAD TABS THAT RAN 1  
2185=THROUGH 15, AND THEN -- WHICH WERE DOCUMENTS --  
2186= THE COURT: NO, I GOT IT.  
2187= MR. WELSH: OKAY.  
2188= THE COURT: THANK YOU.  
2189= (PAUSE IN THE PROCEEDINGS.)  
2190= MR. WELSH: APOLOGIZE, YOUR HONOR, THAT CLIP SHOULD  
2191=NOT HAVE BEEN IN THERE.  
2192= THE COURT: YOU'RE RIGHT.  
2193= OKAY.  
2194=BY MR. WELSH:  
2195=Q. MISS SEE, ARE YOU FAMILIAR WITH THIS DOCUMENT ENTITLED  
2196=INGRAM BOOK COMPANY SUMMARY BILLING PROGRAM?  
2197=A. I HAVE NOT SEEN THIS DOCUMENT.  
2198=Q. OKAY.  
2199= YOU INDICATED, I BELIEVE, YOU HAD SOME UNDERSTANDING  
  
2200=OF SUMMARY BILLING?  
2201=A. YES, I DO.  
2202=Q. OKAY. ALL RIGHT. AND IS YOUR UNDERSTANDING OF SUMMARY  
2203=BILLING CONSISTENT WITH THE TERMS SET FORTH HERE?  
2204=A. (REVIEWING DOCUMENT.)  
2205= YES.  
2206=Q. OKAY. AND -- AND SUMMARY BILLING DOES NOT HAVE ANY MINIMUM  
2207=ORDER REQUIREMENTS; IS THAT YOUR UNDERSTANDING?  
2208=A. (REVIEWING DOCUMENT.)  
2209= THAT'S CORRECT.  
2210=Q. OKAY. AND IT'S LIKEWISE YOUR UNDERSTANDING THAT -- THAT  
2211=EXHIBIT 6368 IS A -- IS A BROCHURE THAT INGRAM PROVIDES TO -- TO  
2212=BOOKSELLERS? IN OTHER WORDS, THIS WOULD BE PART OF INGRAM'S  
2213=PUBLISHED TERMS?  
2214=A. I HAVE NOT SEEN THIS AS A PUBLISHED TERM.  
2215=Q. BUT IT'S CERTAINLY A PUBLISHED SCHEDULE OF A PARTICULAR  
2216=PROGRAM, CORRECT?  
2217=A. I DON'T -- I DO NOT BELIEVE IT IS GENERALLY PUBLISHED AS IT  
2218=WOULD BE IN A TERMS BROCHURE. AS I RECALL -- I --  
2219=Q. UM, LET'S TURN BACK TO THE DOCUMENT IMMEDIATELY PRECEDING  
2220=EXHIBIT 6368 THAT'S BEEN MARKED AS EXHIBIT 63 -- 6356.  
2221=A. (REVIEWING DOCUMENTS.)  
2222=Q. THIS IS THE INGRAM BACKLIST PLUS PROGRAM?  
2223=A. YES.  
2224=Q. ALL RIGHT. YOU'VE SEEN THIS DOCUMENT BEFORE?  
  
2225=A. NO, I HAVE NOT SEEN THIS DOCUMENT.  
2226=Q. DO YOU HAVE AN UNDERSTANDING THAT -- THAT THIS IS PART OF  
2227=THE -- OF THE PUBLISHED TERMS --  
2228=A. YES.  
2229=Q. -- MADE AVAILABLE BY INGRAM?  
2230=A. YES, I HAVE SEEN THIS. THIS IS COMPARABLE TO A STOCK OFFER.  
2231=Q. NOW, WHEN YOU SAY -- LET'S SEE. I'M SORRY.  
2232= MOVING ON TO EXHIBIT 6376, THIS IS THE INGRAM VENDOR  
2233=OF RECORD PROGRAM.  
2234=A. YES.  
2235=Q. OKAY. AND IF YOU TURN TO PAGE 2 OF THIS DOCUMENT, IT  
2236=INDICATES THE DISCOUNT AVAILABLE, 42 PERCENT WITH 43 PERCENT ON  
2237=10 OR MORE UNITS OR TITLES.  
2238=A. YES.  
2239=Q. OKAY. SAYS 5 PERCENT -- ON RETURNS, IT SAYS 5 PERCENT OF  
2240=VOR PURCHASES RETURNABLE PENALTY FREE?  
2241=A. YES.  
2242=Q. OKAY. AND, AGAIN, NONE OF THESE TERMS THAT WE FIND IN THE  
2243=VENDOR OF RECORD PROGRAM ARE FOUND IN THE RED BOOK, CORRECT?  
2244=A. OH, THAT IS CORRECT.  
2245=Q. YEAH, AND NONE OF THE TERMS THAT WE SAW WITH REGARD TO

2246=SUMMARY -- THIS SUMMARY BILLING PROGRAM OFFERED BY INGRAM IS SET  
2247=FORTH IN THE RED BOOK, CORRECT?  
2248=A. THAT IS CORRECT.  
2249=Q. LET'S TURN TO THE NEXT DOCUMENT, 6377.

2250=A. (REVIEWING DOCUMENTS.)  
2251=Q. THIS IS THE OPENING STORE PROGRAM, CORRECT?  
2252=A. THIS IS THE ROSI PROGRAM.  
2253=Q. THE ROSI, R-O-S-I?  
2254=A. YES. IT IS.  
2255=Q. OKAY.  
2256=A. IT'S RECOMMENDED OPENING STORE INVENTORY, I BELIEVE.  
2257=Q. YES, THAT IS CORRECT. THIS IS A -- THIS IS AN INGRAM  
2258=PROGRAM YOU'RE FAMILIAR WITH?  
2259=A. VERY FAMILIAR.  
2260=Q. CORRECT? VERY FAMILIAR. BUT THAT VERY FAMILIAR PROGRAM IS  
2261=NOT STATED IN THE RED BOOK?  
2262=A. BUT THIS VERY FAMILIAR PROGRAM IS FOR A STORE WHEN THEY  
2263=OPEN. AND IT IS NOT PUT IN THE RED BOOK, CORRECT.  
2264=Q. NOW, UNDER THE ROSI PROGRAM, IT SAYS THAT ROSI ORDERS OF  
2265=MORE THAN 50,000 WHOLESALE CAN EARN A FLAT 42 PERCENT?  
2266=A. EXCUSE ME. OH, I FOUND IT.  
2267=Q. OKAY. I'M SORRY. IT'S --  
2268=A. THAT'S OKAY.  
2269=Q. -- BURIED IN PAGE 2.  
2270=A. RIGHT.  
2271=Q. IN THE FAR RIGHT COLUMN ABOUT TWO-THIRDS OF THE WAY DOWN  
2272=UNDER THE --  
2273=A. YES.  
2274=Q. -- UNDER THE HEADING OF MAXIMUM DISCOUNTS. IT THEN GOES  
2275=DOWN AND SAYS A FLAT 42 PERCENT?  
2276=A. UM-HMM.  
2277=Q. CORRECT?  
2278=A. CORRECT.  
2279=Q. NOW, I THINK YOU MENTIONED THAT THE SCHEDULED DELIVERY WAS A  
2280=PROGRAM YOU WERE NOT FAMILIAR WITH.  
2281=A. THAT IS CORRECT.  
2282=Q. THAT IS CORRECT. OKAY.  
2283=A. I BELIEVE IT'S A NEW PROGRAM.  
2284=Q. ARE YOU AWARE THAT -- THAT THIS PROGRAM IS AT LEAST KNOWN TO  
2285=SOME OF THE PLAINTIFFS?  
2286=A. I AM AWARE OF THAT.  
2287=Q. OKAY. SO APPARENTLY, IT -- THE WORD IS GETTING OUT. FOR  
2288=EXAMPLE, ARE YOU AWARE THAT CHANGING HANDS HAS BEGAN TO  
2289=PARTICIPATE IN THE SCHEDULED DELIVERY PROGRAM?  
2290=A. I AM AWARE OF THAT.  
2291=Q. OKAY. AND YOU WERE HERE WHEN MR. ROSS TESTIFIED. DO YOU  
2292=RECALL HIM SAYING THAT HE HAD BEEN OFFERED THE SCHEDULED  
2293=DELIVERY PROGRAM, BUT -- BY INGRAM BUT HAD ELECTED NOT TO TAKE  
2294=IT?  
2295=A. RIGHT.  
2296=Q. OKAY. NOW, WITH REGARD TO SCHEDULED DELIVERY, DO YOU HAVE  
2297=AN UNDERSTANDING THAT -- THAT THERE IS A REQUIREMENT OF -- OF  
2298=PURCHASING BETWEEN 250 AND 500 BOOKS, AND ALSO A REQUIREMENT OF  
2299=BEING CREDITWORTHY?

2300=A. YES.  
2301=Q. OKAY.  
2302=A. EXCUSE ME? I THOUGHT THAT THE CREDITWORTHY WAS FOR THE  
2303=SUMMARY BILLING.  
2304=Q. I BELIEVE -- WELL, WE CAN -- AGAIN, I'M HAPPY TO GO TO THE  
2305=DEPOSITION TESTIMONY OF MR. CHANDLER.  
2306=A. EXCUSE ME. I WAS -- I WAS ONLY POINTING OUT YOU HAD ASKED  
2307=ABOUT SCHEDULED DELIVERY BEING CREDITWORTHY AND I THOUGHT THAT  
2308=THE SUMMARY BILLING WAS WHERE THE CREDITWORTHINESS --  
2309=Q. WELL, DO YOU HAVE AN UNDERSTANDING THAT SUMMARY BILLING IS A  
2310=PART OF THE SCHEDULED DELIVERY PROGRAM?  
2311=A. THANK YOU.  
2312=Q. OKAY. IS THAT --  
2313=A. CLARIFIES.  
2314=Q. ARE WE CLEAR ON THAT NOW?  
2315=A. CLEAR.

2316=Q. OKAY. GREAT.  
2317= I TAKE IT, THEN, MISS SEE, FROM ALL THAT WE'VE  
2318=EXAMINED, THERE'S NO DISPUTE THAT THE RED BOOK DOES NOT CONTAIN  
2319=ALL THE TERMS AND PROGRAMS BEING OFFERED BY PUBLISHERS, DOES IT?  
2320=A. NO, THERE ARE OTHER PUBLISHED TERMS.  
2321=Q. AND BOOKSELLERS WOULD BE WELL ADVISED, IF THEY WANTED TO  
2322=LEARN ALL OF THE TERMS AND PROGRAMS ON AN UPDATED BASIS, EXACTLY  
2323=WHAT WAS OUT THERE IN THE MARKETPLACE, THEY SHOULD CONSULT OTHER  
2324=SOURCES BESIDES SIMPLY THE RED BOOK, CORRECT?

2325=A. YES.  
2326= MR. WELSH: OKAY. I HAVE NO FURTHER QUESTIONS AT  
2327=THIS TIME.  
2328= THE COURT: MR. STEER.  
2329= MR. STEER: THANK YOU, YOUR HONOR.  
2330= PLEASE GIVE ME A MOMENT TO ORGANIZE OUR MATERIALS.  
2331= (PAUSE IN THE PROCEEDINGS.)  
2332= MR. STEER: SALLY, WOULD YOU KINDLY PASS THIS UP TO  
2333=HIS HONOR.  
2334= (PAUSE IN THE PROCEEDINGS.)  
2335= (CONTINUED NEXT PAGE; NOTHING OMITTED.)  
2336=  
2337=  
2338=  
2339=  
2340=  
2341=  
2342=  
2343=  
2344=  
2345=  
2346=  
2347=  
2348=  
2349=

2350= THE COURT: ALL RIGHT, YOU MAY PROCEED.  
2351= MR. STEER: THANK YOU, YOUR HONOR.  
2352= CROSS-EXAMINATION

2353=BY MR. STEER:  
2354=Q. GOOD MORNING, MS. SEE.  
2355=A. GOOD MORNING.  
2356=Q. HOW ARE YOU?  
2357=A. I AM A LITTLE WEARIED.  
2358=Q. IT'S UNDERSTANDABLE. LET ME GO BACK TO SOME OF YOUR  
2359=EARLIER TESTIMONY.  
2360= YOU'VE TESTIFIED A LITTLE BIT ABOUT EXCLUSIVE STOCK  
2361=OFFERS THIS MORNING, AND I WANT TO CLEAR SOMETHING UP. WHEN  
2362=YOU DID THAT, YOU REFERRED TO THE DEFENDANTS. IT IS TRUE, IS  
2363=IT NOT, THAT YOU SAW NO EVIDENCE THAT MY CLIENTS, BORDERS AND  
2364=WALDEN BOOKS, RECEIVED STOCK OFFERS THAT WERE EXCLUSIVE TO  
2365=THEM?  
2366=A. WHEN I WAS TALKING THIS MORNING, I WAS TALKING ABOUT STOCK  
2367=OFFERS THAT WERE MADE GENERALLY AVAILABLE AND HAD DIFFERENT  
2368=TERMS FOR BARNES & NOBLE, AND I'M GOING TO HAVE TO REFRESH MY  
2369=MEMORY IN ORDER TO ANSWER YOUR QUESTION.  
2370=Q. I APPRECIATE THAT. YOUR POINT THIS MORNING WAS THAT YOU  
2371=WERE REFERRING TO BARNES & NOBLE, CORRECT?  
2372=A. CORRECT.  
2373=Q. BUT YOU USED THE WORD "DEFENDANTS," AND I WANTED TO MAKE  
2374=SURE THAT AS FAR AS YOUR TESTIMONY THIS MORNING WAS CONCERNED,

2375=THAT PHRASE DID NOT INCLUDE MY CLIENTS; ISN'T THAT CORRECT?  
2376=A. AS FAR AS MY TESTIMONY THIS MORNING, IT DID NOT INCLUDE  
2377=YOUR CLIENTS.  
2378=Q. THANK YOU. NOW, YOU ALSO TESTIFIED ABOUT ANOTHER MATTER  
2379=WHERE YOU TALKED ABOUT THE DEFENDANTS. YOU TALKED ABOUT  
2380=BORDERS AND WALDEN BOOKS, AND THAT HAD TO DO WITH STATISTICAL  
2381=RESERVES, OR WHAT WALDEN BOOK COMPANY CALLS ITS R.O.G. PROGRAM.  
2382=DO YOU REMEMBER THAT?  
2383=A. I DID.  
2384=Q. NOW, YOU UNDERSTAND, OF COURSE, THAT THAT PROGRAM IS A  
2385=PROGRAM THAT IS OFFERED AND REQUESTED BY WALDEN BOOKS ONLY AND

2386=NOT BY BORDERS BOOKS & MUSIC.  
2387=A. I UNDERSTAND. THANK YOU FOR THE CLARIFICATION.  
2388=Q. OKAY, I JUST WANT THE RECORD TO BE CLEAR. AND YOU ALSO  
2389=UNDERSTAND THAT IT IS OPTIONAL FOR VENDORS. VENDORS DO NOT  
2390=HAVE TO AGREE TO PARTICIPATE IN THE R.O.G. PROGRAM, CORRECT?  
2391=A. RIGHT. I SAW EVIDENCE OF THAT.  
2392=Q. NOW, THE WAY THE R.O.G. PROGRAM WORKS -- YOU CAN CORRECT ME  
2393=IF I'M WRONG, BUT I'M GOING TO LEAD YOU THROUGH IT HERE, JUST  
2394=TO EXPEDITE THE TESTIMONY -- IS THAT EACH YEAR FOR A VENDOR  
2395=THAT AGREES TO BE PART OF THE PROGRAM, WALDEN BOOKS AND THE  
2396=VENDOR SELECT 50 WALDEN STORES, AND THOSE -- I'M SORRY, LET ME  
2397=CORRECT MYSELF. WALDEN BOOKS AND ITS ACCOUNTANTS, ITS BIG FIVE  
2398=ACCOUNTING FIRM, SELECT 50 WALDEN BOOKS STORES FOR WHICH THEY  
2399=DO DETAILED RECEIVING. DO YOU UNDERSTAND THAT?

2400=A. YES, I DO REMEMBER THAT.  
2401=Q. SO IT ISN'T DONE JUST BY WALDEN BOOKS ALONE.  
2402=A. YES.  
2403=Q. AND DETAILED RECEIVING MEANS WHAT? CAN YOU EXPLAIN TO THE  
2404=COURT WHAT THAT MEANS?  
2405=A. DETAILED RECEIVING WOULD MEAN THE KIND OF RECEIVING I HAD  
2406=DESCRIBED BEFORE, WHERE YOU TAKE YOUR -- YOU RECEIVE YOUR  
2407=ORDER, AND YOU MATCH IT AGAINST YOUR PURCHASE ORDER, YOUR  
2408=INVOICE.  
2409=Q. JUST THE WAY YOU DID IT WHEN YOU WERE OPERATING YOUR OWN  
2410=STORE, RIGHT?  
2411=A. CORRECT.  
2412=Q. AND USING THE RESULTS OF WHAT THEY FOUND IN THOSE 50  
2413=STORES, THEY DO A STATISTICAL ANALYSIS WHICH THEY AGREE WITH  
2414=THE PUBLISHER WILL APPLY FOR THE COMING YEAR OR OTHER  
2415=APPLICABLE PERIOD OF TIME, ISN'T THAT CORRECT?  
2416=A. THAT'S CORRECT.  
2417=Q. NOW, I BELIEVE YOU TESTIFIED THAT WHEN YOU WERE ACTIVE IN  
2418=THE ABA, YOU THOUGHT THAT THIS KIND OF ARRANGEMENT WOULD BE A  
2419=BENEFICIAL ONE TO BOOKSELLERS.  
2420=A. I THOUGHT IT WOULD BE VERY BENEFICIAL TO THE WHOLE  
2421=INDUSTRY, ALL BOOKSELLERS.  
2422=Q. AND IT WOULD NOT JUST BE BENEFICIAL TO BOOKSELLERS.  
2423=THERE'S ALSO AN ARGUMENT, ISN'T THERE, THAT THE PUBLISHERS  
2424=WOULD SAVE MONEY IF THEY ADOPTED THIS KIND OF APPROACH TO  
  
2425=ACCOUNTING FOR SHORTAGES AND DAMAGED BOOKS, ISN'T THAT RIGHT?  
2426=A. CORRECT.  
2427=Q. AND YOU MADE THAT ARGUMENT WHEN YOU WERE WITH THE ABA,  
2428=DIDN'T YOU?  
2429=A. CORRECT.  
2430=Q. OKAY. SO TO THE EXTENT THAT PUBLISHERS ARE REFUSING TO GO  
2431=TO THIS, DO YOU HAVE ANY EXPLANATION FOR WHY THEY DON'T GO TO  
2432=THIS VERY LOGICAL AND REASONABLE PROGRAM?  
2433=A. NO, I DON'T. I THINK IT'S JUST DIFFICULT FOR PUBLISHERS TO  
2434=MAKE CHANGES.  
2435=Q. THEY'RE KIND OF STUCK BACK IN TIME, RIGHT?  
2436=A. WELL --  
2437=Q. SOME OF THEM, ANYWAY. YOU MENTIONED EARLIER, UNDER  
2438=QUESTIONING, I BELIEVE, BY YOUR COUNSEL, THAT YOU RECALL THAT  
2439=ST. MARTIN'S PRESS DOES PUBLISH THE FACT THAT IT WILL AGREE TO  
2440=A STATISTICAL RESERVE OF A CERTAIN PERCENTAGE, CORRECT?  
2441=A. CORRECT.  
2442=Q. AND IT'S BEEN PUBLISHING THAT -- THAT FACT HAS APPEARED IN  
2443=THE ABA'S RED BOOK OR HANDBOOK FOR A NUMBER OF YEARS, ISN'T  
2444=THAT CORRECT?  
2445=A. YES, THAT IS CORRECT.  
2446=Q. ISN'T IT ALSO TRUE THAT IT'S BEEN KNOWN THAT SOME OTHER  
2447=PUBLISHERS, EVEN THOUGH THEY DON'T PUBLISH THE TERM IN THE ABA  
2448=HANDBOOK, HAVE STATED PUBLICLY, INCLUDING AS SET FORTH IN OTHER  
2449=ABA PUBLICATIONS, THAT THEY WILL MAKE THAT PROVISION AVAILABLE  
  
2450=TO BOOKSELLERS?  
2451=A. I HAVE NOT SEEN THAT IN WRITING.  
2452=Q. NOW, SO THAT WE'RE SPECIFIC AND WE UNDERSTAND THE SCOPE OF  
2453=WHAT WE'RE TALKING ABOUT HERE WITH RESPECT TO MY CLIENTS --  
2454=A. RIGHT.  
2455=Q. -- BORDERS, YOU UNDERSTAND, DOES NOT HAVE A STATISTICAL

2456=RESERVE PROGRAM, RIGHT?  
2457=A. CORRECT, YES.  
2458=Q. AND WALDEN DOES, BECAUSE PART OF WALDEN'S DELIVERIES OF  
2459=BOOKS ARE SENT STRAIGHT TO THE STORES, ISN'T THAT CORRECT?  
2460=A. YES, THEY'RE DROP SHIPPED.  
2461=Q. YOU UNDERSTAND THAT FOR BORDERS VIRTUALLY A HUNDRED PERCENT  
2462=OF THE BOOKS THEY PURCHASE ARE SENT TO THE RETAIL DISTRIBUTION  
2463=CENTERS?  
2464=A. I UNDERSTAND.  
2465=Q. AND AT THE RETAIL DISTRIBUTION CENTERS THEY DO DETAILED  
2466=RECEIVING, RIGHT?  
2467=A. YES.  
2468=Q. JUST THE WAY YOU DID.  
2469=A. RIGHT.  
2470=Q. OKAY. AND AT WALDEN'S, ABOUT 65 PERCENT -- YOU'VE SEEN THE  
2471=EVIDENCE, HAVEN'T YOU, THE TESTIMONY --  
2472=A. UM-HUM.  
2473=Q. -- THAT ABOUT 65 PERCENT OF WALDEN'S BOOK PURCHASES COME  
2474=THROUGH THE WALDEN DISTRIBUTION CENTERS, CORRECT?  
  
2475=A. CORRECT.  
2476=Q. OKAY, AND SO FOR THOSE DELIVERIES, THERE'S NO NEED FOR A  
2477=STATISTICAL RESERVE. IT IS -- THAT ALSO IS DONE BY DETAILED  
2478=RECEIVING, CORRECT?  
2479=A. YES.  
2480=Q. AND THAT'S BECAUSE OF THE DISTRIBUTION CENTERS, WALDEN AND  
2481=BORDERS HAVE TO ACCOUNT FOR EVERY SINGLE BOOK, BECAUSE WHEN  
2482=THEY COME IN, THEY ARE THEN SOON SENT OUT TO A TOTAL OF ABOUT  
2483=12 OR 1300 STORES, RIGHT?  
2484=A. RIGHT.  
2485=Q. SO THIS PROGRAM, INSOFAR AS MY CLIENTS ARE INVOLVED IN IT,  
2486=IS LIMITED TO THE APPROXIMATELY 35 PERCENT OF WALDEN PURCHASES  
2487=THAT COME THROUGH THE STORES, RIGHT?  
2488=A. YES.  
2489=Q. EXCEPT THAT IT ISN'T 35 PERCENT, IT'S ONLY FOR THE  
2490=PUBLISHERS THAT AGREE TO PARTICIPATE IN IT, CORRECT?  
2491=A. CORRECT.  
2492=Q. AND YOU HAVEN'T DONE ANY STUDY TO DETERMINE, OF THAT 35  
2493=PERCENT OF WALDEN BOOK PURCHASES, WHAT PROPORTION ARE ACCOUNTED  
2494=FOR BY PUBLISHERS WHO HAVE AGREED TO PARTICIPATE IN THE R.O.G.  
2495=PROGRAM.  
2496=A. NO, I HAVE NOT DONE SUCH AN ANALYSIS.  
2497=Q. NOW, TO THE EXTENT THAT WALDEN...  
2498= PARDON ME. THE TIME OF YEAR, I'M STARTING TO HAVE  
2499=ALLERGIES. I APOLOGIZE FOR ALL THIS CONGESTION.  
  
2500= TO THE EXTENT THAT WALDEN BOOKS IS ABLE TO RECEIVE  
2501=R.O.G. TERMS, OR ENTER INTO R.O.G. AGREEMENTS WITH PUBLISHERS  
2502=THAT PUBLICLY ANNOUNCE THEIR WILLINGNESS TO DO SO, ISN'T IT  
2503=PROPER FOR WALDEN BOOKS TO GO TO OTHER PUBLISHERS AND SAY, YOU  
2504=KNOW, THIS IS REALLY A GOOD IDEA, AND YOU REALLY OUGHT TO MEET  
2505=THE COMPETITION OF ST. MARTIN'S AND ANY OTHERS WHO HAVE  
2506=PUBLICLY ANNOUNCED THEIR WILLINGNESS TO DO THIS?  
2507=A. YES, IF THOSE, THEN, MEETING THE COMPETITION IS APPLIED TO  
2508=EVERYBODY IN THE INDUSTRY.  
2509=Q. IT WOULD BE A GOOD THING, FROM YOUR PERSPECTIVE, AND FROM  
2510=THE PERSPECTIVE OF WHAT YOU'VE CALLED INDEPENDENT BOOKSELLERS,  
2511=IF WALDEN WERE TO SUCCEED IN CONVINCING MORE AND MORE  
2512=PUBLISHERS TO OFFER THE R.O.G. PROGRAM, AND TO OFFER IT  
2513=GENERALLY, ISN'T THAT TRUE?  
2514=A. I WOULD CONCEDE THAT IT WOULD BE AN ADVANTAGE FOR EVERYBODY  
2515=IN THE INDUSTRY TO HAVE THESE, WHAT YOU CALL R.O.G.  
2516=Q. YOU ALSO TESTIFIED YESTERDAY ABOUT THE ADVANTAGES OF WHAT  
2517=YOU CALLED JUST-IN-TIME ORDERING. I GUESS THAT PHRASE CAME  
2518=INTO -- IN VOGUE BACK IN THE EARLY 1980'S WHEN TOYOTA WAS  
2519=BEATING THE PANTS OFF DETROIT, USING IT, AND CROWING ABOUT ITS  
2520=JUST-IN-TIME INVENTORY MANAGEMENT, AND I GUESS THAT IT'S BEEN  
2521=ADOPTED IN WIDESPREAD WAYS.  
2522= DID YOU DO YOUR BEST TO ADHERE TO JUST-IN-TIME  
2523=ORDERING WHEN YOU RAN YOUR STORE?  
2524=A. I DID, AND IT BECAME MUCH MORE FEASIBLE WITH THE ADVENT OF  
  
2525=COMPUTERS AND BETTER INVENTORY CONTROL SYSTEMS.

2526=Q. THE COMPANY, OR THE BOOKSELLING BUSINESS, THAT HAS THE  
2527=TECHNOLOGICAL EDGE IN JUST-IN-TIME ORDERING WOULD HAVE A  
2528=SIGNIFICANT COMPETITIVE ADVANTAGE IN THE MARKETPLACE, WOULD IT  
2529=NOT?  
2530=A. YES.  
2531=Q. WHEN YOU RAN YOUR STORE, DID THE COMPUTER SYSTEM THAT YOU  
2532=USED HAVE PREDICTIVE CAPABILITY?  
2533=A. YES.  
2534=Q. IN OTHER WORDS, DID IT HAVE THE ABILITY TO LEARN FROM WHAT  
2535=YOU ORDERED?  
2536=A. YES.  
2537=Q. AND PREDICT WHAT YOU OUGHT TO ORDER?  
2538=A. CORRECT.  
2539=Q. AND YOU FOUND THAT TO BE USEFUL?  
2540=A. YES.  
2541=Q. IT GAVE YOU AN ADVANTAGE IN OPERATING YOUR BOOKSTORE,  
2542=CORRECT?  
2543=A. YES.  
2544=Q. AND HELPED TO MAKE IT MORE PROFITABLE, RIGHT?  
2545=A. YES.  
2546=Q. LET'S TURN TO THE CARTON QUANTITY ISSUE BRIEFLY. I'D LIKE  
2547=YOU TO LOOK BACK AT TAB NUMBER 8 OF THE PLAINTIFFS' SET OF  
2548=EXHIBITS THAT WAS PROVIDED TO YOU THIS MORNING. THAT CONTAINS  
2549=A LETTER FROM ROBIN WAGNER OF BORDERS TO STEVE LEWERS OF  
  
2550=HOUGHTON MIFFLIN COMPANY.  
2551=A. CORRECT.  
2552=Q. I'LL GIVE YOU AND HIS HONOR A MOMENT TO FIND IT AND THEN  
2553=EMBARK ON THIS PATH.  
2554= THE COURT: WHAT TAB IS IT? EIGHT?  
2555= MR. STEER: TAB 8, YOUR HONOR.  
2556=Q. MS. SEE, HAVE YOU HAD A CHANCE TO LOOK BACK AT THE  
2557=DOCUMENT?  
2558=A. YES, I HAVE.  
2559=Q. NOW, I NOTE THAT IT'S A JANUARY 5, 1995 LETTER FROM  
2560=MR. WAGNER OF BORDERS TO HOUGHTON MIFFLIN COMPANY, AND HOUGHTON  
2561=MIFFLIN COMPANY, SO THE RECORD IS CLEAR, IS A SUBSTANTIAL  
2562=PUBLISHER, ISN'T IT?  
2563=A. YES, IT IS.  
2564=Q. AND YOU'LL SEE IN THE FIRST LINE MR. WAGNER WRITES,  
2565= "I AM GLAD WE HAD THE OPPORTUNITY TO FURTHER  
2566= DISCUSS THE PROPOSED HOUGHTON RETAIL SALES POLICIES  
2567= ON TUESDAY."  
2568=AND THEN HE EXPRESSES IN THE NEXT LINE HIS DISTRESS ABOUT  
2569=CERTAIN ISSUES.  
2570= NOW, IS IT FAIR TO CHARACTERIZE THIS AS A  
2571=NEGOTIATING LETTER?  
2572=A. NEGOTIATION IS A TERM I WOULD NOT USE. IT'S A CONVERSATION  
2573=LETTER.  
2574=Q. IN WHICH MR. WAGNER IS SETTING FORTH HIS VIEWS AS TO HOW  
  
2575=HOUGHTON OUGHT TO STRUCTURE ITS SALES TERMS, CORRECT?  
2576=A. CORRECT.  
2577=Q. HE HAS AN ABSOLUTE RIGHT TO DO THAT, DOESN'T HE?  
2578=A. YES, HE DOES.  
2579=Q. YOU DON'T QUARREL WITH HIS RIGHT TO DO THAT.  
2580=A. NO.  
2581=Q. FROM YOUR PERSPECTIVE, THERE WAS ABSOLUTELY NOTHING WRONG  
2582=WITH MR. WAGNER'S WRITING THIS LETTER TO MR. LURES AT HOUGHTON  
2583=MIFFLIN, RIGHT?  
2584=A. THERE'S NOTHING WRONG WITH TRYING TO GET THE BEST POSSIBLE  
2585=TERMS, AS LONG AS THEY ARE AVAILABLE TO EVERYBODY.  
2586=Q. NOW, IN THE FIRST FULL PARAGRAPH, THE ONE THAT TALKS ABOUT  
2587=CARTON QUANTITY RESTRICTION, TOWARD THE END, MR. WAGNER WRITES,  
2588=AND I'LL QUOTE,  
2589= "ALL MAJOR PUBLISHERS (INCLUDING RANDOM HOUSE,  
2590= SIMON & SCHUSTER, LITTLE BROWN, ET CETERA) HAVE  
2591= RECOGNIZED THAT SUCH RESTRICTIONS ARE ANATHEMA TO  
2592= OUR EFFICIENT ORDERING PRACTICES."  
2593= HE ADDS THAT,  
2594= "THESE PUBLISHERS HAVE BEEN FLEXIBLE ON THIS  
2595= ISSUE BY OFFERING 2 PERCENT ADDITIONAL ON RDC ORDERS  
2596= WITHOUT ENFORCING CARTON QUANTITY ORDERING,"

2597= AND THEN HE SAYS, "HOUGHTON MUST DO THE SAME."  
2598= DO YOU KNOW WHETHER HOUGHTON DID THE SAME?  
2599=A. YES, I DO. I SAW THE LETTER BACK FROM STEVE TO MR. WAGNER.

2600=Q. AND HOUGHTON SAID, YOU'RE RIGHT, WE'LL DO THAT?  
2601=A. SAID, WE'LL DO THAT. HE AGREED.  
2602=Q. THEY AGREED. NOW, IN YOUR -- LET ME DIVERGE A LITTLE BIT  
2603=HERE AND ASK YOU A FEW QUESTIONS ABOUT YOUR UNDERSTANDING OF  
2604=YOUR RESPONSIBILITY IN ACTING AS AN EXPERT WITNESS IN THIS  
2605=LAW SUIT.  
2606= WOULD YOU TELL ME, AND TELL THE COURT, PLEASE, WHAT  
2607=YOU UNDERSTOOD TO BE YOUR JOB, YOUR ROLE.  
2608=A. WELL, I DON'T HAVE MY REPORT HERE, SO I CAN'T QUOTE IT  
2609=EXACTLY, BUT I WAS ASKED TO EVALUATE, TO MAKE AN OPINION, ON  
2610=WHETHER THE -- FROM THE EVIDENCE THAT I SAW, WHETHER THE  
2611=DEFENDANTS WERE GETTING TERMS THAT WERE DIFFERENT FROM THE  
2612=PUBLISHED TERMS THAT ARE GENERALLY AVAILABLE IN THE BOOK  
2613=INDUSTRY.  
2614=Q. ALL RIGHT. YOU SAY, THE PUBLISHED TERMS THAT ARE GENERALLY  
2615=AVAILABLE IN THE BOOK INDUSTRY, AND AT THE VERY LEAST, THAT  
2616=WOULD REQUIRE A REVIEW OF THE ABA'S HANDBOOKS, RIGHT?  
2617=A. CORRECT.  
2618=Q. AND IT WOULD ALSO REQUIRE A REVIEW OF OTHER PUBLISHED FORMS  
2619=OF PRICE AND TERM ANNOUNCEMENTS FROM PUBLISHERS AND OTHER  
2620=VENDORS, WOULDN'T IT?  
2621=A. YES.  
2622=Q. DID YOU LOOK TO SEE WHETHER IN 1995, WHEN MR. WAGNER WROTE  
2623=HIS LETTER, OTHER MAJOR PUBLISHERS WERE OFFERING RETAIL  
2624=DISTRIBUTION CENTER TERMS THAT DID NOT REQUIRE CARTON QUANTITY  
2625=ORDERING?  
2626=A. THERE ARE, AS I TESTIFIED YESTERDAY, THERE ARE PUBLISHERS  
2627=WHO DO NOT REQUIRE, BUT MOST PUBLISHERS REQUIRE CARTON  
2628=QUANTITIES. IT IS ONE OF THE FOUR REQUIREMENTS THAT IS MOST  
2629=OFTEN ENFORCED.  
2630=Q. ALL RIGHT. AMONG THE PUBLISHERS THAT YOU KNOW DO NOT  
2631=REQUIRE CARTON QUANTITY ARE HARPER-COLLINS, IS THAT CORRECT?  
2632=A. THIS IS A MEMORY TEST.  
2633=Q. NO, IT'S NOT INTENDED TO BE A MEMORY TEST. MS. SEE, IF YOU  
2634=DON'T REMEMBER --  
2635=A. I DON'T REMEMBER.  
2636=Q. FOR PURPOSES OF MY EXAMINATION, I ASK YOU TO ASSUME THAT,  
2637=AS A HYPOTHETICAL, THAT HARPER COLLINS, IN 1995, DID NOT  
2638=REQUIRE CARTON QUANTITIES ON SHIPMENTS TO RETAIL DISTRIBUTION  
2639=CENTERS. CAN YOU DO THAT?  
2640=A. I CAN ACCEPT YOUR STATEMENT.  
2641=Q. ALL RIGHT. DO YOU RECALL WHETHER HARCOURT -- HARCOURT  
2642=BRACE IT USED TO BE CALLED -- HAD A CARTON QUANTITY REQUIREMENT  
2643=IN 1995, OR NOT?  
2644=A. I'M TRYING TO THINK. I DON'T THINK THEY DID.  
2645=Q. WELL, I'LL ONCE AGAIN ASK YOU TO ACCEPT MY REPRESENTATION  
2646=AS A HYPOTHETICAL THAT THEY DID NOT REQUIRE CARTON QUANTITY.  
2647= AND FINALLY, DO YOU KNOW WHETHER LITTLE BROWN, JUST  
2648=AS ANOTHER EXAMPLE, REQUIRED CARTON QUANTITY BACK THEN?  
2649=A. I'M TRYING TO THINK WHO OWNED LITTLE BROWN IN 1995.

2650=Q. IT MAY EVEN HAVE BEEN LITTLE BROWN. WHO KNOWS?  
2651=A. I BELIEVE THAT -- I'LL ACCEPT YOUR STATEMENT.  
2652=Q. AND DO YOU KNOW WHETHER TODAY, UNDER RANDOM HOUSE'S  
2653=PUBLISHED TERMS, GENERALLY, RANDOM HOUSE DOES NOT REQUIRE  
2654=CARTON QUANTITIES?  
2655=A. I UNDERSTAND RANDOM HOUSE HAS CHANGED THEIR POLICY, FOR  
2656=EVERYONE.  
2657=Q. SO ASSUMING, THEN, FOR THE PURPOSES OF MY QUESTIONING, IF,  
2658=IN FACT, LITTLE BROWN, HARPER-COLLINS AND HARCOURT BRACE, JUST  
2659=TO NAME SOME EXAMPLES, BACK IN 1995 DID NOT REQUIRE CARTON  
2660=QUANTITY ORDERING, WAS THERE -- DO YOU HAVE ANY QUARREL WITH  
2661=MR. WAGNER'S RIGHT TO ASK HOUGHTON MIFFLIN TO CHANGE ITS TERMS  
2662=SO THAT IT WOULD NOT REQUIRE CARTON QUANTITY ORDERING?  
2663=A. OBVIOUSLY, YOU'RE GOING TO ASK FOR THE BEST TERMS THAT --  
2664=THAT ARE POSSIBLE.  
2665=Q. SO YOUR ANSWER IS, HE HAD THE RIGHT.  
2666=A. HE HAD THE RIGHT TO DO IT.

2667=Q. NOW, I'D LIKE TO CALL YOUR ATTENTION TO EXHIBIT NUMBER  
2668=11574, WHICH IS IN THE BINDER THAT WE JUST PROVIDED.  
2669= YOUR HONOR, I THINK THAT'S A FAIRLY THIN ONE.  
2670=11574, MS. SEE. IT'S WHITE.  
2671=A. I DID NOT RECEIVE A BINDER UP HERE.  
2672=Q. I'M SORRY, YOU DIDN'T RECEIVE IT?  
2673=A. NO.  
2674=Q. BECAUSE, THANKS TO APPROACHING SENILITY, I FORGOT TO HAND  
2675=IT TO YOU.  
2676=A. EXCUSE ME, THE NUMBER OF THE TAB?  
2677=Q. 11574.  
2678=A. 11574?  
2679=Q. YES, MA'AM.  
2680=A. IT WAS HIDING BEHIND 11566.  
2681=Q. I JUST HAVE A COUPLE QUESTIONS, THAT I DON'T ASK YOU TO GO  
2682=TO ANY DETAIL ON THIS. THERE ARE TWO PAGES HERE. YOU'LL NOTE  
2683=THAT THEY WERE PRODUCED IN THIS LITIGATION BY TWTP, WHICH  
2684=REFERS TO TIME WARNER TRADE PUBLISHING, THEREBY ANSWERING WHO  
2685=OWNS LITTLE BROWN. RIGHT?  
2686=A. RIGHT.  
2687=Q. YOU UNDERSTAND THAT THEY DO TODAY, RIGHT?  
2688=A. RIGHT.  
2689=Q. OKAY. HAVE YOU SEEN THIS KIND OF A DOCUMENT BEFORE?  
2690=A. I NEED TO TAKE A MINUTE AND --  
2691=Q. OH, ABSOLUTELY.  
2692=A. I'VE SEEN THIS KIND OF DOCUMENT.  
2693=Q. NOT NECESSARILY THIS ONE.  
2694=A. I HAVE NOT SEEN THIS ONE.  
2695=Q. OKAY. WOULD YOU GO TO THE BOTTOM OF THE SECOND PAGE,  
2696=PLEASE. YOU'LL SEE IN THE LOWER LEFT-HAND CORNER THAT IT  
2697=APPEARS TO CONTAIN A DATE, 7/1/97, AND THE TERM, "RETAIL  
2698=DISTRIBUTION CENTER."  
2699=A. EXCUSE ME, I'M LOOKING AT A LETTER TO TIMOTHY HOPKINS?  
2700=Q. NO --  
2701=A. I'M ON THE WRONG PAGE.  
2702=Q. 11574.  
2703=A. THAT'S MY TAB.  
2704=Q. OH -- MAY I...?  
2705= MAY I APPROACH THE WITNESS AGAIN, YOUR HONOR?  
2706= THE COURT: YES.  
2707=BY MR. STEER:  
2708=Q. PERHAPS THIS VERSION WAS CREATED ERRONEOUSLY. MAY I  
2709=EXCHANGE THEM WITH YOU? THANKS. I'M GOING TO BURDEN MR. WELSH  
2710=HERE WITH -- WELL, YOU DON'T HAVE THAT TAB, FOR WHICH I  
2711=APOLOGIZE. OKAY?  
2712=A. THAT CLARIFIES IT. I'M NOW LOOKING AT LITTLE BROWN. I WAS  
2713=LOOKING AT FARRAR STRAUSS.  
2714=Q. JUST A QUICK QUESTION. IF YOU GO UP, JUST ABOVE THAT LOWER  
2715=LEFT-HAND CORNER DESIGNATION OF THE NATURE OF THE DOCUMENT, AND  
2716=YOU LOOK AT ITEM NUMBER 7 --  
2717=A. OH.  
2718=Q. -- IT SAYS, "CHANGES IN TERMS. THIS SCHEDULE IS SUBJECT TO  
2719=CHANGE WITHOUT NOTICE." THAT IS WHAT IT SAYS, ISN'T IT?  
2720=A. IT DOES SAY THAT, YES.  
2721=Q. NOW, IN YOUR EXPERIENCE IN LOOKING AT PUBLISHED TERMS  
2722=SCHEDULES THAT YOU RECEIVE FROM PUBLISHERS OVER THE YEARS, THEY  
2723=GENERALLY SAY, "THIS SCHEDULE IS SUBJECT TO CHANGE WITHOUT  
2724=NOTICE," ISN'T THAT TRUE?  
2725=A. YES, GENERALLY THAT'S SOMETHING THEY PUT IN THERE.  
2726=Q. NOW, LET'S TURN TO A DIFFERENT SUBJECT, PLEASE. I WANT TO  
2727=GO BACK TO TALKING ABOUT MY CLIENT'S RELATIONSHIP, BUSINESS  
2728=RELATIONSHIP, WITH INGRAM BOOK COMPANY, ABOUT WHICH YOU'VE  
2729=TESTIFIED A LITTLE BIT.  
2730= AND HERE, I'LL REFER YOU, IF YOU'D LIKE TO HAVE IT  
2731=IN FRONT OF YOU, BACK TO THE MEMORANDUM OF UNDERSTANDING WHICH  
2732=IS IN THE PLAINTIFFS' THREE-RING BINDER AT TAB NUMBER 17.  
2733=SORRY THAT WE HAVE TO PLAY MUSICAL BINDERS, BUT IT'S NECESSARY.  
2734=A. YES.  
2735=Q. YOU TESTIFIED EARLIER ABOUT THE PROVISIONS OF THIS  
2736=AGREEMENT THAT RELATE TO THE RETURNS CREDIT THAT INGRAM AGREES

2737=TO PROVIDE MY CLIENTS, BORDERS AND WALDEN BOOKS. THOSE ARE SET  
2738=FORTH AT PAGE 3 OF THE MEMORANDUM OF UNDERSTANDING.  
2739=A. CORRECT.  
2740=Q. AND THE BASE BUSINESS REFERRED TO THERE PROVIDES THAT WE  
2741=CAN RETURN UP TO 5 PERCENT OF THE TOTAL YEAR PURCHASES AT  
2742=PURCHASE PRICE.  
2743=A. YES.  
2744=Q. CORRECT?  
2745=A. CORRECT.  
2746=Q. NOW -- I'M SORRY, I'VE MISSPOKEN. WHAT IT TALKS ABOUT  
2747=ABOVE IS, "HASSLE-FREE RETURNS WILL RECEIVE CREDIT AT PURCHASE  
2748=PRICE." LOOK AT PAGE 3 --  
2749=A. YES.

2750=Q. -- JUST ABOVE THE CHART.  
2751=A. YES, I SEE THAT.  
2752=Q. DO YOU KNOW WHAT "HASSLE-FREE RETURNS" ARE?  
2753=A. YES, I DO.  
2754=Q. COULD YOU EXPLAIN?  
2755=A. YES, "HASSLE-FREE RETURNS" REFERS TO A DOCUMENT THAT COMES  
2756=WITH YOUR BOOKS, AND YOU CAN SEND THAT BACK WITH THE  
2757=QUESTIONABLE BOOK RECEIPTS ON IT, SO THAT YOU DON'T HAVE TO  
2758=BRING UP YOUR OWN -- YOU DON'T HAVE TO CREATE NEW DOCUMENTS.  
2759=Q. SO THAT EXPEDITES THE RETURN PROCESS?  
2760=A. CORRECT.  
2761=Q. RIGHT?  
2762=A. CORRECT.  
2763=Q. AND THEY ARE CREDITED TO MY CLIENTS AT PURCHASE PRICE.  
2764= DO YOU KNOW WHETHER, GENERALLY SPEAKING, OTHER  
2765=BOOKSELLERS WHO ARE -- WHO TAKE ADVANTAGE OF THE HASSLE-FREE  
2766=RETURN PROCESS CAN ALSO GET CREDIT AT PURCHASE PRICE?  
2767=A. I DO BELIEVE -- I'M TRYING TO THINK ABOUT THE INGRAM  
2768=BROCHURE, BECAUSE IT DOES REFER TO THE HASSLE-FREE IN THERE.  
2769=Q. AND IT DOES PROVIDE FOR FULL PURCHASE PRICE CREDIT IF YOU  
2770=USE THAT PROCESS, RIGHT?  
2771=A. YES.  
2772=Q. OKAY, AND THEN IT GOES ON AND TALKS ABOUT MERCHANDISE  
2773=RETURN OF OVERSTOCK, RECEIVING CREDIT, ACCORDING TO THE CHART,  
2774=AND THERE, THE CREDITS FOR THE BASE BUSINESS ARE -- WELL,

2775=THEY'RE ON AN AVERAGE BASIS, AREN'T THEY? THEY'RE BASED ON  
2776=SOMETHING OTHER THAN FULL RETURN VALUE, RIGHT?  
2777=A. YES. COULD YOU DIRECT ME TO WHERE YOU JUST READ? IS THAT  
2778=THE NEXT BOX OVER?  
2779=Q. I'M LOOKING AT THE BOX, THE SAME BOX --  
2780=A. OKAY.  
2781=Q. -- AT THE BOTTOM OF THE PAGE 3.  
2782=A. FINE.  
2783=Q. THE FIRST SEGMENT ON TOP IS TITLED, "BASE BUSINESS."  
2784=A. RIGHT.  
2785=Q. YOU SEE ON THE LEFT SIDE IT SAYS, "RETURNS UP TO 5 PERCENT  
2786=OF TOTAL YEAR PURCHASES," AND THEN ON THE RIGHT SIDE --  
2787=A. RIGHT.  
2788=Q. -- IT SAYS, "CREDIT AT AVERAGE GROSS PURCHASE DISCOUNT OF  
2789=ALL 1997 PURCHASES." ISN'T THAT RIGHT?  
2790=A. YES.  
2791=Q. AND SO BORDERS IS 37.88 PERCENT AND WALDEN BOOKS IS  
2792=40.59 PERCENT, RIGHT?  
2793=A. UM-HUM.  
2794=Q. SO FOR MY CLIENTS, THE RETURNS ARE, ON THE BASE BUSINESS,  
2795=NOT MADE AT THE FULL PURCHASE PRICE, ISN'T THAT CORRECT?  
2796=A. YOUR RETURNS ARE NOT MADE AT THE FULL PURCHASE PRICE.  
2797=HOWEVER, THE -- EXCUSE ME -- BUT THE INGRAM PUBLISHED TERMS ARE  
2798=THAT YOU DO HAVE A PENALTY THAT'S HIGHER THAN THIS.  
2799=Q. OKAY. THAT'S TRUE FOR INGRAM'S ABA HANDBOOK PUBLISHED

2800=TERMS, CORRECT?  
2801=A. I BELIEVE I READ THAT ALSO IN THEIR BROCHURE THEY SEND TO  
2802=BOOKSTORES, THE SAME TERMS FOR RETURNS.  
2803=Q. MOST PUBLISHERS, ON THE OTHER HAND, HAVE NO RETURNS  
2804=PENALTY, ISN'T THAT CORRECT?  
2805=A. WELL, NOT EXACTLY. SOME PUBLISHERS DO. THERE'S A RETURNS  
2806=PENALTY -- WELL, WE'RE TALKING ABOUT TWO DIFFERENT THINGS HERE.

2807=ONE IS THE AMOUNT YOU'RE ALLOWED TO RETURN, AND THE PENALTY AS  
2808=FAR AS DISCOUNT IS CONCERNED.  
2809=Q. RIGHT, AND WE WERE TALKING --  
2810=A. ABOUT DISCOUNT.  
2811=Q. -- WITH RESPECT TO THE MEMORANDUM OF UNDERSTANDING A MOMENT  
2812=AGO, WE WERE TALKING ABOUT THE AMOUNT OF THE DISCOUNT APPLIED  
2813=ON THE RETURN, AND I'M STICKING TO THE SAME SUBJECT, RIGHT? SO  
2814=MOST PUBLISHERS, AND THE TREND -- LET ME WITHDRAW THAT.  
2815= THE TREND HAS BEEN FOR PUBLISHERS TO ELIMINATE  
2816=PENALTIES ON RETURNS, ISN'T THAT TRUE?  
2817=A. THAT IS THE TREND.  
2818=Q. AND MY CLIENTS HAVE NEGOTIATED FOR YEARS WITH PUBLISHERS TO  
2819=ELIMINATE PENALTIES ON RETURNS; ISN'T THAT ALSO TRUE?  
2820=A. I DON'T KNOW THAT THEY HAVE, BUT I ASSUME THEY ARE.  
2821=Q. AND TO THE EXTENT THAT MY CLIENT'S NEGOTIATIONS MAY HAVE  
2822=RESULTED IN THE PUBLISHERS ELIMINATING RETURNS PENALTIES FOR  
2823=EVERYBODY, THAT'S A GOOD THING FOR THE BOOK RETAILING INDUSTRY,  
2824=ISN'T IT?  
  
2825=A. OF COURSE IT IS, AS LONG AS ALL OF THESE BENEFITS BENEFIT  
2826=EVERYBODY.  
2827=Q. NOW, I NEED TO GO BACK TO A DIFFERENT DOCUMENT THAT YOU  
2828=TESTIFIED ABOUT EARLIER, BUT I'M EMBARRASSED TO SAY THAT I'M  
2829=HAVING TROUBLE FINDING IT. SO BEAR WITH ME FOR JUST A MOMENT,  
2830=PLEASE.  
2831= IT'S THE BETHKE SERIES OF E-MAILS HAVING TO DO WITH  
2832=INGRAM BOOK COMPANY, AND I MAY HAVE LEFT IT ON MY TABLE.  
2833=A. IT'S UNDER TAB 18.  
2834=Q. CORRECT.  
2835= MR. STEER: I APOLOGIZE FOR THE DELAY, YOUR HONOR.  
2836=Q. IT'S UNDER TAB 18 OF THE PLAINTIFFS' NOTEBOOK.  
2837= BUT BEFORE WE GO BACK TO TAB 18, LET'S COVER A  
2838=COUPLE OF QUESTIONS ON THE MEMORANDUM OF UNDERSTANDING ITSELF.  
2839=THAT'S TAB NUMBER 17. YOU JUST HAD IT IN FRONT OF YOU.  
2840=A. RIGHT.  
2841=Q. THIS PARTICULAR MEMORANDUM OF UNDERSTANDING IS FOR 1998,  
2842=RIGHT?  
2843=A. YES.  
2844=Q. OKAY. BUT THERE HAS BEEN AN INCENTIVE PROVISION IN THE  
2845=MEMORANDA OF UNDERSTANDING OVER SOME YEARS, ISN'T THAT CORRECT?  
2846=A. YES, AND THEY ORIGINALLY WERE -- WALDEN AND BORDERS HAD  
2847=DIFFERENT INCENTIVES.  
2848=Q. BUT THEN WHEN THE TWO OPERATIONS OF BORDERS AND WALDEN  
2849=MOVED TOGETHER, THE AGREEMENT WAS CONSOLIDATED, RIGHT?  
  
2850=A. RIGHT.  
2851=Q. NOW, AT THE -- AT PAGE 8 OF EXHIBIT NUMBER 1894, WHICH IS  
2852=AT TAB 17, YOU SEE THE PROVISION AT THE VERY TOP OF THE PAGE  
2853=FOR THE INCENTIVE REBATE.  
2854=A. I DO.  
2855=Q. AND YOUR UNDERSTANDING IS, IS IT NOT, THAT INGRAM INFORMED  
2856=BORDERS THAT THE REASON IT WANTED TO STRUCTURE ITS CONTRACT,  
2857=ITS ARRANGEMENT WITH BORDERS IN THIS FASHION, WITH THE  
2858=INCENTIVE PAYMENT, WAS IN ORDER TO COMPLY WITH THE  
2859=ROBINSON-PATMAN ACT, ISN'T THAT CORRECT?  
2860=A. WELL, YES, I READ THAT IF THEY DID NOT DO THIS, THEY WOULD  
2861=BE OUT OF COMPLIANCE, IF THEY GAVE THE DISCOUNT IN A DIFFERENT  
2862=WAY.  
2863=Q. SO THEY REPRESENTED TO BORDERS --  
2864= THE COURT: WHERE DID YOU READ THAT?  
2865= THE WITNESS: WELL, IN THE E-MAIL, ON THE NEXT -- IN  
2866=THE -- UNDER TAB 17, TAB 18, GO BACK TO THAT E-MAIL.  
2867= MR. STEER: EXHIBIT 2470, YOUR HONOR.  
2868= THE WITNESS: AND IN THE E-MAIL I REFERRED TO THIS  
2869=MORNING --  
2870= THE COURT: YES.  
2871= THE WITNESS: YOU SEE THAT?  
2872= THE COURT: YES. ALL RIGHT.  
2873= MR. STEER: THANK YOU.  
2874=Q. ONE LAST TOPIC TO COVER, MS. SEE. YOU, IN DOING YOUR WORK,  
  
2875=YOU DID NOT TALK TO ANY OF THE PLAINTIFFS IN THE CASE IN ORDER  
2876=TO GET ANY FACTUAL INFORMATION, CORRECT?

2877=A. I DID NOT.  
2878=Q. OKAY, AND YOU DIDN'T TALK TO REPRESENTATIVES OF ANY  
2879=PUBLISHERS, ISN'T THAT RIGHT?  
2880=A. NO, I DID NOT.  
2881=Q. YOU DIDN'T ASK FOR DOCUMENTS DIRECTLY FROM PUBLISHERS?  
2882=A. NO, I DID NOT.  
2883=Q. YOU DIDN'T DO INDEPENDENT RESEARCH IN THE LITERATURE  
2884=RELATING TO THIS INDUSTRY BEYOND LOOKING AT THE ABA'S HANDBOOK  
2885=AND SOME PUBLISHERS WEEKLY EXAMPLES AND SO ON?  
2886=A. I REFERRED BACK TO THE MANUAL ON BOOKSELLING AND SOME OTHER  
2887=REFERENCES.  
2888=Q. NOW, I'D LIKE YOU TO TURN TO EXHIBIT 10924 IN OUR PAMPHLET,  
2889=OR THREE-RING BINDER, PLEASE. THIS IS THE LAST SET OF  
2890=DOCUMENTS ABOUT WHICH I WILL ASK YOU ANY QUESTIONS. AT LEAST  
2891=ON THIS ROUND, IF I MAY REFER TO IT THAT WAY.  
2892=A. WAIT A MINUTE, I HAVE TO MAKE CERTAIN THAT I HAVE.... OH,  
2893=GOT THE WRONG NOTEBOOK.  
2894=Q. RIGHT, IT'S THE THIN ONE.  
2895=A. RIGHT, I KNOW. THANK YOU. EXCUSE ME WHAT IS THE TAB  
2896=NUMBER?  
2897=Q. 10924. AND BEHIND 10924 WE HAVE ATTACHED TWO  
2898=DEMONSTRATIVES WHICH ARE INTENDED SIMPLY TO PULL NUMBERS THAT  
2899=ARE VERY SMALL ON NUMBER 10924 AND ENLARGE THEM, JUST FOR THE  
  
2900=EASE OF EVERYBODY'S REFERENCE AND MY OWN ABILITY TO SEE THEM.  
2901= SO TAKE A MOMENT, PLEASE, AND REVIEW EXHIBIT 10924.  
2902=THEN I'LL ASK YOU A COUPLE QUESTIONS.  
2903=A. ARE YOU ASKING ME TO REVIEW THE PAGE OF SUMMARY OF BDD'S  
2904=SALES ANALYSIS, THE ENLARGED...?  
2905=Q. YOU CAN DO EITHER WAY, BUT JUST FOR ACCURACY OF THE RECORD,  
2906=AND I'M SURE PLAINTIFFS' COUNSEL WOULD PREFER, THAT YOU LOOK AT  
2907=THE SALES ANALYSIS DOCUMENT ITSELF, AT LEAST INITIALLY, SO THAT  
2908=YOU'RE FAMILIAR WITH WHAT IT SETS FORTH.  
2909=A. OKAY.  
2910=Q. AND I'LL ASK YOU A FEW QUESTIONS.  
2911=A. (WITNESS REVIEWING DOCUMENT.)  
2912= THE COURT: WHY DON'T YOU ASK HER SO SHE CAN FOCUS  
2913=HER REVIEW.  
2914= MR. STEER: OKAY, I'LL DO THAT, YOUR HONOR. AS I  
2915=SAID, THIS WON'T TAKE LONG.  
2916=Q. THIS DOCUMENT IS A BDD DOCUMENT THAT WAS PRODUCED IN THE  
2917=COURSE OF LITIGATION, AND EVERYONE WILL SEE THAT IT BEARS A  
2918=RANDOM HOUSE TAG OR NUMBER IN THE CORNER, AND THAT'S BECAUSE  
2919=RANDOM HOUSE ACQUIRED BDD IN THE LATE 1970'S, ISN'T THAT TRUE?  
2920=A. YES.  
2921=Q. OKAY. SO THESE WERE PROVIDED TO US BY RANDOM HOUSE, OKAY,  
2922=AND I ASK YOU JUST TO ASSUME FOR PURPOSES OF MY QUESTIONING  
2923=THAT THESE NUMBERS ARE RANDOM HOUSE'S, OR BDD'S INTERNAL  
2924=CALCULATIONS OF BASE DISCOUNTS AND TOTAL EFFECTIVE DISCOUNTS.  
  
2925=IF YOU WANT TO, YOU CAN LOOK AT THE TWO DOCUMENTS THAT WE'VE  
2926=CREATED AS DEMONSTRATIVES, THEY'RE EXHIBIT 11747 AND 11748,  
2927=MS. SEE, AND WHAT YOU'LL SEE IS THAT IT APPEARS THAT BDD  
2928=CONDUCTED A COMPARISON OF THE BASE DISCOUNTS AND TOTAL  
2929=EFFECTIVE DISCOUNTS AFTER ADJUSTMENTS THAT WERE RECEIVED BY MY  
2930=CLIENT BORDERS, MY CLIENT WALDEN BOOKS, BARNES & NOBLE, AND THE  
2931=TATTERED COVER, ONE OF THE PLAINTIFF BOOKSELLERS IN THIS CASE.  
2932= SO HERE'S MY QUESTION: YOU HAVE TESTIFIED ABOUT  
2933=DIFFERENCES IN TERMS THAT YOU SAY CERTAIN OF THE DEFENDANTS  
2934=HAVE ENJOYED. IN CONDUCTING YOUR WORK AS AN EXPERT HERE,  
2935=DIDN'T YOU WANT TO KNOW WHAT EFFECTIVE TERMS THE PLAINTIFFS  
2936=RECEIVED FROM THE PUBLISHERS IN THE PERIOD TIME THAT'S IN  
2937=QUESTION IN THE LAWSUIT?  
2938=A. I WAS ASKED TO COMPARE THE PUBLISHED TERMS WITH THE TERMS  
2939=THAT THE DEFENDANTS RECEIVED. I WAS NOT ASKED TO COMPARE THE  
2940=PLAINTIFFS' TERMS.  
2941=Q. AND SO YOU DIDN'T.  
2942=A. SO I DID NOT.  
2943=Q. AND YOU DIDN'T ASK TO BE ALLOWED TO DO SO, ISN'T THAT  
2944=RIGHT?  
2945=A. I DID NOT ASK TO BE ALLOWED TO DO SO, BECAUSE THAT WAS NOT  
2946=WHAT I WAS ASKED TO GIVE AN EXPERT OPINION ON.  
2947=Q. AND TO CUT TO THE CHASE, IF WE LOOK AT EXHIBIT NUMBER

2948=11748, WE SEE THAT FOR THE FISCAL YEAR 1997, 98, IN FACT, OR AT  
2949=LEAST AS SET FORTH IN THIS BDD INTERNAL DOCUMENT, THE TATTERED

2950=COVER ENJOYED A BETTER -- A BETTER -- TOTAL EFFECTIVE DISCOUNT  
2951=THAN MY CLIENT BORDERS.

2952=A. IN THE YEAR 1978.

2953=Q. '97- '98.

2954=A. I SEE THAT.

2955= THE COURT: AND I'M SORRY THAT I HAVEN'T BEEN ABLE  
2956=TO CUT TO THE CHASE.

2957= MR. STEER: I'M SORRY, YOUR HONOR, IF I CAN HELP

2958=YOU --

2959= THE COURT: ALL RIGHT, JUST KINDLY DESCRIBE THE

2960=PAGE, BY NUMBER OR OTHERWISE.

2961= MR. STEER: YES, YOUR HONOR. ON EXHIBIT NUMBER

2962=11748 --

2963= THE COURT: I GUESS THE REASON I HAVEN'T BEEN ABLE  
2964=TO DO THAT IS BECAUSE I DON'T HAVE 11748.

2965= MR. STEER: IT SHOULD BE RIGHT BEHIND 10924. I DID  
2966=THAT OUT OF ORDER, SO IT WOULD FOLLOW WITH THE BASIC DOCUMENT.

2967= THE COURT: ALL RIGHT, THANK YOU.

2968= MR. STEER: THANK YOU, YOUR HONOR.

2969=Q. SO WHAT THIS CHART SHOWS FOR 1997-98 IS THAT THE TATTERED  
2970=COVER IN THAT YEAR ENJOYED A -- OR APPEARED TO HAVE ENJOYED A

2971=BETTER TOTAL EFFECTIVE DISCOUNT, AFTER ADJUSTMENTS, THAN

2972=BORDERS, AND A DISCOUNT THAT LAGGED WALDEN BY TWO-TENTHS OF A

2973=POINT AND LAGGED BARNES & NOBLE BY EIGHT-TENTHS OF A POINT

2974=OVERALL, CORRECT?

2975=A. CORRECT.

2976=Q. AND THAT VARIED FROM YEAR TO YEAR. THOSE RELATIONSHIPS,  
2977=NUMERICAL RELATIONSHIPS, VARIED FROM YEAR TO YEAR. I WON'T

2978=SUMMARIZE THEM AGAIN SINCE THEY'RE SET FORTH IN THE DOCUMENT.

2979= DON'T YOU CONSIDER THIS KIND OF INFORMATION TO BE

2980=IMPORTANT TO THE FORMATION OF YOUR OPINIONS IN CONNECTION WITH  
2981=THIS LAWSUIT?

2982=A. WELL, I KNOW THE TATTERED COVER IS AN ENORMOUS, AND VERY

2983=LARGE BOOKSTORE, AND ONLY ONE OF MANY BOOK STORES IN THE

2984=BUSINESS -- IN THE INDUSTRY, AND I'M DELIGHTED TO SEE THAT THE

2985=TATTERED COVER IS DOING AS WELL AS IT IS IN TERMS OF EFFECTIVE

2986=DISCOUNT.

2987= HOWEVER, I DID NOT EXAMINE ANY -- AS I EXPLAINED, I

2988=DID NOT EXAMINE ANY OF THE PLAINTIFFS' FINANCIALS, AND IN

2989=ANSWER TO YOUR QUESTION AS TO WHETHER I SHOULD HAVE IN ORDER TO

2990=MAKE A COMPARISON, AS I SAID BEFORE, I WAS MAKING A COMPARISON

2991=BETWEEN THE DEFENDANTS AND THE PUBLISHED TERMS.

2992=Q. I UNDERSTAND. YOU'VE ALSO READ THE REPORTS OF THE OTHER

2993=PLAINTIFF EXPERTS, HAVE YOU NOT?

2994=A. I HAVE READ -- NO, I HAVE NOT READ THE OTHER PLAINTIFF

2995=EXPERT REPORTS. YOU MEAN THE FINANCIAL -- THE --

2996=Q. THE ECONOMISTS, THE MARKETING PEOPLE, THE OTHERS. YOU HAVE

2997=NOT READ THEM?

2998=A. I HAVE NOT READ THOSE REPORTS.

2999=Q. AND SO YOU DON'T KNOW WHETHER ANY OF THEM CONSIDERED THE

3000=REAL NUMBERS THAT SHOW WHAT EFFECTIVE DISCOUNTS EACH OF THE

3001=PLAINTIFFS REALLY ENJOYED.

3002=A. I DO NOT KNOW THAT.

3003= MR. STEER: OKAY, I HAVE NO FURTHER QUESTIONS.

3004=THANK YOU.

3005= THE COURT: REDIRECT.

3006= MR. SPIVA: JUST ONE MOMENT, YOUR HONOR.

3007= REDIRECT EXAMINATION

3008=BY MR. SPIVA:

3009=Q. MS. SEE, WHY DON'T WE FIRST BEGIN WITH WHERE MR. STEER

3010=ENDED, REGARDING THE COMPARISON OF THE TATTERED COVER'S TERMS

3011=TO THE TERMS THAT BORDERS WALDEN GOT.

3012= HE ASKED YOU WHETHER THEY WERE GETTING A BETTER

3013=EFFECTIVE DISCOUNT, ACCORDING TO THE REPORTS THAT HE SHOWED

3014=YOU, TATTERED COVER, THAT IS, THAN BORDERS, AND I BELIEVE YOUR

3015=ANSWER WAS THAT IT APPEARED THAT THEY WERE.

3016= AND MY QUESTION IS, WOULD YOU NEED TO KNOW THE

3017=PURCHASE MIX OF THOSE TWO COMPANIES IN ORDER TO HAVE AN OPINION

3018=ON THAT?  
3019=A. YES, BECAUSE THERE ARE CERTAIN CATEGORIES THAT A BOOKSTORE  
3020=CARRIES THAT CARRIED A HIGHER DISCOUNT, CATEGORIES OF AUDIO  
3021=BOOKS, AND CERTAIN -- FOR INSTANCE, COMPUTER BOOKS FREQUENTLY  
3022=CARRY MUCH HIGHER DISCOUNTS. SO IT WOULD HAVE BEEN IMPORTANT  
3023=TO LOOK AT THAT, WHAT THE MIX WAS.  
3024=Q. MS. SEE, I WANT TO TURN BACK TO THE INGRAM DISCUSSION, AND  
  
3025=SPECIFICALLY, I WANT TO START WITH THESE TWO PROGRAMS, THE  
3026=SCHEDULED DELIVERY PROGRAM AND THE SUMMARY BILLING PROGRAM,  
3027=THAT HAVE BEEN DISCUSSED TODAY.  
3028= YOU RECALL THAT YOU WERE ASKED WHETHER THOSE  
3029=PROGRAMS -- YOU WERE ASKED BY FIRST THE BARNES & NOBLE ATTORNEY  
3030=WHETHER THOSE PROGRAMS WERE AVAILABLE TO ALL BOOKSTORES, AND I  
3031=BELIEVE YOU RESPONDED THAT YOU WEREN'T SURE.  
3032= MS. SEE, HAVE YOU HAD A CHANCE TO REVIEW THE  
3033=CHANDLER DEPOSITION?  
3034=A. WELL, THE DEPOSITION WAS ONLY TAKEN LAST THURSDAY, AND SO  
3035=IT WAS AFTER, OF COURSE, THE TIME THAT I HAD PREPARED MY  
3036=REPORT, AND I HAD NOT HAD A CHANCE TO LOOK AT ALL OF IT. I  
3037=HAVE EXAMINED PARTS OF IT.  
3038=Q. AND DO YOU KNOW WHETHER THE SCHEDULED DELIVERY PROGRAM IS  
3039=AVAILABLE TO ALL RETAIL BOOKSTORES?  
3040=A. NO, IT IS NOT AVAILABLE TO ALL RETAIL BOOKSTORES.  
3041=Q. DO YOU RECALL WHAT MR. CHANDLER OF INGRAM SAID ABOUT THAT?  
3042=A. I THINK HE SAID THAT THEY CHOOSE THE -- THAT -- I'M  
3043=CONFUSED HERE, EXCUSE ME.  
3044=Q. LET ME REFRESH YOUR RECOLLECTION. DO YOU RECALL THAT HE  
3045=SAID THAT, QUOTE, "IT WAS OFFERED TO A NUMBER OF CUSTOMERS,  
3046=INCLUDING BARNES & NOBLE"?  
3047=A. YES.  
3048=Q. AND YOU DIDN'T SEE TODAY ANY WRITTEN BROCHURES REGARDING  
3049=THE SCHEDULED DELIVERY PROGRAM, DID YOU?  
  
3050=A. NO.  
3051=Q. DO YOU KNOW WHAT MR. CHANDLER SAID ABOUT WHETHER THERE WAS  
3052=ANYTHING IN WRITING WHATSOEVER THAT INGRAM PROVIDED TO  
3053=BOOKSELLERS REGARDING THE SCHEDULED DELIVERY PROGRAM?  
3054=A. I BELIEVE HE SAID THERE WAS NOTHING IN WRITING.  
3055=Q. YOU BELIEVE HE SAID THAT THERE WAS, QUOTE, "NOTHING IN  
3056=WRITING?"  
3057=A. QUOTE, "NOTHING IN WRITING."  
3058=Q. MORE IMPORTANTLY, DO YOU KNOW WHAT THE REQUIREMENTS FOR THE  
3059=SCHEDULED DELIVERY PROGRAM ARE?  
3060=A. IT REQUIRED YOU TO HAVE YOUR BOOKS DELIVERED AT THE SAME  
3061=TIME.  
3062=Q. DOES IT REQUIRE DELIVERY ON A SCHEDULED DAY OF THE WEEK?  
3063=A. YES, SCHEDULED DAY OF THE WEEK.  
3064=Q. DO YOU KNOW WHETHER BORDERS RECEIVES ITS SHIPMENTS FROM  
3065=INGRAM ON A SET DAY PER WEEK? AND AGAIN, I CAUTION YOU NOT TO  
3066=SPECULATE. IF YOU KNOW, YOU KNOW. IF NOT --  
3067=A. I DON'T. I'VE FORGOTTEN, IF I KNEW.  
3068=Q. AND DO YOU KNOW WHAT MR. CHANDLER OF INGRAM SAID ABOUT  
3069=THAT?  
3070=A. ABOUT THE SCHEDULED DELIVERY?  
3071=Q. ABOUT WHETHER BORDERS DELIVERED -- RECEIVED ITS SHIPMENTS  
3072=FROM INGRAM ON A SET DAY PER WEEK.  
3073=A. YES, HE DID. HE SAID IT IN HIS DEPOSITION, THAT THEY DID.  
3074=Q. WELL, LET ME ACTUALLY REFRESH YOUR RECOLLECTION. YOUR  
  
3075=MEMORY IS THAT HE SAID THEY DID?  
3076=A. I'M TRYING TO REMEMBER. I'M FRANKLY AT THE POINT WHERE I  
3077=DON'T REMEMBER.  
3078=Q. I UNDERSTAND. LET ME SHOW YOU....  
3079= AND I REGRET, YOUR HONOR, I DON'T HAVE AN EXTRA COPY  
3080=OF THIS RIGHT NOW, BUT I THINK THE DEFENDANTS HAVE THEIR --  
3081= THE COURT: I SHOULD THINK YOU WOULD REGRET, AND  
3082=CHANDLER HASN'T APPEARED HERE AS A DEPONENT, AND YOUR EXPERT IS  
3083=ON THE STAND TO TESTIFY FROM HER LONG EXPERIENCE IN THE  
3084=BOOKSELLING INDUSTRY CONCERNING THE ISSUES IN THIS CASE, AND  
3085=SHE'S NOT HERE TO TESTIFY WITH RESPECT TO HER MEMORY OF WHAT  
3086=CERTAIN PERSONS, WHO HAVEN'T APPEARED AS WITNESSES HERE, MIGHT  
3087=OR MIGHT NOT HAVE SAID IN THEIR DEPOSITIONS.

3088= SO I THINK YOU COULD GO ON TO SOMETHING ELSE. I  
3089=DON'T SEE -- FURTHERMORE, THIS IS REDIRECT EXAMINATION, AND I  
3090=DON'T UNDERSTAND AT ALL WHY YOU EVEN ASK THE QUESTIONS WITH  
3091=RESPECT TO THIS MR. CHANDLER -- WHO I DON'T HAPPEN TO KNOW  
3092=BECAUSE HE HASN'T APPEARED HERE, NOR HAS HE BEEN OFFERED AS A  
3093=WITNESS -- SAID IN HIS DEPOSITION.  
3094= MR. SPIVA: OKAY, YOUR HONOR, I WILL CONFORM THE  
3095=REST OF MY EXAMINATION TO YOUR HONOR'S STATEMENT.  
3096=Q. NOW, YOU WERE ASKED ABOUT THE SCHEDULED DELIVERY PROGRAM  
3097=AND WHETHER THAT WOULD BE -- WHETHER THAT WAS PROVIDED TO OTHER  
3098=BOOKSTORES, AND YOU'VE ANSWERED THAT YOU DID NOT KNOW.  
3099= HAVE YOU SEEN -- NOW, YOU'VE TESTIFIED EARLIER THAT

3100=THE DEFENDANTS CONTRACTED WITH INGRAM FOR EVERY YEAR BETWEEN  
3101=1994 AND THE PRESENT?  
3102=A. IN THEIR MEMORANDUM OF UNDERSTANDING, CORRECT.  
3103=Q. ARE YOU -- AND I BELIEVE YOU TESTIFIED ON CROSS-EXAMINATION  
3104=THAT ONE OF THE REQUIREMENTS FOR THE SCHEDULED DELIVERY PROGRAM  
3105=WAS TO RECEIVE SHIPMENTS ON SOME TYPE OF A SCHEDULED BASIS.  
3106=A. YES.  
3107=Q. ARE YOU AWARE OF ANY PERIOD IN WHICH BORDERS OR BARNES &  
3108=NOBLE STORES RECEIVED THEIR SHIPMENTS FROM INGRAM ON A  
3109=SCHEDULED BASIS?  
3110=A. I AM NOT.  
3111=Q. IS IT SIGNIFICANT FOR A BOOKSELLER WHETHER IT HAS TO  
3112=RECEIVE ITS SHIPMENTS FROM INGRAM ONLY ON ONE DAY PER WEEK?  
3113=A. WELL, SINCE YOU USE INGRAM FOR REPLENISHMENT SUPPLY, IF  
3114=YOU'RE BUYING A NUMBER OF BOOKS -- I MEAN, IF YOU'RE BUYING  
3115=FREQUENTLY FROM INGRAM, YOU WANT THEM TO COME WHEN YOU NEED  
3116=THEM, AND INGRAM'S -- ONE OF INGRAM'S BENEFITS IS THAT THEY DO  
3117=DELIVER. THEY SHIP AND SEND THEIR BOOKS VERY QUICKLY. SO YOU  
3118=GET THEM QUICKLY AFTER YOU'VE ORDERED THEM. SO IT WOULD BE A  
3119=BENEFIT TO HAVE THEM COME AS YOU NEED THEM OVER THE WEEK, NOT  
3120=JUST ON ONE DAY OF THE WEEK OR ONE DAY OF THE MONTH.  
3121=Q. DO YOU KNOW WHETHER THE SCHEDULED DELIVERY PROGRAM THAT YOU  
3122=WERE ASKED ABOUT IN THE CROSS-EXAMINATION ALSO REQUIRES A  
3123=MINIMUM AVERAGE WEEKLY ORDER SIZE PER STORE?  
3124=A. YES, IT DOES. I THINK IT'S 250 BOOKS. I CAN'T QUITE

3125=REMEMBER WHAT THE NUMBER IS, BUT THERE WAS A MINIMUM.  
3126=Q. BUT YOU RECALL THERE WAS A MINIMUM?  
3127=A. OH, YES.  
3128=Q. AND DO YOU REMEMBER WHETHER THE WALDEN STORES SATISFIED  
3129=THAT REQUIREMENT?  
3130=A. I DON'T THINK -- I DON'T KNOW.  
3131=Q. NOW, YOU WERE ASKED ABOUT AN INCENTIVE COMPONENT OF THE  
3132=SCHEDULED DELIVERY PROGRAM ON CROSS-EXAMINATION. DO YOU RECALL  
3133=THAT?  
3134=A. YES.  
3135=Q. DO YOU KNOW WHAT IS NECESSARY TO RECEIVE THAT INCENTIVE  
3136=COMPONENT?  
3137=A. AGAIN, TO GET THE INCENTIVE --  
3138=Q. DO YOU KNOW WHETHER IT REQUIRES YOU TO GROW YOUR BUSINESS?  
3139=A. RIGHT, I WAS GOING TO SAY, AN INCENTIVE REQUIRES YOU  
3140=OBVIOUSLY TO INCREASE YOUR BUSINESS FROM ONE TIME PERIOD TO  
3141=ANOTHER.  
3142=Q. AND DO YOU KNOW WHETHER THE DEFENDANTS HAVE GROWN THEIR  
3143=BUSINESS WITH INGRAM DURING THE YEARS THEY RECEIVED INCENTIVE  
3144=PAYMENTS FROM INGRAM?  
3145=A. WELL, I KNOW THAT IN ONE YEAR THE INCENTIVES WERE LOWERED  
3146=FROM THE PREVIOUS YEAR.  
3147= (CONTINUED ON FOLLOWING PAGE. NOTHING OMITTED.)  
3148=  
3149=

3150=BY MR. SPIVA:  
3151=Q. BUT DO YOU KNOW OF ANY YEAR IN WHICH THEY WERE REQUIRED TO  
3152=GROW THEIR BUSINESS TO RECEIVE THE INCENTIVES?  
3153=A. NO. WELL, AFTER THAT YEAR FOR ONE OF THE DEFENDANTS, THEY  
3154=HAD TO GROW. BUT NORMALLY, FROM THE DOCUMENTATION I SAW, IT  
3155=STAYED AT THE SAME THRESHOLD.  
3156=Q. NOW, YOU WERE ASKED ABOUT SOMETHING CALLED THE SUMMARY  
3157=BILLING PROGRAM --

3158=A. UM-HMM.  
3159=Q. -- AS WELL THAT INGRAM PURPORTEDLY OFFERS. AND -- AND I  
3160=BELIEVE YOU ANSWERED THAT YOU WEREN'T -- AGAIN, THAT YOU WERE  
3161=NOT SURE WHETHER THAT WAS OFFERED TO ALL BOOKSTORES. DO YOU  
3162=KNOW -- STRIKE THAT. I'M SORRY.  
3163= I ACTUALLY DON'T -- I CAN'T REMEMBER WHAT YOU  
3164=ANSWERED EXACTLY, BUT THE QUESTION I HAVE IS, DO YOU KNOW  
3165=WHETHER THAT PROGRAM IS AVAILABLE TO ALL RETAIL BOOKSTORES?  
3166=A. NO, THAT IS NOT AVAILABLE TO ALL RETAIL STORES.  
3167=Q. LET ME ASK YOU A FEW QUESTIONS ABOUT SOME OF THESE OTHER  
3168=INGRAM PROGRAMS --  
3169=A. YES.  
3170=Q. -- THAT YOU TESTIFIED TO ON CROSS-EXAMINATION.  
3171= YOU WERE ASKED ABOUT THE BACKLIST PLUS PROGRAM. TO  
3172=WHAT DOES THE BACKLIST PLUS PROGRAM OF INGRAM APPLY TO?  
3173=A. WELL, IT'S ALMOST LIKE A STOCK OFFER, AS I SAID BEFORE.  
3174=IT'S VERY LIMITED IN TIME, AND SO IT REALLY IS, IN FACT, A STOCK  
3175=OFFER.  
3176=Q. OKAY. DOES IT -- DOES IT APPLY TO THE WHOLE UNIVERSE OF  
3177=TITLES OR --  
3178=A. NO.  
3179=Q. -- MORE SELECTED UNIVERSE?  
3180=A. NO, IT'S SELECTED GROUP OF TITLES, AND ALSO A SELECTED TIME  
3181=FRAME. SO IT IS NOT REALLY A -- A PROGRAM THAT IS VERY HELPFUL.  
3182=IT'S ONLY HELPFUL FOR THOSE LIMITED NUMBER OF TITLES.  
3183=Q. AND CONSIDERING THE DEFENDANTS MOU'S FROM 1994 TO THE  
3184=PRESENT WHICH YOU TESTIFIED YOU REVIEWED, DID THE DEFENDANTS'  
3185=TERMS WITH INGRAM APPLY ONLY TO VERY SELECTED TITLES?  
3186=A. NO. OBVIOUSLY THEY WERE BUYING ACROSS ALL OF INGRAM'S  
3187=INVENTORY.  
3188=Q. OKAY. AND DO YOU KNOW -- YOU WERE ASKED ABOUT THE VISITING  
3189=AUTHOR PROGRAM, I BELIEVE, ON CROSS-EXAMINATION, DO YOU RECALL  
3190=THAT?  
3191=A. RIGHT. YES.  
3192=Q. DO YOU KNOW WHAT THE VISITING AUTHOR PROGRAM APPLIES TO,  
3193=INGRAM'S VISITING AUTHOR PROGRAM?  
3194=A. WELL, IF YOU'RE GOING TO HAVE AN AUTHOR IN YOUR STORE, THEN  
3195=YOU CAN GET BOOKS IN AT A 43 PERCENT DISCOUNT, AND THERE'S NO  
3196=PENALTY ON THE RETURNS.  
3197=Q. AND DID THE DEFENDANTS' DISCOUNTS WITH INGRAM APPLY ONLY  
3198=UNDER THOSE CONDITIONS?  
3199=A. NO.  
3200=Q. HOW ABOUT THE COMPUTER BOOK PROGRAM?  
3201=A. OH.  
3202=Q. THAT YOU WERE ASKED ABOUT ON YOUR CROSS-EXAMINATION. CAN  
3203=YOU EXPLAIN WHAT THAT IS?  
3204=A. WELL, THAT WOULD BE A PROGRAM WHERE, AGAIN, A VERY SELECTED  
3205=LIST OF BOOKS, AND THESE WOULD ALL BE COMPUTER BOOKS WOULD BE  
3206=MADE AVAILABLE FOR -- FOR A TIME.  
3207=Q. OKAY. AND DID THE DEFENDANTS' TERMS WITH INGRAM APPLY ONLY  
3208=TO COMPUTER BOOKS?  
3209=A. NO.  
3210= (PAUSE IN THE PROCEEDINGS.)  
3211=BY MR. SPIVA:  
3212=Q. NOW, LET ME TURN TO THE -- THE BARNES & NOBLE TERMS YOU WERE  
3213=ASKED ABOUT THE CHART THAT THEY --  
3214=A. OH.  
3215=Q. -- IT WAS CORRECTED OR SUPPOSEDLY CORRECTED BY DEFENDANTS  
3216=BASED ON MORE RECENT DATA. IS IT YOUR UNDERSTANDING THAT AFTER  
3217=THE -- THIS LAWSUIT WAS FILED, INGRAM WAS ELIMINATED SOME OF THE  
3218=SPECIAL TERMS THAT BARNES & NOBLE HAD BEEN RECEIVING?  
3219=A. YES.  
3220=Q. AND FOR MANY OF THE PRECEDING YEARS INCLUDING UP TO 1998  
3221=WHEN THE LAWSUIT WAS FILED, WAS BARNES & NOBLE RECEIVING THE  
3222=TERMS PRINTED ON THE CHART BEFORE ADDING THE RED MARKER?  
3223=A. YES. AND I REVIEWED A NUMBER OF MEMORANDUMS OF  
3224=UNDERSTANDING OVER -- FOR MANY OF THOSE YEARS.  
3225=Q. AND DOES IT ALSO APPEAR THAT SINCE THE LAWSUIT WAS FILED,  
3226=INGRAM HAS MADE SOME ADDITIONAL PROGRAMS AVAILABLE TO SOME  
3227=ADDITIONAL BOOKSTORES?

3228=A. SOME ADDITIONAL PROGRAMS TO SOME ADDITIONAL BOOKSTORES, YES.  
3229=Q. NOW, MISS SEE, I WANT TO MAKE SURE I GET THIS RIGHT, I  
3230=BELIEVE THAT WHEN MR. STEER WAS QUESTIONING YOU, HE ASKED YOU  
3231=WHETHER YOU HAD SEEN ANY DOCUMENTS OTHER THAN THE DEFENDANTS'  
3232=DOCUMENTS, WHETHER YOU'D SEEN ANY PUBLISHER DOCUMENTS OR THIRD  
3233=PARTY DOCUMENTS LIKE FROM A WHOLESALER, AND I BELIEVE YOU --  
3234=A. OH.  
3235=Q. -- ANSWERED "NO." IS THAT RIGHT?  
3236=A. WELL, I RECEIVED MANY -- MANY DOCUMENTS THAT WERE PERTINENT  
3237=TO THE CASE, YES. I SAW -- OBVIOUSLY I SAW WHOLESALER  
3238=DOCUMENTS. I SAW THE MOU'S. I SAW LOTS OF DOCUMENTS WITH  
3239=E-MAILS AND THINGS LIKE THAT.  
3240=Q. WHAT --  
3241=A. AND I WAS JUST GOING TO SAY --  
3242=Q. LET ME JUST -- ACTUALLY, JUST FOR THE COURT REPORTER'S SAKE,  
3243=LET ME ASK THE QUESTION AND YOU CAN GIVE THE ANSWER.  
3244= WOULD IT REFRESH YOUR RECOLLECTION ABOUT THE  
3245=DOCUMENTS THAT YOU REVIEWED --  
3246=A. YES.  
3247=Q. -- TO LOOK AT THE ATTACHMENT B TO YOUR REPORT WHICH LISTS  
3248=THOSE DOCUMENTS?  
3249=A. YES, IT WOULD BE VERY HELPFUL.  
  
3250=Q. (HANDING DOCUMENT.)  
3251=A. I LOOKED AT, OBVIOUSLY, THE INGRAM MOU'S, AND I LOOKED AT  
3252=SIMON & SCHUSTER AND HOUGHTON MIFFLIN, YES.  
3253=Q. SO YOU DID REVIEW SOME DOCUMENTS PRODUCED BY PUBLISHERS IN  
3254=THIS CASE AND --  
3255=A. YES.  
3256=Q. AND I TAKE IT, MISS SEE, LOOKING AT SOME OF THE OTHER PAGES  
3257=IN THERE, THAT YOU ALSO REVIEWED QUITE A NUMBER OF DOCUMENTS  
3258=PRODUCED BY THE DEFENDANTS?  
3259=A. OH, I REVIEWED -- AS I SAID, I BELIEVE, YESTERDAY ABOUT 20  
3260=OF THE DEPOSITIONS, AND I READ ABOUT 10 OF THEM AND MANY OTHER  
3261=DOCUMENTS.  
3262=Q. WHEN YOU SAY YOU READ ABOUT TEN OF THEM, DO YOU MEAN THAT  
3263=YOU READ THEM IN FULL?  
3264=A. YES.  
3265=Q. AND YOU REVIEWED OTHERS --  
3266=A. AND I REVIEWED --  
3267=Q. -- IN PART?  
3268=A. -- OTHERS.  
3269=Q. MISS SEE, ON CROSS-EXAMINATION, YOU WERE ASKED BY MR. STEER  
3270=WHETHER BORDERS IN RECEIVING AN INCENTIVE FROM INGRAM WAS TRYING  
3271=TO STRUCTURE THE INCENTIVE AS A VOLUME INCENTIVE IN ORDER TO  
3272=COMPLY WITH THE ROBINSON-PATMAN ACT. AND I BELIEVE YOU SAID --  
3273=YOU ANSWERED YES?  
3274= MR. STEER: OBJECTION, YOUR HONOR. MISCHARACTERIZES  
  
3275=THE QUESTION THAT I ASKED AND THE TESTIMONY.  
3276= MR. SPIVA: I DON'T THINK I'VE MISCHARACTERIZED IT,  
3277=YOUR HONOR.  
3278= THE COURT: NO. OVERRULED.  
3279= MR. SPIVA: OKAY.  
3280=Q. I BELIEVE YOU ANSWERED "YES."  
3281= AND THE QUESTION I HAVE IS, DO YOU KNOW WHETHER OR  
3282=NOT RECEIVING AN INCENTIVE BASED ONLY ON THE VOLUME OF PURCHASES  
3283=THAT A BOOKSTORE PURCHASES COMPLIES WITH THE ROBINSON-PATMAN  
3284=ACT?  
3285=A. WELL, THE ROBINSON-PATMAN ACT HAS TO DO WITH THE DISCOUNTS.  
3286=EXCUSE ME. COULD YOU ASK THE QUESTION AGAIN.  
3287=Q. SURE. AND AGAIN --  
3288= THE COURT: SHE'S NOT QUALIFIED AS A LAWYER.  
3289= MR. SPIVA: YEAH, I'M CAUTION YOU NOT TO SPECULATE.  
3290= THE WITNESS: -- LAWYER --  
3291= MR. SPIVA: I JUST WANT TO KNOW WHETHER OR NOT YOU  
3292=KNOW THAT.  
3293= THE WITNESS: THANK YOU. I KNOW A BIT ABOUT THE  
3294=ROBINSON-PATMAN ACT, BUT I AM NOT A LAWYER.  
3295=Q. OKAY. SO IS THE ANSWER THAT YOU DON'T KNOW?  
3296=A. I DON'T KNOW.  
3297=Q. YOU WERE ASKED BY MR. STEER ON DIRECT WHETHER IT WAS --  
3298=THERE WAS A TREND IN THE INDUSTRY FOR PUBLISHERS TO ELIMINATE

3299=PENALTIES FOR RETURNS IN RECENT YEARS; YOU RECALL THAT?

3300=A. I DO RECALL THAT.

3301=Q. AND I BELIEVE YOU ANSWERED "YES"?

3302=A. YES.

3303=Q. MY QUESTION IS, IS THERE A SIMILAR TREND FOR WHOLESALERS IN

3304=THE INDUSTRY?

3305=A. NO, I HAVE NOT SEEN ANY TRENDS IN THE DOCUMENTATION I LOOKED

3306=AT.

3307=Q. AND ARE THERE DIFFERENCES BETWEEN WHOLESALERS AND PUBLISHERS

3308=WHICH WOULD EXPLAIN WHY THERE'S NOT A TREND TO ELIMINATE RETURNS

3309=PENALTIES BY WHOLESALERS?

3310=A. BY -- WHY IT'S NOT A TREND? WHY WHOLESALERS ARE NOT

3311=CHANGING --

3312=Q. NOT ELIMINATING --

3313=A. WELL, I THINK THE -- THE WHOLESALERS HAVE MAINTAINED THIS

3314=PENALTY, AND I THINK THAT THE -- WITH THE PUBLISHERS, THERE'S

3315=BEEN A LOT OF CHANGE BECAUSE THE BOOKSELLERS HAVE SAID, "YOU

3316=KNOW, WE'RE LOSING A LOT OF MONEY."

3317=Q. UM-HMM.

3318= OKAY. MR. STEER, ALSO IN RESPECT TO THE RETURNS

3319=PENALTY, DIRECTED YOU TO -- YOUR ATTENTION TO A PORTION OF THE

3320=DOCUMENT THAT SHOWED BORDERS' AVERAGE PURCHASE PRICE. DO YOU

3321=RECALL THAT? YOU CAN --

3322=A. WOULD YOU REPEAT THAT, PLEASE.

3323=Q. YEAH, YOU RECALL THAT IN CONNECTION WITH THE RETURNS PENALTY

3324=ISSUE ON THE --

3325=A. OH, YES.

3326=Q. -- INGRAM MOU --

3327=A. YES.

3328=Q. -- THAT MR. STEER DIRECTED YOU TO A PORTION OF THE

3329=DOCUMENT --

3330=A. YES.

3331=Q. -- WHICH REFLECTED --

3332=A. YES.

3333=Q. -- BORDERS AVERAGE PURCHASE PRICE?

3334=A. YES.

3335=Q. RECALL THAT?

3336=A. YES.

3337=Q. AND HE ASKED YOU WHETHER OR NOT -- HE ASKED YOU WHETHER YOU

3338=AGREE THAT BORDERS WAS NOT, IN FACT, BASED ON THAT AVERAGE

3339=PURCHASE PRICE RECEIVING THE FULL PRICE IN -- WHEN IT RETURNED

3340=BOOKS TO INGRAM. AND I BELIEVE YOU ANSWERED "YES."

3341= MY QUESTION IS, ISN'T THE AVERAGE PURCHASE PRICE THE

3342=ACTUAL PURCHASE PRICE OF THE BOOK?

3343=A. THE AVERAGE PURCHASE PRICE, AS I UNDERSTAND IT, IS THEY TAKE

3344=THE -- ALL OF THE PURCHASES FOR THE YEAR AND AVERAGE OUT WHAT

3345=THE -- WHAT THE DISCOUNTS WERE. AND THEN THAT BECOMES YOUR

3346=AVERAGE PURCHASE PRICE.

3347=Q. LET ME ASK YOU ABOUT HASSLE-FREE RETURNS. YOU WERE ASKED

3348=ABOUT HASSLE-FREE RETURNS ON CROSS-EXAMINATION. AND YOU WERE

3349=ASKED WHETHER OTHER BOOKSTORES WERE PERMITTED TO DO HASSLE-FREE

3350=RETURNS WITHOUT PENALTY.

3351= ARE HASSLE-FREE RETURNS FOR ALL TYPES OF RETURNS?

3352=A. HASSLE-FREE RETURNS ARE -- EXCUSE ME. I SHOULD HAVE MADE

3353=THAT CLEAR -- FOR THE GENERAL -- IN THE GENERAL BROCHURE OF THE

3354=BOOKSTORES, THE HASSLE-FREE RETURNS ARE FOR BOOKS THAT ARE

3355=DAMAGED WHEN THEY COME IN.

3356=Q. SO THEY DO NOT INCLUDE --

3357=A. THEY --

3358=Q. -- SHORT SHIPMENTS.

3359=A. THEY DO NOT INCLUDE SHORT SHIPMENTS.

3360=Q. AND DO YOU KNOW WHETHER THAT TERM IS IN THE RED BOOK?

3361=A. "HASSLE-FREE"?

3362=Q. YES.

3363=A. I BELIEVE IT WAS IN ONE OF INGRAM'S -- YES, IT WAS IN ONE OF

3364=INGRAM'S TERMS.

3365=Q. OKAY.

3366=A. THEIR RETURNS POLICIES.

3367=Q. NOW, MR. STEER ASKED YOU ABOUT A LETTER FROM MR. WAGNER TO

3368=STEVEN LEWERS AT HOUGHTON MIFFLIN. DO YOU RECALL THAT?

3369=A. YES, I DO.  
3370=Q. AND HE ASKED YOU, IN ESSENCE, WHETHER MR. WAGNER HAD THE  
3371=RIGHT TO ASK FOR A CARTON QUANTITY WAIVER BASED ON MEETING  
3372=COMPETITION. AND YOU -- DO YOU RECALL THAT?  
3373=A. I DO RECALL THAT.  
3374=Q. AND I BELIEVE YOU ANSWERED "YES."  
  
3375= MY QUESTION IS, DID HE HAVE THE RIGHT TO ASK FOR SUCH  
3376=A WAIVER ONLY FOR BORDERS?  
3377=A. NO.  
3378=Q. AND WOULD IT BE ALL RIGHT, IN YOUR OPINION, TO TAKE A WAIVER  
3379=OF A RESTRICTION THAT WAS IN THE STANDARD INDUSTRY TERMS OF A  
3380=PUBLISHER IF YOU KNEW THERE WERE PUBLISHED TERMS STILL IN EFFECT  
3381=THAT REQUIRED CARTON QUANTITY PURCHASES?  
3382= WANT ME TO REPEAT THAT?  
3383=A. YES, I --  
3384=Q. SORRY. HAD A LOT OF WORDS THERE, AND I'LL TRY TO PARE IT  
3385=DOWN.  
3386=A. SORT OF -- WITH THE DOUBLE NEGATIVES.  
3387=Q. YEAH. WOULD IT BE ALL RIGHT IN YOUR OPINION TO ACCEPT A  
3388=CARTON QUANTITY WAIVER -- FOR A BOOKSELLER TO ACCEPT A CARTON  
3389=QUANTITY WAIVER AND STILL RECEIVE THE HIGHER RDC DISCOUNT IF THE  
3390=BOOKSELLER KNEW THAT THERE WERE PUBLISHED TERMS STILL IN EFFECT  
3391=THAT REQUIRED CARTON QUANTITY PURCHASES IN ORDER TO RECEIVE THAT  
3392=RDC DISCOUNT?  
3393=A. NO, THE POINT OF THE TERMS IS -- IT'S CERTAINLY FINE TO GO  
3394=AND TRY AND GET THE BEST POSSIBLE TERMS. WE WERE TALKING  
3395=YESTERDAY ABOUT TRYING TO IMPROVE YOUR BUSINESSES AND HOW YOU DO  
3396=IT. AND YOU DO OBVIOUSLY GO AND SAY, "I WOULD LIKE THE BEST  
3397=POSSIBLE TERMS" LEGALLY.  
3398= BUT TO HAVE THOSE TERMS JUST FOR ONE PERSON IS NOT  
3399=WHAT I WOULD SAY WAS CORRECT.  
  
3400= THE COURT: CORRECT IN WHAT SENSE?  
3401= THE WITNESS: AS I UNDERSTAND IT, THAT YOU'RE --  
3402=YOU'RE ABLE TO ASK FOR THE TERMS THAT ARE AVAILABLE TO EVERYONE.  
3403=RIGHT? AND SO IF YOU CAN -- YOU CAN SAY "I WANT THE BEST  
3404=POSSIBLE TERMS." BUT THAT -- AND THAT'S FINE. BUT TO GET TERMS  
3405=THAT ARE NOT AVAILABLE TO OTHER PEOPLE IS -- IS NOT LEGAL.  
3406= THE COURT: WHY NOT?  
3407= THE WITNESS: WELL, I BELIEVE THAT YOU'RE SUPPOSED TO  
3408=BE -- BE -- THAT YOU'RE SUPPOSED TO BE DEALING WITH -- EVERYBODY  
3409=DEALING WITH THE SAME TERMS.  
3410= I'M NOT MAKING MYSELF CLEAR.  
3411= THE COURT: ARE YOU CLAIMING THIS IS A MATTER OF THE  
3412=APPLICATION OF THE LAW?  
3413= THE WITNESS: A MATTER OF THE APPLICATION OF THE LAW?  
3414=YES. I THINK IT IS A MATTER OF THE APPLICATION OF THE LAW.  
3415= GO AHEAD.  
3416=BY MR. SPIVA:  
3417=Q. LET ME ASK YOU THIS QUESTION IN FOLLOWING UP ON THE CARTON  
3418=QUANTITY ISSUE: WOULD IT GIVE A BOOKSTORE AN ADVANTAGE OVER  
3419=OTHER BOOKSTORES TO BE ABLE TO RECEIVE AN RDC DISCOUNT WITHOUT  
3420=PURCHASING IN CARTON QUANTITIES WHEN OTHER BOOKSTORES WERE STILL  
3421=REQUIRED TO PURCHASE IN CARTON QUANTITIES TO RECEIVE THAT  
3422=DISCOUNT?  
3423=A. YES. AS I EXPLAINED YESTERDAY, IT WOULD BE A TREMENDOUS  
3424=ADVANTAGE BECAUSE YOU'D BE ABLE TO GET A CARTON FILLED WITH ONE  
  
3425=OR TWO -- WITH A NUMBER OF DIFFERENT TITLES IN QUANTITIES OF ONE  
3426=OR TWO VERSUS GETTING TWENTY COPIES OF THE SAME TITLE.  
3427= MR. SPIVA: IF I COULD JUST HAVE ONE MOMENT, YOUR  
3428=HONOR, I MAY NOT HAVE ANY FURTHER QUESTIONS.  
3429= (PAUSE IN THE PROCEEDINGS.)  
3430= MR. SPIVA: OH, I'M SORRY, I DO.  
3431=Q. GOING BACK TO THE BARNES & NOBLE ATTORNEY'S  
3432=CROSS-EXAMINATION THIS MORNING, AS YOU RECALL, HE ASKED YOU A  
3433=QUESTION ABOUT THE -- THE DOCUMENT WHICH IS AT TAB 14 OF YOUR  
3434=BINDER. YOU DON'T NEED TO TURN TO IT UNLESS YOU -- UNLESS YOU  
3435=FEEL YOU NEED TO, BUT I'LL TELL YOU THE QUESTION FIRST AND YOU  
3436=CAN DECIDE.  
3437= AND I BELIEVE HE POINTED YOU BOTH TO THAT DOCUMENT  
3438=AND THE DOCUMENT AT TAB 15 AND ASKED YOU, IN ESSENCE, DIDN'T

3439=BARNES & NOBLE SAY THAT THEY WANTED TO DO AN AUDIT TO MAKE THEIR  
3440=STATISTICAL RESERVES FACT BASED. AND I BELIEVE YOU ANSWERED  
3441=THAT YES, THAT DID INDICATE THAT.  
3442= NOW, HAVE YOU REVIEWED THE HAZELL TESTIMONY?  
3443=A. YES, LEONA (SIC) HAZELL. L-E-O-N-A.  
3444=Q. AND BASED ON -- I'M SORRY.  
3445= BASED ON THAT, DID YOU -- DO YOU HAVE AN OPINION  
3446=ABOUT WHETHER BARNES & NOBLE EVER DID AUDIT FOR ITS STATISTICAL  
3447=RESERVES?  
3448=A. WELL, MY OPINION BASED ON MY REVIEW OF THAT PARTICULAR  
3449=TESTIMONY DOCUMENT, SHE CLEARLY SAID THEY HAD NOT CONDUCTED AN  
  
3450=AUDIT.  
3451=Q. AND THAT WAS THROUGH THE TIME OF MISS HAZELL'S DEPOSITION?  
3452=A. CORRECT.  
3453=Q. ON THE ISSUE OF STOCK OFFERS, YOU WERE ASKED BY THE BARNES &  
3454=NOBLE ATTORNEY, IN ESSENCE, WOULDN'T IT BE BETTER FOR BDD TO  
3455=PERMIT BARNES & NOBLE TO PURCHASE -- PLACE MANY MORE PURCHASE  
3456=ORDERS THAN AVAILABLE UNDER THE STANDARD TERMS IN ORDER TO  
3457=PREVENT BARNES & NOBLE FROM PLACING FEWER BUT MUCH LARGER ORDERS  
3458=AT THE SAME TIME.  
3459= AND I BELIEVE YOU ANSWERED YES, THAT WOULD BE  
3460=BENEFICIAL TO BDD. NOW, MY QUESTION IS THAT DOESN'T BARNES &  
3461=NOBLE'S JUST-IN-TIME INVENTORY SYSTEM ACTUALLY PROHIBIT --  
3462=PREVENT IT FROM BEING ABLE TO PLACE SUCH LARGE ORDERS ALL AT  
3463=ONCE?  
3464=A. YES, I THOUGHT I MADE THAT CLEAR IN MY RESPONSE, THAT  
3465=OBVIOUSLY IT WOULD BE CONTRADICTORY TO THEIR JUST-IN-TIME ORDER.  
3466=Q. AND AS A MATTER OF FACT, YOU'VE REVIEWED THE BOSTELMAN  
3467=TRANSCRIPT?  
3468=A. YES, I HAVE AND --  
3469=Q. AND --  
3470=A. -- IN THAT TRANSCRIPT, SHE REFERS TO THAT.  
3471=Q. OKAY. IS IT THE TIME CASE THAT BARNES & NOBLE, IN FACT,  
3472=COULD NOT TAKE ADVANTAGE -- DID SHE SAY THAT BARNES & NOBLE  
3473=COULD NOT TAKE ADVANTAGE --  
3474=A. YES.  
  
3475=Q. -- OF THE STOCK OFFER --  
3476=A. YES.  
3477=Q. -- IF IT HAD TO PLACE LARGER ORDERS?  
3478=A. IT WOULD NOT --  
3479= MR. PETROCELLI: YOUR HONOR, I'M GOING TO OBJECT ON A  
3480=COUPLE OF GROUNDS. THIS IS LEADING. AND, SECONDLY, HE'S NOT  
3481=ASKING FOR AN OPINION. HE'S ASKING FOR, IN FACT, WHAT HAPPENED.  
3482= THE COURT: I SUSTAIN THE OBJECTION ON BOTH GROUNDS.  
3483=I LET THE LEADING GO ON JUST TO GET ON WITH IT, AND -- BUT  
3484=YOU'RE GETTING WAY OFF THE TRACK IN YOUR EXAMINATION OF AN  
3485=EXPERT WITNESS. YOU'RE TESTING HER MEMORY AS TO WHAT SHE  
3486=REMEMBERED IN DEPOSITIONS AND --  
3487= MR. SPIVA: OKAY. THANK YOU.  
3488= YOUR HONOR, WELL, I ONLY HAVE ONE MORE QUESTION, AND  
3489=THEN I'M GOING TO SIT DOWN.  
3490=Q. YOU WERE ASKED MUCH EARLIER IN CROSS-EXAMINATION ABOUT  
3491=WHETHER VARIOUS ENTITIES WERE MEMBERS OF THE AMERICAN  
3492=BOOKSELLERS ASSOCIATION, INCLUDING AMAZON.COM AND COSTCO AND THE  
3493=REST.  
3494= AS A MATTER OF FACT, DO YOU KNOW WHETHER ANY OF THOSE  
3495=ENTITIES ARE MEMBERS OF BOOKSELLERS ASSOCIATION?  
3496=A. AFTER I ANSWERED THAT QUESTION, I THOUGHT I DO NOT KNOW WHO  
3497=IS -- ALL OF THE MEMBERSHIP OF ABA.  
3498= MR. SPIVA: I HAVE NO FURTHER QUESTIONS.  
3499= THE COURT: ALL RIGHT. RE-CROSS?  
  
3500= MR. WELSH: NO FURTHER QUESTIONS, YOUR HONOR.  
3501= THE COURT: MR. STEER.  
3502= MR. STEER: NO QUESTIONS, YOUR HONOR.  
3503= THE COURT: ALL RIGHT. YOU MAY STEP DOWN.  
3504= CALL YOUR NEXT WITNESS.  
3505= (PAUSE IN THE PROCEEDINGS.)  
3506= THE COURT: DO YOU HAVE ANY MORE WITNESSES?  
3507= MR. HOHENGARTEN: YES, WE DO, YOUR HONOR.  
3508= (PAUSE IN THE PROCEEDINGS.)

3509= MR. HOHENGARTEN: WILLIAM HOHENGARTEN. AND WE'RE  
3510=CALLING JOHN BARRINGER.  
3511= THE CLERK: PLEASE RAISE YOUR RIGHT HAND.  
3512= JOHN EMERSON BARRINGER,  
3513=CALLED AS A WITNESS FOR THE PLAINTIFFS, HAVING BEEN DULY SWORN,  
3514=TESTIFIED AS FOLLOWS:  
3515= THE CLERK: THANK YOU. PLEASE BE SEATED.  
3516= PLEASE STATE YOUR FULL NAME AND SPELL YOUR LAST NAME  
3517=FOR THE RECORD.  
3518= THE WITNESS: MY FULL NAME IS JOHN EMERSON BARRINGER.  
3519=THAT'S SPELLED B-A-R-R-I-N-G-E-R.  
3520= DIRECT EXAMINATION  
3521=BY MR. HOHENGARTEN:  
3522=Q. GOOD AFTERNOON, MR. BARRINGER.  
3523=A. GOOD AFTERNOON.  
3524=Q. COULD YOU STATE YOUR ADDRESS FOR THE RECORD, PLEASE?  
  
3525=A. MY ADDRESS IS 3336 WINNIPEG CIRCLE. THAT'S W-I-N-N-I-P-E-G.  
3526=CHARLOTTE, NORTH CAROLINA.  
3527=Q. AND WHAT IS YOUR CURRENT OCCUPATION?  
3528=A. I'M THE OWNER OF LITTLE PROFESSOR BOOK CENTER IN CHARLOTTE,  
3529=NORTH CAROLINA.  
3530=Q. AND ARE YOU FAMILIAR WITH THE OPERATIONS OF THAT STORE?  
3531=A. YES, SIR.  
3532=Q. HOW LONG HAVE YOU OWNED THE LITTLE PROFESSOR?  
3533=A. TWENTY-FOUR YEARS.  
3534=Q. SINCE 1976?  
3535=A. 1977.  
3536=Q. AND IN 1977, DID YOU OPEN A NEW STORE OR TAKE OVER AN  
3537=EXISTING STORE?  
3538=A. I OPENED A NEW STORE.  
3539=Q. COULD YOU BRIEFLY DESCRIBE YOUR OWN RESPONSIBILITIES AT THE  
3540=LITTLE PROFESSOR FROM 1990 TO THE PRESENT?  
3541=A. FROM 1990 TO 1999, I WAS THE -- THE OWNER. I DID THE HIRING  
3542=AND FIRING, THE ACCOUNTING -- NOT THE ACCOUNTING, BUT ACTUALLY  
3543=THE -- PAYING THE BILLS, PAYING THE CHECKS, ORDERING, GENERAL  
3544=MANAGEMENT.  
3545=Q. DID YOU HAVE ANY RESPONSIBILITIES WITH RESPECT TO RECEIVING?  
3546=A. I DID QUITE A BIT OF RECEIVING.  
3547=Q. OKAY. AND YOU SAID THOSE WERE YOUR RESPONSIBILITIES UNTIL  
3548=ABOUT 1999?  
3549=A. TILL JULY OF 1999.  
  
3550=Q. AND HOW DID YOUR RESPONSIBILITIES CHANGE AT THAT TIME?  
3551=A. AT THAT TIME, I BECAME SEMI-RETIRED.  
3552=Q. ARE YOU STILL IN ANY WAY ACTIVE IN THE MANAGEMENT OF THE  
3553=BOOKSTORE?  
3554=A. OH, VERY MUCH SO. I'M IN THERE ON A WEEKLY BASIS. I MEET  
3555=WITH MY STAFF REGULARLY, IN TOUCH WITH THEM REGULARLY.  
3556=Q. VERY BRIEFLY, I'D JUST LIKE TO ASK YOU WHETHER PRIOR TO  
3557=OPENING LITTLE PROFESSOR, YOU HAD A DIFFERENT PROFESSION.  
3558=A. YEAH, SPENT 17 YEARS IN THE LUTHERAN MINISTRY.  
3559=Q. AND ARE YOU STILL A LUTHERAN MINISTER?  
3560=A. NO, BUT I'M STILL A VERY ACTIVE MEMBER OF CHURCH.  
3561=Q. AND WHY DID YOU LEAVE THE MINISTRY?  
3562=A. I REACHED THAT POINT IN MY LIFE, AS MANY PEOPLE DO, WHERE  
3563=YOU HAVE TO DECIDE WHICH WAY YOU'RE GOING FOR THE REST OF YOUR  
3564=LIFE. I HAD AN ENTREPRENEURIAL ITCH, AND I DECIDED I EITHER  
3565=SCRATCHED IT NOW OR FORGOT ABOUT IT.  
3566=Q. AND WHAT DID YOU DO AT THAT TIME?  
3567=A. WHAT DID I DO AT THAT TIME? I BEGAN NEGOTIATIONS WITH  
3568=LITTLE PROFESSOR BOOKSTORE, INCORPORATED, WHICH IS A FRANCHISER,  
3569=AND WE WORKED TOGETHER UNTIL WE FOUND A PLACE TO OPEN A NEW  
3570=STORE.  
3571=Q. DO YOU STILL HAVE -- DID YOU HAVE A FRANCHISE RELATIONSHIP  
3572=WITH LITTLE PROFESSOR, INC. -- I'M SORRY. WHAT WAS THE NAME OF  
3573=THE FRANCHISER?  
3574=A. LITTLE PROFESSOR BOOK CENTERS, INCORPORATED.  
  
3575=Q. AND DID YOU HAVE A FRANCHISE RELATIONSHIP WITH THEM?  
3576=A. YES, AND STILL DO.  
3577=Q. AND WHERE WAS THE LITTLE PROFESSOR STORE LOCATED WHEN IT  
3578=OPENED?

3579=A. IN THE PARK ROAD SHOPPING CENTER IN CHARLOTTE, NORTH  
3580=CAROLINA.  
3581=Q. AND WHERE IS IT LOCATED TODAY?  
3582=A. IN THE PARK ROAD SHOPPING CENTER IN CHARLOTTE,  
3583=NORTH CAROLINA.  
3584=Q. AND HAS THE BOOKSTORE MOVED OR CHANGED AT ALL WITHIN THAT  
3585=SHOPPING CENTER?  
3586=A. YES. WE HAD FOUR EXPANSIONS IN OUR EARLY YEARS IN OUR  
3587=ORIGINAL LOCATION. AND THEN IN 1990, WE MOVED FROM OUR ORIGINAL  
3588=LOCATION TO A LARGER LOCATION IN THE SAME SHOPPING CENTER.  
3589=Q. AND HAS THE STORE BEEN THE SAME SIZE SINCE 1990 TO THE  
3590=PRESENT?  
3591=A. YES, IT HAS.  
3592= MR. HOHENGARTEN: YOUR HONOR, PLAINTIFFS HAVE  
3593=SUPPLIED A BINDER FOR MR. BARRINGER'S TESTIMONY. I BELIEVE IT'S  
3594=ALREADY UP AT THE BENCH. MAY I APPROACH THE WITNESS AND HAND  
3595=HIM THE EXHIBITS?  
3596= THE COURT: YES.  
3597= MR. HOHENGARTEN: (HANDING BINDER.)  
3598=Q. PLEASE TURN TO TAB 1 OF THIS BINDER, WHICH IS PLAINTIFF'S  
3599=EXHIBIT NUMBER 2417 AND JUST TAKE A MOMENT TO LOOK THROUGH THAT.  
  
3600=A. (REVIEWING DOCUMENT.)  
3601= THE COURT: WHY DON'T YOU ASK HIM A QUESTION.  
3602= MR. HOHENGARTEN: I'M SORRY. HE WAS JUST LOOKING  
3603=THROUGH IT.  
3604=Q. WHAT IS THIS EXHIBIT DEPICTING?  
3605=A. THESE ARE PHOTOGRAPHS OF THE EXTERIOR AND INTERIOR OF OUR  
3606=STORE.  
3607=Q. AND ARE THEY FAIR AND ACCURATE REPRESENTATIONS OF THE STORE?  
3608=A. YES, THEY ARE.  
3609=Q. OKAY. FROM 1990 TO THE PRESENT, HOW LARGE HAS THE LITTLE  
3610=PROFESSOR STORE BEEN?  
3611=A. THE STORE IS 4300 SQUARE FOOT IN TOTAL SPACE, OF WHICH 3600  
3612=SQUARE FEET IS SELLING SPACE.  
3613=Q. AND APPROXIMATELY HOW MANY TITLES DOES THE LITTLE PROFESSOR  
3614=CARRY?  
3615=A. APPROXIMATELY 20- TO 25,000.  
3616=Q. AND HOW MANY EMPLOYEES DO YOU HAVE?  
3617=A. I HAVE FIVE FULL-TIME AND VARIES, FIVE TO SIX PART-TIME.  
3618=Q. HAS THE STORE WON ANY AWARDS?  
3619=A. WE'VE WON NUMEROUS AWARDS. WE'VE BEEN NAMED CHARLOTTE'S  
3620=BEST INDEPENDENT BOOKSTORE FOR 13 STRAIGHT YEARS. WE WERE NAMED  
3621=THE STORE OF THE YEAR BY LITTLE PROFESSOR BOOK CENTER IN I  
3622=BELIEVE IT WAS 1985.  
3623=Q. OKAY. AND TODAY, WHAT -- WHAT CATEGORIES OF BOOKS DOES THE  
3624=LITTLE PROFESSOR SELL?  
  
3625=A. WE CARRY EVERYTHING A GOOD GENERAL BOOKSTORE CARRIES,  
3626=HARDBACK, PAPERBACK, TRADE PAPERBACK, AUDIO BOOKS. WE CARRY ART  
3627=BOOKS, COOK BOOKS, TRAVEL BOOKS, SELF HELP BOOKS, PHILOSOPHY,  
3628=RELIGION, CHILDREN'S BOOKS, MAGAZINES.  
3629=Q. DO YOU CARRY MASS MARKET BOOKS?  
3630=A. YES, WE DO. MANY.  
3631=Q. AND DO YOU CARRY BOTH FRONT LIST AND BACKLIST BOOKS?  
3632=A. YES, WE DO.  
3633=Q. ARE THERE ANY CATEGORIES OR FORMATS OF BOOKS THAT LITTLE  
3634=PROFESSOR DOES NOT CARRY?  
3635=A. WE DO NOT CARRY TEXTBOOKS.  
3636=Q. AS OPPOSED TO TRADE BOOKS?  
3637=A. THAT'S CORRECT.  
3638=Q. AND HAS THAT BEEN TRUE THE WHOLE TIME SINCE 1994 TO THE  
3639=PRESENT?  
3640=A. YES.  
3641=Q. NOW, IN 1992, WHO WERE THE MOST SIGNIFICANT COMPETITORS OF  
3642=THE LITTLE PROFESSOR?  
3643=A. IN 1992, A SMALL INDEPENDENT CHAIN CALLED INTIMATE BOOK  
3644=SHOPS EXISTED. WE HAD TWO OF THEM IN CHARLOTTE. THEY WERE BY  
3645=FAR MY MOST SIGNIFICANT COMPETITOR.  
3646=Q. WERE THERE ANY BARNES & NOBLE OR BORDERS STORES IN CHARLOTTE  
3647=AT THAT TIME?  
3648=A. IN 1992, NO.  
3649=Q. AND DO YOU HAVE A SENSE OF WHAT THE BREADTH OF YOUR TRADING

3650=AREA IS, NAMELY WHERE YOU DRAW YOUR CUSTOMERS FROM?  
3651=A. NOW OR THEN?  
3652=Q. IN 1992.  
3653=A. IN 1992, WE REALLY DREW FROM A WIDE AREA, 20 MILES, THE  
3654=WHOLE CITY.  
3655=Q. AND HAS THAT CHANGED OVER TIME?  
3656=A. IT'S -- IT'S NARROWED CONSIDERABLY WITH THE ARRIVAL OF MORE  
3657=COMPETITION.  
3658=Q. WHAT WOULD YOU -- WHERE DO YOU SAY -- WOULD YOU SAY YOU DRAW  
3659=YOUR CUSTOMERS FROM TODAY?  
3660=A. OUR BASIC AREA -- OUR TARGET MARKET AREA MAJORITY OF OUR  
3661=CUSTOMERS COME FROM WOULD BE ABOUT A FOUR-MILE RADIUS.  
3662=Q. OKAY. AND WHO WERE THE LITTLE PROFESSOR'S PRIMARY  
3663=COMPETITORS FOR SALES OF BOOKS TODAY?  
3664=A. TODAY, IT WOULD BE CERTAINLY BORDERS, BARNES & NOBLE AND  
3665=MEDIA PLAY.  
3666=Q. OKAY. WHERE IS THE BARNES & NOBLE STORE THAT IS THE CLOSEST  
3667=TO LITTLE PROFESSOR?  
3668=A. IT IS ONE POINT 8 MILES SOUTH.  
3669=Q. IS THERE AN ADDRESS THAT YOU CAN GIVE ME?  
3670=A. IT'S AT SHARON AND FAIRVIEW ROADS.  
3671=Q. AND ABOUT HOW LONG DOES IT TAKE TO DRIVE BETWEEN YOUR STORE  
3672=AND THAT STORE?  
3673=A. SEVEN MINUTES.  
3674=Q. AND DO YOU KNOW WHEN THE SHARON ROAD BARNES & NOBLE STORE  
3675=OPENED?  
3676=A. SEPTEMBER OF 1993.  
3677=Q. LET ME ASK YOU TO LOOK AT TAB 3 IN THE BINDER, WHICH IS  
3678=EXHIBIT 2522. DO YOU RECOGNIZE WHAT THIS IS?  
3679=A. YES. IT'S A MAP OF OUR AREA OF CHARLOTTE.  
3680=Q. DOES THE MAP SHOW WHERE THE LITTLE PROFESSOR BOOK STORE IS?  
3681=A. YES, IT DOES.  
3682=Q. COULD YOU IDENTIFY THAT, PLEASE?  
3683=A. IT IS THE GREEN DOT SURROUNDED BY A YELLOW CIRCLE, AND IT'S  
3684=MARKED 4139 PARK ROAD.  
3685=Q. AND IS THAT AN ACCURATE REPRESENTATION OF WHERE THE LITTLE  
3686=PROFESSOR IS?  
3687=A. YES, IT IS.  
3688=Q. AND IS THE SHARON ROAD BARNES & NOBLE SHOWN ON THIS MAP?  
3689=A. YES, IT DOES.  
3690=Q. WHERE IS THAT?  
3691=A. IT IS SOUTH OF THAT AT THE INTERSECTION OF FAIRVIEW AND  
3692=SHARON ROADS. IT IS THE RED DOT MARKED BARNES & NOBLE AT 4720  
3693=SHARON ROAD.  
3694=Q. AND IS THAT ACCURATE REPRESENTED HERE?  
3695=A. YES, IT IS.  
3696=Q. ARE THERE OTHER BARNES & NOBLE STORES IN THE CHARLOTTE AREA  
3697=TODAY?  
3698=A. YES, THERE ARE THREE OTHERS.  
3699=Q. COULD YOU BRIEFLY SAY WHERE THEY ARE?  
3700=A. THERE IS ONE ON INDEPENDENCE AVENUE. IT'S ALSO MARKED BY A  
3701=RED DOT THAT'S ON THE FAR EASTERN SIDE OF TOWN. THERE IS ONE AS  
3702=IT SHOWS ON MAP ALSO AS A RED DOT ON THE FAR SOUTH CENTRAL SIDE  
3703=OF THE CITY. AND THERE IS ONE THAT IS NOT ON THE MAP. IT'S AT  
3704=THE INTERSECTION OF INTERSTATE 485 AND NORTH CAROLINA ROUTE 51  
3705=JUST WHERE IT SAYS "PINEVILLE."  
3706=Q. OKAY. AND WHERE IS THE BORDERS STORE THAT IS CLOSEST TO  
3707=LITTLE PROFESSOR?  
3708=A. WELL, THERE'S ONLY ONE. IT IS ALSO 1.8 MILES AWAY. 3900  
3709=BLOCK OF COLONY ROAD. THAT'S COLONY AND SHARON ROAD.  
3710=Q. AND DO YOU KNOW WHEN THAT STORE OPENED?  
3711=A. THAT OPENED IN THANKSGIVING TIME OF 1993, NOVEMBER '93.  
3712=Q. AND LOOKING STILL AT THE MAP AND BEHIND TAB 3, IS THE  
3713=BORDERS STORE ON COLONY ROAD MARKED THERE?  
3714=A. YES, IT IS. IT'S THE BLUE DOT.  
3715=Q. AND THAT'S ACCURATELY REPRESENTED?  
3716=A. YES, IT IS.  
3717=Q. YOU ALSO MENTIONED MEDIA PLAY. COULD YOU DESCRIBE BRIEFLY  
3718=WHAT MEDIA PLAY IS?  
3719=A. MEDIA PLAY IS WHAT I ALSO CONSIDER A LARGE CHAIN BOOKSELLER.

3720=CERTAINLY BOOKSELLING IS A LARGE PART OF THEIR BUSINESS. IT'S A  
3721=CONGLOMERATE THAT SELLS BOOKS, VIDEO, COMPUTER MATERIALS,  
3722=T-SHIRTS, ALL OF THAT.

3723=Q. DO YOU KNOW APPROXIMATELY HOW MANY TITLES A MEDIA STORE

3724=(SIC) -- OF BOOKS A MEDIA STORE (SIC) SELLS?

3725=A. NO, I KNOW THAT -- I DON'T KNOW HOW MANY TITLES, BUT THEY  
3726=HAVE IN THE STORE CLOSEST TO US, PROBABLY BETWEEN 10- AND 15,000  
3727=SQUARE FOOT OF BOOK SPACE.

3728=Q. AND WHERE IS THAT CLOSEST MEDIA (SIC) STORE LOCATED?

3729=A. IF YOU LOOK DIRECTLY WEST FROM OUR LOCATION, YOU'LL SEE  
3730=SOUTH BOULEVARD, AND IT IS AT THE INTERSECTION OF WOODLAWN AND  
3731=SOUTH BOULEVARD.

3732=Q. AND ABOUT HOW FAR AWAY IS THAT?

3733=A. ABOUT ONE AND A QUARTER MILES.

3734=Q. AND WHEN DID THAT MEDIA PLAY STORE OPEN?

3735=A. IT WAS EITHER LATE SPRING OR EARLY SUMMER OF 1994.

3736=Q. SO A HALF A YEAR OR MORE AFTER THE BARNES & NOBLE AND

3737=BORDERS THAT ARE CLOSEST TO YOU?

3738=A. YES.

3739= THE COURT: I THINK WE'LL STOP NOW UNTIL TOMORROW.

3740= MR. HOHENGARTEN: VERY GOOD, YOUR HONOR.

3741= THE COURT: COURT'S IN RECESS TILL 8:30 TOMORROW.

3742= THE CLERK: ALL RISE.

3743= (PROCEEDINGS WERE ADJOURNED AT 1:21 P.M.)

3744= --000--

3745=

3746=

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3751=APPEARANCES: (CONTINUED)

3752=FOR DEFENDANTS: BORDERS GROUP, INC.

3753=(BORDERS GROUP) 100 PHOENIX DRIVE

3754= ANN ARBOR, MICHIGAN 48108-2202

3755= BY: THOMAS D. CARNEY, GENERAL COUNSEL

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