



SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN FRANCISCO

1 ELIEZER WILLIAMS, ET AL., )  
2 )  
3 Plaintiff, )  
4 )  
5 vs. ) No. 312236  
6 )  
7 STATE OF CALIFORNIA, ET AL., )  
8 )  
9 Defendants. )

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12  
13  
14  
15 Deposition of DR. RICHARD BERK, taken on behalf  
16 of Plaintiff at 555 West Fifth Street, Suite 3500,  
17 Los Angeles, California, beginning at 9:24 a.m. and  
18 ending at 12:23 p.m. on Tuesday, July 15, 2003,  
19 before DIANA JANNIERE, Certified Shorthand Reporter  
20 No. 10034.  
21  
22  
23  
24  
25

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1 Los Angeles, California, Tuesday, July 15, 2003  
2 9:24 a.m. - 12:23 p.m.  
3  
4 RICHARD BERK,  
5 having been first duly sworn, was examined and testified  
6 as follows:  
7  
8 EXAMINATION  
9 BY MR. KREEGER:  
10 Q Good morning. Although we have met off the  
11 record, my name is Matthew Kreeger. I work at the law  
12 firm of Morrison & Foerster.  
13 We are here to take your deposition. Have you  
14 ever had your deposition taken before?  
15 A I have.  
16 Q I am going to ask you a series of questions.  
17 You are to answer the questions. If at any time my  
18 questions are unclear, please ask me to clarify it and I  
19 will do so.  
20 The court reporter is going to take down  
21 everything that we say. So it is important that we speak  
22 one at a time.  
23 A I understand.  
24 Q If you ever need a break, let me know and we  
25 will stop.

1 A I understand.  
 2 Q Any questions on what we are going to be doing  
 3 here today?  
 4 A I have no questions.  
 5 MR. KREEGER: Off the record for one minute.  
 6 (Discussion off the record.)  
 7 MR. KREEGER: So let me mark as Berk  
 8 Exhibit 1.  
 9 (Plaintiffs' Exhibit 1 was marked for  
 10 identification by the court reporter.)  
 11 BY MR. KREEGER:  
 12 Q Are you familiar with this document?  
 13 A Well, it looks -- which one are we talking  
 14 about? There are several here.  
 15 Q Let's take it piece by piece.  
 16 A Sure.  
 17 Q There is a declaration that last three pages  
 18 signed by Paul Salvaty?  
 19 A I see that.  
 20 Q And there is an Exhibit A and Exhibit B. Let's  
 21 start with the declaration portion. Have you ever seen  
 22 that before?  
 23 A Yes, I have.  
 24 Q What is that document?  
 25 A That is a request for me to provide materials in

1 anticipation of my deposition.  
 2 Q And then Exhibit A, what is that?  
 3 A That is a -- it looks to be a copy of my C.V.  
 4 Yes, that is correct.  
 5 Q And what about Exhibit B?  
 6 A Let me just check the C.V. for a moment. The  
 7 C.V. document is not complete.  
 8 Q And how is it incomplete?  
 9 A There are pages missing at the end. Let me see  
 10 if I can figure out where. I would say half of the C.V.  
 11 which is basically the list of publications, is not  
 12 there. The publication list ends in 1982. And  
 13 certainly, I have been active since then.  
 14 MR. KREEGER: I see. Would you be willing to  
 15 produce an updated copy of the C.V.?  
 16 MR. CHOATE: I think we produced it, but I will  
 17 go back and check and double verify that. Sure, of  
 18 course.  
 19 BY MR. KREEGER:  
 20 Q What is Exhibit B attached to Exhibit 1?  
 21 A This looks to be the report that I provided in  
 22 this case.  
 23 Q What question did you hope to address in your  
 24 report?  
 25 A Well, I was asked by the attorneys to consider

1 the scientific and statistical credibility of the Harris  
 2 study.  
 3 Q And Exhibit B attached to Berk Exhibit 1  
 4 contains your analysis of that question?  
 5 A It looks to be. The reason why I am hesitating  
 6 is it looks to be a continuing error in the last  
 7 instance. Perhaps there is one here today. I am just  
 8 checking the pages. Yes, it looks to be completed.  
 9 Q In your report, you talk about an ideal study.  
 10 I believe it is a section that begins on Pages 3 and 4 of  
 11 your report?  
 12 A I see that.  
 13 Q And you describe a way to perform -- you  
 14 referred to it as an ideal study.  
 15 And what question was this ideal study that you  
 16 are talking about here? What would it be designed to  
 17 answer?  
 18 A The same questions that the Harris study was  
 19 assigned to answer.  
 20 Q And what did you think those questions to be?  
 21 A Well, I have it quoted at the beginning of my  
 22 report. Why don't we turn there. On Page 2, and I quote  
 23 from the Harris study: Find out what the public school  
 24 system is providing and -- end quote -- to its students  
 25 and so on.

1 Q In order to perform an ideal study designed to  
 2 examine that question, you've described the use of  
 3 auditors?  
 4 A Yes.  
 5 Q And is there another component to your ideal  
 6 study or is it just for the purpose of using auditors?  
 7 MR. CHOATE: Objection to the question.  
 8 THE WITNESS: Let's go back to that page and  
 9 take a look. You will see that there are two issues.  
 10 One is how you measure. The other is how you sample.  
 11 The auditors referring to how you measure. And in the  
 12 ideal study, you wouldn't sample at all.  
 13 BY MR. KREEGER:  
 14 Q Do you have any view as to whether this ideal  
 15 study would be feasible to accomplish?  
 16 MR. CHOATE: Objection. Vague and ambiguous.  
 17 Incomplete hypothetical.  
 18 THE WITNESS: Feasibility in this case is a  
 19 matter of resources. I don't know what resources are  
 20 available to this work.  
 21 BY MR. KREEGER:  
 22 Q With adequate resources, do you believe a study  
 23 of this type that you consider to be an ideal study can  
 24 be accomplished?  
 25 MR. CHOATE: Objection. Vague and ambiguous.

1 THE WITNESS: I do.  
 2 BY MR. KREEGER:  
 3 Q Beginning on Page 7, you talk about issues  
 4 associated with disagreement between the teachers who  
 5 were surveyed by Harris. I want to spend some time on  
 6 that issue.  
 7 Am I right that the reason that you have written  
 8 in this question about disagreement between the teachers  
 9 is because you were concerned that the Harris survey  
 10 questions were subjective?  
 11 A That was only part of the problem.  
 12 Q Why else were you interested in that question?  
 13 A There is no rigorous way to get to the answers  
 14 from the facts.  
 15 Q Why is that?  
 16 A Because the facts are not being directly  
 17 measured. You are asking for people's subjective  
 18 assessment to facts and there is no way to step from one  
 19 to the other.  
 20 Q When you speak about a disagreement between  
 21 teachers, does your analysis assume that the teachers are  
 22 asking -- start again.  
 23 When you speak about a disagreement between  
 24 teachers, does your analysis assume that the teachers are  
 25 describing the same fact?

1 MR. CHOATE: Objection. The document speaks for  
 2 itself. You are asking about his analysis in this  
 3 report?  
 4 THE WITNESS: In this analysis, I am very clear  
 5 that when there is disagreement, the only way you can  
 6 look at it empirically is when the teachers are examining  
 7 the same phenomenon.  
 8 BY MR. KREEGER:  
 9 Q For some of questions that were specific to the  
 10 teachers' own personal experience, a different answer by  
 11 two different teachers wouldn't be a disagreement; would  
 12 it?  
 13 MR. CHOATE: Mischaracterizes the witness's  
 14 testimony. It is vague and ambiguous.  
 15 THE WITNESS: That needs to be unpacked a bit.  
 16 If I asked you what you had for breakfast, you  
 17 presumably would be the only expert. Maybe that -- that  
 18 is your family.  
 19 If I asked you what is this room like, there are  
 20 several of us who might have opinions. So it really  
 21 depends upon the topic that you are asking about.  
 22 BY MR. KREEGER:  
 23 Q Were there some questions in the Harris survey  
 24 that you considered different responses from different  
 25 teachers from the same school to reflect something other

1 than disagreement?  
 2 MR. CHOATE: I'm sorry.  
 3 MR. KREEGER: It is complex. Let me try it  
 4 again.  
 5 MR. CHOATE: Sure.  
 6 BY MR. KREEGER:  
 7 Q Let me -- it might be easier with the Harris  
 8 survey.  
 9 First of all, are you familiar with the document  
 10 that I have marked as Berk Exhibit 2?  
 11 (Plaintiffs' Exhibit 2 was marked for  
 12 identification by the court reporter.)  
 13 THE WITNESS: Yes, it looks to be the survey  
 14 instrument used in the Harris study.  
 15 BY MR. KREEGER:  
 16 Q So I mean just to pick one example, kind of  
 17 random here, on the specific page -- there is a question  
 18 1A that asks, "Overall, what percentage of  
 19 students in your classes are  
 20 Limited English Proficient?"  
 21 Now, if two teachers from the same school  
 22 responded to that question and they responded  
 23 differently, would your analysis conclude that they  
 24 disagreed about a fact?  
 25 MR. CHOATE: Objection. Incomplete

1 hypothetical.  
 2 THE WITNESS: That is one of the ones that is  
 3 ambiguous for two reasons. First of all, in some classes  
 4 students are passed between teachers. So they may have  
 5 some of the same students.  
 6 Second of all, if students are shoveled between  
 7 classes on a reasonably random basis, what one teacher  
 8 experiences with respect to the mix of the students would  
 9 be quite a bit like what other teachers might experience.  
 10 So, in this instance, if there were two teachers  
 11 in the same school, you might be able to learn something  
 12 about disagreement by comparing their answers.  
 13 BY MR. KREEGER:  
 14 Q Did you analyze this particular question for  
 15 that purpose?  
 16 A I did not.  
 17 Q Which questions did you analyze in the Harris  
 18 survey for purposes of looking at disagreements between  
 19 teachers?  
 20 A In my report, if you look at Figures 1 and 2,  
 21 those reflect the questions that I answered.  
 22 Q Okay. I will spend a little more time on those  
 23 figures later. Leaving aside what is in your report, did  
 24 you examine any other questions in the course of your  
 25 work in this case?

1 MR. CHOATE: Objection. It is vague and  
2 ambiguous.  
3 THE WITNESS: When I first began looking at the  
4 data, I reviewed virtually all of the questions that were  
5 asked in the survey to get a sense of what kinds of  
6 answers were being provided.  
7 So, in that sense, I looked at virtually all of  
8 the survey.  
9 BY MR. KREEGER:  
10 Q How did you choose the particular items to --  
11 that appear in Figure 1 and Figure 2?  
12 A Well, this, of course, is in an illustrative  
13 analysis. The study was not designed properly. So you  
14 can't really tell, except for a hundred schools, how much  
15 agreement or disagreement there is.  
16 So these were picked to illustrate the problem  
17 and they seemed to be questions that the Harris analysis  
18 took very seriously, which is one of the reasons why I  
19 focused on these.  
20 Q The items that appear in Figure 1 and 2, those  
21 are instances, where, in your view, if teachers provide  
22 different answers, they are disagreeing upon a particular  
23 fact at a school?  
24 A I believe that is a reasonable inference, yes.  
25 Q Can you tell me which items on the Harris survey

1 corresponded to the answers in Figure 1?  
2 A Yes, I can.  
3 If you look at Figure 1, let's leave "Teacher  
4 Turnover" for a second because that is in another area.  
5 These items came from the block of questions  
6 under question 9, and these were 9A.  
7 Q Okay. Let me just stop you right there.  
8 A Sure.  
9 Q So maybe, to be more precise, if you -- you will  
10 see the responses in the Harris survey have -- in  
11 addition to the question, they have several response  
12 numbers. So it looks like the 9A column has responses to  
13 71 through 78.  
14 Do you see those entries?  
15 A I do.  
16 Q Which, for example, you said Teacher Turnover  
17 doesn't apply in this block. Which is one way that the  
18 school involves parents?  
19 A That is the way the school involves parents.  
20 Q Fair enough. That would be item No. 75?  
21 A Yeah, I take it that those numbers refer to  
22 column numbers in the data set. I wasn't working from  
23 those. I was working from the text, but, yes, I think  
24 that is right.  
25 Q And what about "Quality of School Facilities" in

1 your report, Figure 1?  
2 MR. CHOATE: Objection. It is vague and  
3 ambiguous. What is the question?  
4 BY MR. KREEGER:  
5 Q I am asking where in his report the entry that  
6 says, "Quality of School Facilities," what Harris survey  
7 item corresponds to that entry?  
8 A That is the adequacy of physical facilities in  
9 your school.  
10 Q That appears at the bottom of page, Plaintiff 1,  
11 71613.4?  
12 A Yes. Yes. That's correct. It is Page 4 of the  
13 survey.  
14 Q All right. And which Harris survey item  
15 corresponds to your entry, "Working Conditions for  
16 Teachers"?  
17 A "Working Conditions for Teachers. "  
18 Q On the same page?  
19 A Yes.  
20 Q And "Availability of Technology"?  
21 A "Availability of Technology," on the same page.  
22 Q On the same page. What about "Quality of  
23 Instruction Materials"?  
24 A That would be the textbooks and instructional  
25 materials you were given.

1 Q On the same page?  
2 A Same page.  
3 Q All right. So I guess that leaves "Seriousness  
4 of Teacher Turnover" in your chart. Where does that come  
5 from?  
6 A That comes later in the questionnaire, and that  
7 is item 14A, on Page 7, in the questionnaire.  
8 Q All right. All right. Sticking with Figure 1,  
9 you calculate just in the first column, on the  
10 Seriousness of Teacher Turnover entry, that the  
11 respondents disagree 48 percent of the time.  
12 Can you tell me how you calculated that number?  
13 A For schools in which there was more than one  
14 teacher, we simply looked at the responses provided by  
15 the survey, throughout the responses which were "Not  
16 Sure," and any time there was a difference in the  
17 responses, we called it a disagreement.  
18 Q So for purposes of this figure, if one  
19 respondent said, "Excellent" and another respondent said,  
20 "Good," that would be considered a disagreement?  
21 A That's correct.  
22 Q Did you calculate these numbers by hand?  
23 A I didn't calculate these numbers, but they were  
24 calculated by someone.  
25 Q Who calculated the numbers?

1 A They were calculated by Sean Simmons, who, at  
2 that time, was working on the case with O'Melveny.  
3 Q One of the attorneys at O'Melveny?  
4 A That's correct.  
5 Q How was it that -- let me start again.  
6 Did you do something to insure that these  
7 calculations were accurate?  
8 MR. CHOATE: objection. It is vague and  
9 ambiguous.  
10 THE WITNESS: The conception of this analysis  
11 was mine. The way to organize the data so that the  
12 analysis could be done, that organization was mine.  
13 I instructed him on the calculations to  
14 undertake. We talked on the phone many times. He ran  
15 preliminary calculations by me.  
16 I looked at the spreadsheet to see if he  
17 corresponded with what I saw. And then as the numbers  
18 became available, I questioned him again to review that  
19 he had done what I had instructed him to do.  
20 BY MR. KREEGER:  
21 Q So the spreadsheet that you were working with  
22 didn't reflect these calculations?  
23 MR. CHOATE: Objection. Mischaracterizes the  
24 witness's testimony.  
25 THE WITNESS: Spreadsheets were the data. And

1 the spreadsheet was simply sorted by school and then  
2 examined.  
3 BY MR. KREEGER:  
4 Q Right. My question was imprecise.  
5 You didn't and, so far as you know, no one  
6 modified the spreadsheet to actually perform the  
7 calculations that ended up with the 48 percent figure?  
8 MR. CHOATE: Objection.  
9 THE WITNESS: What did you mean by modify?  
10 BY MR. KREEGER:  
11 Q Adding a column and then let the Excel calculate  
12 the percentage of interest, for example.  
13 MR. CHOATE: Are you asking him? What Dr. Berk  
14 did?  
15 MR. KREEGER: I think the question is clear.  
16 (Record read as follows:  
17 "Question: You didn't and, so far as you  
18 know, no one modified the spreadsheet to  
19 actually perform the calculations that ended up  
20 with the 48 percent figure?")  
21 MR. CHOATE: Objection. Vague and ambiguous.  
22 THE WITNESS: I didn't do that.  
23 BY MR. KREEGER:  
24 Q As far as you know, no one did that?  
25 A As far as I know, this was all done by hand.

1 That Mr. Simmons had a large piece of paper in front of  
2 himself. He wrote down the schools. And as he went  
3 through the spreadsheet, he simply tabulated where there  
4 was agreement or disagreement.  
5 Q Did you review that piece of paper?  
6 A On the phone.  
7 MR. CHOATE: Objection. Calls for speculation.  
8 BY MR. KREEGER:  
9 Q You never saw the piece of paper that you are  
10 referring to?  
11 MR. CHOATE: Objection. Assumes facts not in  
12 evidence.  
13 THE WITNESS: I did not see the piece of paper,  
14 but we spoke about the calculations a number of times.  
15 BY MR. KREEGER:  
16 Q Do you know what numerator was in the  
17 calculation that led to the 48 percent?  
18 MR. CHOATE: Objection. It is vague and  
19 ambiguous. Are you referring to 48 percent in Figure 1?  
20 MR. KREEGER: Yes.  
21 THE WITNESS: Well, I know there were about 100  
22 schools and as 48 percent, so the numerator is somewhere  
23 around 48.  
24 BY MR. KREEGER:  
25 Q But you can't tell me what, exactly, the

1 corresponding numbers that lead to that 48 percent  
2 calculation number?  
3 A Well, there were actually 99 schools. So it is  
4 a little bit less than 47. Meaning, that is a pretty  
5 good fix on that numerator.  
6 Q And that -- right. Because -- let me make sure  
7 I understand how this works.  
8 Is this the percentage of schools for which  
9 there was a disagreement or was there a -- or was this a  
10 particular time that the respondents didn't agree?  
11 MR. CHOATE: Objection. Vague.  
12 BY MR. KREEGER:  
13 Q In excess of 200 respondents, at schools where  
14 there was more than one respondent per school?  
15 A Yes, there was about 200 schools. Yes.  
16 Q So, in some cases, there were three respondents  
17 for a particular school?  
18 A A few.  
19 Q In instances where there was three respondents  
20 per school and two of them said "Excellent" and one of  
21 them said "Good," was that considered to be three  
22 respondent agreements or to one school which there was  
23 disagreement?  
24 A The analysis is of the level of the school. So  
25 if there were three people and if there was any dispute

1 amongst them, that school had disagreement.  
 2 Q So in Figure 1, although your title says,  
 3 "Percentage of Time Respondents Disagreed," the actual  
 4 percentage is the percentage of times where there was  
 5 disagreement about a particular school; is that right?  
 6 MR. CHOATE: Objection. Mischaracterizes the  
 7 witness's testimony.  
 8 THE WITNESS: Well, yes, the title I thought was  
 9 clear, but I guess it is not. It is about a school. It  
 10 says ", Conditions at the Same School." So we were  
 11 characterizing schools.  
 12 BY MR. KREEGER:  
 13 Q Were there ever instances in which there were  
 14 four or more respondents at a particular school?  
 15 A There may have been one or two. It was very  
 16 rare.  
 17 Q If there were -- say, there were four  
 18 respondents at a school and a particular question about,  
 19 for example, the Seriousness of Teacher Turnover.  
 20 Three of them said "Excellent," and one of them  
 21 said "Good," that school would be considered a school as  
 22 to which there was disagreement?  
 23 A Yes.  
 24 Q Why is it that you didn't record these  
 25 calculations in some permanent way?

1 MR. CHOATE: Objection. Mischaracterizes the  
 2 witness's testimony. It is vague and ambiguous.  
 3 THE WITNESS: I did. It is right here in this  
 4 table.  
 5 BY MR. KREEGER:  
 6 Q The table records a result. I am asking why you  
 7 didn't record the calculations that is the underlining  
 8 result?  
 9 A There is no need. The calculations were trivial  
 10 and what you have is a record of that result.  
 11 (Plaintiffs' Exhibit 3 was marked for  
 12 identification by the court reporter.)  
 13 MR. KREEGER: Actually, before we do Exhibit 3,  
 14 let me ask you a few more questions about Figure 1.  
 15 MR. CHOATE: Figure 1 on the doctor's report?  
 16 MR. KREEGER: Yes.  
 17 Q So one of these entries relates to the textbooks  
 18 and instruction materials you were given. And if I  
 19 understand your answer before, correct me if I am wrong,  
 20 in your reading that question, teachers at the same  
 21 school who answered differently disagreed about a fact;  
 22 is that right?  
 23 A That's correct.  
 24 Q And was that based on your assumption that the  
 25 teachers would be -- at a particular school would be

1 given the same quality of textbooks and instruction  
 2 materials?  
 3 MR. CHOATE: Objection. Vague and ambiguous.  
 4 THE WITNESS: Well, let's go back and look at  
 5 the question.  
 6 BY MR. KREEGER:  
 7 Q All right.  
 8 A For that question, the assumption was, yes, that  
 9 they would be given the same textbooks and instructional  
 10 materials.  
 11 Q Later in your report, when you were dealing with  
 12 an item that has this range of responses, Excellent,  
 13 Good, Only Fair, Poor, Not Sure, you collapsed the  
 14 responses into two groups.  
 15 You know, one category for Excellent/Good, on  
 16 the other hand, and another category, Only Fair or Poor.  
 17 Did you perform that analysis for disagreement  
 18 rates?  
 19 A No.  
 20 Q Why not?  
 21 A Because it wasn't relevant.  
 22 Q Why wasn't it relevant?  
 23 A The two analyses addressed different questions.  
 24 The question here is if you get two different answers, on  
 25 a questionnaire, what do you believe? So I checked to

1 see if at any time there were different -- two different  
 2 or more answers.  
 3 Q Let's look at Figure 2 of your report, please.  
 4 You have three columns. How did you choose these  
 5 particular items to analyze?  
 6 A As the others, they were ones that were  
 7 identified very prominently in the Harris study.  
 8 Q Can you tell me which items correspond to your  
 9 items in Figure 2?  
 10 A I can.  
 11 MR. CHOATE: Can you refer to the question,  
 12 which item in Figure 2?  
 13 BY MR. KREEGER:  
 14 Q Yes.  
 15 A The question, "Evidence of Mice, Rats and  
 16 Cockroaches," comes from the question of Evidence of  
 17 Mice, Rats or Cockroaches". That is Item G.  
 18 "Bathrooms Opened and Clean" comes from 13H, or  
 19 "Are the bathrooms opened and clean" -- "clean and open,"  
 20 excuse me.  
 21 And the "Quality of Classroom Temperatures,"  
 22 comes from question 13C, now let me ask you about the  
 23 temperature of your classroom.  
 24 Q With respect to classroom temperature, your  
 25 analysis assumed that the teachers at the same school

1 would experience the same temperature in their  
2 classrooms?

3 MR. CHOATE: Objection. Assumes facts not in  
4 evidence. It is vague and ambiguous. And the document  
5 speaks for itself.

6 THE WITNESS: It is about your classroom. So  
7 the assumption is that within a particular school, yes,  
8 that is a homogeneous -- it is a homogeneous set of  
9 classrooms.

10 BY MR. KREEGER:

11 Q Homogeneous with respect to their temperature?

12 A Well, that is not what the question asked. The  
13 question asked about comfort, so that -- that is one of  
14 the difficulties related to it, but the assumption is  
15 that they are all experiencing basically the same  
16 physical conditions.

17 Q At a particular school?

18 A That's correct.

19 Q And similarly, with respect to cockroaches, rats  
20 or mice, if one person responded they have seen evidence  
21 of cockroaches, rats and mice and the other person  
22 responds that they have not, your analysis assumes that  
23 is a disagreement because they should have experienced  
24 the same level of cockroaches, rats or mice?

25 A That, Counsel, is a misreading of this question.

1 THE WITNESS: My role in that was much more  
2 hands on. I did not do the calculations, but as they  
3 were being done, we talked on the phone to make sure they  
4 were plausible.

5 When there were particular items, we both went  
6 to the spreadsheet. I looked at my computer. He looked  
7 in front of his to make sure that we were talking about  
8 the same items and coding them the same, which when the  
9 results were ultimately provided, we went over it again,  
10 plausibility.

11 BY MR. KREEGER:

12 Q What do you mean by if you were coding them the  
13 same way?

14 A There were a lot of materials to examine on the  
15 spreadsheet and it might be very easy, for example, to  
16 miss the fact that one respondent answered with a one and  
17 another one with a two.

18 So we would spot check to make sure that we both  
19 saw a one and a two there. And that he didn't  
20 inadvertently or I didn't inadvertently misread the  
21 numbers.

22 Q Did Mr. Simmons ever show you a record of the  
23 calculations that he performed?

24 A He did not.

25 Q Is Figure 2, like Figure 1, a percentage of

1 It says, Have you seen evidence of cockroaches, rats or  
2 mice? Have they been a problem in your school over the  
3 past year?

4 So the question asked about the school. So I  
5 assumed that the teachers are responding about the  
6 school. So, yes, disagreement is a disagreement.

7 Q How are the percentages in Figure 2 of your  
8 report calculated?

9 A The "Not Sures" were thrown out and these were  
10 then just either basically a true or a false. I agree or  
11 disagree. So there was just two options there.

12 Q And these percentages were again calculated by  
13 someone at O'Melveny and Myers?

14 MR. CHOATE: Objection. Assumes facts not in  
15 evidence. Calls for speculation.

16 THE WITNESS: Like the earlier items, these  
17 reflect an analysis that I laid out, and checked many  
18 times over the phone with Mr. Simmons, who did the work.

19 BY MR. KREEGER:

20 Q Well, let me be clear on that. You directed  
21 Mr. Simmons on how you wanted the calculations to be  
22 performed and that he performed the calculations?

23 A Well, it was --

24 MR. CHOATE: Objection. I am going to object to  
25 the extent it calls for speculation.

1 schools as to which there is disagreement?

2 A It is.

3 Q Are there any items in the Harris survey that,  
4 in your view, have a feature that -- let me start over  
5 again.

6 Are there any questions in the Harris survey as  
7 to which, if teachers at a particular school responded  
8 differently, you would not conclude that there was a  
9 disagreement?

10 A Well, there are certainly obvious questions  
11 about a given individual teacher. There was stuff on the  
12 teacher's educational background, for example.

13 Clearly, people can answer differently on that.  
14 And then there are some questions for which it is really  
15 impossible to check whether there is disagreement because  
16 there is not two readings for the same phenomena.

17 For example, two social study kids may use the  
18 exact same textbooks. When asked about the textbook,  
19 they may or may not agree, but we cannot tell if they are  
20 using the same textbooks.

21 The point is disagreements are expected and are  
22 pervasive. It is difficult because the design of the  
23 study does not allow to document what those disagreements  
24 were.

25 Q I want to turn to your analysis that appears on



1 Page 11 of your report -- well, beginning on 10 and  
2 continues on to 11, where you do some more work with the  
3 questions that appear -- in some of the questions that  
4 appear in Figure 1. First of all, I want to make sure if  
5 I have that right.

6 In the analysis that begins at the last  
7 paragraph, 10, and begins onto 11 in your report, you  
8 talk about a question about construction materials,  
9 question about available technology and a question about  
10 bathrooms.

11 Are those three items the same questions that we  
12 discussed in Figure 1?

13 A They are.

14 Q And here it says you collapsed the responses  
15 "Excellent" and "Good" into one category and "Only Fair"  
16 and "Poor" into another category; is that right?

17 A That's correct.

18 Q And you say for 99 schools there was more than  
19 one respondent for a total of 214 respondents overall.

20 Do you know how often those 99 schools displayed  
21 disagreement --

22 MR. CHOATE: Objection.

23 BY MR. KREEGER:

24 Q -- for purposes of that analysis?

25 MR. CHOATE: Vague and ambiguous. And I will

1 calculation because, again, these are just meant to  
2 illustrate a problem that is pervasive throughout the  
3 instrument.

4 BY MR. KREEGER:

5 Q Okay. Turning to the analysis that appears on  
6 Page 11 of your report, you say that there is two  
7 different ways to analyze these responses as to the  
8 schools where there were actual multiple respondents.

9 One would be average over all teachers, as  
10 Harris did, and the other is applying a majority vote  
11 rule, and then you contrast these results.

12 Maybe I could just ask you: On the  
13 instructional materials question you say 18 percent of  
14 the teachers felt that the materials were unsatisfactory.

15 And where does that 18 percent come from?

16 A That was from the calculations that Mr. Simmons  
17 did.

18 Q What exactly was being calculated there?

19 A The percentage of teachers that felt the  
20 materials were unsatisfactory.

21 Q So the denominator in that school calculation  
22 was 214?

23 A That's correct.

24 Q Have you seen that calculation recorded in any  
25 form?

1 object to the extent that it mischaracterizes the  
2 testimony and the report.

3 THE WITNESS: The analysis of disagreement is  
4 Figure 1. We have been through that. This was not an  
5 analysis of disagreement. This was an attempt just to  
6 illustrate because that is all you can do with this data,  
7 illustrate potential problems, calculating numbers as  
8 Harris did.

9 BY MR. KREEGER:

10 Q Okay. You go on to talk about applying a  
11 majority vote rule to those responses, and I guess my  
12 question is: Do you know with respect to those 99  
13 schools, how frequently there was a unanimous vote?

14 MR. CHOATE: Objection. It is vague and  
15 ambiguous.

16 THE WITNESS: Well, we can tell from the  
17 previous analysis on those items. We can go back at the  
18 table, that there was disagreement a substantial fraction  
19 of the time but not with respect to this particular  
20 dichotomy size of the variables.

21 BY MR. KREEGER:

22 Q You just take a look at that.

23 MR. CHOATE: Objection. Mischaracterizes his  
24 testimony.

25 THE WITNESS: I don't recall doing that

1 MR. CHOATE: Objection. Asked and answered.

2 THE WITNESS: I don't recall seeing a hard copy  
3 of those calculations, no. It was discussed over the  
4 phone.

5 BY MR. KREEGER:

6 Q And then you say that only 2 percent of the  
7 schools had unsatisfactory materials. And by that, you  
8 are referring to the calculation that results from your  
9 majority vote rule being applied?

10 MR. CHOATE: Objection. The document speaks for  
11 itself.

12 THE WITNESS: Well, first of all, the majority  
13 vote rule is an arbitrary way of trying to put some  
14 rationale into calculations that were done. Not standing  
15 by it as a right model because there really isn't any  
16 presented in the Harris work, but if you use that model,  
17 that is how it is calculated, yes.

18 BY MR. KREEGER:

19 Q Can you explain how that majority vote rule  
20 works?

21 MR. CHOATE: Objection. It is vague and  
22 ambiguous.

23 THE WITNESS: Just like an election.

24 BY MR. KREEGER:

25 Q So if there were three respondents for a

1 particular school and if two out of the three of them  
2 responded differently, in a particular way, that would be  
3 considered the response to that school?

4 A Under this majority vote assumption, yes.

5 Q And if there were only two respondents at a  
6 particular school and they gave different answers, what  
7 did you do then?

8 MR. CHOATE: Objection. The document speaks for  
9 itself.

10 THE WITNESS: I think that is covered in  
11 footnote one.

12 BY MR. KREEGER:

13 Q Let me just be clear on that. You collapsed the  
14 respondents into two categories: Satisfactory and  
15 unsatisfactory?

16 A That's correct.

17 Q And the rule was if there were two respondents  
18 and one of them gave a satisfactory response and the  
19 other gave an unsatisfactory response, for purposes of  
20 this analysis, the school was considered to be  
21 satisfactory?

22 A Yeah, just, again, it was an illustrative  
23 analysis one might do to get a handle on these issues.  
24 That's correct.

25 Q Did you examine the question as to what would

1 18 percent figure?

2 MR. CHOATE: Objection.

3 BY MR. KREEGER:

4 Q Is that right?

5 MR. CHOATE: That is vague and ambiguous.  
6 This --

7 THE WITNESS: It is a commentary on the  
8 18 percent figure and other figures in that paragraph.

9 BY MR. KREEGER:

10 Q So, for example, when I asked you if the  
11 18 percent figure had a denominator of 214 and you said  
12 yes, that would have been true only in the instances  
13 where you included the "Not Sure" responses?

14 A That's correct.

15 Q And the instance where you did not include the  
16 "Not Sure," the denominator would be somewhat less?

17 A Correct.

18 Q But you don't know what it is, sitting here?

19 A I know that it didn't make much of a difference.  
20 I don't know what the number is.

21 Q You then go on to say: "At the level of  
22 the school, the majority vote rule was  
23 applied including 'Not Sure' as a  
24 response."

25 Can you explain how that worked?

1 happen if you excluded the situations where there was a  
2 tie?

3 A I don't recall doing that, no.

4 Q This whole majority vote analysis only looked at  
5 the schools as to which there was multiple respondents;  
6 is that right?

7 A There is no other way to do it, which is, again,  
8 the key flaw in this study.

9 Q As to schools where there was only the one  
10 respondent, you just excluded them from this analysis?

11 A Yes. There is no way to measure disagreement  
12 when there is only one person responding.

13 Q Your footnote talks about a different way of  
14 treating the "Not Sure" responses.

15 It says, "The analysis averaging  
16 over teachers was about the same  
17 whether or not the 'Not Sure'  
18 responses were included in the  
19 denominator."

20 What did you mean by that?

21 A That the proportions reported in the conclusions  
22 arrived at didn't materially change. I mean, yes, they  
23 changed a little bit, but not so that one would arrive at  
24 a different conclusion.

25 Q And this is a comment, for example, the

1 MR. CHOATE: Objection. It is vague and  
2 ambiguous.

3 THE WITNESS: Well, it was the same -- it was  
4 the same process as before, but now there are three  
5 candidates in this election, rather than two.

6 BY MR. KREEGER:

7 Q So if there were two respondents at a particular  
8 school, one of them said that the condition was  
9 "Unsatisfactory," and the other said, "Not Sure," what  
10 would your rule result in?

11 A Unsatisfactory.

12 Q If there were three respondents at a particular  
13 school and one said, "Satisfactory," the second said,  
14 "Unsatisfactory" and a third said, "Not sure," what would  
15 you do then?

16 A I don't think that came up, but I can go and  
17 check. That is a good question.

18 Q What if there were three responses at a  
19 particular school, two of them were "Not Sure" and one of  
20 them was "Unsatisfactory"?

21 A I don't think that came up either, but I can  
22 check.

23 Q How would you check?

24 A Go back to the spreadsheet and look.

25 Q The spreadsheet would tell you whether that

1 instance came up, but it wouldn't tell you how you  
2 treated it; would it?

3 A It would tell me --

4 MR. CHOATE: Objection. Vague and ambiguous.

5 THE WITNESS: It would tell me whether it came  
6 up, from which I could probably infer what we did. I  
7 would also talk to Mr. Simmons, who did the calculations,  
8 because like I said, I don't think it came up.

9 MR. KREEGER: Can I have the answer read back,  
10 please?

11 (Record read as follows:

12 "Answer: It would tell me  
13 whether it came up, from which  
14 I could probably infer what we  
15 did. I would also talk to  
16 Mr. Simmons, who did the  
17 calculations, because like I  
18 said, I don't think it came up.")

19 BY MR. KREEGER:

20 Q If there were two respondents at a particular  
21 school and they both indicated "Not Sure," how did you  
22 treat that school?

23 A I think we just went through that. That is the  
24 first sentence of footnote one. I may have misunderstood  
25 your question.

1 Q Well, maybe I misunderstood what footnote one  
2 said. If there is a tie, meaning there were two -- two  
3 votes for different responses, my question is somewhat  
4 different. We have two respondents and they both  
5 indicate "Not Sure"?

6 A Again, I don't think that came up. I don't  
7 remember discussing that with Mr. Simmons, but I will ask  
8 him to refresh my memory. I don't think it was an issue.

9 Q You go on, on Page 12, to discuss another  
10 problem you found, which is the way that schools with  
11 multiple respondents are addressed in the Harris survey.

12 In particular, you are concerned about the  
13 prospect that schools under which there is multiple  
14 respondents are over represented in the conclusions that  
15 Harris draws in the survey; is that correct?

16 A Yes, I am concerned about that, but that is not  
17 what this is about.

18 Q Okay. Isn't this issue in the hypothetical you  
19 lay out on Page 12 the concern that School C, where there  
20 was multiple respondents, is over represented -- over  
21 represented in the data?

22 A No.

23 Q What is the concern about in the hypothetical?

24 A If you calculate the result the way Harris did,  
25 you get one answer. If you calculated it, take school

1 into account, you get a different answer.

2 Q What do you mean by taking school into account?

3 A Just as described. If you take a vote in each  
4 school, in this case you don't really need a vote because  
5 I set it up to be pretty clear and simple.

6 If you characterize a school with what a  
7 respondent says, you get one answer. And if you simply  
8 add across all teachers, you get a different answer.

9 Q Because there are three teachers at a particular  
10 school. And, therefore, they were treated as three  
11 responses instead of just one; is that right?

12 A Well, that certainly figures in the arithmetic,  
13 but the point, again, is not that. The point is that  
14 teachers are being asked about schools, but the analysis  
15 ignores schools, even though teachers are being asked  
16 about schools. It simply aggregates the cross  
17 respondents. And then you go through a lot of silliness,  
18 as this demonstrates.

19 Q Did you do any calculation where this  
20 hypothetical problem exists in the result?

21 MR. CHOATE: Vague and ambiguous.

22 THE WITNESS: The study is poorly designed that  
23 a serious analysis cannot be done.

24 BY MR. KREEGER:

25 Q At the end of the last full paragraph on the

1 Page 12 of your report, you say, "The apparent  
2 contradiction could be resolved by  
3 proper weighting of the teachers."

4 How could the contradiction be resolved?

5 A Proper sampling theory makes very clear that you  
6 weight responses by the universe of the probability of  
7 the selection. If that number was known and applied  
8 properly, then, in principle, you can avoid this  
9 difficulty.

10 Q Did you make any attempt to see whether that  
11 could be done with the Harris data?

12 A As I said, this study is so poorly designed that  
13 that information is simply not available, at least to me.

14 Q What information would you need to solve this  
15 particular problem that you don't have?

16 MR. CHOATE: Objection. It is vague and  
17 ambiguous. This particular problem being?

18 MR. KREEGER: The one that he describes in these  
19 paragraphs on Page 12.

20 THE WITNESS: I answered that. You need to know  
21 the probability of selection to the sample.

22 BY MR. KREEGER:

23 Q If the problem is simply -- if the problem is  
24 failing to take into account that you asked a question  
25 about a particular school, as opposed to a question about

1 a particular teacher, why couldn't you resolve this  
2 particular problem by weighting the schools as to  
3 which -- as to which there was actual multiple  
4 respondents, less than the schools to which there was one  
5 respondent?

6 A Because that is a function of the sample itself,  
7 which is, as I say in my report inadequate. You need to  
8 know this about the population.

9 Q You offer your view on Page 13 that some of the  
10 questions, on the face, appear to you to be overly  
11 subjective.

12 For example, you give the instance about  
13 textbooks and your expectation that the question, as  
14 asked, is so subjective as to not elicit meaningful data.  
15 I don't mean to put words in your mouth, but am I right  
16 about that?

17 MR. CHOATE: Objection.

18 MR. KREEGER: Let me withdraw the question. It  
19 is not really important.

20 Q Are there certain items in the Harris survey  
21 that you think are not so subjective?

22 MR. CHOATE: Objection. It is vague and  
23 ambiguous.

24 THE WITNESS: Yeah, the questions vary in their  
25 ability to elicit facts being sought. Asking a teacher

1 think are sufficiently reliable that they provide  
2 meaningful survey data?

3 MR. CHOATE: Objection. It is vague and  
4 ambiguous. It is an incomplete hypothetical.

5 THE WITNESS: Again, it is a matter of degree  
6 and it depends upon how that question is used. If I am  
7 interested in just sort of a global sense of a particular  
8 issue, some of the questions may be adequate.

9 If I am trying to ultimately document in a  
10 quantitative way some phenomena, that same question may  
11 not be. So it depends on the context. If you provide me  
12 a context and show me a question, I might be able to make  
13 a judgment. I'm not sure I can.

14 BY MR. KREEGER:

15 Q Dr. Berk, in your view, would it be possible to  
16 construct a survey of teachers to answer questions about  
17 the conditions in California schools?

18 A You need to be more precise about what you mean  
19 by "conditions."

20 Q If I wanted to understand how prevalent certain  
21 conditions were in California schools, could a survey of  
22 teachers be instructed to answer that question?

23 MR. CHOATE: Objection. Vague and ambiguous.  
24 He just testified that he needs to know more about what  
25 conditions are.

1 about, for example, whether they have a particular  
2 degree, presumably is something they can answer  
3 relatively accurately about.

4 Virtually all of the questions may be -- not  
5 all, but almost all of the questions, about experience in  
6 the schools, require a subjective judgment. And they are  
7 more or less unreliable because of that.

8 BY MR. KREEGER:

9 Q Leaving aside the questions about the particular  
10 qualifications of a teacher, are there any questions on  
11 the Harris survey that you think are reliable?

12 MR. CHOATE: Take a look at the survey if you  
13 need to.

14 THE WITNESS: Well, first, as I said, more or  
15 less reliable. I mean, any question if I asked you what  
16 you had for breakfast, you may not recall accurately at  
17 this point.

18 So all of these things, depends on recall, and  
19 there may be and often are errors, so it is a matter of  
20 degree. But you want me to find some questions that are  
21 likely to be more reliable rather than less?

22 BY MR. KREEGER:

23 Q Well, I guess my question is: Are there any  
24 items in the Harris survey, leaving aside demographic  
25 questions about the teacher, that you identify that you

1 THE WITNESS: Yeah, I need to know what  
2 conditions are.

3 BY MR. KREEGER:

4 Q Are there some conditions under which a survey  
5 can be constructed?

6 MR. CHOATE: Vague and ambiguous. Asked and  
7 answered.

8 THE WITNESS: What I meant by asking about  
9 conditions, are we talking about whether the roof leaks?  
10 Whether kids come to school in an unruly fashion? It  
11 depends on what you are asking teachers about.

12 BY MR. KREEGER:

13 Q I am trying to understand. How does it depend  
14 on that?

15 MR. KREEGER: Objection. Vague and ambiguous.  
16 THE WITNESS: Well, certain conditions can be  
17 more easily apprehended than others and reported more  
18 accurately.

19 In addition, it depends upon what you are going  
20 to do with the information. I keep coming back to that.

21 If all you want is kind of a qualitative  
22 description of what teachers feel, you can do that. If  
23 you are trying to ascertain whether some structural  
24 feature of the building is inadequate, it is more  
25 difficult.

1 BY MR. KREEGER:

2 Q It is more difficult because the teachers  
3 wouldn't know?

4 A They might know. They might not know. It is  
5 hard to determine that. Plus, the fact that for things  
6 like structural condition, there is a right answer and it  
7 is often very quantitative and the way these questions  
8 are asked, there is no way to map from satisfactory to 78  
9 degrees with 40 percent humidity. There is no way to get  
10 from A to B, which is presumably the goal of the study.

11 Q Maybe my question -- I need to put aside the  
12 Harris survey. I am talking about, for instance, in  
13 principle, whether one could construct a different  
14 teacher survey that could answer the question how  
15 prevalent certain conditions are in California schools?

16 MR. CHOATE: Vague and ambiguous. Asked and  
17 answered.

18 THE WITNESS: It depends on the condition. If  
19 you describe the condition, maybe I can think it through.  
20 Maybe it can be done.

21 BY MR. KREEGER:

22 Q Well, let's take some conditions then. If one  
23 was interested in knowing, for example, the quality of  
24 instruction materials at a particular school, would it be  
25 possible to construct a survey of teachers to address

1 get information that would sort of advance the ball.

2 BY MR. KREEGER:

3 Q What about questions about whether there are  
4 sufficient textbooks to meet the teachers and the  
5 students needs; is that kind of question one that can be  
6 answered by a survey of teachers?

7 MR. CHOATE: Objection. It is vague and  
8 ambiguous. It is an incomplete hypothetical. Sufficient  
9 for what?

10 MR. KREEGER: Enough textbooks to meet the  
11 teachers and students needs.

12 MR. CHOATE: Same objections.

13 THE WITNESS: Best I can do is to describe my  
14 own situation. If you were to ask me that question, I  
15 would report that in my introductory statistics class,  
16 most of the students don't have textbooks. Is that a  
17 problem?

18 Well, you have to have a follow-up question  
19 which determines whether those textbooks are essentially  
20 material.

21 In my particular class, I hand out instructional  
22 materials which the students find more useful than the  
23 textbook. So do I have sufficient textbooks for my  
24 students? It depends on what you mean.

25 Same would apply to these teachers. You have to

1 that question?

2 MR. CHOATE: Objection. Vague and ambiguous.  
3 It is an incomplete hypothetical.

4 THE WITNESS: Depends on what you mean by  
5 "quality." I do not mean to be particular picky. I  
6 design surveys, too, but it really depends on what you  
7 mean by quality.

8 BY MR. KREEGER:

9 Q Well, we can talk about different aspects of  
10 quality. One aspect of quality is whether the textbooks  
11 are in good physical condition as opposed to falling  
12 apart. Can that sort of question be addressed by a  
13 survey of teachers?

14 MR. CHOATE: Objection. Vague and ambiguous.  
15 Incomplete hypothetical.

16 THE WITNESS: Again, it depends on -- well, not  
17 again, but it depends on what you mean by "survey." You  
18 can certainly instruct teachers, on a given day, to look  
19 through each textbook that their students have and record  
20 whether or not any of the pages are ripped.

21 You can instruct them and look at textbooks and  
22 record the publication date. You can see the textbooks  
23 and see if the bindings are broken. Teachers would be  
24 doing what an auditor would do, in effect, and elicit the  
25 information in a form of a survey. You might be able to

1 learn a lot more about what teachers are doing and what  
2 the students need than a simple public opinion poll item.

3 BY MR. KREEGER:

4 Q I'm sure you are aware that the Harris survey  
5 asked several questions along the lines of sufficient  
6 textbooks, not just not simply the one?

7 A I understand that.

8 Q And leaving aside the particular questions that  
9 are asked, my question is a more global one. Could one  
10 design a survey designed to answer that question, which  
11 survey teachers?

12 MR. CHOATE: Objection. It is vague and  
13 ambiguous. It is asked and answered. It is an  
14 incomplete hypothetical.

15 THE WITNESS: As said, now several times, these  
16 things are a matter of degree. Surveys are generally  
17 very blunt measurement tools and they are fine if the  
18 questions that you need to answer are blunt questions.  
19 If you need precise answers, surveys are often flawed.

20 I could imagine a situation in which you  
21 designed a much more lengthy questionnaire, to get a  
22 better fix on whether teachers thought that their  
23 textbooks were adequate or not. Whether it would be  
24 sufficient, it would depend on what you want to do with  
25 the data after the data was collected.

1 BY MR. KREEGER:

2 Q What sort of questions would you include in that  
3 better survey that weren't asked in this one?

4 MR. CHOATE: Objection. Vague and ambiguous.

5 THE WITNESS: It is a little hard to sort of do  
6 this on the fly because it requires a lot of thought and  
7 I, quite frankly, did not look at the literature on what  
8 educators think what textbooks should accomplish. All I  
9 know is what your experts should say. So I am at a  
10 little disadvantage.

11 I wouldn't design a survey over a cup of coffee  
12 in a deposition. As I said, it is really important that  
13 you learn what it is in the teachers' view that the  
14 textbooks are supposed to provide, and then find out what  
15 the alternative is that is currently in place; and then  
16 determine to what degree the textbooks are providing what  
17 the teachers say they need in great detail. That would  
18 tell you whether teachers thought the textbooks are  
19 adequate.

20 Now, how that translates into students learning  
21 is a wholly other matter, which is -- which is not  
22 addressed in the Harris study.

23 BY MR. KREEGER:

24 Q In your view, would it be possible to construct  
25 a survey of teachers that is designed to elicit

1 MR. CHOATE: Vague and ambiguous. He answered  
2 essentially that same question about three minutes ago.

3 THE WITNESS: Again, I don't like to design  
4 surveys in a middle of a deposition. I have to be  
5 thoughtful about it and review previous work that has  
6 been done and review the expert reports that your group  
7 provided, I haven't done that.

8 But I can certainly imagine, as in the case of  
9 textbooks, teachers being asked to actually behave as if  
10 they were auditors.

11 And for example, keep a diary for a month, which  
12 days the bathrooms were working and which they weren't,  
13 to actually record the days, and how often they saw  
14 rodent droppings.

15 And insofar as you could ask teachers about  
16 objective facts, rather than subjective reactions to  
17 those facts, I think you would have a stronger survey.

18 BY MR. KREEGER:

19 Q What did you mean a minute ago when you say  
20 field test the survey to see how accurate it was?

21 A Well, before you go into the field, with an  
22 instrument that you are going to collect scientific data  
23 from, you -- there are normal steps that you normally  
24 take.

25 One of them is to pilot test or field the

1 information about the physical condition of the school in  
2 which they teach?

3 MR. CHOATE: Objection. It is vague and  
4 ambiguous. It is an incomplete hypothetical.

5 THE WITNESS: Well, the Harris survey attempted  
6 that very thing. And I think failed.

7 Would it be possible to do better? Perhaps.

8 BY MR. KREEGER:

9 Q Do you have an opinion one way or the other  
10 whether a survey of teachers could be probably designed  
11 to achieve that goal?

12 MR. CHOATE: Objection. It is vague and  
13 ambiguous. It is asked and answered.

14 THE WITNESS: Well, again, it depends upon what  
15 you want to do with the data. It depends on which  
16 features of schools we are talking about. I can imagine  
17 a survey which would do better.

18 Whether it would be adequate for the purposes of  
19 this litigation, it is hard to tell. I mean you would  
20 have to field test such a survey and get a sense of how  
21 accurate the information was.

22 BY MR. KREEGER:

23 Q What sort of questions would appear in this  
24 better survey of physical conditions of schools that  
25 don't appear in the Harris study?

1 instrument. In a small sample to see if the instrument  
2 is eliciting sensible information.

3 Q How --

4 A In an ideal world, again, this isn't an  
5 imaginary world. What I would do and what I have done in  
6 analogous situations is you test the situation, test the  
7 instrument in a situation where you know the facts.

8 So if you know that the bathrooms are working on  
9 a particular day, you go in and ask a teacher, today  
10 is -- how is the bathroom working?

11 If they say, "yes," that is encouraging. If  
12 they say, "no," there is something wrong with your  
13 instrument. The idea is to get some external reference  
14 and benchmark your instrument against that.

15 Sometimes the teachers simply don't know what  
16 your question means. So you ask, after the fact, what  
17 did you take my question to mean?

18 And you get back an answer that indicates that  
19 they didn't really comprehend what you were really trying  
20 to do.

21 Q Would it be possible, after the fact, to perform  
22 some field test on that verification of the data provided  
23 by the Harris survey?

24 MR. CHOATE: Objection. Vague and ambiguous.

25 THE WITNESS: For some of the items that are

1 more objective, like a teacher's credentials, presumably  
2 you can go to see whether they were, when the survey was  
3 done. I'm not sure. I believe those records exist.

4 Most of the other items we have been focusing on  
5 are so loosely worded, I don't know how you would  
6 validate them.

7 BY MR. KREEGER:

8 Q Let's turn to your report -- Exhibit 1, Page 14  
9 of your report. Where you begin talking about your  
10 concerns about sampling.

11 MR. CHOATE: Matt, Exhibit 1 -- oh, sorry. My  
12 mistake.

13 BY MR. KREEGER:

14 Q And you discuss the three databases that came  
15 from Market Data Retrieval that were used in the Harris  
16 survey.

17 Are you aware of any data that analyzed the  
18 question of whether these MDR data sets are  
19 representative?

20 MR. CHOATE: Objection. It's vague and  
21 ambiguous.

22 THE WITNESS: What do you mean by  
23 representative?

24 BY MR. KREEGER:

25 Q Representative of the universe of California

1 want to go through -- if you want to point him to the  
2 particular opinion in his report, I suppose we can do it  
3 like that.

4 MR. KREEGER: Why don't you state your  
5 objections for the record and then we can get the answer?

6 THE WITNESS: The point is to generalize to all  
7 teachers, schools and students in California. If you are  
8 going to generalize to that population, you have to know  
9 how that population did or did not get properly  
10 represented on those MDR lists. And there is no  
11 information about that, one way or the other.

12 BY MR. KREEGER:

13 Q No information about that in the Harris survey  
14 or Harris study?

15 A Particularly in the technical appendix, there is  
16 no explanation. And by the way, none of the depositions  
17 I have seen either is there an explanation about how  
18 these lists are constructed. They are taken basically on  
19 faith, apparently, by the Harris people and by your  
20 experts.

21 Q Have you done any work to analyze the question  
22 about how the MDR lists are constructed?

23 A No, I have not. I -- normally, when good  
24 scientific work is done, that kind of central question is  
25 addressed very explicitly. It is not addressed here at

1 teachers?

2 MR. CHOATE: Objection. It is vague and  
3 ambiguous.

4 THE WITNESS: In statistics, that is not the way  
5 that we use the term "representative." What I do know is  
6 that they did some tabulations at the end, which shows a  
7 few demographics. Sample data matched the population of  
8 teachers, but that isn't complete evidence that this is  
9 representative at all.

10 BY MR. KREEGER:

11 Q In statistics, how do you use "representative"?

12 A "Representative" refers to the process by which  
13 the data were collected. If you follow appropriate  
14 probability procedures and if the study is implemented  
15 properly, then you know that the study is representative.  
16 It has to do with process, with outcome.

17 Q You asked the question: How are the MDR's lists  
18 constructed and who was audited, and so on.

19 How did those questions relate to any opinions  
20 you have about the validity of the Harris Survey?

21 MR. CHOATE: Objection. It is vague and  
22 ambiguous. And Matt, where are you referring to in the  
23 report?

24 MR. KREEGER: Page 15.

25 MR. CHOATE: It is the same objection. If you

1 all.

2 Q What sort of information would you need to know  
3 about -- start again.

4 What tests would one perform on the MDR lists to  
5 obtain confidence that the data taken from them can be  
6 generalized to the universe of California teachers?

7 MR. CHOATE: Objection. Vague and ambiguous.

8 THE WITNESS: It is not a matter of tests. It  
9 is a matter of process. If I was told, if I knew how it  
10 was that a teacher appeared on these lists, then it might  
11 be possible to draw some better inference about how  
12 credible they are, but it is a matter of process.

13 Conceivably, if I understood the process, there  
14 might be some ways you could make a case more or less  
15 strongly about how good the lists were, but the first  
16 problem is you have to know how it was done.

17 BY MR. KREEGER:

18 Q You mentioned that the demographic checks that  
19 the Harris technical appendix described weren't  
20 sufficient to prove that the MDR list can be generalized  
21 to the universe of California teachers.

22 Are there other tests you think could be  
23 performed to help answer that question?

24 MR. CHOATE: Objection. It is vague and  
25 ambiguous.

1 THE WITNESS: It is also covered in my report.  
2 You could certainly make tests if there were information  
3 on the population for a wider variable of variables that  
4 were used. As I say in my report, there is very  
5 important variables that are nowhere to be found for  
6 which tests are possible. That is why statisticians rely  
7 on process.

8 BY MR. KREEGER:

9 Q Which part of your report are you referring to?

10 A The discussion of weighting, on Page 17, same  
11 issue comes up. It is in the middle of the, I guess,  
12 second full paragraph.

13 The paragraph starting with "Clearly" -- "But  
14 perhaps more important" -- and then from there on.

15 Q You also talk about the concern about response  
16 rate and response rate bias. Is that correct?

17 A That's correct.

18 Q And you discuss the possible bias that might be  
19 introduced from the lower response rates, that the survey  
20 will "over represent respondents that have a particular  
21 axe to grind."

22 Is that the bias that you had in mind?

23 A That is an illustration of the kind of bias that  
24 might appear.

25 Q Are there other kinds of biases that you think

1 MR. CHOATE: Vague and ambiguous. Incomplete  
2 hypothetical.

3 THE WITNESS: There are steps that you can  
4 undertake which help a bit, but it is one of these  
5 extremely difficult problems because if you don't have  
6 the information, there is nothing to work with.

7 And so while there are things that some people  
8 try, it is often not very compelling. It is a difficult  
9 problem.

10 BY MR. KREEGER:

11 Q What steps do you have in mind?

12 A Well, as best you can, you benchmark your data  
13 against information on the population. But, as I say, it  
14 is extremely difficult because many of the key issues on  
15 which you might have bias, you have no measures.

16 Q On Page 18, you talk about the fact that the  
17 study over samples teachers living in low-income census  
18 tracts.

19 And you have a concern that the weighting that  
20 the Harris study performed didn't adequately address that  
21 over sampling. Do I have that right?

22 A Not quite. What I say is the over sample for  
23 teachers who live in low-income census tracts --

24 Q Right. I believe that is what I said.

25 A You said, and I'm not sure if it was schools --

1 can be introduced by a low response rate?

2 A There are a limitless number, but it is well  
3 known, for example, that people who are likely to respond  
4 are also more likely to respond to the social  
5 desirability of the question.

6 So they try to appear cooperative, helpful, and  
7 they try to give interviewers the answer that they think  
8 the interviewers want. So you get a very compliant sort  
9 of response.

10 There are a lot of biases. That is why  
11 statisticians rely on process because if the process is  
12 appropriate to begin with, these problems are minimized.

13 Q How can one insure that response rate bias does  
14 not factor in through a process?

15 MR. CHOATE: Objection. It is vague and  
16 ambiguous.

17 MR. KREEGER: Let me rephrase.

18 Q How can one use process to insure that response  
19 rate bias does not appear?

20 MR. CHOATE: Same objection.

21 THE WITNESS: Have a high response rate.

22 BY MR. KREEGER:

23 Q Are there any checks one can do after the  
24 fact to examine whether response rate bias was  
25 there?

1 Q Fair enough. If -- start again.

2 Is your criticism that the teachers who live in  
3 low-income census tracts, will be over represented in the  
4 survey results?

5 A If you aggregate a three samples together pool,  
6 those three samples together, and don't properly weight  
7 for the over sampling of teachers from low-income  
8 neighborhoods, you will over represent the views of  
9 teachers from low-income neighborhoods.

10 Q Now, I take it this could be corrected -- this  
11 particular criticism could be corrected by using a  
12 weighting fact to take into account the residence track  
13 of the teacher?

14 A In principle.

15 MR. CHOATE: Objection. Vague and ambiguous.

16 THE WITNESS: In principle, you could properly  
17 weight, but the information, apparently, is not  
18 available.

19 BY MR. KREEGER:

20 Q The information is not available? What do you  
21 mean?

22 A Well, again, you need to weight by the universe  
23 of the probability of selection. That information is not  
24 available.

25 And moreover, the weighting that is done, only



1 very indirectly corrected for the problem and not  
2 completely at all.

3 Q Are you saying that the Harris survey data  
4 doesn't record which survey responses came from  
5 low-income census tracts?

6 A No. You know that because you know what sample  
7 they came from, but the weight that the appendix  
8 describes does not describe a weighting (phonetic)  
9 process taking that information into account.

10 Q This weight only bases on the poverty level on  
11 the school, not on the part of the poverty level of the  
12 residence of the teacher?

13 A We can turn to the appendix. There are four or  
14 five items that it weights on and only those. It doesn't  
15 weight, if I recall correctly, on the features of the  
16 neighborhood in which the teacher lives.

17 Q But that data is available, one could factor  
18 that into the weighting analysis; couldn't one?

19 MR. CHOATE: Objection. I will object to the  
20 extent that it has been asked and answered. Calls for  
21 speculation.

22 THE WITNESS: You can certainly improve things  
23 by weighting with respect to that variable, yes.

24 BY MR. KREEGER:

25 Q If I could take you back to the discussion that

1 perform that calculation, I would appreciate it.

2 A Could you direct me to the sorted spreadsheet?

3 MR. CHOATE: We just -- for the record, Exhibit  
4 3 is a 530-page document. If you are asking Dr. Berk to  
5 flip through page by page, we can sit here and do that.

6 Otherwise, maybe you can direct Dr. Berk to what  
7 it is that you want him to look at.

8 BY MR. KREEGER:

9 Q I will be glad to tell you everything I know,  
10 and I don't want to put words in your mouth. This is  
11 your production and I don't want to tell you what is in  
12 there and not in there. I will tell you what appears to  
13 us, but this has really got to be your answer.

14 There was two sets of spreadsheets. One begins  
15 at Page RB 122 and continues on to 157. That appears to  
16 be a spreadsheet that was simply about the particular  
17 respondent.

18 It doesn't actually include any data about the  
19 respondents. And then there was a second spreadsheet,  
20 158 through 301, which looks to be a sorted spreadsheet.

21 And there appears to be copies of -- exact same  
22 spreadsheets appear again at Page 337 through 526.

23 I know it is difficult to work off of a hard  
24 copy, but that is what we have.

25 A I can tell you immediately, that you need the

1 we had about -- on Page 11 of your report where you  
2 discussed this majority vote analysis.

3 And I will just be frank here. We tried to  
4 duplicate your computation and just couldn't get them to  
5 come out with the same numbers that you have in here.

6 So I want to ask you, if you can, to -- with the  
7 aid of Exhibit 3, which is the -- which includes every  
8 document that was produced on your behalf, and certainly,  
9 it includes some spreadsheet, if you can demonstrate how  
10 one of these numbers were calculated. That might help us  
11 see how this worked.

12 So if we could just take the --

13 A Do you have the spreadsheet sorted by school?

14 Q I think that is in the printout here, but you  
15 have to verify that, obviously. And I brought the  
16 CD-ROM, if you wanted to play on the computer.

17 But, for example, if we just take example in the  
18 first full paragraph on Page 11, you make the statement  
19 "2 percent of the schools had unsatisfactory materials,"  
20 after applying your majority vote.

21 A 2 percent of the schools for which there is  
22 multiple respondents.

23 Q Right. That is how you described the  
24 calculation. And if you could just walk us through how  
25 you performed that or how you directed Mr. Simmons to

1 full spreadsheet with the questionnaire answers linked to  
2 the particular school. And with these pieces of paper, I  
3 can't do that.

4 So I have no way of doing any meaningful  
5 calculations on that question with this information.

6 Q All right. Here is what I propose and load onto  
7 my computer, the CD-ROM that was produced by you folks,  
8 which was represented to be the same data that is found  
9 in this spreadsheet.

10 And perhaps if you take a look at that, and we  
11 can go off the record, too. So, you know, we don't sit  
12 here watching, and if you can spend a few minutes on  
13 that.

14 A Okay.

15 Can I talk to you for a minute? I may have  
16 another answer.

17 (Discussion off the record.)

18 BY MR. KREEGER:

19 Q You folks conferred over the break.  
20 What did you guys talk about?

21 MR. CHOATE: What I will let you do is ask  
22 Dr. Berk questions and I think you are, quite frankly,  
23 entitled to ask him questions about the methodology of  
24 how the data was analyzed and constructed for purposes of  
25 report.

1 But what you are asking him is to sit down and  
2 look at a document on your computer and to engage in some  
3 type of quantitative analysis that, frankly, would take  
4 hours, if not days, and be error prone under the pressure  
5 of a deposition. He is not required to do that. And I  
6 am not going to have him do that.

7 But to the extent you want to ask him questions  
8 about the methodology of how his report was constructed  
9 and how data was analyzed, you are free to do that. He  
10 can answer to that.

11 BY MR. KREEGER:

12 Q Before we get to that, what did you guys talk  
13 about during the break?

14 A I explained to him to work from your computer  
15 screen, on the fly like this, is not professionally  
16 responsible.

17 I cannot guarantee that the results that we got  
18 are credible. And I didn't feel that it was  
19 professionally sensible for me to proceed to redo the  
20 analysis on the fly in here, on the spreadsheet in  
21 your -- on your computer, and I basically asked him what  
22 the options were.

23 Q Did you have some other idea in mind?

24 A Well, we talked about the possibility of working  
25 with one of your experts, but we didn't get very far in

1 that discussion.

2 Q What do you mean?

3 A Well, presumably, someone -- one of your experts  
4 tried to duplicate these calculations. You said that.  
5 So someone must have tried. And perhaps a conversation  
6 with that person might be useful. But as I said, we  
7 didn't get very far with that.

8 Q Get very far meaning what?

9 A We just didn't pursue that. We just never  
10 followed up on it particularly.

11 Q Who was in the conversation? It was just you  
12 and Mr. Choate?

13 A That's correct.

14 Q And he did he tell you anything about this idea  
15 about consulting with our expert?

16 A He basically told me what he just told you,  
17 which he just said that in his judgment, I wasn't  
18 responsible for doing a difficult analysis that could  
19 take literally the rest of the day, and then some on the  
20 fly on your computer.

21 Q Let me try one more thing before we get into the  
22 details. After having looked at the spreadsheet that you  
23 folks did produce on CD-ROM, it became clear to me on the  
24 break, the document that begins 122 on the production  
25 set --

1 MR. CHOATE: 122, Exhibit 3.

2 MR. KREEGER: Which was separately clipped.  
3 Although we have these clipped, they weren't produced  
4 that way. It is separately produced.

5 On Page 158, this is, in fact, the same  
6 spreadsheet. That this -- you know, the way the printer  
7 broke things up, it appears this way. But as you can  
8 see, just from the electronic file that was produced, the  
9 row that begins "I.D. 117," on Page 122, goes to the top  
10 row on Page 158.

11 A How do you know that?

12 Q From viewing the CD-ROM that you folks produced.

13 A Okay.

14 Q I don't know if that helps you in any way. What  
15 I would like to -- like you to do is not -- if not  
16 perform the calculations, but walk us through how you got  
17 to the 2 percent figure that is shown on Page 11.

18 If you are not comfortable doing it on the  
19 screen, but in reference to whatever spreadsheet that you  
20 have produced in hard copy that relates to that  
21 calculation.

22 A Well, I can show you the method, I think, with  
23 this, but we need to lay it out wider.

24 Q All right.

25 MR. CHOATE: Just for the record, I am just

1 going to be clear that Mr. Kreeger is asking Dr. Berk to  
2 look at two different clipped documents.

3 One which bears the dates -- one set of  
4 documents, which bears the Bates range 0122 to 0157, and  
5 the second document, Bates range 0158 through 0301.

6 And Mr. Kreeger has represented on the record  
7 that these two documents somehow relate -- are related  
8 and constitute one document.

9 I don't know if that is accurate, and I don't  
10 know if Dr. Berk knows that either.

11 BY MR. KREEGER:

12 Q Well, let me just correct something. I am not  
13 asking you to look at this document in particular. I am  
14 telling you that based on the review of the CD-ROM that  
15 was produced, these two -- the documents that we clipped  
16 and you folks did not clip in this particular manner are,  
17 in fact, one document.

18 A Well, yes, probably, but that is not the end of  
19 it. And the problem is that the items that are relevant  
20 are further on to the right. So we need a third or  
21 perhaps a fourth page.

22 And if you notice, this piece beginning 0375,  
23 this is again the same variables, beginning with Sex and  
24 School Type that are on 158. So there is material  
25 between the two that I don't have and need to --

1 Q I'm sorry. The 337 appears to be a duplicate.  
2 You guys produced it to us. So you will have to be the  
3 answer to that.

4 A All I am saying is -- all I am saying is that,  
5 in principle, this would allow me to show you how the  
6 calculations were done.

7 But the difficulty is the items that you are  
8 referring to are much farther to the right of the  
9 spreadsheet than are shown on 158. And when I went to  
10 the next assembled pages, that is the same again. So --

11 Q Is -- that is not where you need -- I do not  
12 want to do this for you. I am trying to get you to  
13 explain it.

14 I will tell you, if you go to Page 194, you see  
15 columns that look to be again more variable names. And  
16 I'm sure there may even be another set. I am happy to  
17 help you in any way, but ultimately, I am asking you to  
18 show me how you did the calculation.

19 MR. CHOATE: If you are asking Dr. Berk to do  
20 some type of quantitative analysis at a particular  
21 school, you've shown him three stacks of documents, that  
22 is very difficult to assemble together. They are  
23 double-sided.

24 MR. KREEGER: No, his is single-sided. I want  
25 to be clear. I am not asking you to use any particular

1 the fourth column reads the label Parvinv, P-A-R-I-N-V,  
2 which I take to mean whether there is parental  
3 involvement.

4 That is one of the issues that came up in which  
5 we did an analysis. Suppose, now, that the first three  
6 rows were the same school, okay?

7 Q Which they don't seem to be.

8 A Okay. But I can illustrate the method I think  
9 by supposing that. And again, I don't know whether they  
10 are or they aren't.

11 Q Okay.

12 A In this particular case, the vote -- the  
13 majority vote would be 2's, 3's, first one. So that  
14 would be counted as a 3.

15 Q What is a 3?

16 A I think that is Very Good. Let's go back to the  
17 questionnaire.

18 I'm sorry. I am assuming that this is item --  
19 this is Page 4 of the questionnaire, the item which says,  
20 The Way Schools Involve Parents. I believe that is the  
21 same item. And a 3, I'm sorry, is "Only Fair." I'm  
22 sorry. It wasn't "Good." It was "Only Fair."

23 So in this particular case, if this were the  
24 same school, two teachers would have said "Only Fair,"  
25 and one would have said ", Excellent." Okay.

1 document. I am looking at the document that you folks  
2 produced. And you told me that the calculations aren't  
3 actually in those documents, and I appreciate that.

4 And now I am asking that from the documents that  
5 you -- that were produced, show me the method that was  
6 used.

7 If you can, fine. If you can't, fine.

8 MR. CHOATE: You can show him the methodology to  
9 produce the calculations. You can answer the question.

10 THE WITNESS: What I can do easily is I can  
11 do -- I can go to a spreadsheet which has, I think, one  
12 of the variables you are interested in and show you, for  
13 example, if the three adjacent rows happen to be of the  
14 same school.

15 I would have to figure that out, but how we  
16 would have handled that problem. And so I can show you,  
17 with illustrations, how the calculations were done.

18 But I cannot vouch for the fact that they are  
19 the same school until I shuffle these all. If that is  
20 helpful, that is relatively easily done.

21 MR. KREEGER: Why don't you do that.

22 THE WITNESS: Okay. If you look at Page 0212 --

23 BY MR. KREEGER:

24 Q Okay.

25 A -- there are variable names across the top. And

1 Now, if you were to take the majority vote rule,  
2 this would be a situation where you would call this  
3 unsatisfactory because we had a dividing line which  
4 separated "Excellent" and "Good" on one hand, from "Only  
5 Fair," "Poor" on the other. That would have been the  
6 vote.

7 If, on the other hand, you took -- that school  
8 would be characterized in that one single column  
9 (phonetic).

10 If you, on the other hand, took a vote of the  
11 teachers, two-thirds only -- saying "Only Fair" and  
12 one-third saying, "Excellent," that process then is  
13 simply carried down on all of the items where you look at  
14 schools, where you tally up what the majority vote says,  
15 and then classify the school as Satisfactory or  
16 Unsatisfactory.

17 Then you also do a tally across all teachers,  
18 and simply report the proportion that says,  
19 "Satisfactory" or "Unsatisfactory."

20 Q And the analysis that you described does not  
21 appear on the spreadsheet that we were looking at; it  
22 appeared or was performed by Mr. Simmons at your  
23 direction; is that right?

24 A By hand, yes, that's correct. There are no  
25 spreadsheet results. I have not ever seen like -- as you

1 suggested earlier, a column with this information. If  
2 that exists, I don't know about it.

3 Q So to get to my question, if I want to know  
4 where the 2 percent came from. Sitting here today, you  
5 can't recreate that with the papers that are in front of  
6 you?

7 A No, I can't.

8 Q When were you first contacted to work on this  
9 matter?

10 A What do you mean by "this matter"?

11 Q The -- anything associated with the "Williams  
12 versus State of California" case.

13 A Approximately 18 months ago, I was contacted by  
14 Mr. Daum, who told me about the case and asked me if I  
15 would help him.

16 At the time, I was too busy with other matters.  
17 And I said, no, I don't -- I didn't think I could find  
18 the time.

19 He contacted me again -- it is hard for me to  
20 recall -- about a year ago. And maybe less, maybe it was  
21 in the early fall. And asked me again.

22 And we talked -- my schedule had freed up a bit.  
23 And I asked what exactly he wanted me to do. And he said  
24 that he was interested in having me look at the  
25 quantitative work that the plaintiffs had provided.

1 Q Why don't you keep them in the right order.

2 A This will take me a moment to --

3 MR. CHOATE: Off the record.

4 (Recess taken.)

5 BY MR. KREEGER:

6 Q Okay. So you mentioned that you looked at some  
7 expert reports and you have referred to Pages 1 and 2 of  
8 your report, which is Exhibit B of Berk Exhibit 1.

9 By "expert reports," do you mean the -- do you  
10 mean other than the reports of Coral, Lee, Eargman,  
11 Mitchell & Fein?

12 A No, that is exactly what I mean.

13 Q Okay.

14 MR. KREEGER: I think you missed Oaks, for  
15 whatever that is worth.

16 THE WITNESS: Yes, that is true. I'm sorry.  
17 Oaks as well.

18 MR. KREEGER: Oaks as well.

19 Q Two reports from Oaks, I gather?

20 A Yes, that's right.

21 Q And you provided comments to the attorneys at  
22 O'Melveny for questions that they should ask these  
23 experts?

24 A These are phone conversations and we  
25 discussed -- and first, in general terms, what I thought

1 And I said, well in, for instance, principle  
2 sure. You know, get back to me when you know precisely  
3 what it is that you want to do.

4 After that, I was contacted by several  
5 individuals, Mr. Egan, who is with the Attorney General's  
6 office, and one or more attorneys from O'Melveny & Myers.

7 I'm sure Mr. Daum was in there, but there were  
8 others as well. And at that point, the depositions of  
9 your experts were beginning and they needed some help  
10 interpreting the expert reports. And so that is what  
11 they asked me to do.

12 And I read over perhaps four or five of the ones  
13 that I think are listed in my report, and provided  
14 suggestions about questions they might ask to clarify  
15 what it is that the experts had done. That was sort of  
16 the beginning of the relationship.

17 Q And what expert reports did you say you took a  
18 look at?

19 A The ones that are listed in my report.

20 Excuse me. If we are done with these for now,  
21 can I move them because I am kind of swamped with paper  
22 here.

23 Q That would be fine.

24 A Does it matter if I assemble them in the wrong  
25 order?

1 these reports were about. And then I helped them  
2 understand the procedures, as best I could, that were  
3 employed.

4 Q When were these conversations with O'Melveny  
5 lawyers?

6 A I believe they were in the fall.

7 Q What was your next involvement?

8 A I don't recall who initiated it, but I was asked  
9 to review the Harris study in particular, and to write my  
10 own report on the Harris study.

11 Q When did you -- when did that conversation take  
12 place?

13 A It was also in the fall, I believe, but much  
14 later. Perhaps November, December.

15 Q And did you prepare the document that is shown  
16 on Exhibit B of Berk Exhibit 1?

17 A Yes, I did.

18 Q Were you asked to write a report or render  
19 opinions about something other than the contents that are  
20 in Exhibit B?

21 A No.

22 Q Were you ever asked by the attorneys at  
23 O'Melveny about the feasibility of conducting another  
24 survey to answer some of the same questions addressed by  
25 the Harris survey?

1 MR. CHOATE: Objection. Vague and ambiguous.  
 2 THE WITNESS: I don't believe so, no.  
 3 BY MR. KREEGER:  
 4 Q Now, turning to O'Melveny or someone at  
 5 O'Melveny, Margaret Carter, did she participate in  
 6 analyzing the data?  
 7 MR. CHOATE: Objection. Calls for speculation.  
 8 THE WITNESS: I was at a meeting with several  
 9 attorneys in which we talked about the case. She was at  
 10 that meeting. If memory serves, she was the individual  
 11 who merged the spreadsheets.  
 12 BY MR. KREEGER:  
 13 Q At your direction?  
 14 A Yes.  
 15 Q What exactly did you tell her to do?  
 16 A There was a spreadsheet with information about  
 17 the schools and there was a separate spreadsheet with  
 18 information about the survey respondents, and I asked her  
 19 to merge them, yes.  
 20 Q Why did you ask her in particular to perform  
 21 that task?  
 22 A I'm sorry. I wasn't being clear. They needed  
 23 to be merged and she was assigned to the task. I didn't  
 24 make that assignment. I don't know why she was quite  
 25 picked, but she certainly can do it.

1 Q Was she doing it in order to aid your analysis?  
 2 A Well, I had asked her to do it. There were some  
 3 discussions about what else might be done with the  
 4 spreadsheets. There may have been some other purposes  
 5 that the attorneys had in mind that I wasn't party to.  
 6 Q But you wanted them merged for your own  
 7 purposes?  
 8 A That's correct.  
 9 Q How is it that you choose to rely on an  
 10 attorney from O'Melveny on the task of merging the spread  
 11 sheets?  
 12 MR. CHOATE: Objection. Vague and ambiguous.  
 13 THE WITNESS: I don't work in Excel and none of  
 14 my students do and that is the form of the data we are  
 15 in. And it was much less prone to error to have someone  
 16 work in Excel rather than moving it into a database that  
 17 we are familiar with and then merge it.  
 18 BY MR. KREEGER:  
 19 Q So we talked about Margaret Carter and Sean  
 20 Simmons, I believe, who are attorneys at O'Melveny that  
 21 helped you manipulate the data.  
 22 Is there anyone else who helped you manipulate  
 23 the data in this case?  
 24 A Not that I know of, no.  
 25 Q What did you do to prepare for today's

1 deposition?  
 2 A I reread all of the documents that are listed on  
 3 Pages 1 and 2 of my report.  
 4 Oh, excuse me. And also since I finished this,  
 5 I asked for and got copy of -- well, actually, I got it  
 6 as part of this, a copy of Dr. Oaks' deposition, and I  
 7 read that as well.  
 8 Q You mentioned that in your report.  
 9 A Oh, I do -- sorry.  
 10 Q I assumed --  
 11 A It is just not listed, unfortunately, as one of  
 12 the documents, but yes, I did.  
 13 Q On Pages 20 and 21, I believe you commented on  
 14 her transcript?  
 15 A Yeah.  
 16 Q Between the time you finished your report and  
 17 today, have you performed any other work on the case?  
 18 Other than the work that you just mentioned,  
 19 preparing for the deposition?  
 20 A No, I don't think so. No.  
 21 Q Is Exhibit B to Berk Exhibit 1, this document  
 22 reflected the opinions that you have developed in this  
 23 case?  
 24 A It does.  
 25 Q I'm sorry. I thought I was done with that, but

1 I have one more question with Exhibit 3.  
 2 One particular page, if you look at the page  
 3 that is -- has Bates label 335 in Exhibit 3 --  
 4 A Yes.  
 5 Q -- you will see the E-mail message from Mr. Daum  
 6 to yourself --  
 7 A Yes.  
 8 Q -- in which he comments on some changes he  
 9 wanted to make to your report. Do you see that?  
 10 A Yes, I do.  
 11 Q He has one change that he proposes, where he  
 12 says he would like to drop the sentence about Dr. Oaks?  
 13 A Yes.  
 14 Q The sentence reading -- "One has to  
 15 wonder how carefully she reviewed  
 16 the other work on which she relies  
 17 and what commands she has on that  
 18 material." Who wrote -- who was it that wrote  
 19 that sentence?  
 20 A I did.  
 21 Q And Mr. Daum wanted to delete it?  
 22 A We both thought, in hindsight, that it was  
 23 unprofessional.  
 24 Q That the statement was not professional?  
 25 A Yes.

1 Q And that is why you took it out?  
 2 A Yes, that's correct.  
 3 Q But that is your view?  
 4 A Well, I do wonder how thoroughly she reviewed  
 5 the other materials, yes.  
 6 Q Have you served as an expert witness in cases  
 7 before this one?  
 8 A Excuse me. Are we finished with this one?  
 9 Q Probably.  
 10 MR. CHOATE: Put it away.  
 11 THE WITNESS: Yes.  
 12 BY MR. KREEGER:  
 13 Q Have you served as an expert witness in cases  
 14 before this one?  
 15 A I have.  
 16 Q Can you give me a list?  
 17 A Well, I have been doing expert witness work  
 18 intermittently through my entire career. So that is 30  
 19 years. So it is lots. Do you want more recent ones or  
 20 more significant ones?  
 21 Q Let's start with the most recent ones.  
 22 A I am an expert with a firm of Milberg, Wise,  
 23 blah, blah, Larry Rich on a case involving the way in  
 24 which escrow companies charge customers for their  
 25 services.

1 I was involved with them in a case which also  
 2 the ACLU was involved in also. On the way in which  
 3 in-home inspections were done on welfare recipients.  
 4 I am currently involved in -- with a case with  
 5 the law firm of Lett and Associates here in L.A. on what  
 6 is called overdeterment in the D.C. county jail.  
 7 I just finished a case involving a dispute with  
 8 the Fuller Austin asbestos trust. The trial was this  
 9 spring.  
 10 Q Who were the attorneys that you worked with  
 11 then?  
 12 A It was an army because there were probably a  
 13 dozen insurance companies and trusts and, literally,  
 14 there was a dozen firms.  
 15 I worked most with a new firm, Robinson -- it is  
 16 four names. I'm sorry. I don't recall. Another key  
 17 firm was Rosenthal, Natt and those folks.  
 18 About this time last year, I worked on  
 19 litigation involving the Exxon Valdez spill. That was  
 20 with O'Melveny. The details become more and more vague,  
 21 the further back I go.  
 22 But there was a case again with Lit & Associates  
 23 suing L.A. County for over detention in the L.A. County  
 24 jail.  
 25 There was a case again here in town of the firm

1 English, Munger & Rice in which we sued the State of  
 2 California for the way that funds for new school  
 3 construction were being distributed.  
 4 Q Who did this English, Munger & Rice firm  
 5 represent?  
 6 A It was a class action and it was a variety of  
 7 school districts and parents therein. But it was a class  
 8 action suit.  
 9 Q But what subjects did you analyze in that case?  
 10 A Well, there was, apparently, a statute which  
 11 determines how funds for new school construction are to  
 12 be distributed. Data were collected to determine whether  
 13 that statute was being followed.  
 14 It was quite evident that it was not being  
 15 followed. The case settled and the state proposed new  
 16 methods to determine how much money would be distributed  
 17 for new school construction.  
 18 Q And your opinions related to which aspect of  
 19 that case?  
 20 A I did the analysis to show the lack of fit  
 21 between what the statute requirements were and how the  
 22 state was, in fact, distributing funds to schools.  
 23 Q Okay. What other cases have you worked on that  
 24 you recall?  
 25 A Well, I have done a lot of death penalty work,

1 for example, with the California Appellant project.  
 2 I did some work with your firm many years ago on  
 3 a case suing California -- State of California for the  
 4 way it was using I.Q. tests to place kids in classes for  
 5 the mentally retarded. It was a big case. I don't  
 6 recall it.  
 7 Q Late Larry Pete?  
 8 A Yup. I worked with you folks on that.  
 9 There was a lawsuit involving the State of  
 10 California where I defended the state against the charge  
 11 that the warden at San Quentin was discriminating against  
 12 minority prison staff in promotion and policies. I don't  
 13 recollect the law firm. It was a Sacramento firm that I  
 14 worked with.  
 15 Q And did you provide a statistical analysis?  
 16 A All -- in each and every case, my job was either  
 17 to evaluate an analysis done by the other side or to  
 18 provide my own statistical analysis.  
 19 Q What sort of work have you done for the  
 20 California Appellant project, the death penalty case?  
 21 A My work was done -- McClesky case. I was one of  
 22 the experts for Mr. McClesky. As you know, we lost big  
 23 time.  
 24 Q That is racial disparity in the disposition of a  
 25 death penalty?

1 A We did an analysis in Georgia which shows that  
2 who you kill makes a difference. That went up through  
3 the appellate courts. The statistical analysis was  
4 sound.

5 The Superior Court decided that if you show on  
6 the average that the system discriminates, unless you can  
7 show -- you probably know this, that a particular client  
8 was discriminated against. I was one of the experts in  
9 that.

10 Q That is where your analysis was true, but  
11 considered to be irrelevant?

12 A I would consider -- I would like to think it was  
13 true, but it was considered irrelevant.

14 Q What is the Exxon Valdez case?

15 MR. CHOATE: What does that -- what is the basis  
16 and where is this going? What does the expert opinions  
17 that he gave in this Exxon --

18 BY MR. KREEGER:

19 Q You can answer.

20 MR. CHOATE: We are going for the scope of his  
21 expert report.

22 THE WITNESS: The trial last summer was about  
23 whether Exxon had properly compensated municipalities in  
24 Alaska for expenses that the municipalities claimed that  
25 they incurred as a consequence of the spill.

1 Q Have any of your other cases that you have  
2 testified in involved the question -- the question of the  
3 validity of the survey?

4 MR. CHOATE: We will object to the extent it is  
5 vague and ambiguous.

6 THE WITNESS: I am thinking.

7 BY MR. KREEGER:

8 Q Take your time.

9 A I think I had one other case where that was  
10 certainly central. Yes.

11 Q And which case was that?

12 A An earlier version -- an earlier facet of the  
13 Exxon Valdez case. The plaintiff had done a survey of  
14 Alaskan natives, fishermen and other residents in the  
15 Gulf of Prince Edward Sound, describing -- having the  
16 respondents describe their reactions to the spill, and  
17 what consequences befell them.

18 And I was asked again to review that survey for  
19 its statistical and scientific credibility.

20 Q And what was your conclusion of that survey?

21 A Once -- well, once again, that survey was not a  
22 very credible effort.

23 Q Was that another instance in which you thought  
24 there were instruments other than a survey that could be  
25 used to answer that question?

1 The plaintiffs in this case had undertaken a  
2 survey of municipal workers to estimate the costs to the  
3 municipalities of the spill. My job was to evaluate that  
4 survey and how credible the results were.

5 BY MR. KREEGER:

6 Q And what was your opinion in that case?

7 A The survey was not properly undertaken.

8 Q Was it your view that the question to be  
9 addressed in this case should have been addressed in  
10 another way as other than a survey?

11 MR. CHOATE: Objection to the extent that we are  
12 getting way off the field right now. You are asking  
13 Dr. Berk about his -- about opinions in other cases. I  
14 don't see how that is relevant as to what he has been  
15 asked to testify about in this case.

16 MR. KREEGER: Your objection is noted.

17 Q You can answer, please.

18 A In this particular case, there were two sources  
19 of information, at least in principle. One was various  
20 city records, like payroll records. And the other was  
21 information collected by the survey.

22 In my view, the official records would probably  
23 give a more credible estimate, that is what I testified,  
24 than the survey that was undertaken.

25 BY MR. KREEGER:

1 MR. CHOATE: Objection. Vague and ambiguous.

2 THE WITNESS: No, in this case, the problem was  
3 more fundamental. The entire research design, no matter  
4 how you did the measurement, was going to be problematic.

5 BY MR. KREEGER:

6 Q Any other cases that you can think of in which  
7 you offered opinions about a survey?

8 A You know, there may be, but I can't remember  
9 right now any cases that featured survey results as a key  
10 feature.

11 Q Have you yourself designed surveys?

12 A I have.

13 Q Can you give me an example of a survey that you  
14 designed?

15 A Well, the most recent survey was a study of  
16 ethics that scientists apply to research in biological  
17 sciences.

18 Q And what question was that survey designed to  
19 answer?

20 A Well, in modern scientific research there is a  
21 lot of moral and ethical difficulties. To -- in order  
22 to -- this was an attempt to sort of map the terrain of  
23 ethical problems and find out how scientists were  
24 deciding what to do.

25 Q And you surveyed scientists?

1 A Yes.

2 Q What is another example of a survey that you  
3 have done?

4 A I did several surveys of citizens -- the public,  
5 in Southern California in a variety of environmental  
6 issues.

7 Q These are attitudinal surveys?

8 A Not really. When people talk about attitudes,  
9 they talk about subjective states of mind. This is  
10 called willingness to pay surveys, which -- where the  
11 object was to find out the value of a particular amount  
12 of environmental goods and services.

13 Q Does your C.V., the complete version, have a  
14 list of the surveys that you organized?

15 A No. You would have to know what was behind each  
16 of the publications to know whether a survey was used or  
17 not.

18 Q Can you give me an example of another survey  
19 that you designed?

20 A Well, let me start at the very beginning of my  
21 career. I was -- I worked with the Kerner Commission  
22 and -- in their massive surveys of urban professionals,  
23 teachers, police, shop keepers and so on, in which we  
24 were trying to understand the services that they were or  
25 were not providing to inner city residents.

1 Q Who was surveyed in that case, in those surveys?

2 A That is, as I said, teachers, police officers,  
3 inner city merchants, welfare workers. There is one --  
4 another group I have forgotten. And these are within 15  
5 cities across the country.

6 Q And you surveyed the professionals themselves?

7 A Yes.

8 Q What sort of questions did you ask to address  
9 the question of what services they were providing?

10 MR. CHOATE: Vague and ambiguous.

11 THE WITNESS: This is 30 years ago.

12 BY MR. KREEGER:

13 Q All right.

14 A It was about the provision of services. I can't  
15 reproduce the question for you right now.

16 Q Does that survey or your work on that survey  
17 appear in any of your publications?

18 A Yes. There is a group of Roots of Urban  
19 Discontent, it is listed in that C.V., and that survey is  
20 described in there.

21 Q Any other surveys that you have designed?

22 A Well, there is many. A more recent book that is  
23 called "Just Punishment" was a survey of individuals,  
24 asking them basically to sentence hypothetical offenders  
25 based on features of the crime and the offender himself.

1 The problem there was to see to what degree the  
2 sentence meted out by the U.S. Sentencing Commission was  
3 consistent with the public opinion.

4 Q Any other surveys?

5 MR. CHOATE: You are asking what he can remember  
6 today?

7 THE WITNESS: What I am doing in my mind, my  
8 publications, working through those.

9 BY MR. KREEGER:

10 Q If you would like your C.V. --

11 A That would certainly help. If we are really  
12 going to do this.

13 Q I believe it is Exhibit A of Exhibit Berk 1.

14 A Item No. 5 of Page 2. "Corrections Reform and  
15 State Elites." This was a survey in three states of  
16 legislators and various public officials associated with  
17 the criminal justice system. The goal was to determine  
18 what sort of prison sentences they felt were appropriate  
19 for felons in their state.

20 No. 6, "Crime as Play," that involved a survey  
21 of middle school students in a town just outside of  
22 Evanston, Illinois. In fact, it might have been in  
23 Evanston. Asking them about self-report measures of  
24 misconduct.

25 No. 7, "Labor and Leisure at Home," that

1 involves both surveys in diaries of a random sample of  
2 individuals, asking them about household work that they  
3 undertook.

4 No. 8, "Money, Work and Crime," that was an  
5 experiment testing whether small payments to individuals  
6 released from prison would reduce the chances of  
7 recidivism. Survey data was collected of those  
8 individuals about their job experiences and other  
9 features of their lives.

10 I already talked about "Just Punishment." That  
11 covers the books. Although, there is one more. This is  
12 slightly not updated. There is now a thirteenth, but it  
13 doesn't involve surveys.

14 There are about 150 publications. Do you want  
15 me to go through them and --

16 Q Do many of them have surveys?

17 A I think it is the same. I think probably maybe  
18 a quarter of them have surveys. Some of them are the  
19 same surveys that are discussed in the book. Some of  
20 them are different ones.

21 Q Let me stop you. Be more specific.

22 Do you have examples, other than what you have  
23 talked about so far, of instances where you surveyed or  
24 designed a survey to be administered to professionals?

25 A Let's see. We talked about life scientists. We



1 talked about teachers, police. We talked about  
2 legislators and criminal justice professionals.

3 Can I scan what is here --

4 Q Take your time.

5 A -- and see if I can come up with any more.

6 No. 12, on Page 4, "Determinants of White Collar  
7 Income," there was a survey that played an important role  
8 in that we were talking to white collar workers in large  
9 firms in Chicago. Some of them I think you would call  
10 professional, but this was not public sector. This was  
11 private sector. The same holds for "Sex, Earnings and  
12 The Nature of Work," talking about 19.

13 Q Right.

14 A Which stops unfortunately, but I know I have  
15 conducted --

16 MR. CHOATE: Is that the rest of his C.V.?

17 MR. KREEGER: It looks to be.

18 MR. CHOATE: I think we produced that.

19 MR. KREEGER: Mr. Eliasberg, from the ACLU,  
20 handed me a copy of what appears to be a more complete  
21 copy of your C.V.

22 THE WITNESS: Yes. I will continue here.

23 38, that was a survey of -- it involved a survey  
24 of college students. I don't know -- they are  
25 preprofessionals, many of them.

1 case as to the extent to which school facilities had --  
2 at particular district were inadequate?

3 MR. CHOATE: Objection. Vague and ambiguous.

4 THE WITNESS: What the analysis showed was that  
5 the decision-making process was extremely capricious. So  
6 instead of being driven by need, it was driven by factors  
7 which was outside of the scope of the governing statute.  
8 I think that's a fair summary of the conclusion, there,  
9 yes.

10 BY MR. KREEGER:

11 Q Did you reach any views of the extent to which  
12 the district needed the funds to improve the school  
13 facilities?

14 MR. CHOATE: Objection. It's vague and  
15 ambiguous.

16 THE WITNESS: No, it was -- it was basically a  
17 study of the match between the dollars that were actually  
18 distributed and the dollars that the statute implied  
19 should have been distributed.

20 I think the ACLU was party to that suit. You  
21 may have complete records of that.

22 BY MR. KREEGER:

23 Q Over what period of time did your study look for  
24 that case?

25 A We looked over a ten-year period because there

1 There are other surveys here, but they are not  
2 of professionals that I can see.

3 I believe we are finished. But let me -- we are  
4 coming towards the end here. Yes, that's the end of it.

5 BY MR. KREEGER:

6 Q Other than the ones that you told me about, have  
7 you done any surveys that involve education issues?

8 A Other than the ones that I talked to you about,  
9 no.

10 MR. KREEGER: Let's take a short break.  
11 (Recess taken.)

12 MR. KREEGER: Can we go back on.

13 Just so the record is clear, we discussed off  
14 the record, in order to improve the accuracy of Berk  
15 Exhibit 1, we are going to tack on Pages 6 through 14 of  
16 his C.V., which apparently was omitted from the photocopy  
17 that we had prepared for this morning.

18 So now Berk Exhibit 1 has a complete, albeit  
19 slightly dated version of Dr. Berk's C.V.

20 Q Dr. Berk, before the break, we talked about some  
21 other matter in which you provided other expert  
22 testimony. One of them involved school construction  
23 funds?

24 A That's correct.

25 Q Did you reach any opinions in your work on that

1 would be actually year-to-year fluctuations stated and we  
2 were looking for general trends. It might have been  
3 something like the 1990's approximately.

4 Q Was it your view during that ten-year period  
5 study that the criteria used by the state in deciding how  
6 to allocate the funds was capricious for that entire  
7 period?

8 MR. KREEGER: Objection. Vague and ambiguous.

9 THE WITNESS: Well, what we concluded was that  
10 if you look at the ten-year period as a block, capricious  
11 dominated the process. Some years it may have been more  
12 capricious than others, but there was no way to really  
13 tell that from the analysis.

14 BY MR. KREEGER:

15 Q And when you say it wasn't based on need, what  
16 do you mean by need?

17 A If memory serves, the statute required that the  
18 school district file projections of student enrollment  
19 and ability to meet those, that is what I mean by need.

20 And those projections did not predict  
21 particularly well the amount of money that schools  
22 actually received.

23 Q So some schools that had a lot of need for new  
24 construction didn't get as much money as the statute  
25 would have indicated they should get?

1 MR. CHOATE: Objection. Vague and ambiguous.  
 2 THE WITNESS: What the data showed was when --  
 3 it went both ways. There were some school districts that  
 4 didn't seem to be in great need that got substantial  
 5 amounts of money, where there were districts that seemed  
 6 to have substantial needs that didn't.  
 7 BY MR. KREEGER:  
 8 Q Dr. Berk, on Page 21 of your report, Exhibit B  
 9 of Exhibit 1, in your conclusion --  
 10 A I have it, thank you.  
 11 Q -- you state that "There are surely  
 12 schools in California whose  
 13 educational infrastructure is  
 14 unsatisfactory. And just as surely,  
 15 many of those schools are in  
 16 low-income areas."  
 17 What is the basis for your view on those points?  
 18 A Well, I haven't done a study. I did read the  
 19 expert reports. And I, like you, am a citizen of the  
 20 state and read the newspapers and visits and so forth;  
 21 and I am convinced there are a number of schools that  
 22 have an unsatisfactory educational infrastructure, but I  
 23 can't point to any work that I have done about that.  
 24 Q And what about your view that many of those  
 25 schools are at low-income areas?

1 A I mean, likewise, at UCLA, I talk to students  
 2 all of the time from a variety of different schools, and  
 3 they describe what it was like in this high school and  
 4 primary schools.  
 5 And it is clear that, as I said, there are many  
 6 schools that the infrastructure is unsatisfactory, and  
 7 many of these are in low-income neighborhoods. It is not  
 8 a rigorous scientific study, but I think it is credible.  
 9 Q Is it your view that schools whose educational  
 10 infrastructure is unsatisfactory are more likely to be  
 11 located in low-income areas?  
 12 MR. CHOATE: Objection. Vague and ambiguous.  
 13 THE WITNESS: Well, I can give you a lay opinion  
 14 because, again, I haven't done a -- the survey. We just  
 15 know that, in general, income is associated with perks.  
 16 Higher income neighborhoods have better streets,  
 17 you know. Better public services in general. Stands to  
 18 reason the school is being publicly serviced, would also  
 19 be associated with income. So, yes, there probably is an  
 20 association between income and the infrastructure of the  
 21 schools.  
 22 BY MR. KREEGER:  
 23 Q Do you have in mind any additional work that you  
 24 intend to do in this case?  
 25 A If there are further depositions of plaintiff's

1 experts, I might be asked to review those, or if the  
 2 depositions haven't been held yet, to help with -- help  
 3 the attorneys prepare for that.  
 4 But other than that, I have not been asked to do  
 5 anything in addition.  
 6 Q There are no opinions that you have been asked  
 7 to render at this point that you haven't yet rendered?  
 8 A No, but I will qualify it is in here. Insofar  
 9 as the new depositions provide new facts that were not  
 10 apparent when I wrote this, of course, my opinions will  
 11 change.  
 12 Q Just a moment.  
 13 MR. KREEGER: We can take a quick break for a  
 14 minute. Home stretch.  
 15 (Recess taken.)  
 16 MR. KREEGER: Okay. Dr. Berk, that is all I  
 17 have. Thanks for your time.  
 18 THE WITNESS: Thank you.  
 19 MR. CHOATE: We will have 30 days --  
 20 MR. KREEGER: Sure.  
 21 MR. CHOATE: -- from the receipt of the court  
 22 reporter's letter to make any corrections, review the  
 23 depo.  
 24 MR. KREEGER: Is that what we have been doing?  
 25 MR. CHOATE: I think that is what we have been

1 doing.  
 2 MR. ELIASBERG: We can say --  
 3 MR. KREEGER: Just one last thing for the  
 4 record. In light of Dr. Berk's responses to questions  
 5 about how he performed the calculations, we reserve the  
 6 right to seek additional discovery, whether it be from an  
 7 attorney at O'Melveny or from Dr. Berk, or additional  
 8 document production, if necessary, in order to understand  
 9 how the calculations were performed.  
 10 MR. CHOATE: You can reserve the right.  
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I, DR. RICHARD BERK, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made such corrections as noted herein, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this \_\_\_\_\_ day of \_\_\_\_\_, 2003, at \_\_\_\_\_, \_\_\_\_\_  
(City) (State)

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DR. RICHARD BERK

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I, the undersigned, a Certified Shorthand Reporter of the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: \_\_\_\_\_

\_\_\_\_\_  
DIANA JANNIERE  
CSR No. 10034