

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

FLOORGRAPHICS, INC.,	.	Case No. 04-3500 (AET)
	.	
Plaintiff,	.	
	.	402 East State Street
v.	.	Trenton, NJ 08608
	.	
NEWS AMERICA MARKETING	.	
IN-STORE SERVICES,	.	
et al.,	.	
	.	
Defendants.	.	March 6, 2009
	.	9:55 a.m.
.	A.M. Session

TRANSCRIPT OF TRIAL
BEFORE HONORABLE ANNE E. THOMPSON
UNITED STATES DISTRICT COURT JUDGE and JURY

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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1 THE COURT: -- until 1:30, because I've got a
2 sentencing at two, so --

3 (Pause)

4 UNIDENTIFIED SPEAKER: Are you ready?

5 THE COURT: Yes. Do we have everybody? Mr.
6 Basilone? Wait just a few minutes. We don't have all the
7 attorneys.

8 (Pause)

9 THE COURT: Did we conclude with the last witness
10 yesterday?

11 UNIDENTIFIED ATTORNEY: Yes, Your Honor.

12 UNIDENTIFIED ATTORNEY: We did, your Honor.

13 (Pause)

14 COURTROOM DEPUTY: All rise.

15 (Jury in)

16 THE COURT: Welcome back, ladies and gentlemen. One,
17 two, three, four, five, six, seven, eight, nine, ten.

18 Wonderful. Thank you. Please be seated. All right. Ladies
19 and gentlemen, yesterday afternoon we concluded with one of the
20 plaintiff's witnesses. We now proceed to the next. Counsel?

21 MS. CHUTKAN: Yes, Your Honor. We call George Rebh
22 to the stand.

23 THE COURT: Very well. Mr. Rebh will come forward,
24 sir. Mr. Rebh, the first thing we have to do is administer the
25 oath, so I'm going to ask you to stand up. And be careful.

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1 See that little sponge, that has a way of being our nerve
2 center.

3 COURTROOM DEPUTY: Place your left hand on the Bible,
4 raise your right hand.

5 GEORGE LEONARD REBH, PLAINTIFF'S WITNESS, SWORN

6 THE COURT: Very well. Have a seat.

7 COURTROOM DEPUTY: State your full name?

8 MR. REBH: George Leonard Rebh, R-e-b-h.

9 DIRECT EXAMINATION

10 BY MS. CHUTKAN:

11 Q How old are you, sir?

12 A I am 58 years old.

13 Q Where were you born?

14 A I was born in Washington, D.C.

15 Q Where do you currently live?

16 A In Arlington, Virginia, a suburb of Washington, D.C.

17 Q And where were you educated?

18 A After graduating from high school I went to Williams
19 College in Williamstown, Massachusetts.

20 Q And what year did you graduate from Williams?

21 A 1973.

22 Q Did you have any further education after Williams?

23 A In terms of business school or that -- no, that, that was
24 it.

25 Q What line of work did you go into after college?

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1 A When I returned to Washington from college I went to work
2 for the White House. The -- what was known then as the Office
3 of Emergency Preparedness. Following that I became a
4 syndicated illustrator for The Washington Post, and did
5 portraits in Washington.

6 Q What kind of portraits?

7 A I did portraits of politicians. I did the inaugural
8 portraits of Ronald Reagan and Bill Clinton. I did portraits
9 of visiting heads of state, such as Anwar Sadat of Egypt and
10 Menachem Begin of Israel.

11 Q How long were you an illustrator and portraitist?

12 A Through about 1981.

13 Q What did you do after that?

14 A I went -- I got involved in marketing of real estate
15 development projects on the East Coast.

16 Q And how long did you do that for?

17 A I did that for the next ten years, into the early 1990's.

18 Q And what did you start doing after that?

19 A That was when I co-founded Floorgraphics, Inc.

20 Q Now, can you tell the ladies and gentlemen of the jury,
21 Mr. Rebh, how did Floorgraphics get started? How did you get
22 -- how did you come up with the idea of doing floor
23 advertising?

24 A It started with my colleague from the real estate
25 marketing business, Fred Potok, coming to me in Washington, and

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1 with my background in marketing and art, told me of an idea
2 that he was developing for a new form of advertising.

3 Q What was his idea?

4 A It was called floor advertising, and it was -- the idea
5 stemmed from a family business that his family had of printing
6 decals, and placing them on the sides of trucks and other large
7 vehicles, such as buses.

8 Q And what -- how did you get the idea from those decals?

9 A These ads would many times be for products, such as
10 Campbell Soup and other types of consumer products, and as
11 these trucks and buses would go down the highway stones could
12 get kicked up from other vehicles, damaging the sides of those
13 decals.

14 Q And how did the stones damaging the decals get to the
15 floor ads?

16 A Well, the solution for protecting those decals was to
17 place a clear laminate over the decal surface to protect the
18 decal. And in doing that, almost inadvertently was created a
19 super decal that was strong enough to go on the floor and be
20 able to withstand shoppers walking on them, and floor
21 maintenance.

22 Q So, with this idea, how did you turn the idea of putting
23 these decals on the floor into a business?

24 A Well, the idea simply was if advertising Campbell Soup on
25 the side of a truck might be good, advertising Campbell Soup on

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1 a decal in front of where Campbell Soup is actually sold in
2 competition with Progresso and other soups might be better.

3 Q When did you actually launch the business? When did you
4 start Floorgraphics?

5 A This was in the -- these discussions, these talks were
6 '94, '95, '96 time frame.

7 Q And once you had the idea of putting the decals on the
8 floor, how did you get advertisers to sign up for that?

9 A The first thing that we had to do was prove that it
10 worked.

11 Q How did you do that?

12 A We went to New York, to a company called audits and
13 surveys, and they were recognized as experts in the field of
14 proving sales increase, or sales lift of various advertising
15 media. And we went there to discuss with them the methodology
16 by which we could prove to advertisers that floor advertising
17 indeed worked and increased sales of the advertised product.

18 Q So, what methodology did you use?

19 A The methodology is called classic match panel research.

20 Q What's a match panel?

21 A A match panel is choosing a set of stores, in this case
22 grocery stores, in a supermarket, so choosing, say, 15 stores
23 as your test stores, and then 15 comparable stores matched in
24 pairs, 15 comparable stores in the same supermarket chain in
25 the same geographic area that you call control stores.

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1 Q And then what would you do with the -- how would you do
2 the test? Can you tell the jury?

3 A What you do is you -- in the test stores we placed, in
4 this case, 26 floor ads for 26 different products, and we did
5 those 26 ads in each of those 15 test stores.

6 Q So, this is a test you actually did, you ran? The match
7 panel study test you ran?

8 A Yes.

9 Q And where were these stores that you selected?

10 A We approached Acme Markets in the Philadelphia area and
11 asked them if they would allow us to conduct a match panel
12 study in their stores.

13 Q And what about the ads that you put down? Where did you
14 get those from?

15 A We contacted consumer package goods companies, CPGs, and
16 said we would like to print and install ads for your products,
17 and report back to you on the results, sales results of those
18 floor ads.

19 Q Now, how long did you -- did the test period last?

20 A The test period was for an eight-week period, and as I
21 said, we placed the ads in the test stores and did not place
22 ads in the control stores.

23 Q And what happened at the end of the test period?

24 A At the end of the test period we, Acme gave us the sales
25 figures, the sales data for those products which were

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1 advertised with floor ads in those 15 test stores, and they
2 also gave us the sales data for the 15 stores that didn't have
3 the floor ads.

4 Q What were the results?

5 A When we compared the sales data in the test stores to
6 those of the control stores, we found that the presence of the
7 floor ads in the test stores had, in every case, in all 26 ads,
8 produced positive sales increase of the advertised product.

9 Q By what order of magnitude?

10 A It -- almost all of them -- it ranged from single digits
11 to double digits, but almost all of them were in the double
12 digits, meaning ten or greater. It ranged all the way up into
13 the 90's, which meant almost a doubling of sales.

14 Q Now, you talked about this match panel study that you did
15 in 1997. Did you -- after your business got going did you
16 continue doing these match panel studies?

17 A Yes.

18 Q Now, referring back to the 1997 one, the first one you
19 did, what did you do with the results when you got them?

20 A We took those results and of course contacted the
21 advertisers who had participated, and reported those results to
22 the advertisers.

23 Q And how did they react?

24 A The results were very good, and the reaction was positive,
25 and beyond the results we had very productive conversations

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1 with those advertisers about the idea of advertising in a big
2 way, two feet by three feet, at what's called point of sale,
3 where their product is sold in the store.

4 Q What was the advantage to point of sale advertising?

5 A The biggest advantage is that this is where shoppers make
6 their decisions, and what was so special about floor
7 advertising is that you could show a message, an image and a
8 message for a product in a big way, that potentially could
9 communicate useful information, announce new products, do
10 things like this, in a way that would be helpful to shoppers,
11 and get their attention, and cause them to focus on the
12 advertised product.

13 Q And how did -- was there any one point that you used to
14 illustrate the advantage of point of purchasing advantage?

15 A Yes. There are a lot of means of advertising available to
16 advertisers, and we were able to condense our new idea down to
17 one slide that we could show advertisers to illustrate the
18 power of this new medium that we were pioneering.

19 Q What was that slide?

20 A We said to advertisers all of us remember television
21 campaigns that stick in our heads, and the question is, after
22 the advertiser has spent millions and millions of dollars
23 advertising that product through that t.v. campaign on
24 television, the question is when you get into the store do you
25 really remember the ad? And more importantly, if you remember

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1 the ad, do you remember the product advertised by that ad?

2 Q And what was the example that you used?

3 A Well, we said -- we had a list of them, but the first one,
4 an example I'll give was we said do you happen to remember that
5 television commercial where the gorilla was stomping on the
6 luggage, and we said every time that ad came on television the
7 sales of that certain brand of luggage increased? And we asked
8 the question do you happen to remember what that brand of
9 luggage was?

10 Q And what was the answer?

11 A Well, the answer I would have given myself, and the answer
12 that we almost always got was Samsonite.

13 Q What was the actual company that was doing the advertising
14 with the gorilla?

15 A After we gave the example, we said the fact is that the
16 company that paid for those ads, millions of dollars, and hoped
17 that that would increase their sales was a company called
18 American Tourister. And so, we said it's a cute example with a
19 very serious point, and that is had American Tourister, who
20 spent all that money on that ad done one simple thing, had they
21 put a floor ad in the luggage category with a picture of that
22 television commercial, the gorilla stomping on the luggage, and
23 done -- put two simple words, American Tourister, they would
24 have gotten all the sales of that very memorable campaign,
25 instead of what actually happened, which was their competitor,

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1 Samsonite, benefitting from the commercial. So, we presented
2 floor advertising as a real solution, almost media insurance,
3 for large companies placing television advertising.

4 Q Now, at the time you were going to CPGs and making the
5 case for floor advertising, and starting your business, were
6 any other companies doing floor advertising?

7 A Yes. The 3M Company. 3M out of Minneapolis.

8 Q And what eventually happened with their floor advertising
9 business?

10 A In August of 1998 we acquired their Floor Advertising
11 Division.

12 Q Okay. Now, you'd discussed talking to CPGs about signing
13 up for floor advertising. Did you also discuss this with
14 retailers?

15 A Yes.

16 Q And how did you present your case for floor advertising to
17 retailers?

18 A We presented the results of our match panel research that
19 showed that the sales of the advertised products increased, but
20 we also showed them that even more importantly to the retailer,
21 when we placed an ad for a product in a category it not only
22 increased the sales of that advertised product, but it also
23 increased the sales in that total category, which was of --

24 Q What do you mean, that total category?

25 A It would mean if we placed an ad for Campbell Soup it

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1 would not only increase the sales of Campbell Soup, but by
2 virtue of reminding people to buy soup it would increase sales
3 in the entire category, not just at the expense of Campbell's
4 competitors, but increase total sales.

5 Q And were there any other points that you made to retailers
6 about floor advertising?

7 A Yes. We said that the program required no new fixtures in
8 the store. It was very turnkey. We simply came in, placed the
9 ads, and at the end of a four, or eight, or 12-week period,
10 one, two, or three cycles, we would come in and remove the ads.
11 And it was very simple and clean.

12 MS. CHUTKAN: Your Honor, with the Court's permission
13 I'd like Mr. Rebh to demonstrate the -- how a floor ad was
14 installed, if that's --

15 THE COURT: Very well.

16 Q Installers would --

17 THE COURT: Now, here's the problem. You're
18 separated from a microphone. And make sure you only respond to
19 a question that's been asked.

20 Q Mr. Rebh, can you show the ladies and gentlemen of the
21 jury how a floor ad worked, what you did with this item? And
22 for the record Mr. Rebh is holding up a brightly colored floor
23 advertisement for Campbell's Chunky.

24 A All right. This, as I mentioned, this ad is printed on
25 vinyl and has a clear laminate coat over it. On the back there

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1 is adhesive that's applied, and then there's a sheet, a
2 protective sheet on the back. When an installer installs the
3 ad, they simply remove the backing, which exposes the adhesive.
4 It sticks on the floor. They apply it to the floor. They
5 squeegee it, so -- they put it on the floor with the adhesive,
6 squeegee it until all -- there would be no bubbles, or anything
7 like that, because one of the things that we wanted to make
8 sure of was that in placing these ads on the floor that nobody
9 would trip or fall, so that applying them correctly was very
10 important. And then, at the end of --

11 THE COURT: All right. That's it. Next question? I
12 don't mean to disrupt the demonstration. All I want is to
13 break up the testimony so that it follows a question and answer
14 format. But I don't mean that that has to stop.

15 MS. CHUTKAN: That's fine.

16 THE COURT: Oh. All right.

17 Q Now, who -- oh, so how does the business work? How did
18 your business work? How did you make money? How did retailers
19 make money? How did that work?

20 A Well, the first step was we went to CPGs and said would
21 you like to -- us to place advertising for you in the stores
22 that we have contracted with, that we have the rights to place
23 those ads in? And we would sell that to CPGs. They would pay
24 us money to produce and install the ad.

25 Q And then, how would the retailers make money?

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1 A The money that we took in from the sale of those ads to
2 the CPGs we would then share with the retailers.

3 Q And was that share according to any kind of formula?

4 A Yes.

5 Q What was the formula?

6 A Early on in our company we decided that we thought it was
7 fair and right that it truly be a sharing of revenue. The
8 retailer was contributing their stores and their floors, and we
9 were contributing manufacturing the product and installing
10 them.

11 Q So, what was the percentage?

12 A We shared with them 25 percent of the gross revenue that
13 came in, which equated to about 50/50 of the net revenue.

14 Q Now, who was your first retailer client?

15 A Our first grocery supermarket chain was Price Chopper in
16 the Albany, New York area.

17 Q Can you describe for the ladies and gentlemen of the jury,
18 Mr. Rebh, the first, say, two years of your business? How big
19 were you?

20 A We were a classic start up. We were two people, then
21 three, then four.

22 Q Where were you located?

23 A We were located in Cherry Hill, New Jersey.

24 Q And what was -- who was working there? What was it like
25 in the first two years you had your business?

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1 A It was -- we worked out of space that was donated to --
2 office space that was donated to us. We paid -- took no
3 salary. We financed anything we did with our own funds, or
4 funds that we were able to raise from friends and family. We
5 slept at the office. When we traveled to make presentations we
6 would share hotel rooms. It was that kind of very much start
7 up lifestyle.

8 Q When did your brother, Richard, join the company?

9 A In the fall of 1997.

10 Q Now, you just showed the jury, a few minutes ago, how an
11 ad is laid down, or how it's installed. Who did the
12 installation of the ads in the retailers?

13 A Thousands of merchandisers all over the country would do
14 those installations.

15 Q What's a merchandiser?

16 A That's a name given to a person who goes into a store and
17 performs certain tasks. It might be if Disney has come out
18 with a new video it would be placing those videos on the shelf
19 and perhaps promotional material around it. But they do
20 various assigned tasks within grocery stores and other retail
21 stores.

22 Q Were these merchandisers employees of your company, or
23 were they third parties?

24 A They were third parties.

25 Q Now, when would the ads -- was there -- when were the ads

1 installed?

2 A I mentioned earlier that we sold the advertising on four,
3 eight, and 12-week periods, but a four-week cycle. We
4 installed the ads in the first seven days, called the
5 installation window, of the first week of that four-week cycle.

6 Q How common in the industry is the -- that seven-day
7 installation window?

8 A It's very standard.

9 Q What is the -- you've heard, at trial, the term compliance
10 rate, installation rate, execution rate. What does that mean?

11 A That means that of the ads that we sell to a CPG, so for
12 example if we make a sale of 10,000 ads, the compliance rate or
13 execution rate is how many of those ads do we actually install
14 in the stores?

15 Q Why is the -- is the installation rate, compliance rate
16 important?

17 A It's critically important.

18 Q Why?

19 A Because it represents the fundamental bargain, the
20 fundamental sale, the fundamental agreement that you reach with
21 a CPG. If you pay me this amount of money, I will produce that
22 many products and install them in these many stores. It's the
23 bargain that you strike.

24 Q And what -- was there -- did you have any kind of minimum
25 installation rate that you guaranteed to your CPGs?

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1 A Yes.

2 Q And what was that?

3 A We guaranteed that we would install in excess of 90
4 percent of the ads that we sold, that we bargained with the CPG
5 to do.

6 Q Now, why 90 percent and not, you know, 100, or 99 percent?

7 A If this were, for example, the billboard business, where
8 there would not be a very good reason why you could not install
9 100 percent of all the billboards that you contracted, in the
10 in-store industry there are quite a few reasons why, beyond
11 your control that you cannot install 100 percent of the ads in
12 a store.

13 Q Can you give us an example of some of those reasons?

14 A The examples range from a store closing to the product
15 that's advertised not being on the shelf. In the case of floor
16 advertising the store re-waxing their floors and having to
17 remove the wax, and things such as that that would prevent you
18 from placing the ad.

19 Q Now, at the -- in the early years of your company who did
20 your floor ad installation?

21 A A company called SPAR Marketing out of Tarrytown, New
22 York.

23 Q What is SPAR Marketing?

24 A SPAR Marketing is a public company that has thousands of
25 merchandisers that they task to do certain things inside retail

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1 stores on behalf of companies like ours.

2 Q Now, as your business continued to grow, did you ever use
3 any other companies for in-store installation?

4 A Yes.

5 Q What were those companies?

6 A CROSSMARK, and a company called National In-Store, which
7 was a division of Omnicom Advertising Agency.

8 Q Why is it you decided to hire a third party, in this case
9 SPAR or National In-Store, to do the installation instead of
10 doing it in-house with your own employees?

11 A Two reasons. Principally, number one, this was a company
12 -- these are companies that specialize in this kind of
13 activity, so they are very experienced and knowledgeable on how
14 to execute tasks inside stores. The second reason is it made
15 financial and economic sense that since they were performing a
16 function in the first week of a four-week period, that
17 financially it made sense to hire a third party rather than
18 have an employee do that.

19 Q Now, did the installers that you hired, the third parties,
20 did they get any training in installing the floor ads?

21 A Yes.

22 Q What kind of training?

23 A At the outset, with this being a new medium, we did quite
24 a bit of training, personally supervising training sessions for
25 the merchandisers, providing -- we produced and provided

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1 training videos that the installers watched and could even take
2 home, and periodically thereafter we would do regional training
3 sessions, especially for new installers, and to, you know, just
4 as a refresher.

5 Q Now, how long before the installation do you need to get
6 the artwork from the CPG?

7 A We told CPGs that they could give us their artwork as
8 close as three weeks to the time it could be installed out
9 there in stores around the country.

10 Q What was the significance of this three-week lead time?

11 A We tried to make it as short as possible because the
12 significance was the advertising message would be fresh and as
13 new as possible when it was put into the store. That short
14 lead time assured that it wasn't a stale advertising message or
15 an old thought.

16 Q Now, once an installer had laid down the ad, how is that
17 they reported, or did they report that they had put the ad
18 down? How did you know that the ad had gone down?

19 A There were two forms of reporting by the installers. The
20 first was a voice, a call in report that they did immediately
21 following their -- executing their tasks in the store.

22 Q And what was the second?

23 A The second was a written report that they mailed in, which
24 included not just what ads they had installed, what ads they
25 had verified as remaining on the floor into the next cycle, and

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1 what ads they had removed, but also evidence of the fact that
2 they had visited the store in the form of a -- what they call a
3 store stamp, or a signature of a store manager or personnel
4 showing that they had actually been in that store.

5 Q Did Floorgraphics, over the years, receive copies of the
6 written reports that the installers produced?

7 A Yes.

8 Q And how many reports would you estimate you received over
9 the years?

10 A Hundreds.

11 Q And what were your procedures regarding the copies of the
12 reports you received?

13 A The reports that we received we maintained as business
14 records of our company.

15 Q Now, over the years that you received these reports and
16 received information from installers about their installation
17 rate, what was your installation rate during the time you've
18 been in business?

19 A We exceeded 90 percent, and typically we achieved 94 or 95
20 percent execution rate.

21 Q Okay. Now, you've described for the jury how the third
22 party installers reported that they had done their installation
23 and their reporting methods. Did anyone from Floorgraphics
24 check on what the installers had done?

25 A Yes.

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1 Q And how did you do that?

2 A We hired operational vice presidents with responsibilities
3 for regions of the country to go out and do store checks.

4 Q What's a store check?

5 A A store check was meant to, number one, look at how the
6 ads were being installed, that they were being installed
7 correctly. I talked about bubbles, and, you know, making sure
8 that they were installed correctly, and secondly, verifying
9 that installations were actually occurring as reported.

10 Q Now, did these store checks take place in all the stores
11 that had had ads in, or some percentage?

12 A Our purpose in doing this was to, throughout the course of
13 a year, to visit many, many, many of the stores around the
14 country to do these kind of verifications. They were a
15 sampling of the 10,000 or more stores that we would have on our
16 network at the time.

17 Q Who from Floorgraphics does this sample checking that
18 you've described?

19 A We had about 15 people at one time doing these kind of
20 store checks.

21 Q Can you name some of them?

22 A John Kroll, Jan Ballestra (phonetic), John Gibson. We
23 had, you know, I'd say 15 people around the country, Marina
24 Semprovivo (phonetic) out of Chicago.

25 MR. CHUTKAN: Your Honor, I'm just going to get some

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1 exhibit binders --

2 THE COURT: Very well.

3 MS. CHUTKAN: -- since we're moving into exhibits.

4 (Pause)

5 MS. CHUTKAN: May I approach, Your Honor?

6 THE COURT: Yes, you may.

7 THE WITNESS: This is not for me, right?

8 MS. CHUTKAN: No. I think that was -- that was left
9 (indiscernible). And, Your Honor, I'm going to have Mr. Rebh
10 also hand that to the Court.

11 THE COURT: Very well. Thank you.

12 Q Now, you talked about entering into -- signing up your
13 first retailer, your first grocery retailer, Price Chopper.
14 Did there come a time when you entered into a contract with a
15 contract with a company by the name of Kmart?

16 A Yes.

17 Q And when was that?

18 A March of 1998.

19 Q Who led the negotiations for Kmart during those contract
20 negotiations?

21 A A vice president by the name of Ken Kramer.

22 Q And do you know who Ken Kramer reported to?

23 A Yes. A vice president by the name of Gary Roofing.

24 Q Who led the negotiations on behalf of Floorgraphics?

25 A I did.

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1 Q Okay. I'm going to show you what's been marked but not
2 yet admitted into Evidence as Plaintiff's Exhibit Number 11.
3 If you'd turn to Tab 11 in your binder? Have you seen this
4 document before, Mr. Rebh?

5 A Yes, I have.

6 Q What is this?

7 A This is that contract that we entered into with Kmart,
8 Floorgraphics and Kmart.

9 Q And have you read this document before?

10 A Yes.

11 Q And how familiar are you with this?

12 A I was -- I am very familiar with it.

13 Q All right. What date is on the document?

14 A March 18th, 1998.

15 Q Okay. And if you go to the last page of the document,
16 there -- signed by two parties. Who signed for Floorgraphics?

17 A A vice president by the name of Greg Ulm (phonetic).

18 Q And who signed for Kmart?

19 A Mr. Roofing, Gary Roofing, that I mentioned earlier.

20 Q And did you, after this contract was signed did you keep a
21 copy of it?

22 A Yes.

23 Q And where was the copy kept?

24 A We kept it in a Kmart file as part of our business
25 records.

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1 Q And was this document signed in the regular course of your
2 business?

3 A Yes.

4 MR. CHUTKAN: Your Honor, I would move for the
5 admission of Plaintiff's Exhibit Number 11.

6 THE COURT: Any objection?

7 MR. ABRAMS: No objection

8 THE COURT: Very well. It may be admitted.

9 Q Okay. Now -- just a minute.

10 (Pause)

11 Q What was the initial term of this contract?

12 A Two years.

13 MS. CHUTKAN: If you could show the date on -- the
14 first paragraph on top, the date of signature?

15 Q And you said that the contract was signed on the 18th of
16 March, 1998?

17 A Yes.

18 Q Okay. And the term of the contract was?

19 A Two years.

20 Q Okay. And how important was this --

21 MS. CHUTKAN: Can we see the signature page, Roger?

22 Thank you.

23 Q Was -- and there are the signatures. And is that Gary
24 Roofing's signature at the bottom?

25 A Yes.

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1 Q And the Kathleen Patton on the left, is that a witness?

2 A Yes.

3 Q And up at the -- the top signature, is that a signature on
4 behalf of Floorgraphics?

5 A Greg Ulm.

6 Q Now, you said the initial term of the contract was to last
7 for two years, correct?

8 A Yes.

9 Q How important was this contract to --

10 MR. ABRAMS: Objection. Vague. Inviting a speech, I
11 think, Your Honor.

12 MS. CHUTKAN: I certainly hope not.

13 THE COURT: Well, it's somewhat rhetorical, but
14 perhaps the witness can answer in terms of the percentage this
15 would be of his business. Maybe some answer to that effect.
16 Maybe reframe the question, Ms. Chutkan.

17 Q What percentage of your business -- how much -- of the
18 revenues your business took in, what percentage did the Kmart
19 contract represent? Is that clearer to you?

20 THE COURT: Can you answer that question?

21 THE WITNESS: That calls for a period -- what period
22 -- during what of time? So -- Your Honor, I --

23 THE COURT: All right.

24 MS. CHUTKAN: Oh, I --

25 Q How much money -- how much revenues did the Kmart contract

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1 represent to your company?

2 A About --

3 THE COURT: For what period of time, he's saying. He
4 needs to have that --

5 MS. CHUTKAN: Per year.

6 A About \$9 million a year.

7 Q Okay. And what kind of -- what kind of a retailer did you
8 consider Kmart? Was it a grocery chain? Was it a merchandise
9 --

10 THE COURT: I still don't get the answer in terms of
11 what that -- what percentage of your overall business that
12 would represent at the particular time. And don't turn towards
13 me. Just answer towards the microphone.

14 THE WITNESS: At the time this was the most revenue-
15 producing contract that we had, and was by far the largest
16 retailer that we had.

17 THE COURT: All right.

18 Q You testified that you had retailers who were grocery
19 stores. Were there other categories that you sold floor
20 advertising to?

21 A Yes.

22 Q And what categories were those?

23 A Well, they included drug and what's known as mass
24 merchandise, everything from pots and pans to blue jeans.

25 Q Of those categories, groceries, drug and mass

1 merchandising, what categories of those did Kmart cover?

2 A All three.

3 Q Now, what did the contract provide, the Kmart contract
4 provide with regard to renewal?

5 A The contract provided a process by which nine months prior
6 to the end of the term Floorgraphics and Kmart would meet and
7 discuss the program, and decide whether or not to extend the
8 term for a year.

9 Q Can you point to the section of the contract that refers
10 to the renewal provision?

11 A It is in Section 3D.

12 Q That section states, Floorgraphics -- Subsection 1,
13 Floorgraphics -- FGI is Floorgraphics. Is that correct?

14 A FGI is Floorgraphics. Yes.

15 Q "FGI and operator agree to provide for extension of the
16 contract term for a procedure of annual contract renewal.
17 Subsection 2, nine months prior to the contract's expiration of
18 term, as measured by the original term or the current term
19 created by the most recent contract renewal, FGI and operator
20 will meet and decide whether to renew the contract. Subsection
21 3, contract renewal extends the term of the contract for one
22 additional year added at the end of the existing contract
23 term." And then it goes down to some payment provisions. Was
24 that the contract extension that you just described?

25 A Yes.

1 Q Okay. Now, after Plaintiff's Exhibit 11, the Kmart
2 contract, was signed, what issues arose with regard to this
3 contract?

4 A The issue was the matter of contract term renewal.

5 Q And what was that -- what arose with regard to that issue?

6 A When we -- after signing the contract, when we showed the
7 contract to our investors, who were to invest money into our
8 company, they were not comfortable or satisfied --

9 MR. ABRAMS: Objection, Your Honor. He described
10 what it was they said, but even then we may have a hearsay
11 problem. He's characterizing the reaction of third parties.

12 THE COURT: No. I think that they can -- he can
13 testify to that, and if you can to cross examine on that, you
14 are free to do so. How many investors are we talking about?
15 Don't turn towards me.

16 THE WITNESS: This was an investment -- well, it was
17 a group of investors, an investment fund I guess would be the
18 best way to describe it.

19 THE COURT: What do you mean an investment fund?

20 THE WITNESS: Specifically, this was the private
21 investment fund of William Berkley, the founder of Berkley
22 Insurance, and this fund was managed by a managing director,
23 and had various other people who looked for investments to make
24 with that fund.

25 THE COURT: And what relationship did they have to

1 Floorgraphics?

2 THE WITNESS: The only relationship at that time was
3 that they were intent upon investing in our company if we were
4 able to find a contract for a large national retail chain.

5 THE COURT: So, they were an investment fund that you
6 were hoping would invest in your company if you had this big
7 contract with Kmart?

8 THE WITNESS: Yes, ma'am.

9 THE COURT: All right.

10 Q So, after the contract was signed did -- you've testified
11 that your investors had issues regarding the renewal of the
12 contract. What was the issue?

13 A The issue was that for them to invest this money into our
14 company, and with much of that money going to Kmart, their
15 concern was the certainty of our being able to extend the
16 contract if Kmart was happy with our program, and if we were in
17 good standing, if our contract was in good standing.

18 Q What did you do in response to this concern?

19 A I telephoned -- called Ken Kramer, the vice president at
20 Kmart, with whom I had negotiated the contract.

21 Q And what was the result of the conversation?

22 A The result of the conversation was that having told him of
23 our investor's issue he asked me to write a memo to him
24 memorializing that issue and our conversation, and send it to
25 him.

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1 Q Did you?

2 A I did.

3 Q Showing you Plaintiff's Exhibit Number 11, which has not
4 been admitted into Evidence. Can you turn to tab -- not 11,
5 12, tab 12 in your binder? What's Plaintiff's Exhibit Number
6 12?

7 A This is that memo that I wrote following our conversation.

8 Q And how long after your conversation with Ken Kramer did
9 you write this memo?

10 A Very soon after.

11 Q And by the way, Mr. Rebh, you testified that the contract
12 date of the contract that is now in Evidence is March 18th of
13 1998. How long after the contract was signed did you call Ken
14 Kramer?

15 A It was after -- a day or so following, after I had had the
16 conversation with our investors.

17 Q Okay. And how long after your conversation with Ken
18 Kramer did you draft this memo that's in Plaintiff's Exhibit
19 Number 12?

20 A Immediately after.

21 Q Okay. And did you write it?

22 A Yes.

23 Q And did you sign it anywhere?

24 A Yes.

25 Q What's the date on it?

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1 A March 8 -- excuse me -- March 20th, 1998.

2 Q What did you do with it after you wrote it?

3 A I faxed it to Ken Kramer at Kmart.

4 Q Did you keep a copy?

5 A Yes.

6 Q And what did you do with the copy?

7 A I made it a part of our Kmart file of our business
8 records.

9 MS. CHUTKAN: Your Honor, I would move to admit
10 Plaintiff's Exhibit Number 12 and publish for the jury?

11 MR. ABRAMS: No objection.

12 THE COURT: Very well. It may be admitted.

13 Q Okay. It's now up on the screen. I'm going to show you
14 the top part of the memo. It's dated March 20th. Is that your
15 signature beside your name?

16 A Yes.

17 Q And up in the right hand corner, is that Kmart file -- did
18 you write that?

19 A I did.

20 Q And did you have a Kmart file at your office?

21 A Yes.

22 Q And what was kept in the Kmart file?

23 A The important documents relative to the -- relating to the
24 contract.

25 Q I'm going to go down to the second -- and is this -- you

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1 said you wrote this memo right after you had the conversation
2 with Ken Kramer.

3 A Yes.

4 Q Is this a summary of the conversation you had with Ken
5 Kramer?

6 A Yes.

7 Q Let's go down to the second paragraph. The second
8 paragraph states, "As you know, in the final negotiations for
9 the agreement, you requested that we increased the guaranteed
10 minimum payment from \$250,000 to 1.3 million for the remainder
11 of 1998, an additional two million for 1999. These amounts,
12 plus all the Kmart specific investments we will be making to
13 develop our program will produce losses for us. In
14 consideration of these investments and our new financial risks,
15 we had requested an automatic annual renewal to assure we could
16 continue to develop floor advertising in Kmart into the future.
17 You told us Kmart could not agree to an automatic renewal and
18 Kmart inserted the final language of the renewal procedure in
19 the agreement." If we could go down one more paragraph?

20 (Pause)

21 Q "We are concluding our first investment round, as Richard
22 discussed with your CFO. Our investors have reviewed the final
23 language of the agreement and are requesting a letter from our
24 program supervisor reflecting our final discussions and
25 conditions for contract extensions. What you and I agreed

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1 was," and your is referring to Ken Kramer; is that right?

2 A Yes.

3 Q "What you and I agreed was that if Floorgraphics made the
4 required payments, was not in default of the agreement, and
5 Kmart wanted to continue with floor advertising, our contract
6 would be renewed annually. If Kmart management decides it no
7 longer wants floor advertising as distinct from pursuing floor
8 advertising itself, or with another provider, at some point in
9 the future our agreement will be allowed to expire, and that is
10 a risk we bear. But as a creator of this new medium we will
11 work long and hard to make sure that that does not happen."

12 Does that describe your conversation you had with Ken Kramer?

13 A Yes.

14 Q Now, why is that you went to Ken Kramer for this
15 modification of the contract?

16 A He was the vice president at Kmart that I had negotiated
17 the contract with, and secondly, in the contract it says for
18 any notices, or our contact person at Kmart for anything
19 regarding this contract is Ken Kramer.

20 Q Now, the last paragraph I read to you about if a renewal
21 if Kmart is still doing floor advertising, and we -- meaning
22 Floorgraphics are still in compliance with the contract, what
23 were you talking about in that paragraph?

24 A I was saying that if we were going to invest this money in
25 Kmart and really prove floor advertising, and Kmart were happy

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1 with floor advertising, that if they chose to continue with it
2 and we were in compliance and our contract was in good
3 standing, and we had made all the payments, that they would do
4 it with us, considering the fact that we had been the ones to
5 approve it in their stores.

6 Q Now, what happened -- what did you do with this memo after
7 you -- you said you faxed it to Ken Kramer?

8 A Yes.

9 Q What happened after you wrote it and faxed it to Ken
10 Kramer?

11 A I called him to assure that he received it.

12 Q All right. And I'm going to show you Plaintiff's Exhibit
13 Number 13, which is not yet in Evidence. If you could turn to
14 Tab 13? What's Plaintiff's Exhibit Number 13?

15 A This is a letter from Ken Kramer addressed to me on Kmart
16 letterhead.

17 Q What's the date?

18 A The date is March 24th, 1998.

19 Q And did you receive this letter?

20 A Yes.

21 Q And when you received the letter what did you do with it?

22 A The first thing I did with this letter after receiving it
23 was to show it to our investors.

24 Q And what is this letter?

25 A Well, this letter is the follow up that I asked for in the

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1 last paragraph in my memo, which asked him if he would consider
2 the modification that I was asking for, and send me a letter
3 for my signature reflecting that requested modification.

4 Q Okay. And you said you took this letter and showed it to
5 your investors?

6 A Yes.

7 Q And after you did that, what did you do?

8 A I signed it with my title, dated it, and because I was
9 grateful that this had occurred, I said -- I wrote, "Thank
10 you." And I faxed it back to Mr. Kramer at Kmart.

11 Q All right. Now, what was your understanding about Mr.
12 Kramer's authority to sign on behalf of Kmart?

13 A I believed he had the authority to do this on behalf of
14 Kmart.

15 Q Why do you believe that?

16 A Because in my conversation with him he indicated so, and
17 as I mentioned earlier, by virtue of the contract he was our
18 point of contact for all notices, and matters relative to the
19 contract.

20 Q Can you show us, in the Kmart contract, where it says that
21 Mr. Kramer is the point of contact?

22 MS. CHUTKAN: Put Plaintiff's 11 back up, please?

23 A It appears under Section 8, the last part of Section 8.

24 Q Okay. If to operator, Kmart, 31 West Big Beaver Road,
25 Troy, Michigan, 4804, Attention: Ken Kramer." Is that it?

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1 A Yes.

2 Q Okay. Thank you. After you -- referring back to
3 Plaintiff's Exhibit Number 13, the letter modification that
4 you've just described, after you signed it, dated it, wrote
5 "thank you," what did you do with the letter?

6 A I faxed it to Ken Kramer.

7 Q And did you have any further contact with Mr. Kramer about
8 this letter after you faxed it to him?

9 A Yes.

10 Q What was that?

11 A I again called him to confirm that he had received it.

12 Q And did you receive that confirmation?

13 A Yes.

14 Q Okay. And what did you do with your copy of this letter
15 after you faxed it to Mr. Kramer?

16 A I put it in our Kmart file as part of our business
17 records.

18 Q All right. And did you routinely do that with contracts
19 and modifications?

20 A Yes.

21 MS. CHUTKAN: Your Honor, I would move for admission
22 of Plaintiff's Exhibit Number 13 into Evidence.

23 MR. ABRAMS: We object, Your Honor, on the grounds
24 that the parol evidence rule and Paragraph 14 of Exhibit 11,
25 the merger clause, which says that the contract sets forth all

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1 the terms and supercedes any prior oral agreements, bars
2 admission of this exhibit.

3 MS. CHUTKAN: Your Honor, I believe that would go to
4 weight, not admissibility. I think we've laid the foundation.

5 THE COURT: Well, not necessarily, but here's the
6 problem here. I appreciate that you have some good arguments
7 that prior conversations are what these were. On the other
8 hand, it's ambiguous, it's unclear as to whether it's prior or
9 subsequent. And if it's subsequent, then it seems to me it
10 would not involve the parol evidence rule. And the plaintiffs
11 have contended that this was an amendment, if I understand
12 correctly, of the contract of March 18th.

13 MR. ABRAMS: I will bring out on cross examination
14 the reasons why it wasn't, Your Honor.

15 THE COURT: All right. Well, you're entitled to
16 cross examine. The jury will listen and the jury will
17 ultimately have to decide. I think it's a jury question.

18 MS. CHUTKAN: So, we may --

19 THE COURT: So, I will overrule the objection, and I
20 understand it based on legal principles, but it's going to have
21 to be up to the jury to decide. All right.

22 Q Okay. We have Plaintiff's Exhibit Number 13 on the
23 screen. Is this the letter modification you testified to that
24 Ken Kramer signed for Kmart and you signed for Floorgraphics?

25 A Yes.

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1 MS. CHUTKAN: And can you show Ken Kramer's
2 signature, please?

3 Q And is that your signature, Mr. Rebh?

4 A Yes.

5 Q Okay. And that's the "thank you" you said you wrote?

6 A Yes.

7 Q All right. Now --

8 THE COURT: Now, this is after the contract had been
9 signed with Kmart? Is that correct?

10 THE WITNESS: Yes.

11 Q And at the top, could we look at the date on the letter?
12 The date states March 24th, 1998. And the original contract
13 was signed on March 18th, 1998? Is that correct?

14 A That's correct.

15 Q And is this letter on Kmart stationery?

16 A Yes.

17 MS. CHUTKAN: And let's go down to the -- can we just
18 show the whole -- yes. Perfect. Thank you.

19 Q It says, "Dear George: In response to your letter the
20 contract calls for a meeting between Kmart and Floorgraphics to
21 discuss whether to renew the contract. We were not able to
22 include your language for automatic renewal because we may
23 decide not to continue with floor advertising in the future.
24 However, I have reviewed with Gary Roofing our discussions on
25 this point, and our agreement is that if Floorgraphics is not

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1 in default of the contract and we want to continue to have
2 floor advertising in our stores we will extend your contract
3 year to year, and not do floor advertising with someone else.
4 I realize you are making a big investment in your program, and
5 I understand your concerns, but you can tell your investors
6 that if you are doing the job and we want floor advertising we
7 will extend your contract." Did that -- after you showed this
8 letter to your investors, did they invest in your company?

9 A Yes.

10 Q Now, did you use a lawyer to draw up this letter, Mr.
11 Rebh?

12 A No.

13 Q Why not?

14 A I did not think it was necessary because it was a
15 straightforward communication.

16 Q Now, I'm going to --

17 THE COURT: Those are famous last words, aren't they,
18 Mr. Rebh?

19 THE WITNESS: Yes, ma'am.

20

21 Q I'm going to show you what's been marked as Plaintiff's
22 Exhibit Number -- let me ask you, before I do that, was the
23 Kmart contract extended?

24 A Yes, it was.

25 Q How many times?

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1 A Twice.

2 Q All right. I'm showing you Plaintiff's Exhibit Number 14,
3 which is not yet in Evidence. Can you turn to Plaintiff's
4 Exhibit 14 in your binder? What is Plaintiff's Exhibit Number
5 14?

6 A This is the first extension of the term of our Kmart
7 contract.

8 Q And when is it dated?

9 A It's dated the 20th of March, 2000.

10 Q Well, look at your signature.

11 A I was looking at the date in the first paragraph.

12 Q Oh. Okay. And when did you sign it?

13 A I signed it on March 21st.

14 Q And who signed it for Kmart?

15 A Gary Roofing.

16 Q And when did he sign it?

17 A He signed it on March 20th.

18 Q All right.

19 THE COURT: And now, Mr. Roofing, again, is the
20 person who signed the March 18th agreement on behalf of Kmart?
21 Is that correct?

22 THE WITNESS: Yes.

23 THE COURT: It wasn't Mr. Kramer who signed the March
24 18th contract on behalf of Kmart?

25 THE WITNESS: It was Gary Roofing.

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1 THE COURT: All right.

2 Q And who prepared this addendum?

3 A I did.

4 Q And what did the -- is this the addendum that extended the
5 contract?

6 A Yes.

7 Q Okay. Did you get a lawyer to help you prepare this?

8 A No.

9 Q And did you -- have you -- did you read it and sign it?

10 A Yes. This was a form of term extension that I had
11 developed with respect to other retailers that we were doing
12 business with, so I used it to create this extension.

13 Q Okay.

14 MS. CHUTKAN: Okay. And, Your Honor, we would move
15 Plaintiff's Exhibit Number 14 into Evidence.

16 MR. ABRAMS: No objection.

17 THE COURT: Very well. It may be admitted.

18 MS. CHUTKAN: It's a one-page document. This is
19 Plaintiff's Exhibit Number 14 -- if we could enlarge the
20 written body of it?

21 Q "This addendum is made this 20th day of March, 2000, to a
22 certain retail advertising license agreement entered into on
23 March 18th, 1998 by and between Floorgraphics, Inc., FGI, a
24 Pennsylvania corporation, and Kmart, a Michigan corporation, in
25 which Kmart agreed to participate in FGI's national floor

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1 advertising program." And the paragraphs below, I'm going to
2 go down to the bottom, where it says, "Upon execution of this
3 addendum the term of the agreement will be one year. All other
4 terms of the agreement currently in effect will remain the
5 same." Is that correct?

6 A Yes.

7 Q And is that the term that it was extended for, one year?

8 A Yes.

9 Q Okay. Thank you. And after this -- after Plaintiff's
10 Exhibit -- after the contract was extended for one year, as
11 shown in Plaintiff's Exhibit Number 14, it was extended again?
12 Is that correct?

13 A Correct. Yes.

14 Q And did you use the same method of extension?

15 A Yes.

16 Q Did you use lawyers when you prepared these addenda, Mr.
17 Rebh?

18 A No.

19 Q Why not?

20 A It was not necessary from our standpoint, and it was
21 acceptable, so I saw no need.

22 Q Okay. Now I'm going to ask you some questions about Gary
23 Henderson. By the end of 1998, going into early 1999, how many
24 employees -- approximately how many employees did Floorgraphics
25 have?

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1 A I think we had about 15 employees at that point.

2 Q And where were you located?

3 A Still in Cherry Hill, New Jersey.

4 Q Are you still located there?

5 A We're now located in Hamilton, New Jersey.

6 Q In 1998, about how many stores -- not retailers, but
7 actual stores were you running ads in?

8 A Excuse me. The time period again?

9 Q 1998. So, this is after you acquired the 3M business.

10 A About 6,000 stores.

11 Q All right. Did there come a time when you hired an
12 individual by the name of Gary Henderson?

13 A Yes.

14 Q And when did you hire him?

15 A At the beginning of 1999.

16 Q How is it that you came to hire Gary Henderson?

17 A He contacted us, and we received a fax of his resume, and
18 we subsequently hired him.

19 Q When you hired him, what were his job responsibilities at
20 Floorgraphics?

21 A We hired him to be in charge of the Kmart account, and his
22 title was Vice President of Mass Merchandise Division.

23 Q What were his responsibilities with regard to the Kmart
24 account?

25 A He was responsible for supervising the Kmart account, both

1 the account itself with Kmart and the advertising that we were
2 selling to CPGs to go into Kmart.

3 Q Who else at Floorgraphics was responsible for the Kmart
4 account?

5 A I was.

6 Q And did you have any salespeople that dealt with Kmart?

7 A Yes.

8 Q Who were they?

9 A In addition to our national sales staff, who could sell
10 advertising that would go into Kmart, we hired two people,
11 Susan Griffin and Ann Walter, who lived in -- nearby the
12 corporate headquarters of Kmart in Michigan.

13 Q Now, what sort of work did Henderson do? What were his
14 duties with regard to his Kmart responsibilities?

15 A He was responsible for maintaining good relations with
16 Kmart and following up on our performance and responsibilities
17 there, and he was also, as I say, responsible for the
18 advertising sales that would go into Kmart.

19 Q And how familiar -- you testified -- I asked you a
20 question a few minutes about your Kmart file. How familiar was
21 Gary Henderson with that Kmart file?

22 MR. ABRAMS: Objection. Lack of foundation.

23 MS. CHUTKAN: As part of --

24 THE COURT: I think you -- I'm going to sustain the
25 objection. The question has to be revised.

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1 Q As part of his job duties with Floorgraphics was Mr.
2 Henderson allowed to -- was he given access to the Kmart file?

3 A Yes.

4 Q And how -- what was the extent of that access?

5 A He had full access to the file.

6 Q You testified that you had a salesperson, Sue Griffin, in
7 Troy, Michigan, who was responsible, along with Ann Walter, for
8 selling ads to Kmart. What were her responsibilities with
9 regard to Kmart -- the Kmart -- fulfilling the Kmart contract?

10 A Her primary responsibilities were to sell advertising.
11 Secondly she was, because either I or Gary might not be at
12 Kmart headquarters at the time, she would follow up on various
13 things with Kmart executives having to do with our program.

14 Q Now, I've asked you about the Kmart file. I'm going to
15 ask you about generally with regard to your business records
16 and business files and information, what sort of access did
17 Gary Henderson have to your confidential business records and
18 information?

19 A He had broad, full access to our files, as we considered
20 him at the time to be a top executive of our company.

21 Q What sort of information did he have access to? What
22 type, I should say?

23 A All of our sales files and records, our personnel records,
24 our financial records, our retail records, across the board.

25 Q Now, I'm going to take you forward to -- well, I'm going

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1 to stay -- back in -- in the period of 1998 to 1999, you talked
2 about floor advertising. Were there other kinds of in-store
3 advertising in existence back then?

4 A Yes.

5 Q What were those types of advertising?

6 A They were principally programs that went on the shelf,
7 that were attached to the shelf, so there were shelf ads,
8 frames that were attached to the shelf with a clip. There were
9 coupons, plastic coupon dispensers that also were attached to
10 the shelf. There was a program called "Take One," which was
11 for recipes and sweepstakes that would be in a plastic
12 dispenser attached to the shelf. And then the final one was
13 cart ad -- shopping cart advertising, so that on a frame on the
14 front and outside of the front of the cart you would have
15 advertising.

16 Q When Floorgraphics started out, started its business, did
17 Floorgraphics do any of these forms of advertising that you've
18 just described?

19 A No.

20 Q And why not?

21 A We were pioneering floor advertising. This was our baby.
22 This was our -- the advertising medium that we were
23 evangelizing all over the country, and we saw great potential
24 in it, both nationally and internationally, so it really was
25 our focus, and we were quite excited about it.

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1 Q Back in let's say the summer of '99, were there other --
2 what were the major companies doing with shelf and cart
3 advertising?

4 A News America Marketing

5 Q And at the time, this is the summer of 1999, were you
6 aware of whether News America Marketing was doing floor
7 advertising?

8 A My understanding was that they were not.

9 Q And again, the same time period, the summer of 1999, how
10 was your business doing?

11 A We were very -- our business was doing very well. We were
12 growing as a company, we had, with the acquisition of the 3M
13 company's division we had created really the first national
14 media network for floor advertising. And we had, I think very
15 satisfied, good relations with our CPG customers, as well as
16 our retail partners.

17 Q Do you recall, in the summer of 1999, attending a lunch
18 meeting with News America Marketing executives?

19 A Yes.

20 Q And do you remember when in the summer of 1999 that was?

21 A Yes.

22 Q When?

23 A July of 1999.

24 Q Who arranged the meeting?

25 A Gary Henderson.

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1 Q And do you know who he arranged it with?

2 A My understanding was that he arranged it with the office
3 of Mr. Paul Carlucci, the CEO of News America Marketing.

4 Q When you went to this lunch, or agreed to go to this
5 lunch, what was your understanding about the purpose of the
6 lunch meeting?

7 A My understanding of the purpose was that it would be a
8 lunch to introduce each other.

9 Q Had you ever met Mr. Carlucci before?

10 A We had not. And we thought that the other purpose, I
11 think, was that we thought that there was some potential for
12 doing joint promotions, we being a floor advertising company,
13 they being a company doing the shelf and cart programs.

14 Q Okay. Now, where was the lunch meeting held?

15 A It was at a restaurant near News Corp. headquarters in New
16 York City, a restaurant called A Dish of Salt.

17 Q Who attended the lunch?

18 A For Floorgraphics, Richard, my brother, I did, and Gary
19 Henderson. And for News America Marketing Paul Carlucci, their
20 CEO, and Dominick Porco, their president.

21 Q You just testified that you hadn't met Mr. Carlucci
22 before. Had you met Mr. Porco before?

23 A No.

24 Q Can you tell the ladies and gentlemen of the jury what
25 happened at the meeting?

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1 A We sat down at a round table and obviously introduced
2 ourselves, had some initial talk about personal backgrounds,
3 and talked about in-store -- the in-store industry.

4 Q And then what happened?

5 A At a certain point in the conversation Mr. Carlucci turned
6 to Richard and said, "So, I understand your --" words to the
7 effect, "So, I understand you're here to sell your company?"

8 Q And was there a response?

9 A We were -- I was surprised to hear that, and Richard's
10 response was, "No. That's not why we're here. We were really
11 here to meet you, and to discuss the possibility of doing joint
12 promotions."

13 Q What happened after that?

14 A Well, Mr. Carlucci then said to Richard, "You know, when
15 we acquired Actmedia in 1997, we asked them whether they --
16 what they thought of floor advertising, and they didn't think
17 much of it, but I've always liked floor advertising." And then
18 he said, "So, congratulations," to Richard and me,
19 "Congratulations for what you've accomplished." And then he
20 followed that by saying, "But from now on, consider me, us your
21 competitor, and understand this, if you ever get into any of
22 our businesses, I will destroy you." And he said, "I work for
23 a man who wants it all, and doesn't understand anybody telling
24 him he can't have it all." And that ended his discussion.

25 Q How did you respond to this?

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1 A We were shocked, to say the least, because having not gone
2 to this meeting expecting this kind of reception I processed
3 what he had just said, and I said to him, "So, let me
4 understand, make sure I understand. You can get into our
5 business and compete with us, but if we get into your business
6 you will destroy us?"

7 Q And what did he say?

8 A He said, "That's right."

9 Q And what happened after that?

10 A There was, I would say, a nervous kind of end to the
11 meeting where we said goodbye, and even there was talk of
12 perhaps following up the meeting, but we left the meeting
13 shortly thereafter.

14 Q What did you decide to do after the meeting?

15 A We considered what he had said, and realized where we
16 were, and we decided that our only course was to continue to do
17 what we had been doing. We had competed against a big company,
18 3M, and we knew that if we worked hard, and produced the best
19 product and delivered the best service, that we could win.

20 Q So, why did you decide to stay and compete?

21 A We felt we had no choice at that point. We had built a
22 company. We had contracts with retailers. We had advertisers
23 that were enthusiastic about our product. And we had employees
24 that had joined our company because they had a belief in our
25 product and our program, and had a belief in us, in our

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1 company, and I think we felt a responsibility to all of that to
2 continue.

3 Q At the time of the lunch meeting with Mr. Carlucci and Mr.
4 Porco did you consider News America to be a competitor of
5 yours?

6 A Going into that meeting we did not.

7 Q Why not?

8 A Because we were a floor advertising company focused on
9 floor advertising, and we understood them to be a shelf and
10 cart program focused company.

11 Q And going into that lunch meeting were you interested in
12 moving into shelf and cart advertising at that time?

13 A No.

14 Q Now, did there come a time when you did, in fact, end up
15 moving into shelf and cart advertising?

16 A Yes.

17 Q And how did that come about?

18 A It came about with A&P.

19 Q What happened with A&P?

20 A A&P contacted us and asked us whether we were able to
21 provide shelf and cart programs to A&P in addition to the floor
22 contract that we had in place with A&P.

23 Q And did you agree to do that?

24 A We did.

25 Q Why?

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1 A We felt we had no choice at that point because we wanted
2 to -- we stood to lose our floor program at A&P if we did not
3 also provide to them the shelf and cart programs.

4 Q Was A&P an important retailer for you?

5 A Very, yes.

6 Q And when did you enter into the shelf and cart as well as
7 floor, which I'm just going to call entire in-store? When did
8 you enter the entire in-store program for A&P?

9 A In December of 1999.

10 Q After you entered into that entire in-store program for
11 A&P, did you expand your business to provide shelf and cart
12 advertising for other retailers?

13 A Yes.

14 Q Why?

15 A Primarily because other retailers asked us, at that point,
16 to also provide the shelf and cart programs, and secondly
17 because once you're into a business and you've invested in the
18 fixtures, and all the things associated with that business, it
19 is good business to create efficiencies and try to expand.

20 Q Now, did there come a time when Gary Henderson left
21 Floorgraphics?

22 A Yes.

23 Q When -- well, before I ask you -- well, yeah, when?

24 A In July of 2000.

25 Q What were the circumstances of his leaving? Why did he

1 leave?

2 A Mr. Henderson made compensation and stock demands upon our
3 company that we could not and would not agree to meet.

4 Q And did you meet with Mr. Henderson regarding his demands?

5 A Yes.

6 Q And what were the results of the meeting?

7 A The results of the meeting were an impasse. He insisted
8 on those financial demands, and we saw no way to agree to them.
9 It was an impasse.

10 Q And after the impasse, how long after you hit this impasse
11 did he leave?

12 A A few days.

13 Q And what did he tell you regarding your refusal to meet
14 his demands?

15 A He said that if we did not meet his financial demands that
16 he would leave Floorgraphics and go to our competitor at that
17 point, News America, and work with them to destroy us.

18 Q And how long after he told you this did he leave?

19 A This was -- a matter of days, right after that.

20 Q And how long after the meeting at the Dish of Salt did he
21 leave, the lunch meeting with News America?

22 A This would be one year since that meeting.

23 Q Now, when he was employed at Floorgraphics did Mr.
24 Henderson have any company equipment?

25 A Yes.

1 Q What did he have?

2 A He had a company laptop computer, he had other small
3 equipment, and had company files.

4 Q After Mr. Henderson left what did you do with regards to
5 collecting his work equipment?

6 A We requested that he return them.

7 Q And did he?

8 A No.

9 Q Did he -- did you ever get your company laptop back?

10 A Ultimately we did.

11 Q And what did you do when you got the company laptop back?

12 A We opened the laptop to see if there were still company
13 records on the computer.

14 Q Now, I'm going to ask you, Mr. Rebh, you heard Mr.
15 Henderson testify that at the time that he sent certain e-mails
16 from his work computer to his home computer, that he was in
17 good standing at Floorgraphics and was sending it to work on
18 upcoming projects. Is that true?

19 A That is not true.

20 Q At the time Mr. Henderson sent his e-mails, the ones that
21 were viewed in Court and we're about to look at, what was his
22 status at Floorgraphics? What was your relationship with him?

23 A We were at the impasse that I described. We no longer
24 were going to do business together.

25 Q All right. I'm going to show you Plaintiff's Exhibit

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1 2178, which was admitted into Evidence previously, and can you
2 turn to -- you can turn to it in your binder. This is an e-
3 mail sent from Gary Henderson's work computer to his home
4 computer, JGHRichfieldConnecticut.com, on June 27th of 2000.
5 How is that date, June 27th, 2000, related to when Mr.
6 Henderson left your company?

7 A This is days, four days, five days prior to his leaving.

8 Q And how is that date related to the time you said you had
9 reached an impasse?

10 A This is right in the middle of that. We had reached an
11 impasse at this point.

12 MS. CHUTKAN: Now, if we could go down to the
13 attachments, please, Roger?

14 Q We're looking at various attachments, EJ2001, EMS2001, and
15 so forth. What are those attachments that Mr. Henderson has e-
16 mailed to his home computer?

17 A These are the -- for each of them it represents a CPG, an
18 advertising customer. And these are the complete forecast and
19 review of our business with each one of those CPGs.

20 MS. CHUTKAN: If we could open the first attachment,
21 if we could go to FG1161?

22 Q Okay. We're looking at a document that's part of that
23 exhibit with a Bates number FG116123. What is this?

24 A This is a form that our sales representative fills out to
25 give an overview, and evaluation of our business with this

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1 particular CPG, which is Ben & Jerry's Ice Cream.

2 Q Okay. It's for Ben & Jerry's Ice Cream. What is an
3 account overview?

4 A This is really the salesperson's analysis, their opinion
5 of where the opportunities are at the CPG to make sales.

6 MS. CHUTKAN: Can we look at the first part -- yes.
7 That one. Thank you.

8 Q I'm sorry. Continue.

9 A Well, this part of the chart, you know, takes the various
10 departments and people with whom you might interact within an
11 organization to potentially sell advertising, and in this case
12 it calls upon the sales representative to rate which one of
13 these departments or people are the best -- represent the best
14 opportunities for us to make sales.

15 Q Okay. And if you could look at the rest of the document?
16 So, in other words, the numbers in the chart signify how
17 important those people are, and whether the account
18 representative, or the salesperson should call on those people
19 by virtue of the number they're assigned?

20 A And it tells us, as managers, who they are focusing on and
21 where we are applying our resources in order to best make sales
22 at that account.

23 Q Did you consider this kind of information to be
24 confidential?

25 A Yes.

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1 Q And who prepared these account reviews?

2 A These account reviews were prepared by each one of our
3 advertising salespeople.

4 Q One moment.

5 (Pause)

6 MS. CHUTKAN: Can we turn to the next page on that
7 document, please?

8 Q And on the next page, which is FG116124, what's this page?

9 A This page gives the salesperson's report as to what
10 revenue in the current year in this case that we expect to
11 sell, we expect to receive from that CPG, and then it looks
12 forward into the next year as what is our goal of how much
13 advertising can sell at that CPG.

14 Q Let's go down to Number 5, brief summary of overall plan
15 to penetrate account. What was that?

16 A That was the opportunity for the -- that's the expression
17 of the salesperson's evaluation of the account, and their best
18 advice, or analysis of how best to make sales at that account.

19 Q How -- you said this information was confidential? How
20 would this information be helpful to a competitor if they got
21 it?

22 A It would provide a competitor a road map within each CPG
23 that they were doing business with to how best to sell floor
24 advertising to that account, the most efficient way to do it,
25 who to approach, where the money was, etcetera.

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1 MS. CHUTKAN: Can we go back to the front page of
2 2178, please? If we can highlight the attachments again?

3 Q So, we've been over Ben & Jerry's. What's BMS?

4 A Bristol-Myers Squibb.

5 Q That's Dannon. What's DeLuca?

6 A DeLuca, as I recall, was an agency.

7 Q And we've got Fort James, which Mr. Henderson testified
8 was Fort James Paper?

9 A Yes.

10 Q IHF? What was that?

11 A International Home Foods.

12 Q And then Lipton and Perdue Chicken? Is that right?

13 A Yes.

14 Q Were these important accounts for you?

15 A Yes.

16 Q Okay. Can I turn your attention to Plaintiff's Exhibit
17 Number 2180, which is another e-mail? I do not know if -- this
18 one I don't believe was admitted yet, so let's hold on. Can
19 you -- do you have 2180?

20 A Yes.

21 Q Okay.

22 A Yes.

23 Q What's Plaintiff's Exhibit 2180?

24 A This is an e-mail sent by Gary Henderson from his company
25 e-mail address to --

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1 MR. ABRAMS: Objection, Your Honor. The witness
2 doesn't know that for a fact. He is simply looking at the
3 document and describing what the document says. If they want
4 to lay a foundation for it, that should have occurred when Mr.
5 Henderson --

6 THE COURT: Yes. What's the nexus? How would this
7 witness be able to tell us what this e-mail -- where it went,
8 or anything other than the "To" on it?

9 Q Well, did you know Gary Henderson's e-mail address at
10 Floorgraphics?

11 A Yes.

12 Q What was it?

13 A It was Ghenderson@Floorgraphics.com.

14 Q Okay. And are you familiar with Mr. Henderson's home e-
15 mail address?

16 A Yes.

17 Q And after -- after Mr. Henderson left and you got this
18 laptop, what did you do with the laptop?

19 A As I said earlier, we turned it on, opened it, and looked
20 to see if there were still company records on the laptop that
21 he had returned.

22 Q And what did you find?

23 A We found that the in box in his e-mail, company e-mail
24 account had been erased, but that his sent file representing
25 those documents that he sent out from that computer were still

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1 on the computer.

2 Q Were you able to, by looking at the sent file, to
3 determine what documents Mr. Henderson had sent from his work
4 computer to his home computer?

5 A Yes.

6 Q And did you print out the copies of the e-mails that he
7 had sent from his work computer to his home computer?

8 A Yes, we did.

9 Q And what did you do with those -- those e-mails once you
10 printed them out?

11 A We kept copies of them and kept them in our company
12 records.

13 Q What about the attachments that were sent with the e-
14 mails? Did you print those out, as well?

15 A We did. Yes.

16 Q And what did you do with all those documents?

17 A We assembled them and kept them in our files.

18 MS. CHUTKAN: I would move for admission of
19 Plaintiff's Exhibit Number 2180 onto the --

20 THE COURT: Is that what this is?

21 THE WITNESS: Yes, ma'am.

22 MR. ABRAMS: No objection.

23 THE COURT: Very well. It may be admitted.

24 Q All right. Looking at Plaintiff's Exhibit Number 2180 --

25 THE COURT: What did we do before the world -- the

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1 day of e-mail?

2 MS. CHUTKAN: I think we had more time, Your Honor.

3 Q What's the date on this e-mail, Mr. Rebh?

4 A This was the 27th of June, 2000.

5 Q And what is this -- it said below is another e-mail, so
6 this looks like it was forwarded, dated Saturday, January 24th.
7 Actually, if you go up to the top, the date. Yes. The date is
8 Saturday, January 24th of 2000. And it says from Richard Rebh.
9 Is that your brother?

10 A Yes.

11 Q To G. Henderson. It says, "Gary, you asked for the 2001
12 sheet. It is puffed up by the large EPA numbers. Richard."
13 So this appears to be an e-mail for -- requested by Mr.
14 Henderson, sent to your -- sent by your brother to Mr.
15 Henderson and then on to his home computer. Is that correct?

16 A That is correct.

17 Q What's the -- now, let's look at the attachment, Sales 201
18 Numbers. If we could open that that? Okay. Now we're going
19 way beyond my ability. Is this a -- what is this document? I
20 can't see it, but I --

21 A What this document does is summarize all of our business -
22 - all of our advertising sales business by salesperson.

23 Q Okay, and so it's a -- is it a -- it's a spreadsheet
24 analyzing business by salesperson?

25 A Yes, this is a comprehensive view of the entire company's

1 advertising sales.

2 Q Okay, so let's turn to Bates Number FG-1116196. It think
3 it's the third or second page in. Okay. This page, FG-
4 1116196, at the top it's Michael Folks. Who is Michael Folks?

5 A He was one of our advertising salespeople.

6 Q So what's this document?

7 A Well, unfortunately when you print out Excel spreadsheets,
8 sometimes it -- this isn't the best way to look at it. It
9 would look somewhat different on a --

10 Q It is -- it would be longer?

11 A -- computer screen. Yes. But what this generally is, is
12 if you see --

13 Q Let's go to the next page. Okay.

14 A Well, actually what I -- what I'm going to say is on the
15 previous page it talks about deals. If you see deals there?
16 Right there, yes.

17 Q Yes.

18 A And what that simply means is what business is in process.
19 What do we think is -- we are going to be able to sell, and
20 then the next category down is contracts, which says what
21 business, you know, do we actually, you know, have. And, you
22 know, this gives a manager a sense of what the potential of the
23 account is versus what we have actually contracted.

24 THE COURT: All right. Can we take a break somewhere
25 along here?

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1 MS. CHUTKAN: This is a good spot, Your Honor.

2 THE COURT: Is this a good spot?

3 MS. CHUTKAN: Yes.

4 THE COURT: Good. All right. Ladies and gentlemen,
5 let's take a ten-minute break.

6 THE CLERK: All rise.

7 (Jury out)

8 THE COURT: All right.

9 (Recess)

10 (Jury in)

11 THE COURT: Please be seated, ladies and gentlemen,
12 as soon as you reach your chairs.

13 (Pause)

14 THE COURT: Okay. Let's proceed. Counsel.

15 MS. CHUTKAN: Yes, thank you. I believe we were on
16 plaintiff's Exhibit 2180 and we were at the attachment, the
17 spreadsheet. Is that -- yes, 2180.

18 Q Now, Mr. Rebh, was the information -- you said these were
19 summaries for sales -- by salesperson, is that right, or
20 projections by salespersons?

21 A Yes, and then summaries of those.

22 Q Was this confidential information?

23 A Yes.

24 Q Why?

25 A This represented our -- represents our business, the way

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1 we earn money through the sales of advertising to these CPGs,
2 and this is the roadmap and all of the result of our investment
3 and our salespeople and their efforts. It's summarized in
4 these documents.

5 Q The document that you said went by summary -- by
6 salesperson, did that show the productivity of a salesperson?

7 A Yes.

8 Q All right. Now, how many e-mails, if you remember, did
9 Mr. Henderson send in the days just before he left
10 Floorgraphics?

11 A Quite a few.

12 Q All right. And after you found out that Mr. Henderson had
13 sent these e-mails, what did you do?

14 A We tried to contact him and ask him to return the
15 documents that he had emailed to his home computer. Were they
16 ever returned?

17 A No.

18 Q After Mr. Henderson left Floorgraphics, do you know where
19 he went to work?

20 A Yes.

21 Q Where?

22 A News America Marketing.

23 Q And after he left did anyone else who was familiar with
24 the Kmart account join him at News America?

25 A Yes.

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1 Q Who did -- who was that?

2 A Susan Griffin.

3 Q Now, I want to go back for a second. I had asked you
4 about Gary Henderson's responsibilities with regard to the
5 Kmart contract. What were his responsibilities with regard to
6 implementing the contract and making sure that the terms were
7 being complied with?

8 A He met with Kmart executives, including Ken Kramer, and
9 when we extended the contract, he was involved in those
10 contract extension negotiations.

11 Q Now, did anybody else from Floorgraphics leave to join
12 other than Sue Griffin, who you testified to? Any other
13 Floorgraphics employees leave to join Mr. Henderson at News
14 America?

15 A Yes.

16 Q Who were those people?

17 A They were four of our salespeople, Candace Hamilton,
18 Michael Folks. I mentioned Susan Griffin. Sue Knepper, Dana
19 Anderson.

20 Q Now, do you know if -- other than those people you've
21 named, do you know whether other Floorgraphics staff were
22 contacted or were solicited by Mr. Henderson for News --

23 MR. ABRAMS: Objection. Calls for hearsay.

24 Q -- for jobs at News America?

25 MS. CHUTKAN: I believe they're employees, Your

1 Honor.

2 MR. ABRAMS: What an employee told him is hearsay.

3 THE COURT: Well --

4 MS. CHUTKAN: I'm not -- I --

5 THE COURT: Why don't you ask him -- I appreciate
6 that this may not accomplish all you wish, but whether there
7 are anymore people who left Floorgraphics and went to work for
8 the defendant.

9 MS. CHUTKAN: I was actually -- my question was
10 whether there were anymore people who were contacted about
11 leaving.

12 THE COURT: Yes, I see the question. I was
13 rephrasing it in order to avoid the objection.

14 Q Were any -- did any other employees leave to join
15 Floorgraphics -- I mean to News America other than the people
16 you named?

17 A Those were the people that left.

18 Q All right. Now, did you -- do you know -- do you have
19 personal knowledge as to whether Floorgraphics -- were you ever
20 contacted by Floor -- by News America?

21 A I was not contacted. No.

22 Q Okay. Now, after Gary Henderson left -- and you heard him
23 testify that he took the corporate directory. Is that true?

24 A Yes.

25 Q And, by the way, Mr. Rebh, did you ever receive a

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1 Christmas card from Gary Henderson?

2 A I never received a Christmas card from Mr. Henderson.

3 Q Okay. Did --

4 THE COURT: You send Christmas cards in this
5 business?

6 THE WITNESS: Yes.

7 THE COURT: Whom do they send Christmas cards to, the
8 competitors, customers? Whom?

9 THE WITNESS: Not generally competitors, but you do -
10 -

11 THE COURT: All right.

12 THE WITNESS: You would send Christmas cards to
13 people in your company and in some cases to people with whom
14 you do business.

15 THE COURT: All right. Forgive the Judge. Just
16 having a moment of levity. All right. Go right ahead.

17 Q Did you or any of your employees -- were you or any of
18 your employees contacted by News America after Gary Henderson
19 left?

20 MR. ABRAMS: Objection, Your --

21 THE COURT: Well, see that's going to be the
22 objection, because he's going to have to tell us what some of
23 the employees may have told him.

24 MS. CHUTKAN: I can do it another way, Your Honor.

25 THE COURT: All right.

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1 Q You heard testimony yesterday with regard to plaintiff's
2 Exhibit Number 280, 2-8-0, which has been admitted into
3 evidence.

4 MR. ABRAMS: I'm sorry. What is the number?

5 MS. CHUTKAN: 2-8-0. Oh, I'm -- yes, 2-8-0.

6 Q Do you remember seeing this document in court yesterday,
7 Mr. Rebh?

8 A Yes.

9 Q Okay, and this is a press release from News America
10 Marketing announcing the establishment of the Floortalk task
11 force in -- at News America Marketing. Is that right?

12 A Yes.

13 Q And it's from February of 2001. Correct?

14 A Yes.

15 Q And Mr. Henderson -- you heard Mr. Henderson testify that
16 this -- that this was sent to Floorgraphics employees.

17 Correct?

18 A Yes.

19 Q Did you or any other of your employees receive other types
20 of press releases from News America such as the one in Exhibit
21 280?

22 MR. ABRAMS: Objection, Your Honor, to the extent
23 that she's asking about what other people received and told him
24 about.

25 THE COURT: Very well. I will sustain the objection

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1 with regard to others, unless he can tell us some other way he
2 would've found out other than they're telling him.

3 Q Did you receive press releases from News America, Mr.
4 Rebh?

5 A I did.

6 Q Okay, and I'm going to show you, which has not been --
7 moved into evidence yet, plaintiff's Exhibit 2219.1, which is
8 in your binder, point 1 to 5. What's plaintiff's Exhibit 2219?

9 A I'm sorry. Is that in this book?

10 Q It is. It should be towards the back right after 2185,
11 2219.1 dash 5.

12 A Yes.

13 Q Okay. What is plaintiff's Exhibit 2219?

14 A This is a press release on News America Marketing
15 letterhead dated May 23rd, 2001.

16 Q Okay. Now, if you turn to the page marked -- it's upside
17 down -- FGI -- the next page, FGI-05970, what is that page?

18 A That is the envelope -- one of the envelopes that I was
19 given containing a News America press release.

20 Q Who is the person that's addressed -- that the envelope is
21 addressed to?

22 A Ms. Valerie Bomus.

23 Q And who is she?

24 A She was an employee of ours, a clerical graphic artist.

25 Q And how did -- how -- have you seen this envelope before?

1 A Yes.

2 Q How?

3 A She received it at her home and gave it to me.

4 Q All right, and 2219 is a series of these releases and
5 envelopes. Can you look through 2219 and tell me who all the
6 people on the envelopes are? There's about 5 -- 7 of them.

7 And, by the way, do the envelopes contain a letter --
8 letterhead to show where it's coming from?

9 A On the envelope it has a return address letterhead of News
10 America Marketing.

11 Q And is there a date and a postmark on those envelopes?

12 A Yes.

13 Q Okay, and who are all the -- in Exhibit 2219 who are the
14 envelopes addressed to?

15 A These are --

16 Q Not the people, but what is their status?

17 A They're status is they are employees of ours at every
18 level including clerical employees.

19 Q And how -- have you seen these envelopes and the documents
20 that came in there before?

21 A Yes, I was given them.

22 Q Who were you given them by?

23 A By our employees.

24 Q And what did you do with them when you were given them by
25 your employees?

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1 A I kept them in a file and made them a part of our company
2 records.

3 MS. CHUTKAN: Your Honor, I would move to admit
4 plaintiff's Exhibit 2219.

5 MR. ABRAMS: No objection.

6 THE COURT: Very well. It may be admitted.

7 Q Let's -- well, let's look at the first page of 2219,
8 please. Okay. The first page of plaintiff's Exhibit 2219 is a
9 press release from News America Marketing. It says, "News
10 America Marketing's Floortalk network reaches all-time high
11 with addition of Kroger Atlanta stores," and it's dated May
12 23rd, 2001. Was this a press release that was sent -- and the
13 envelope at -- to the -- on the next page is addressed to
14 Valerie -- how do you pronounce that?

15 A Bomus.

16 Q Valerie Bomus, was she an employee of yours?

17 A Yes.

18 Q And the press release shown on the first page basically
19 announces the -- getting the Kroger Atlanta contract. Is that
20 right?

21 A Yes.

22 Q And going further into the exhibit, there's envelopes
23 addressed to Bob -- you're going to have to help me with the
24 pronunciation.

25 A Duffy.

1 Q No, there's an -- Mr. Bill Telot.

2 A Telot.

3 Q Telot. Is he an employee of yours?

4 A Yes.

5 Q Okay, and then there's Bob Duffy.

6 A Yes.

7 Q And Bill Bushlow?

8 A Busher.

9 Q Barry Metzger?

10 A Yes.

11 Q And there are some more envelopes in here. I'm not going
12 to read them all through, but these employees -- were these
13 employees of yours?

14 A Yes.

15 Q When they brought you these envelopes and their contents,
16 how did they appear to you? What was their demeanor?

17 A I believe they were rattled and very upset.

18 Q What did you do in response to them bringing you these
19 envelopes and their contents?

20 A I tried to assure them that we had competed against a
21 large company in the past, and that while I understood why
22 receiving a series of press releases like this at their homes
23 could be unsettling and make them fear for their jobs and the
24 future of our company, that if we bore down and worked harder
25 and delivered better and better service, that we could not only

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1 survive this but do well.

2 Q Mr. Rebh, did you receive press releases at your home as
3 well?

4 A I did.

5 Q Now, during the time that -- well, I'm going to go back to
6 Kmart now. Before you signed the Kmart contract did you have
7 any other retailer under contract that was comparable to Kmart?

8 A No.

9 Q And during the time that you were providing for
10 advertising for Kmart how did they respond to your services for
11 their floor program?

12 A We had a very good relationship, and they responded
13 positively to what we -- our program and our service and I
14 think the fact that we really wanted to add value.

15 Q Describe the work, the things that you did for Kmart as
16 part of your responsibilities to them under the contract.

17 A Well, the first thing was to sell advertising to CPGs and
18 to produce and install those ads in Kmart stores. And,
19 secondly, we interacted with Kmart personnel in different
20 departments and worked with them to develop floor advertising
21 to promote their back to school or Halloween or whatever
22 seasonal promotions. We gave them analysis and reports on the
23 effectiveness -- the sales effectiveness of our floor ads and
24 reported them -- the degree to which they had increased sales
25 of products and, as I mentioned earlier, category sales.

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1 Q Now, you testified earlier that the Kmart contract was
2 extended twice. In two thousand -- so in 2000 and 2001 did
3 Kmart continue to do floor advertising?

4 A Yes.

5 Q Okay. Did there come a time when your business
6 relationship with Kmart changed?

7 A Yes.

8 Q When was that?

9 A In July of 2001.

10 Q And what happened in July of 2001?

11 A We received an e-mail at our headquarters here in Hamilton
12 -- excuse me. At that time it was in Princeton. We received
13 an e-mail from Susan Griffin, now working at News America
14 Marketing, to which she attached a press release announcing
15 that Kmart had signed a in-store marketing agreement with News
16 America Marketing, which included our floor program.

17 Q I'm showing you plaintiff's Exhibit 2226, which has not
18 been admitted yet. Could you turn to 2226, please? What is
19 2226?

20 A This is -- the front of 2226 is a record of an e-mail from
21 Dana Anderson, who at this time was working for News America
22 Marketing, to a list of recipients and copying Gary Henderson
23 with the subject Kmart press release.

24 Q Is there anything else other than the Kmart attachment and
25 an FYI on that document?

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1 A No, just the attachment.

2 Q Have you seen this before?

3 A I have not seen --

4 Q Well, let's go to the second page.

5 A We -- what I was trying to understand --

6 Q Oh.

7 A -- are you talking about the press release or the e-mail

8 or --

9 Q Have you seen the e-mail before?

10 A (No verbal response from the witness.)

11 Q Actually, let's move to Page --

12 A I don't know that I have seen that -- that e-mail before.

13 Q Okay. Let's look at Page 2 of that exhibit. What is

14 that?

15 A This is a press release.

16 Q Okay. Now, when you received this -- a copy of this press

17 release that announced that Kmart had signed with News America

18 for their advertising -- in-store advertising as well as their

19 floor programs, how did you react to that?

20 A When I looked at this press release, I -- it shocked me to

21 the degree that I almost got -- I almost got physically ill.

22 It was one of the most shocking things I had ever experienced,

23 to read this press release --

24 Q Without reading from --

25 A -- announcing this contract.

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1 Q Without reading from the press release, but going back to
2 when you first saw it, why were you so shocked?

3 A Because we had a contract with Kmart and a relationship
4 with Kmart that was very positive, and we had a year remaining
5 in our term -- in our contract with Kmart, and this came as a
6 complete shock to --

7 Q Were you --

8 A -- to me.

9 Q Were you still providing floor services for Kmart?

10 A Absolutely, yes.

11 Q Had you received any complaints from Kmart about your
12 services?

13 A We had not.

14 Q Now, what did you?

15 A The first thing I did was to talk to Richard, and
16 following that I got on the phone and tried to contact our
17 contact at Kmart.

18 Q Were you able to?

19 A Eventually, I was able to, yes.

20 Q Who were you able to talk to?

21 A I spoke with Tom Lemke, who at that time was the program
22 supervisor, and to his boss, Doug Meisner.

23 Q Was Ken Kramer still working at Kmart then?

24 A No.

25 Q And when were -- when did you speak to Tom Lemke and Doug

1 Meisner?

2 A This was I believe later that day or the next day
3 following the -- us receiving this press release.

4 Q How would you describe your state of mind in the 24 hours
5 after you received the press release?

6 MR. ABRAMS: Objection. Relevance, Your Honor.

7 THE COURT: Overruled. I'm sorry. Why would this be
8 relevant?

9 MS. CHUTKAN: I am trying to address the issue of the
10 urgency of his communications with Mr. Lemke and Mr. Meisner.

11 THE COURT: Sustained.

12 Q All right. What was the result of the phone call that you
13 had with Mr. Lemke and Mr. Meisner?

14 A The result of that phone call was that I scheduled a
15 meeting with them at Kmart headquarters.

16 Q And when did the meeting take place?

17 A The next day literally, I believe. I think the date was
18 July 27th at Kmart headquarters.

19 Q And who attended the meeting?

20 A I attended with Richard, and for Kmart, Doug Meisner.

21 Q What happened at the meeting?

22 A We had one hour for the meeting, and we presented -- we
23 had not met Mr. Meisner before, so we presented our program,
24 because he was not familiar with it. We also presented our
25 work experience, our business -- our relationship with Kmart

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1 and told him of the things that we had done and accomplished at
2 Kmart. And, thirdly, we brought our contract file and showed
3 him why we had a contract in place that would not allow for
4 Kmart, if they wanted to continue with floor advertising, to do
5 it with a competitor.

6 Q What was the result of the meeting?

7 A The result of the meeting was that Mr. Meisner, who had
8 listened to all that we had said, said to us I'm going on
9 vacation for a week, and you've given me a lot to think about.
10 When I get back, I will contact you.

11 Q Did they ever get back in touch with -- did he ever get
12 back in touch with you?

13 A No.

14 Q And what did you do to try and reach him?

15 A I tried to contact him by phone and was not successful.

16 Q Were you able to reach anyone at Kmart with regard to this
17 matter?

18 A At a certain point in trying to reach Mr. Meisner, I was
19 told that we should direct our communication to Kmart
20 attorneys.

21 Q Were you successful, Mr. Rebh, in keeping the Kmart
22 business?

23 A No.

24 Q How did -- but why weren't you successful?

25 A We filed suit against Kmart in -- and this was at a time

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1 when Kmart filed for bankruptcy, and the matter ended up in
2 Bankruptcy Court in Chicago.

3 Q When did you finally stop placing floor ads in Kmart
4 stores?

5 A In June of the following year, June, 2002.

6 Q And how was it your were able to continuing keeping ads in
7 after the contract?

8 A Our contract term ended in March of 2002, and in the
9 contract there is a three-month provision whereby we could
10 continue to place the advertising that we had sold prior to the
11 end of the term.

12 Q How much in Floorgraphics' ad revenues per year were
13 linked to the Kmart contract at the time you lost it?

14 A Approximately \$9 million a year.

15 Q And other than losing the revenue from the Kmart contract
16 did the loss of the contract affect your business in any other
17 ways?

18 A Yes.

19 Q And what ways were those?

20 A For the same reasons that our gaining the Kmart account
21 was so important to our company, it was just that devastating
22 to us to lose it. This represented thousands of stores all
23 over the United States geographically, so it gave our
24 advertisers national reach presence in stores all over the
25 country. As I mentioned earlier, it was a somewhat unique

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1 retailer in that there were grocery, mass merchandise, and drug
2 products sold, so that was our foothold in those three forms of
3 advertising. And, lastly, I think, you know, it was a real
4 signal to the marketplace that in losing such a prestigious
5 account that something perhaps was wrong with our company.

6 Q Now, before News America took the Kmart contract from you,
7 was there a time when you had considered selling your company
8 or doing some other type of business arrangement?

9 A Yes.

10 Q And did you have investment bankers to help you with
11 regards to that?

12 A Yes.

13 Q And when you -- when did you begin to work with investment
14 banks about a potential sale or other business arrangement for
15 your company?

16 A I think it was some time in the 2000/2001 time frame.

17 Q Now after News took the Kmart contract did you try to sell
18 your company or do some other kind of business arrangement?

19 A Yes, we had hired CIBC, a investment banking firm in New
20 York City. Our investors had introduced us to them, and we
21 hired them to explore strategic partnerships for our company.

22 Q Which companies did you talk to about doing that?

23 A CIBC, we talked --

24 Q No, which companies did you talk to about being bought by?

25 A Right. They contacted and arranged for us to meet with

1 most of the major media companies, General Electric that owns
2 NBC, Viacom that owns CBC, Disney that owns ABC, Clear Channel
3 that has many billboards and radio stations all over the
4 country. The major media companies including News Corporation.

5

6 Q And did you have any meetings with News Corporation?

7 A We did.

8 Q And how many times?

9 A As I understand it, there were three meetings with News
10 Corporation.

11 Q And how many did you attend?

12 A Two.

13 Q Okay. Now up until the end of 2002 had you continued to
14 do your own internal -- in-house sort of sampling of the
15 installation rates that you testified to about earlier?

16 A Yes.

17 Q And up until the end of 2002 can you describe for the jury
18 what your relations were -- what your interactions were with
19 CPGs?

20 A On the part of our sales people they spoke with their CPG
21 accounts virtually daily and met with them every other week,
22 monthly. I flew out and met with major CPGs to do account
23 reviews, looking at our -- the business we had done in the past
24 year, and also made presentations to CPGs when we had a major
25 announcement or initiative on new products or new innovations

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1 that we had developed such as animated floor ads, floor ads
2 that you could step on and that would give you a 15 second
3 jingle, things like that, that were exciting to the
4 marketplace.

5 Q Now, as part of your business, how often would you meet
6 with CPGs?

7 A Personally?

8 Q Yes.

9 A Well, as I say, I went out and presented when we were
10 -- would make major presentations, and I would say as far as
11 that, I would be out twice a month making those kind of calls.

12 Q Okay. Now up through the end of 2002 how would you
13 describe your relationships with CPGs?

14 A Our relationships with CPGs was excellent.

15 Q Okay. Now did there come a time when your relationships
16 with CPGs began to change?

17 A Yes.

18 Q When was that?

19 A By the end of 2002 the positive and constructive relations
20 that we had with CPGs gave way to questions from CPGs to us
21 regarding our execution of our programs of the way at which we
22 were actually installing our ads for them in the stores.

23 Q Up until this time what had your information showed you
24 about your installation rate?

25 A We installed at 90 percent or higher, and typically, as I

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1 say, 94/95 percent of all the ads that we contracted we placed
2 in the stores.

3 Q Let me show you plaintiff's Exhibit 178, which has --
4 which you saw and which has been admitted into evidence
5 already. If you could turn to it in your binder?

6 A Can I look at it on the screen?

7 Q Sure. I'm trying to find it here. Okay. This is the
8 letter that Mr. Henderson testified went out to all CPGs back
9 in -- I believe it was around December of 2002. Do you recall
10 hearing that testimony in court?

11 A Yes.

12 Q Now have you seen plaintiff's Exhibit 178 before?

13 A Yes.

14 Q And when did you first see it?

15 A I saw it in February of 2003.

16 Q At the time you saw it did you know who this letter had
17 gone out to?

18 A No.

19 Q I'm showing you what's been marked as plaintiff's Exhibit
20 174 also admitted into evidence. And this is --

21 MS. CHUTKAN: Sorry, Your Honor.

22 Q This is -- and I'm going to Page 2 of the exhibit. This
23 is a chart that you heard testimony from Mr. Henderson was also
24 sent out with the -- what I'll refer to as the Porco letter --
25 with the Porco letter to CPGs. Have you -- before yesterday,

1 had you ever seen this document?

2 A No.

3 Q Now, I want to direct your attention to the bar graph
4 -- the bar in the graph on the far right which shows
5 Floorgraphics at 49 percent. Did you see that?

6 A Yes.

7 Q Okay. Now also direct your attention back to Page -- to
8 plaintiff's Exhibit Number 178, the Porco letter where it says
9 -- and this would be the third paragraph starting, "Did you
10 know." "Did you know that most in-store marketing services
11 provide -- providers rely on retailers or subcontracted field
12 labor to execute the programs that you buy? This means that on
13 average less than half of the stores that you contracted for
14 are ultimately installed. Less than half. We know that from a
15 variety -- we know that from a variety of sources including
16 client feedback, industry intelligence, and a range of audit
17 studies. In fact, our latest audit studies confirm this, as
18 the results indicated that Floorgraphics' compliance averages
19 were once again below 50 percent." Now, what was your reaction
20 to seeing this letter and to seeing that statement that your
21 compliance averages are once again below 50 percent?

22 A I was stunned to read this letter on News America
23 corporate letterhead signed by the President of their company
24 putting in writing something that I knew not to be true and a
25 big lie. And while we did not know who it had been sent to, it

1 was addressed to "Dear Valued Client."

2 Q Now, had your compliance rates ever been 50 percent or 49
3 percent or in that range?

4 A No.

5 Q Did you respond to this letter?

6 A No.

7 Q Why not?

8 A We -- first of all, we didn't know who it went to, so we
9 did not know how to respond or who to respond to in this
10 letter. Secondly, we found ourselves in a bit of a dilemma.

11 Q What was the dilemma?

12 A We had a letter from one of the largest media companies in
13 the world going out accusing us of a lie, that we were cheating
14 our customers.

15 Q Well, what do you mean accusing you of cheating your
16 customers? In what way?

17 A This letter cut to the heart of our basic ability to do
18 business, because when we signed contracts with CPGs, that
19 basic bargain was if you pay us money, we will produce and
20 install this many ads in the stores. And what this letter said
21 was that we had accepted their money, but we had installed less
22 than half of what we had promised. It was accusing us of
23 cheating our customers. It was accusing us of running a scam.

24 Q So you said you had a dilemma. What was your dilemma?

25 A Our dilemma was with a charge this serious, we felt like

1 we were damned if we did and damned if we didn't.

2 Q What do you mean by that?

3 A If we went out to our customers and said did you get a
4 letter accusing us of cheating you out of hundreds of
5 thousands, if not millions, of dollars, it was possible they
6 hadn't received the letter, and we would've raised a question
7 about the fundamentals of our business and harmed ourselves
8 needlessly. On the other hand, if we didn't go out and talk to
9 advertisers and see if they had received the letter, the
10 possibility existed that this big lie would sink in with our
11 customers nationwide without us giving a response.

12 Q So what did you decide to do with regard to responding to
13 the letter?

14 A We did at that point the only thing that we thought we
15 could do, which was when all of our salespeople -- whenever we
16 sensed or came to know that this client had received the
17 letter, then we would try to meet with them and tell them the
18 truth about our compliance and the falsity of this letter from
19 News America.

20 Q And how did you -- when you say we tried to show them the
21 truth, how did you go about doing that?

22 A It was difficult, because what this letter did was break
23 the bond of trust that existed between us and our customers.
24 They trusted us to install and then honestly report back to
25 them as to what we had installed. And in order for us to

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1 defend ourselves, we had to say that even though this letter
2 said it was based on audits and once again we were only giving
3 half of the product that we had contracted for, that it was a
4 lie, and that put us in a very uncomfortable position.

5 Q So what did you actually -- how did you meet the force of
6 the letter. What did you -- when you said we tried to show
7 them the truth, how did you do that?

8 A We met with them. We showed them the results of our own
9 execution reports. We, in many cases, gave them assurance
10 about our installation company as to how prestigious and
11 accomplished, you know, they were. We prepared presentations
12 that evidenced the fact that we had always installed above 90
13 percent, and, as I say, typically 94 -- 95 percent.

14 Q Now after the Porco letter came out what happened to your
15 business relationship with CPGs?

16 A After the Porco letter came out -- and this is now end of
17 2002/beginning of 2003 -- our relationship with CPGs
18 dramatically changed.

19 Q Did any CPGs change their business relationship with you?
20 In other words, did any stop doing business or reduce business?

21 A Yes.

22 Q Which companies?

23 A Companies such as Kellogg's, Gillette, Conagra, Kraft,
24 many companies. The major clients that we had -- were doing
25 business with either stopped doing business with us all

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1 together or cut back on the advertising that they did with us.

2 Q Now, before -- you say that even before you had -- you
3 knew about the Porco letter, that some clients -- some CPGs had
4 started asking questions about your compliance. Can you give
5 an example of a CPG who was asking questions about your
6 compliance?

7 A Yes.

8 Q Which one was that?

9 A Kellogg's.

10 Q What happened with Kellogg's?

11 A Kellogg's informed us that they had conducted an audit of
12 our installation compliance.

13 Q And what was the result of that audit?

14 A They reported to us that their audit had reported results
15 in the 80s -- 80 percent -- in the 80s of execution compliance,
16 meaning that we had installed only 80 -- in the 80 percent of
17 our ads.

18 Q What did you do in response to this?

19 A The first thing I did was to call our operations people,
20 and given the information that I had say we have to address
21 this, and we had conference calls with our operations people
22 and ultimately included our installation company SPAR.

23 Q And what was the result of this?

24 A We took the information that we were given, and we checked
25 it out. We literally sent people to stores where Kellogg's

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1 audit had reported that an ad was not present, and we visited
2 those stores and asked store personnel whether there had been
3 an ad in their store and any information they knew about them.

4 Q When you were finished doing that, what did you do with
5 the information you had collected?

6 A I compiled all of this information and created a report
7 that I then presented to Kellogg's.

8 Q And when you presented your report to Kellogg's, what
9 -- what was your -- what did your investigation show that your
10 execution rate had been?

11 A It showed that our execution rate had been above 90
12 percent, and it reported on the stores that we had visited, and
13 that those stores where there were verified placement of ads
14 but that had been removed.

15 Q You heard testimony in court yesterday about people from
16 News taking up ads or defacing ads that you had put down.

17 A I did hear that.

18 Q Have you had reports of that before this trial?

19 A Yes.

20 Q Now, how did Kellogg's react to your presentation to them?

21 A I believe that they were not convinced by my presentation
22 and did not believe that we had installed more than 90 percent.

23 Q When you went to make your presentation to them, or at the
24 time you made your presentation to them were you aware of
25 whether they had received the Porco letter?

1 A Yes.

2 Q How did you know that?

3 A At the meeting with Kellogg's executives, there were about
4 six Kellogg's people in the room, I looked and saw the
5 clipboard that Ed Bauman of Kellogg's had at the meeting, and
6 on the top of his clipboard was the Porco letter. I recognized
7 it.

8 Q Did you speak to them -- to him about it?

9 A Yes.

10 Q What did you tell him?

11 A I said I see you have that letter, and I just want you to
12 know it's not true.

13 Q Did he have any response?

14 A No.

15 Q After you made your presentation to Kellogg's -- and where
16 did you make this presentation?

17 A At Battle Creek, Michigan, their -- Kellogg's
18 headquarters.

19 Q Okay. After you made this presentation to Kellogg's, how
20 much business did you continue to do with them?

21 A With that meeting, it effectively ended our business with
22 Kellogg's.

23 Q You testified that Kellogg's had done an audit of your
24 compliance rate. Did any other CPGs do audits of your
25 compliance rates that you were aware of?

1 A Yes.

2 Q Which one?

3 A Conagra.

4 Q What happened Conagra?

5 A Conagra contacted us at the end of 2002 and requested that
6 we pay for a third-party audit of our compliance in executing
7 ads for them in stores.

8 Q Did you pay for an independent audit?

9 A We did.

10 Q And what was the result of that audit?

11 A The company that they hired, The Roper Company, reported
12 that we had installed and executed at a 90 percent plus rate.

13 Q I want to show you what's been marked as plaintiff's
14 Exhibit Number 2296, which is not yet in evidence. What is
15 2296?

16 A This is the audit report prepared by The Roper Company on
17 behalf of Conagra.

18 Q And who paid for this report?

19 A We did.

20 Q Were you provided a copy of the report?

21 A After Roper provided it to -- reported it to Conagra,
22 Conagra gave us a copy.

23 Q And this has a Bates Number of FG-1218922.19. When
24 Conagra gave you a copy of this report, what did you do with
25 it?

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1 A We kept it in our files and made it part of our company
2 records.

3 Q Was it your business practice to keep audit reports?

4 A Yes.

5 MS. CHUTKAN: Your Honor, I would move for admission
6 of plaintiff's Exhibit 2296.

7 MR. ABRAMS: Objection. Hearsay, Your Honor. This
8 was prepared by someone else, and he just put a copy in his
9 file.

10 THE COURT: Yes, the fact that he put it in his files
11 wouldn't make it a business record admissible under 80 -- what
12 is it, 8036?

13 MS. CHUTKAN: I think it's also a report of regularly
14 -- it's a -- I think it's an evaluation report, Your Honor.

15 THE COURT: Yes, but the fact that he keeps it in his
16 files wouldn't make it a business record under that hearsay
17 exception.

18 THE COURT: Well, I think the fact that he routinely
19 receives these reports -- they are used in the business. They
20 are -- it was collecting business data information, and that he
21 keeps it in the same manner that he keeps all the other
22 installation reports should --

23 THE COURT: Yes --

24 MS. CHUTKAN: -- should suffice.

25 THE COURT: -- but that's his -- I mean that's just

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1 mail that comes to him, and he can treasure it or throw it
2 away, but I don't think that would make it the exception to the
3 hearsay rule.

4 MS. CHUTKAN: Okay.

5 BY MS. CHUTKAN:

6 Q After you got this report and paid for the report, got the
7 results of the report, did you continue to do business with
8 Conagra?

9 A We continued to do business with Conagra but on a greatly
10 reduced basis.

11 Q All right. Now, the -- having had to pay for this report
12 at the request of Conagra, how did that affect your cost of
13 doing business with Conagra?

14 A It increased our cost of business.

15 Q After the Porco letter went out, was there any change in
16 the number of retailers who asked you to bid on contracts?

17 A Yes.

18 Q And what was that change?

19 A To that point retailers routinely would ask us to bid on
20 retail contracts, and with the mailing of the Porco letter to
21 the marketplace -- and, frankly, in the last couple of days
22 I've really learned for the first time that this information
23 was shared with retailers. And following this letter there
24 were retailers who simply didn't ask us to even bid.

25 Q Can you name some of those retailers?

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1 A Yes.

2 Q Who are they?

3 A Winn Dixie, Roundees, Houchons, Foodtown, Piggly Wiggly
4 South Carolina are among them.

5 Q Okay. Now, I'm going to direct your attention to the end
6 of 2003. What was the state of Floorgraphics' floor ad
7 business both with retailers and CPGs by the end of 2003?

8 A By the end of 2003 we were a company in trouble.

9 Q How well was floor advertising working? You testified
10 that you did match panel studies to determine the effect of
11 floor advertising on driving sales. Remember that testimony?

12 A Yes.

13 Q And by the end of 2003 how well was floor advertising
14 working at driving sales by that point?

15 A If anything, it was better than it had been before,
16 because we had become more educated on what made better selling
17 ads. So the floor ads were even more effective.

18 Q And during this period how did floor ads compare to other
19 in-store promotions, that is shelf and cart, as a way to
20 increase sales?

21 A Floor advertising has proven to be the most effective in
22 increasing sales of the advertise product.

23 Q And let me ask you, Mr. Rebh, has Floorgraphics -- you
24 heard testimony about efforts by News to provide information
25 about Floorgraphics to retailers. Has Floorgraphics ever

1 missed a payment for a retailer?

2 A Never.

3 Q Now in 2003 did Floorgraphics have a website?

4 A Yes.

5 Q And can you describe the website for us?

6 A We had one public website, www.floorgraphics.com, and we
7 had two password-protected, confidential sites, an original and
8 then later a second site that had an additional security added
9 to it.

10 Q Now, the general website, the one that was available to
11 the public, who -- what information was on that website?

12 A This was general information about the company, about our
13 program, our products, generally to introduce somebody to our
14 company and program and show them how they could do business
15 with us.

16 Q Now, you said there were two password-protected websites.
17 One was the original website, and one was an updated website.
18 When did you set up the updated website?

19 A We set up the updated website in two thousand -- late
20 2002.

21 Q And when you set up the updated website, did you keep up
22 the original website?

23 A Yes.

24 Q And what was the difference between the updated website
25 and the original website?

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1 A The original website, which was www.floorgraphics.com
2 forward slash clients, called for a authorized user to enter a
3 username and password to enter the site, and in the site we
4 showed every single ad that we had sold and were placing in
5 stores organized by cycle.

6 Q Okay, and what about the updated ad -- website?

7 A In the fall of 2002 we added security and created a second
8 site. This was clients.floorgraphics.com and this called for
9 an authorized user to enter a username, a password, and an
10 additional access code, which then -- and this was for
11 retailers -- our participating retailers. And by entering that
12 access code unique to the retailer, they would see only those
13 ads that were going to be installed in their stores.

14 Q Okay, and for clarity, on the original website you could
15 see all the ads you were running in all your stores. Is that
16 right?

17 A Yes.

18 Q Okay, and on the updated site you could just see -- a
19 retailer would just see the ads that were going in their
20 stores. Is that right?

21 A Yes.

22 Q Okay, and my questions from here are going to be geared to
23 the original site, the one where you could see all the ads.

24 A Yes.

25 Q Okay. Who was in charge of updating and maintaining your

1 websites?

2 A Our IT Department and our Graphics Department.

3 Q And on the original site, the password-protected website
4 where you could see all the ads, what type of information was
5 contained? You said there were -- it showed the ads, but
6 beyond just pictures, what else was on it?

7 A Again, organized by cycle within the year, advertising
8 cycle, you would see a picture of the ad. There would be a
9 unique number associated with that ad, which indicated the year
10 and cycle and a unique following number. You would have
11 installation instructions on how to install that ad in the
12 store, and you would also have a reference to the specific
13 products advertised by that ad.

14 Q Now you said the site showed all your ads that were
15 running in all your stores. What was the time period of these
16 ads that you could see on the website? Old ads, current ads,
17 or upcoming ads?

18 A All of that. You would see our past cycles, all of the
19 sales that we had one in the past. You'd see current, and then
20 you would see a couple of cycles into the future for this sales
21 that we had made.

22 Q Okay. And where was the information that you could access
23 on the website? Where was this information stored and
24 maintained?

25 A This was maintained on our company computer server.

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1 Q Okay. I'm going to show you -- ask you to look at
2 plaintiff's Exhibit 512, which hasn't been admitted into
3 evidence yet.

4 A Is it here?

5 Q It is, 512, 5-1-2, or it should be.

6 A Yes.

7 Q Okay. What is this?

8 MR. ABRAMS: Document -- excuse me, counsel. We have
9 a 511A in our book but not a 512.

10 MS. CHUTKAN: Oh.

11 MR. ABRAMS: Oh, wait. Wait. I'm sorry. We just
12 found it.

13 MS. CHUTKAN: Oh, here it is.

14 MR. ABRAMS: I apologize. Sorry.

15 MS. CHUTKAN: Thank you, Dan. We've got it.

16 Q What is 512?

17 A This is the screen shot of what would appear on the
18 computer screen when someone would access www.floorgraphics.com
19 forward slash clients, which is our password-protected site.

20 Q Okay, so you -- for the non-computer literate among us,
21 which -- in which I include myself, you type in
22 www.floorgraphics.com back -- forward slash clients, and you'd
23 get this page? Is that right?

24 A Yes.

25 Q And this is a page you would get back in what year, what

1 time period?

2 A This could be in 2002 --

3 Q Okay.

4 A -- for example.

5 Q And you've seen this before?

6 A Yes.

7 Q And this was on your -- this was the portal page of your
8 website. Is that right?

9 A Yes.

10 MS. CHUTKAN: I would move for admission of
11 plaintiff's Exhibit 512.

12 MR. ABRAMS: No objection.

13 THE COURT: It may be admitted.

14 Q On this screen shot there's a box that says prompt that's
15 blocking the writing?

16 A Yes.

17 Q What's that?

18 A This block calls for a authorized user to enter their
19 username that they've been provided and a password, and by
20 doing those two things correctly and clicking on okay, they
21 would gain entry into the site.

22 Q Okay. Thank you. Now, how would retailers get their
23 username and password?

24 A They would get their username and password from the
25 notification that we sent to retailers by e-mail every cycle.

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1 Q And did anyone in your company have -- get -- also get
2 access or get a username and password or access to the site?

3 A There were certain authorized employees that were given
4 the username and password as well.

5 Q Okay. Now you said your authorized retailers would
6 receive a user name and password. How would they -- in what
7 manner would they receive that?

8 A Every cycle we sent by e-mail a notification to the
9 retailer where we said these are the ads that are going to be
10 installed in your stores during the following cycle, and at the
11 bottom of that notification it would tell them the username and
12 password, so that they could access this site and, if they
13 wished, find those ads on the website that we had told them
14 were going to be installed in their stores.

15 Q Okay. I'm going to ask you to look at plaintiff's Exhibit
16 507. Are you there?

17 A Yes.

18 Q And what is 507?

19 A This is an example of one of those notifications that we
20 would send to retailers every four weeks.

21 Q And is this an actual notification that would -- is this a
22 copy of a notification that was actually sent by you to a
23 retailer?

24 A Yes.

25 Q Who was a retailer?

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1 A This retailer was the New Orleans division of A&P
2 Supermarkets.

3 Q And when was it sent?

4 A This was sent on August 19th, 2002.

5 MS. CHUTKAN: Your Honor, I would move for admission
6 of plaintiff's Exhibit 507.

7 MR. ABRAMS: No objection.

8 THE COURT: It may be admitted.

9 Q Okay, so this is a notification that you sent and up at
10 the top --- if we look at the top where it has the date --

11 MS. CHUTKAN: Yes.

12 Q So it's August 19th, 2002 to A&P New Orleans, and it's for
13 Cycle 10, all right, which would've been September 9 through
14 October 6, 2002.

15 MS. CHUTKAN: And then can we go down to -- yes.
16 Actually, all the way, the whole -- yes, thank you.

17 Q And it says, "To view the actual ads that will be placed
18 in your stores, point your browser to," the site you described,
19 "www.floorgraphics.com forward slash clients, type in access."
20 There's your user name, and there's -- there's your user name,
21 and there's a password. And is this a -- this -- is this the
22 installation notice that you would send out routinely to
23 authorized retailers?

24 A Yes.

25 Q Okay. How often would you send these types of

1 notification?

2 A Prior to each cycle -- each advertising cycle, because
3 this was telling them what was going into their stores.

4 Q And how many -- in 2003 about how many retailers received
5 password information in a cycle?

6 A In excess of a hundred.

7 Q Okay, and did you ever change the password?

8 A We did.

9 Q How often?

10 A About every six months.

11 Q Okay. Now, did there come a time when an issue came up
12 regarding the security of your website?

13 A Yes.

14 Q And when did it come up?

15 A January, 2004.

16 Q In January, 2004 what was going on with Floor -- what was
17 going on with your business at that time?

18 A By January, 2004 we had lost the Kmart account, and the --
19 we were in the midst of negotiations for our only remaining
20 anchor chain -- national chain, which was Safeway.

21 Q And what were you negotiating for?

22 A We were negotiating for the extension of that contract,
23 which would expire later that -- in -- this is January, 2004.
24 It'd expire mid-year 2004.

25 Q How important were these negotiations to your business?

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1 A They were critically important to our company.

2 Q Why?

3 A With Safeway, we had an anchor chain to attract CPG
4 advertisers who would then also advertise in the smaller chains
5 that we had on our program. Without Safeway and without that
6 attraction to advertisers, we were far less viable as a
7 company. It was critically important.

8 Q All right. Now, during these negotiations you said it --
9 you testified an issue came up at the time these negotiations
10 were going on an issue came up with regard to the security of
11 your website. What was the issue?

12 A The issue was that we had -- we discovered that our
13 password protected website had been broken into with
14 unauthorized access by unauthorized users.

15 Q What caused you to realize that there was an issue with
16 regard to this? What caused you to realize there had been a
17 break in?

18 A In January, 2004 we were contacted by Smuckers, a --

19 MR. ABRAMS: Objection, Your Honor. Hearsay.

20 MS. CHUTKAN: Not being offered for the truth of the
21 matter, Your Honor. It's being offered to show why they looked
22 into the matter.

23 MR. ABRAMS: On the contrary, Your Honor, there is
24 multi-level hearsay involved in this answer.

25 THE COURT: I don't know what the answer is going to

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1 be. Maybe let's just treat it with as a result of that
2 communication, what did you do. Can you do that?

3 Q As a result of what Safe -- of what Smuckers told you,
4 what did you do?

5 A We investigated as to how information had fallen into our
6 competitors hands, News America Marketing, that was not public
7 and that was known only to us and Smuckers.

8 MS. CHUTKAN: I think to put that answer into
9 context, I can try and be -- have it very narrow --

10 THE COURT: No, you can keep going.

11 MS. CHUTKAN: Okay.

12 THE COURT: We're following.

13 MS. CHUTKAN: Okay.

14 Q So what did you do?

15 A We -- our IT people looked at our password-protected site
16 to see if there was any access to that site by unauthorized
17 users.

18 Q And what did they find?

19 A They discovered that beginning in October of 2003 through
20 the time that we discovered this, in January of 2004, in fact,
21 right up to the day before, there had been unauthorized
22 accesses into our system by people utilizing computers
23 registered with an IP address to News America Marketing. IP
24 address is registered to News America Marketing in Connecticut.

25 Q How many times had these computers registered to News

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1 America Marketing accessed your website?

2 A There were 11 separate accesses over that four-month
3 period.

4 Q Okay. I'm going to show you what's been marked as
5 plaintiff's Exhibit 511A, which is not yet in evidence. What
6 is plaintiff's Exhibit 511A?

7 A This is a printout of all of the cycles of advertising
8 that were accessed through these unauthorized break ins
9 printing out each page, each -- and including each ad that was
10 available to the user in these unauthorized accesses.

11 Q And who -- where did this -- where does information that's
12 in 511A come from?

13 A This comes from that password-protected website and our
14 computer server.

15 MS. CHUTKAN: Your Honor, we would move to admit
16 plaintiff's Exhibit 511A.

17 MR. ABRAMS: No objection.

18 THE COURT: Very well. It may be admitted.

19 MS. CHUTKAN: Oh, this is a -- that's right. Excuse
20 me. This is actually something we don't have up. We have a
21 hard copy of it. I'll pull up mine. I'm actually not going to
22 -- I'm just going to ask Mr. Rebh some questions about this.

23 Q Mr. Rebh, 511A is a whole lot of pages divided by cycles
24 of photographs of ads and instructions -- well, you tell us.
25 What -- describe these photographs and the information

1 contained in here.

2 A These are the pictures of each ad that we sold organized
3 by advertising cycle. And, as I said earlier, it indicates on
4 the left what the brand is, what the CPG name is, what -- and a
5 unique number is associated with it, which identifies that ad
6 by advertising cycle and a unique number. Underneath the ad
7 are the installation instructions for that ad in the stores,
8 and, as I say, in some cases there is also information as to
9 exactly what products, if there's a range of products, that are
10 advertised by this ad.

11 Q Okay. Now, do you consider the information contained on
12 your password-protected website as reflect -- that was accessed
13 by the computers registered to News America and as reflected in
14 plaintiff's Exhibit 511A, did you consider this information to
15 be confidential?

16 A Yes.

17 Q Why?

18 A Because in the hands of a competitor, this information
19 would be harmful to us.

20 Q You heard Mr. Abrams in his opening statement say that the
21 site just contained a lot of pictures. How would all these
22 pictures, as he describes it, be harmful to your company in the
23 hands of a competitor?

24 A Because these aren't just pictures.

25 Q What are -- what's --

1 A This --

2 Q What's the information that could be used here?

3 A By advertising cycle, this is the exact and complete
4 record of each and every sale that our company made not only in
5 the past, so going back many cycles, but also current and for
6 cycles into the future.

7 Q How would a competitor use this information to gain a
8 competitive advantage?

9 A With this information a competitor would know not just an
10 estimate or a sample of what ads we had sold --

11 MS. CHUTKAN: Excuse me. We could put that up.

12 A Not just an estimate or a sample of the ads that we had
13 sold, but an exact and comprehensive -- in other words,
14 everyone that we had sold again in the past, present, and into
15 the future.

16 Q Why is that information useful?

17 A Because -- I would say for three reasons. To a competitor
18 this information would allow them to contact an advertiser that
19 we had sold to attempting to sell advertising for their own
20 benefit. Secondly, it would give them, knowing who we were
21 selling to, a indication of -- that they should go to the
22 competitor of the advertiser that we had sold to and attempt to
23 sell them advertising. But probably more importantly, by
24 representing a complete list of all the ads that we had sold,
25 it would give a competitor a critical piece of information in

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1 computing, in figuring our media revenues. In other words, the
2 revenues that we had in our company as a result of selling all
3 of our ads.

4 Q How would you -- how would it give you the component that
5 you needed to figure out revenue?

6 A In order to figure out revenue, which is how much money we
7 would as a company take in, you really need to know three
8 things. You need to know how many stores we are installing ads
9 in. You secondly need to know how much we're charging per
10 program -- per advertising program. And the last bit of
11 information you would need is how many programs. If you --

12 Q And that is how many ads?

13 A How many ads.

14 Q Okay.

15 A So by multiplying those three factors together, you could
16 get -- you would get a revenue figure.

17 Q And how did these ads -- how did this information that you
18 get on the website help fill in those numbers?

19 A Because again as distinct from going out into stores and
20 looking at what ads were on the stores floors today, which
21 would represent a sample of all -- of all the ads that might be
22 placed, this gave an exact number.

23 Q You heard testimony earlier in the trial about doing store
24 surveys, which I believe there was testimony that it's sort of
25 industry practice to go out and see who's running ads in

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1 stores. Did you hear that testimony?

2 A Yes.

3 Q If you got this information off of a password-protected
4 website, would you need to go and do those kinds of surveys?

5 A No, and it would give you information that perhaps you
6 could not get, which is ads that had been placed in prior
7 cycles that you obviously couldn't go in stores and determine
8 at this time.

9 Q And future? What about future ads?

10 A And future ads that we had sold yet had not gone into
11 stores you would know.

12 Q So in the three things that you need to know for revenue
13 that you described, this would provide you the number of ads.
14 Is that right, that factor?

15 A Yes, this would provide you the exact number of ads --

16 Q Exact.

17 A -- together with information that a competitor would
18 already know.

19 Q And that would be the rate?

20 A They would know the number of stores in our network that
21 was -- I saw testimony yesterday that that was information
22 known to News America. That's the first number. The second
23 number is what do we charge for these programs, the rate. The
24 way that News America knows that number is that they are
25 competing with us with exactly the same CPGs for many of the

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1 same programs. So the amount that we charged for a floor ad
2 program was well known to our competitor. What they didn't
3 know and what they didn't know exactly was how many ads we had
4 sold, and this password-protected site gave them that
5 information.

6 Q Now, how would this information used in calculating your
7 revenue, as you described -- how would that be useful in
8 retailer negotiations?

9 A At this time we were bidding for retail contracts, and if
10 a competitor knows what your, in this case, floor advertising
11 revenues are, it gives them an unfair advantage in pegging or
12 establishing their own bid against us in competition with us to
13 win that retail contract.

14 Q And did you win the Safeway contract?

15 A We did not.

16 Q Why didn't you win it? What happened?

17 A At least two factors. Number one, the information
18 contained in this site by giving our competitor a view of our
19 revenues allowed them to make a bid to defeat our bid, and,
20 secondly, I may say that I saw in testimony yesterday for the
21 first time that information regarding -- the false information
22 regarding our installation compliance at 49 percent was
23 presented to Safeway in -- by News America in negotiating
24 against us.

25 Q Now, after you found out -- when your IT Department did

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1 this investigation and found out that there had been these
2 number of unauthorized entries and who the computers were
3 registered to, what did they do? What did you all do?

4 A Well, the first thing we did was shut down the site. We
5 noticed that there had been access by News America the day
6 before, and we shut down the site that day.

7 Q What else did you do?

8 A The next thing we did was we felt it -- we felt obligated
9 to contact Bill Berkley I mentioned earlier, who was -- who our
10 Board -- our Board member -- Board of Directors, and informed
11 him of this computer breach and the possible implications of
12 it.

13 Q And did you do that?

14 A We did.

15 Q What did -- did you -- and did you direct him to do
16 anything or request that he do any -- take any action?

17 A We did, yes.

18 Q What action was that?

19 A He forwarded a memo that we wrote for him to the Chief
20 Financial Officer of News Corporation.

21 Q Okay, and who did he forward that to?

22 A The CFO, Chief Financial Officer, of News Corporation is
23 David DeVoe.

24 Q I'm showing -- could you look at plaintiff's Exhibit 523?
25 523 is two pages. Actually, three pages. What is 523?

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1 A 523 is -- now, 523, the whole document or just this one
2 page?

3 Q No, it's a whole -- it's all three pages.

4 A The whole document. 523 is a copy of the e-mail that
5 -- excuse me -- the fax that Bill Berkley sent to the Chief
6 Financial Officer of News Corporation, David DeVoe, which
7 attached our e-mail to Mr. Berkley describing the break in.

8 Q All right, and did you -- is this what you asked Mr.
9 Berkley to send to News America?

10 A Yes.

11 Q And the e-mail that is attached to the fax -- well, Page 1
12 -- the first page of plaintiff's Exhibit 523, is that a fax
13 cover sheet?

14 A Yes.

15 Q And the other two pages, is that the memo or e-mail that
16 you wrote to Mr. Berkley describing what had happened?

17 A Yes.

18 MS. CHUTKAN: We would move for admission of
19 plaintiff's Exhibit 523.

20 MR. ABRAMS: No objection.

21 THE COURT: Very well. It may be admitted.

22 Q Is that the fax cover page?

23 A Yes.

24 Q And it's to David DeVoe, who you testified was an
25 executive at News Corporation?

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1 A Yes.

2 Q And it was dated March 3rd, 2004?

3 A Yes.

4 Q Could we turn to the second page? Oh, I'm sorry. Let's
5 just go to the bottom. And the transmittal page says, "Dear
6 Mr. DeVoe, Mr. Berkley asked that I forward to you the
7 accompanying information." Correct? Is that Page 2?

8 A Yes.

9 Q Thanks. I'm not going to read the -- both pages, but is
10 this the memo or the first page of the memo that you wrote to
11 Bill Berkley describing what you had discovered with regard to
12 your computer system?

13 A Yes.

14 Q All right. Thank you. What response did -- well, did Mr.
15 Berkley or did you get a response from News America after this
16 was sent?

17 A No.

18 Q Now, you had mentioned a few minutes ago that you -- at
19 the time you found out about this unauthorized access, this
20 break in to your system, that you had been in the middle of
21 negotiations for the Safeway contract, which you ultimately
22 lost. Do you remember that testimony?

23 A Yes.

24 Q How important a retailer was safeway for you?

25 A At this point Safeway was critically important to us for

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1 the reasons that I said earlier, that it was our -- with the
2 loss of Kmart, it was our lone remaining national chain, and
3 the negotiations for Safeway were for a ten-year contract. So
4 this was especially important, because it really indicated
5 whether we would be viable for ten years or not.

6 Q Now, when had you first signed with Safeway?

7 A We first signed with Safeway in June for a floor
8 advertising contract -- June of 2000 and for a contract for the
9 shelf and cart programs in October of 2000.

10 Q Now, you said you did not end up getting the Safeway
11 contract. Was that because the money was at a level you could
12 not afford?

13 A Yes.

14 Q Now, how did -- how did loss of the Safeway contract
15 affect your business?

16 A In short, the loss of the Safeway contract marked the
17 beginning of the end of our company.

18 Q In what way?

19 A In the way I've described, which is our ability to attract
20 CPG advertising to go into an anchor chain of the size of and
21 prestige of Safeway. Additionally, the loss of Safeway on the
22 heels of the loss of Kmart sent a absolutely devastating and
23 negative message to the marketplace eroding the confidence of
24 CPGs in our future viability as a company and sending a clear
25 signal to other retailers that our future was grim.

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1 Q After you lost Safeway did you lose any other retailers?

2 A We did.

3 Q Which ones?

4 A Winn Dixie, Piggly Wiggly South Carolina, Food Lion, and a
5 number of other retailers -- smaller.

6 Q Now, oh, Mr. Rebh, I don't want to forget this. You heard
7 Gary Henderson testify, I believe it was the day before
8 yesterday, that one of the reasons he described your company as
9 unethical, was because when he was hired, he saw large cases of
10 Campbell's soup and Crunch 'N Munch in your offices and was
11 told that you bought those to effect match panel study results.
12 Was any of that true?

13 A None of it is true.

14 Q Did you keep food in your office, sir?

15 A As I -- the answer is yes. As I testified earlier, we
16 lived in our office. We had a full kitchen, and we kept food,
17 including cases of food, in the office.

18 Q Did you ever buy cases of products that were the subject
19 of match panel studies to effect the results of match panel
20 studies?

21 A No.

22 Q I'm just going to ask you a final few questions. How much
23 floor advertising do you do today?

24 A Less than \$2 million.

25 Q And when you -- say at the time of -- the time that -- end

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1 of 1998, how many employees -- you started -- you testified you
2 started out with about four. By the end of 1998 about how many
3 employees did you have?

4 A By the end of 1998?

5 Q 1999, that area.

6 A That was probably in the 50-employee range.

7 Q What was the most employees? What was the peak of number
8 of employees that you had?

9 A Over 85.

10 Q And as a result of the decline in your floor business,
11 have you had to lay off any employees?

12 A Yes.

13 Q How many?

14 A We are a company of less than 25 employees today.

15 Q Did you have to -- of the employees you had to lay off,
16 were any of those for quality reasons?

17 A No.

18 Q Why did you have to lay off employees?

19 A We held on to our employees -- excuse me -- as long as we
20 could and could financially handle it, and at the point where
21 it was not, we had to lay off employees -- some 60 employees.

22 MS. CHUTKAN: Thank you.

23 THE COURT: All right. We'll take a luncheon break
24 before we go to cross. 2:15, ladies and gentlemen. Please
25 step down. Thank you very much.

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1 THE CLERK: All rise.

2 THE COURT: Do not discuss the case or allow anyone
3 to discuss the case with you at your lunch. The witness may
4 step down.

5 (Jury out)

6 THE COURT: Now, counsel I've got a 2:00 sentencing,
7 so we'll have to work around that, and that should not take
8 more than 15 minutes maximum. Okay. If you have anything you
9 --

10 (Recess)

11 * * * * *

C E R T I F I C A T I O N

We, TAMMY DeRISI and PATRICIA C. REPKO, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Tammy DeRisi DATE: March 9, 2009
TAMMY DeRISI

/s/ Patricia C. Repko
PATRICIA C. REPKO

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