

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	January 10, 2005
Plaintiff,	:	
	:	9:33 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
. . . . .	:	

VOLUME 46  
MORNING SESSION  
TRANSCRIPT OF TRIAL RECORD  
BEFORE THE HONORABLE GLADYS KESSLER  
UNITED STATES DISTRICT JUDGE

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23 Proceedings reported by machine shorthand, transcript produced  
24 by computer-aided transcription  
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1 P R O C E E D I N G S

2 THE COURT: We are now ready for United States versus  
3 Philip Morris, CA 99-2496.

4 Is Mr. Milstein present?

5 MR. BRODY: Yes, he is.

6 THE COURT: Yes, he is. And, Mr. Milstein, you are  
7 still under oath this morning.

8 THE WITNESS: Yes.

9 THE COURT: Mr. Brody.

10 RONALD S. MILSTEIN, Government's witness, RESUMES

11 DIRECT EXAMINATION (Cont'd.)

12 BY MR. BRODY:

13 Q. Good morning, Mr. Milstein.

14 A. Good morning.

15 Q. When we left off on Friday we had talked about the Lorillard  
16 corporate policies, corporate policy, statement of principles  
17 and we talked about that as one aspect of what you called an  
18 effort to reduce youth consumption of tobacco products.

19 And I want to start this morning and conclude the  
20 examination by talking about the other part of what you  
21 identified, which was the Lorillard Youth Smoking Prevention  
22 Program. Is that all right?

23 A. Yes.

24 Q. And, again, this falls within the third bullet on our  
25 outline, Lorillard and Youth Smoking. Is that all right?

1 Lorillard had already hired an advertising agency and  
2 begun designing the media campaign that was part of its Youth  
3 Smoking Prevention Program in the months before the MSA was  
4 signed; right?

5 A. Yes.

6 Q. And so in this respect the MSA represented no change on the  
7 part of Lorillard in terms of what it was doing in the YSP area;  
8 right?

9 A. The YSP was not required under the MSA, that's right.

10 Q. In fact, it's not something that Lorillard decided to do as  
11 a result of entering into the MSA. Lorillard was already  
12 developing this media campaign; right?

13 A. I think we were developing the campaign during the last part  
14 of the negotiations. We had already gone through the proposed  
15 resolution and the McKean bill. We knew what the issues were  
16 and we knew what kind of a program that we felt was right for us  
17 to do considering all of the issues.

18 Q. You were personally involved in the development of the  
19 program; right?

20 A. Yes, I was.

21 Q. And the development process ultimately led to the creation  
22 of the Tobacco is Whacko Campaign. That's whacko with an "H",  
23 W-h-a-c-k-o; is that right?

24 A. I believe that's right.

25 Q. And that was a media campaign that was run by Lorillard?

1 A. Yes.

2 Q. It featured television advertisements, print media, and a  
3 website, all of which bore the tag line that was created for the  
4 program, Tobacco is Whacko if You're a Teen; right?

5 A. Yes.

6 Q. And the website featured screen savers that kids could  
7 download, things they could pull up and make as wallpaper on  
8 their computers, all bearing that same tag line, Tobacco is  
9 Whacko if You're a Teen?

10 A. Yes.

11 Q. And one of the ways that the campaign and the tag line were  
12 developed was through qualitative focus groups undertaken by an  
13 organization called Youth Intelligence. Is that right?

14 A. Yes. The focus groups were run by various vendors, if I  
15 remember correctly. Youth Intelligence was one of them, yes.

16 Q. The Lorillard also commissioned quantitative research in an  
17 effort to see how different themes and concepts would be  
18 received by teens and preteens, right?

19 A. Yes, I think we did that on more than one occasion.

20 Q. Now, Youth Intelligence, they only did qualitative as  
21 opposed to quantitative testing; right?

22 A. I believe that's right. I believe that's all they did for  
23 us.

24 Q. That's good. My question was focused on what they did for  
25 Lorillard in the auspices of the development of this campaign.

1 And all they did was qualitative work; right?

2 A. I believe so. I don't remember whether they got involved  
3 with the surveys and the quantitative studies.

4 Q. And for the benefit of the court, this qualitative research  
5 was focus groups?

6 A. Yes.

7 Q. You would get a few kids into a room and you would run  
8 things by them, and you write down what they think of it and  
9 their impressions, and then they have people who prepare reports  
10 for Lorillard on that; right?

11 A. Basically, yes.

12 Q. Youth Intelligence is a New York-based research and  
13 consulting company?

14 A. Yes.

15 Q. And it's known for doing work on teenagers and what they  
16 call tweens, which is sort of in between years, between  
17 childhood and teenage years; right?

18 A. Yes.

19 Q. Its president, you understand, Jane Buckingham, oversaw the  
20 work that Youth Intelligence did for Lorillard's Youth Smoking  
21 Prevention Program?

22 A. I remember a woman named -- I believe it was Christie Doig.  
23 I don't remember the woman you're referring to.

24 Q. Christie Doig also worked at Youth Intelligence, right?

25 A. Yes, she did.



1 Q. Before that she was at MTV, I believe?

2 A. I don't know.

3 Q. Now, I want to hand you an exhibit, U.S. Exhibit 87874, and  
4 I want to ask you if you recognize this as one of the reports  
5 that Youth Intelligence created for Lorillard?

6 A. Yes.

7 Q. And this indicates that it was prepared on February 24,  
8 2000; is that right?

9 A. That's right.

10 Q. The document is entitled Youth Smoking Prevention Campaign,  
11 Teen Research, Phase II; correct?

12 A. Yes.

13 Q. And this is during the time period that you were still  
14 designated as Lorillard's executive tasked with identifying ways  
15 to reduce youth consumption of tobacco products, isn't it?

16 A. Yes.

17 Q. The third -- I want to go to the third page of the document  
18 and look at the section there indicating background objectives.  
19 And the overall -- it indicates the overall objectives for this  
20 study are to evaluate new creative executions in the youth  
21 smoking prevention communications to determine response to the  
22 overall message, likes, dislikes, perceptual/attitudinal  
23 effects, behavioral implications, relevance of communications  
24 for the target audience.

25 Do you see that?

1 A. Yes.

2 Q. Would you agree with me that that was the purpose of what  
3 Youth Intelligence was doing for Lorillard?

4 A. Yes.

5 Q. One of the things that Youth Intelligence evaluated was a  
6 program tag line, Tobacco is Whacko if You're a Teen. Is that  
7 right?

8 A. Yes. I think it's fair to say that during their research  
9 they researched the effectiveness of the campaign, they  
10 researched different aspects of it, including the tag line.

11 Q. And we see in this document, the tag line addressed on page  
12 13 middle of the page, if we can pull that up, do you see that?

13 A. Yes.

14 Q. And I want to go through a couple of the bullet points.

15 The first thing that they indicated about the tag line,  
16 although memorable, respondents complain that the tag line  
17 Tobacco is Whacko if You're a Teen detracted from the  
18 commercials. They found the slogan distracting from the actual  
19 message. The slogan sucks. It killed the commercial. The  
20 slogan isn't cool.

21 Did I get that right?

22 A. That's what it says, yes.

23 Q. And they also, in their report, told Lorillard the, If  
24 you're a teen portion caused the negative reactions and a great  
25 deal of confusion among respondents. Most teens complained that

1 the phrase should apply to everybody. Why are they singling us  
2 out? Some believe it implies permission to all nonteens. They  
3 also claimed it weakened the power of the message.

4 Did I get that right?

5 A. That's what it says, yes.

6 Q. Despite these reported results from Youth Intelligence,  
7 Lorillard went ahead and included the full tag line as part of  
8 its Youth Smoking Prevention Media Campaign, including  
9 television and print and the website; right?

10 A. Yes, we did.

11 Q. And this decision was made despite the internal expression  
12 of concern?

13 THE COURT: I want to be clear about one thing.

14 Were these focus groups conducted before you started  
15 the campaign?

16 THE WITNESS: The research that I'm reading from now is  
17 a Phase II Research. It was after the initial ads had run in  
18 the late fall of 1999, and it was in anticipation of new ads to  
19 be created to run in 2000.

20 So, no, it's not before we ran, it's actually after we  
21 ran our first series of ads.

22 THE COURT: And before you were starting a second  
23 series?

24 THE WITNESS: Yes, that's correct.

25 THE COURT: All right. Mr. Brody, I interrupted you.

1 (Discussion off the record.)

2 THE COURT: I would like to proceed. I think counsel  
3 are able to follow what's going on.

4 So go ahead, Mr. Brody. You need to restate the last  
5 question.

6 BY MR. BRODY:

7 Q. Actually, I want to ask Mr. Milstein a couple of follow-up's  
8 to the court's question.

9 First of all, this wasn't the first time that  
10 Youth Intelligence did research on the campaign; right?

11 A. That's right.

12 Q. They did research before Phase I as well?

13 A. I believe they did.

14 Q. And the second phase, once it got going, still featured the  
15 same tag line; right?

16 A. Yes. The tag line was not changed, to my knowledge, between  
17 the first series of campaigns -- I'm sorry -- advertisements and  
18 the second.

19 Q. This decision was made despite the internal expression of  
20 concern about the research result by executives at the company;  
21 right?

22 A. Yes. We looked at the recommendations, we looked at the  
23 information that was provided by this group as well as the  
24 information that was provided by Bozell, the advertising agency,  
25 and a couple of other market research people, organizations that

1       were involved, and we decided that the tag line was memorable.

2               The tag line was useful, especially in the print. It  
3       was very briefly shown in the ads on television. It was  
4       memorable, which is something that we really wanted it to be,  
5       got their attention.

6               For a variety of reasons, after reviewing carefully all  
7       of this research and their recommendations, we decided that we  
8       would continue with the tag line and did until I believe 2001.

9       Q. Well, it went beyond 2001, didn't it? You were still using  
10      the tag line on the "Butt Out Now" website in the year 2002 and  
11      you carried that forward from that point as well?

12     A. At some point the tag line was no longer used as part of the  
13      campaign. It just was a question of refreshing the campaign as  
14      we went forward. At some time the message campaign changed, the  
15      effort changed, and we no longer used that tag line.

16     Q. The decision to keep using the tag line at this point in  
17      time, 2000, was a business decision; right?

18     A. It was a business decision, yes. It was made by  
19      Mr. Orlowsky, and I was, of course, part of that decision, and  
20      it was agreed that if we thought the tag line had any  
21      detrimental effect on the ads, we wouldn't use it.

22              But, in fact, that it was directing the message to the  
23      target audience and because, not necessarily in this research  
24      but in other research, we got very, very good reactions to the  
25      campaign as a whole, we felt that we would stay with it.

1 Q. There's a difference between what you looked at, isn't  
2 there, separating the tag line out from some of the other things  
3 that Lorillard was doing?

4 A. I'm not sure I understand your question.

5 Q. Well, let me move on here. Maybe we can take a look at some  
6 of the concerns.

7 You know Victor Lindsley; right?

8 A. Yes.

9 Q. He is a senior group brand director for Newport; right?

10 A. Yes.

11 Q. And during the year 2000 he was a group brand director?

12 A. I believe so. I don't know his exact titles during that  
13 period of time.

14 Q. Today, his duties encompass all of the marketing and  
15 planning activity for Newport cigarettes; right?

16 A. Yes.

17 Q. And he reports directly to George Telford, vice-president of  
18 brand marketing?

19 A. Yes.

20 Q. And Mr. Lindsley was involved in the process of developing  
21 Lorillard's youth smoking prevention media campaign; correct?

22 A. He was one of the people at Lorillard involved, yes.

23 Q. And he reviewed the research done by Youth Intelligence?

24 A. Yes, he did.

25 Q. If we go back to U.S. Exhibit 87874, we see at the bottom of

1 page 3 that the focus groups that were conducted by the  
2 Youth Intelligence involved 10 to 15-year-old boys and girls;  
3 right?

4 A. Yes.

5 Q. And Mr. Lindsley, the group brand manager for Newport, was  
6 also able to access and review the quantitative research on  
7 teens that was gathered for Lorillard during the Youth Smoking  
8 Prevention Program development process; right?

9 A. Yes.

10 Q. So we have a senior brand manager for Newports reviewing  
11 both qualitative and quantitative research on teen attitudes and  
12 behaviors?

13 A. Yes, as it relates to this project, that's right.

14 Q. I want to take a look at U.S. Exhibit 89287. I'll get you a  
15 copy of that.

16 This is an e-mail from Mr. Lindsley, who we just spoke  
17 about, to you, Ronald Milstein; right?

18 A. Yes.

19 Q. The subject of this is the YSPP, the Youth Smoking  
20 Prevention Program, new creative focus group evaluation?

21 A. Yes.

22 Q. And on April 4th of the year 2000, Mr. Lindsley asked you,  
23 "Has Marty reacted to the research results?"

24 You understand that to be a reference to Mr. Orlowsky,  
25 the CEO?

1 A. Yes.

2 Q. He says, "I've heard nothing. Before we move too far ahead  
3 I want to be sure that he knows exactly what we're doing next,  
4 especially as it relates to the tag line. Have you had any more  
5 thoughts about dropping the If you're a teen part? I'm still  
6 very uncomfortable about it. Let's talk when you have time."

7 That's what he was asking you; right?

8 A. Yes.

9 Q. Now you wrote back to him by e-mail a little over an hour  
10 later; right?

11 A. I believe so, yes.

12 Q. Let's take a look at your response. If we can get a copy of  
13 Exhibit 89288.

14 And I'll ask you to take a look at that document and  
15 tell me if that's your response to Mr. Lindsley sent the same  
16 afternoon, April 4, 2000.

17 A. Yes, it appears to be.

18 Q. And you told him, "Marty" -- again, that's a reference to  
19 Mr. Orlowsky, CEO?

20 A. Yes.

21 Q. "Marty's only comment to me was that he did not want to hear  
22 again about the tag line ever, and that I should not be  
23 influenced by the creative complainers. We made the decision  
24 based on legitimate business concerns and we must stick by it."

25 That was your response; right?



1 A. Yes.

2 Q. And you stuck by the tag line and kept running the whole  
3 thing, Tobacco is Whacko if You're a Teen?

4 A. Yes. The consensus was reached by Mr. Orlowsky -- the  
5 decision was reached by Mr. Orlowsky that we were going to use  
6 that tag line and we did so.

7 Q. I want to talk about the money Lorillard has spent on its  
8 Youth Smoking Prevention Program. The budget ranged from about  
9 11 to \$14 million a year; right?

10 A. Yes, I believe that's right. Again, I have not kept track  
11 of the budget since 2000 or so very closely, but I believe that  
12 sounds right.

13 Q. And that's a total of about one-tenth of 1 percent of the 12  
14 and a half billion dollars that the major cigarette  
15 manufacturers spent on advertising and promotion in 2002; right?

16 A. If that's the number -- if that's the way the math works  
17 out, Mr. Brody, I guess that's right.

18 Q. To put it another way. For every dollar that Lorillard  
19 spends on its Youth Smoking Prevention Program the American  
20 public is subjected to a thousand dollars in advertising and  
21 promotion?

22 A. Again, if that's the way the numbers work out, then I'll  
23 agree with you.

24 Q. With the amount of money spent on advertising promotion, if  
25 we go back to the demonstrative exhibits we looked at, went from

1       9 and a half billion or so to 12 and a half billion between 2000  
2       and 2002, the money that Lorillard spent on its Youth Smoking  
3       Prevention Program actually went down, from 14 million to 13  
4       million a year?

5       A. I don't know that for a fact, but if those are the numbers,  
6       then I'll agree with you.

7       Q. I want to talk about what the Lorillard program as it was  
8       developed under your time as executive level manager designated  
9       to reduce -- identify ways to reduce the youth consumption of  
10      tobacco products does not do.

11             The media campaign for kids has not, for lack of a  
12      better word, offered truth; right?

13      A. I'm sorry. Could you say that again?

14      Q. Let's take an example.

15             The television advertisements, for example, that  
16      Lorillard developed simply told kids that, you know, Tobacco is  
17      Whacko if You're a Teen, didn't tell kids about the harms of  
18      tobacco use; right?

19      A. No. The campaign was not directed to the -- the message  
20      from the campaign was not directed at the health aspects of  
21      smoking and health. We found through our research that the kids  
22      were inundated with those kinds of messages from the time they  
23      were very young.

24             We took a different approach. We were trying to break  
25      through the clutter. We were trying to give a unique

1 perspective to kids that would get their attention, get them to  
2 focus on a different sort of message than the usual kind of  
3 health messages that they were used to since they were very  
4 young. So we took a different approach to it.

5 Q. You told kids tobacco is whacko, but you didn't tell them  
6 anything about cigarettes being addictive; right?

7 A. No. Our research indicated they already knew that tobacco  
8 caused disease, that tobacco was addictive. They knew those  
9 kinds of things from the various educational programs, again in  
10 very early grades and through the other youth smoking prevention  
11 efforts that were out there in those years already. So our  
12 research indicated that would not be a beneficial way for us to  
13 go.

14 Q. You didn't tell kids that they would be subject to image-  
15 based marketing from tobacco companies featuring attractive  
16 models engaged in fun and social activities?

17 A. No. Again, Mr. Brody, the campaign's direction was  
18 deliberately chosen to be effective, to break through the  
19 clutter, and to complement all the other youth smoking  
20 prevention programs that were giving those kinds of messages  
21 that you indicated.

22 Q. Where is this clutter that you're talking about coming from?

23 A. I think if you look at all of the messages that were being  
24 delivered by the public health groups and by American Legacy  
25 Foundation, by other companies in the tobacco industry, you get

1 a very good sense that there are a lot of messages going out.

2 There's a lot of things that kids are asked to  
3 concentrate on, focus on, and you really do have to break  
4 through the clutter, so to speak, and try to get their attention  
5 with something that's impactful and meaningful that they can  
6 relate to. And we think our ad campaign was just that.

7 Q. And you chose to tell them that it would be crazy to smoke  
8 if you're a teenager. So instead of giving them or -- telling  
9 them about -- let me ask the question this way.

10 Instead of choosing to tell kids something like,  
11 "Tobacco kills 1200 Americans every day," you decided to simply  
12 say, "It would be crazy to smoke as a teenager." Right?

13 A. No, I don't think that was the message that was intended to  
14 be delivered.

15 Lorillard and the industry were funding -- was funding  
16 a very, very large effort by the American Legacy Foundation, and  
17 that message was getting out as far as the health effects. We  
18 were trying to tell kids that they didn't have to smoke to be  
19 cool. That it was not cool to smoke.

20 We made very dramatic and I think impactful executions  
21 of that message in various different ways, through the TV ads  
22 and through the print ads as well as the accompanying website  
23 and other programs.

24 So, as a complement to all that was going on we really  
25 felt that our program was effective. We tested it to make sure

1       it was effective. And we are still very proud of the program.

2       Q. In the process of doing this, did you look at any of the  
3       research suggesting that the worst thing you can do is, with a  
4       campaign designed to keep teenagers from engaging in certain  
5       activities, is simply telling them not to do something, that  
6       something is an adult activity?

7       A. Yes. We were very much aware of that sort of problem. We  
8       designed the ad specifically to avoid that. All of our research  
9       sought to make sure there were no unintended consequences or  
10      effects of our ads.

11             Any ads that tested poorly, that tested -- that the  
12      test results showed gave unintended consequences, like making  
13      smoking look cool, were cut from the program and never used.

14      Q. Just to close this area out and make sure I understand.

15             Your testimony is that as long as the truth campaign  
16      was out there, there was no need for Lorillard to provide any  
17      sort of information to kids about the health effects of smoking  
18      in its Youth Smoking Prevention Program?

19      A. No, that's not exactly what I said, Mr. Brody.

20             As long as the message was getting out on the health  
21      effects of smoking by American Legacy Foundation, whether it's  
22      the truth campaign or other parts of the American Legacy  
23      Foundation campaign, as long as the message was getting out in  
24      the schools, as long as there was a concerted effort by the  
25      public health people in the states to educate about the health

1 effects, we did not think our program should focus on the health  
2 effects.

3 We also knew that we had some credibility issues, as a  
4 tobacco company doing a campaign like this, that we were going  
5 to be criticized, we were going to be looked at very, very  
6 carefully to see what we were doing. And sending the health  
7 message I think was something that we decided would be better --  
8 we would be better off having someone else do.

9 In fact, that message got across very clearly. And all  
10 the research indicated from the time we began the research that  
11 kids knew the health story; that you needed to give them  
12 something different, a little bit of a twist on the message to  
13 really get across to them and to break through again, to break  
14 through the clutter.

15 Q. There are certain health messages that you at Lorillard  
16 couldn't give kids because Lorillard will not admit to many of  
17 the health consequences of smoking that are recognized by the  
18 public health community; correct?

19 A. Lorillard supports the messages from the public health  
20 community about smoking and health. We defer to the public  
21 health community's view on that. We tell our consumers, we tell  
22 the public they should be listening to the public health people  
23 about those messages.

24 No, there was -- that was not the situation. Again, we  
25 just didn't feel it was being an effective message for our

1 campaign and that campaigns were out there doing a good job of  
2 disseminating the health message.

3 Q. Mr. Milstein, you were here for Mr. Orlowsky's testimony as  
4 we discussed last week. Do you disagree with his testimony, the  
5 testimony of the CEO that Lorillard has never admitted in any  
6 forum that smoking causes any disease other than lung cancer,  
7 heart disease or COPD?

8 MR. NEWBOLD: Objection, Your Honor. I think that  
9 misstates Mr. Orlowsky's prior testimony here in this courtroom.

10 THE COURT: Well, let's be clear. Do you happen to  
11 have it?

12 MR. BRODY: I don't have it, a copy of it with me.

13 Am I leaving one off, Bill?

14 MR. NEWBOLD: No, because I was here too. I simply  
15 don't remember him making that statement under oath from that  
16 witness stand.

17 MR. BRODY: Your Honor, the witness was here. If he  
18 thinks I've got it wrong, he can tell me.

19 THE COURT: Why don't you ask and clarify it with him,  
20 please?

21 BY MR. BRODY:

22 Q. Mr. Milstein, do you recall Mr. Orlowsky testifying that  
23 Lorillard has never affirmatively admitted in any forum that  
24 smoking causes any disease other than lung cancer, heart  
25 disease, COPD or -- I've got the fourth one now -- emphysema?

1 A. I don't remember him quite putting it that way.

2 I think the website's statement is the public statement  
3 of Lorillard regarding these issues.

4 It's clear we defer and support to the public health  
5 view, except where we are going to defend ourselves in  
6 litigation and other forum.

7 We give the message, which is a concise, clear,  
8 unconfusing message, that people should listen to the public  
9 health groups about this issue. We defer and support to those  
10 groups and we will do nothing to interfere with that  
11 communication so that it's misconstrued or misunderstood by us.

12 Q. If Lorillard were to create a Youth Smoking Prevention Media  
13 Campaign that told kids that smoking caused stomach cancer or  
14 liver cancer or pancreatic cancer, that campaign would be the  
15 first time ever that Lorillard had publicly admitted that  
16 smoking causes those diseases; correct?

17 A. I don't know.

18 Q. You talked about what you did do, and I think we've covered  
19 it now pursuant to Section 3(L) of the MSA while charged with  
20 the responsibility to identify ways to reduce youth consumption  
21 of tobacco products, namely, continuing work on the previously-  
22 begun Youth Smoking Prevention Program and promulgating these  
23 corporate principles.

24 I want to conclude by talking about some of the things  
25 you did not do while designated as the executive charged with



1 the responsibility to reduce youth consumption of tobacco  
2 products.

3 You and Lorillard did not change the principal  
4 advertising campaign, the pleasure campaign for Lorillard's best  
5 selling brand of cigarettes, Newport; correct?

6 A. No. We examined the campaign, of course. We had  
7 discussions with the Attorneys General about the campaign.

8 There was never any -- anything brought to our  
9 attention that would lead us to change the campaign after the  
10 MSA, after we agreed to the MSA, because we did not feel, nor do  
11 we feel today, that that campaign is targeting youth.

12 Q. The pleasure campaign was a print campaign for Newport, both  
13 before and after the company entered into the MSA in 1998;  
14 correct?

15 A. Yes.

16 Q. And in 1999, the year that you became the executive level  
17 manager under section 3(L), Newport was the second leading brand  
18 of cigarettes smoked by youth aged 12 to 17; right?

19 A. That is what I've heard reported, yes.

20 Q. You didn't look into that?

21 A. I looked at the research that indicated those kinds of  
22 statistics, yes.

23 Q. In fact, 21.6 percent of minors who smoked chose to smoke  
24 Newports in 1999, correct, second only to Marlboro?

25 A. I don't know the exact percent from what research you're

1 speaking, but I'll accept that if that's what the research might  
2 have said.

3 Q. But you didn't go to Mr. Orlowsky and say, you know, "I  
4 think we should think about changing the pleasure campaign  
5 because of the percentage of kids who smoked who chose  
6 Newports." Right?

7 A. We always review everything we do with an eye toward the MSA  
8 compliance, especially, of course, those issues dealing with the  
9 youth smoking.

10 Q. My question, Mr. Milstein, was you didn't go to Mr. Orlowsky  
11 on April 15, 1999 or any time after that and say, "We really  
12 should think about changing the pleasure campaign because  
13 Newport is chosen by 20 percent, 21 percent of kids who smoke."  
14 Right?

15 A. I discussed the issue several times continuing -- continued  
16 to discuss the issue at Lorillard, and we believe the ad  
17 campaign does not, in fact, attract youth smoking, nor is it  
18 targeted to attracting youth smoking, nor do the Attorney  
19 Generals in their opinion have that view of the Lorillard ad  
20 campaign. We have never been asked to change any of the ads for  
21 Newport.

22 Q. None of the Youth Smoking Prevention Campaign advertisements  
23 that we talked about that Lorillard created even mentioned  
24 Newport cigarettes; correct?

25 A. That's correct.

1 Q. And promotional signs with the pleasure campaign themes and  
2 images are still placed at retail areas like gas stations and  
3 convenience stores; correct?

4 A. Yes, there's point-of-sale advertising for Newport. I don't  
5 know the extent that imagery is being used any longer.

6 Q. These are places where kids are exposed to Lorillard's  
7 marketing; right?

8 A. Convenience stores are open to the public generally, yes.

9 Q. You didn't tell Mr. Orlowsky the company should consider  
10 reducing or eliminating the visibility of the pleasure campaign  
11 materials at retail locations as part of the company's  
12 obligation to reduce youth consumption of tobacco products;  
13 correct?

14 A. No -- I can't recall specifically discussing that with him.

15 I will tell you that I've had many, many discussions  
16 with him and others at the company relating to our advertising  
17 and our commitments under the MSA and our commitments generally  
18 about youth smoking.

19 If we believe that the ads were attractive to kids,  
20 were causing kids to smoke, we would make a change, not only in  
21 the ads but also in where the ads go.

22 We've done that with magazines at the urging of the  
23 Attorney Generals. We continue to assess our media placement  
24 and our media practices.

25 If we thought that those ads in fact were contributing

1 to the problem, we would have changed them or we would have  
2 changed the way that they are presented, the locations they are  
3 presented at.

4 Q. A number of stores receiving payments for the display of  
5 promotional items as part of the Excel program has gone up by  
6 the thousands since the date of the effective MSA, hasn't it?

7 A. I think some of those contracts deal with promotional items.  
8 Most of those contracts deal with simply placement of the  
9 product in the store and their ability to receive buy downs and  
10 other price promotions.

11 Q. I don't know if that was a -- I'm trying to figure out if  
12 that was a "yes" or a "no" to the question.

13 Again, a number of stores receiving payments for the  
14 display of promotional items as part of the Excel program has  
15 gone up by the thousands since the effective date of the MSA.

16 A. Again, Mr. Brody, I don't know if the payments for  
17 promotion -- promotional items is exactly accurate. I do  
18 believe that more stores have been added under our Excel program  
19 over the last several years, yes.

20 Q. And over the last several years the percentage of kids who  
21 smoke who choose to smoke Newport cigarettes, Lorillard's best  
22 selling brand, has actually gone up from 21 percent to  
23 23 percent, hasn't it?

24 A. Again, I don't know what research you're citing, but if that  
25 is what the research says, then I will not dispute that.

1 MR. BRODY: Thank you, Mr. Milstein.

2 CROSS-EXAMINATION

3 BY MR. NEWBOLD:

4 Q. Bill Newbold for Lorillard. Good morning, Mr. Milstein.

5 A. Good morning, Mr. Newbold.

6 Q. Mr. Brody showed you Exhibit, U.S. 55455.

7 Can you put it on the screen, please, Jamie?

8 Is this the 1999 Lorillard Corporate Principles on  
9 Marketing, Promotion and Youth Smoking?

10 A. Yes, it is.

11 Q. I would also like to hand you what has been marked and  
12 admitted as Joint Defendants Demonstrative 020013A. Put it on  
13 the screen, please.

14 Does this demonstrative summarize the key points of  
15 Lorillard's corporate principles as they pertained to marketing  
16 promotion and youth smoking as of June 30, 1999?

17 A. Yes.

18 Q. Would you please read those for the court and for the  
19 record, please?

20 A. Lorillard Corporate Principles on Marketing, Promotion and  
21 Youth Smoking, June 30, 1999.

22 THE COURT: Excuse me just a minute. That's too fast  
23 number one.

24 And number two, he doesn't have to read them all. They  
25 are going to be in the record and I can read them as we go

1 through specific questions that you might have for him.

2 BY MR. NEWBOLD:

3 Q. Having read that document, Mr. Milstein, does that  
4 accurately summarize Lorillard's corporate principles on  
5 marketing promotion and youth smoking as of June 30, 1999?

6 A. Yes.

7 Q. And based upon your experience and based upon the fact that  
8 you were the corporate executive who was in charge of the  
9 program during this period of time, is it your testimony that  
10 all of these corporate principles, insofar as marketing  
11 promotion and youth smoking, have been followed by Lorillard?

12 A. Yes.

13 Q. I would now like to show you JD 025068. Can you identify  
14 that document for me, please?

15 A. These are the Lorillard Corporate Principles on Marketing,  
16 Promotion and Youth Smoking, Dated May 1, 2003.

17 Q. And is that an update from the 1999 Lorillard corporate  
18 principles?

19 A. Yes. It's an update as well as it's a restatement adding  
20 two corporate principles that we established during the interim  
21 between 1999 and 2003.

22 Q. Would you please read for the court the two new corporate  
23 principles on youth smoking and principles on marketing,  
24 promotion and youth smoking?

25 A. Yes. The first new principle was that Lorillard does not

1 and will not target its marketing or promotions, directly or  
2 indirectly, to persons under 21 years of age.

3 The second one is that Lorillard does not and will not  
4 conduct market research for its products involving persons under  
5 21 years of age.

6 Q. I would now like to show you Exhibit JD 021063. Do you have  
7 that, please?

8 Can you please tell the court what that is?

9 A. This is a letter dated April 15, 1999, from me to Tina  
10 Morgan, the tobacco project assistant, at the National  
11 Association of Attorneys General. It's an interim compliance  
12 report that was asked for by NAAG, and this is the report as I  
13 set forth.

14 Q. Now when you say it was an interim compliance report, what  
15 do you mean by that?

16 A. I believe that NAAG was interested in knowing how we were  
17 doing with compliance with certain parts of the MSA, including  
18 the MSA provision that required corporate culture changes in the  
19 issuing or restatement of corporate principles. So, I was  
20 trying to answer that request that we let them know how we were  
21 doing with that part of the MSA.

22 Q. And did the corporate compliance principles include those  
23 things that you had been doing from the entry of the MSA until  
24 the time that you wrote this letter on April 15th of 1999?

25 A. Yes.

1 Q. And does this letter then on this page and on the second  
2 page -- may I see the second page, please?

3 Does that spell out to NAAG the things that you did in  
4 December of 1998 and again in early 1999 as to what you were  
5 doing at Lorillard to make sure that you were complying with all  
6 of the terms of the MSA?

7 A. Yes.

8 MR. NEWBOLD: I won't burden the court's record by  
9 having him read all of this, Your Honor. We're going to move  
10 this into evidence.

11 Q. Thank you, Mr. Milstein.

12 Mr. Milstein, counsel just concluded a long discussion  
13 with you -- you may take that down, please -- concerning  
14 Lorillard's Youth Smoking Prevention Program. I would like to  
15 discuss that with you if I may.

16 I'm going to hand you what has been marked as U.S.  
17 Exhibit 23474. Can you please tell the court what that is?

18 A. This is a press release issued by Lorillard Youth Smoking  
19 Prevention Program on October 11, 1999, announcing the launch of  
20 a nationwide youth smoking program.

21 Q. And was the Youth Smoking Prevention Program launched at  
22 that time?

23 A. Yes.

24 Q. Was there any work -- let me ask you this way.

25 You're a tobacco company, right? And you don't have



1 any specialized expertise on what appeals to kids under the age  
2 of 18; is that correct?

3 A. That's right.

4 Q. Did you hire anybody who had had specialized expertise on  
5 what would appeal to kids under the age of 18 to try to convince  
6 them not to smoke?

7 A. Yes. We hired several consultants that we thought had that  
8 capability, including Youth Intelligence, as I discussed with  
9 Mr. Brody this morning.

10 Q. Did you hire any other advertising agency for that  
11 particular purpose?

12 A. Yes. We hired Bozell, New York, I believe it was called at  
13 the time, as our advertising agency because we believed they had  
14 expertise in delivering messages in media.

15 Q. Now, you also had, in addition to your kids program, you had  
16 a parenting program, did you not?

17 A. Yes, we did. And we still do.

18 Q. And did you hire any expert to advise you on how you should  
19 speak to parents to convince them that their children should not  
20 smoke?

21 A. Yes. We hired Dr. Michael Popkin, who was an expert  
22 consultant, someone who had extensive experience on teenage  
23 behaviors and how to speak to parents about different sorts of  
24 teenage behaviors.

25 He came to us with a very, very impressive resume. And

1 after interviewing him and thoroughly checking his background  
2 out we decided that he would be a perfect fit for our program.  
3 We actually allowed him to build the parent program for us, and  
4 he continues to this day to work with the Youth Smoking  
5 Prevention Program at Lorillard.

6 Q. Now, your involvement with the Youth Smoking Prevention  
7 Program at Lorillard was only from 1998 until September of 2000;  
8 is that correct?

9 A. Yes.

10 Q. I would like to hand you what has been marked as U.S.  
11 Exhibit 55311.

12 Can you please tell the court what this is?

13 A. This is an overview of the research as of October 6th, 1999  
14 into the Youth Smoking Prevention Program.

15 Q. Now, you told Mr. Brody and you told the court that you  
16 researched your program before you launched it. So is this  
17 research done before it was launched?

18 A. Yes.

19 Q. And was this research -- did this research include the kids'  
20 portion with TV ads and print ads and the parenting portions and  
21 all aspects of your Lorillard youth smoking prevention before it  
22 was launched?

23 A. Yes.

24 Q. And did you ask the Bosell agent to assist you in the type  
25 of program that would cut through the clutter that you were

1       talking about, making the assumptions that kids already know  
2       that smoking causes lung cancer since it's been on the packs  
3       since 1966 and because of everybody else in the world telling  
4       them that, did you ask Bozell to create some type of a program  
5       that would cut through this clutter and appeal to the mind-set  
6       of someone under the age of 18?

7               MR. BRODY:  Objection, Your Honor.  That's an  
8       incredibly leading question.  I know this is cross, but it's his  
9       own witness, and under 611(c) --

10              THE COURT:  Sustained.

11              MR. BRODY:  Thank you.

12       BY MR. NEWBOLD:

13       Q.  Did you ask Bozell to assist you in preparing your program?

14       A.  Yes, we did.

15       Q.  Did you ask them to set out some objectives that you were  
16       interested in pursuing?

17       A.  Yes.  I think the objectives were set out by Lorillard  
18       personnel working on the program --

19       Q.  Would you please turn -- will you please turn to the second  
20       page of this document?

21       A.  Yes.

22       Q.  Are these the program objectives that Lorillard was  
23       interested in?

24       A.  Yes.  These are the program objectives that we researched,  
25       that we designed for the program prior to its launch.

1 Q. And the first bullet point addressed the youth smoking issue  
2 in a responsible and visible manner with a proprietary corporate  
3 marketing program. Is that correct?

4 A. Yes.

5 Q. Was that objective consistent with your goals?

6 A. Absolutely.

7 Q. When you say "with a proprietary corporate marketing  
8 program," what does that mean, sir?

9 A. That means that we wanted something from Lorillard that  
10 would -- we would consider to be our program as opposed to a  
11 program that others participated in or --

12 Q. Does that also mean that you wanted your name on the program  
13 so people would know that you were sponsoring this program?

14 A. Yes, absolutely.

15 Q. And why is it that you wanted the Lorillard name on your  
16 Youth Smoking Prevention Program?

17 A. I think, as you said, so that people would know clearly that  
18 this is a program that we've developed and we're sponsoring.

19 Also, I was concerned from a legal point of view that  
20 it could be misleading or it could violate some FCC or other  
21 rules and regulations if we didn't clearly label the program as  
22 coming from us.

23 I wanted to avoid any issue with that developing, so we  
24 made it very clear from beginning that this would be a Lorillard  
25 initiative and identified it as such.

1 Q. The balance of the bullet points state, "Focus on the major  
2 influence areas related to youth smoking with peer pressure and  
3 parental influence and develop a program that would be  
4 comprehensive, relevant, provable, sustainable, and candid."

5 Did you do all of those things?

6 A. Yes, we did.

7 Q. I would like to direct your attention now in that exhibit to  
8 Bates number 80318036. And this is the strategies that Bozell  
9 was recommending that you do. Is that correct, sir?

10 A. I believe this is research again in October of 1999. The  
11 program was launched a couple of weeks later, so this is  
12 research we did prior to the launch involving the executions  
13 that we were getting ready to use.

14 Q. And the message at the bottom, is that the message that you  
15 described to Mr. Brody, that the message that you wanted was,  
16 that you can be cool, outrageous, rebellious, without smoking;  
17 is that correct, sir?

18 A. That is correct, yes.

19 Q. Under the bullet points, do you see where it says, "Alter  
20 receptivity to smoking prior to trial and that health issues are  
21 less relevant and meaningful to kids." Is that what Bozell told  
22 you?

23 A. Yes. That's what we found through the initial research over  
24 and over again. The health issues were not going to be  
25 something that were going to be meaningful to kids since they

1       had heard it, they understood it. And it was something that  
2       would not be impressive to them, would not get their attention  
3       or cause them to think differently about smoking.

4       Q. I would now like you to turn to Bates number 80318038. And  
5       this is still in the Bozell overview that was the results of the  
6       research and the testing before you launched your program; is  
7       that correct sir?

8       A. Yes.

9       Q. What was the main bullet point insofar as the strategy as to  
10      talking to parents?

11      A. Again, we were trying to set up a program with parents so  
12      that they can talk to their kids, that they would talk to their  
13      kids about not smoking. And we wanted it focused in a way that  
14      would give them reliable, convenient, easy to understand, tips,  
15      points, assistance in doing that.

16      Q. Now, I want to go back to the kids and turn to Bates number  
17      80318042. Can you please tell the court what that represents?

18      A. These are the creative executions that were tested for the  
19      kids. There was a 30 second -- two, 30-second spots on TV  
20      advertisements: one called Piercing Parlor and one called  
21      Stereo Kid. And in the print there was a Tobacco is Whacko  
22      Campaign that was launched at that time having to do with --  
23      presenting characters and images that would be attractive to  
24      kids to get their attention and communicate the message.

25      Q. From the kids this was still under the rubric that you don't

1       have to smoke to be cool, that you can do outrageous things and  
2       still be a cool person; is that correct?

3       A.   Yes.   These were the creative executions that carried  
4       through that message.

5       Q.   I want to hand you, sir, a CD that has been marked as JD  
6       024738 which contains five television ads:   Piercing Parlor,  
7       Stereo Kids, Roommates, Sneaking Out and Street Rap.   Have you  
8       reviewed those, sir?

9       A.   Yes.

10      Q.   Were these the -- were the Piercing Parlor and the Stereo  
11      Kids the ads that were tested by Bozell prior to the launch of  
12      the program and that were to be run on TV as part of your  
13      program?

14      A.   Yes, as part of the first wave of the program, Piercing  
15      Parlor and Stereo Kid were used.

16      Q.   I'm going to play for the court two of the ads on this CD,  
17      Piercing Parlor and Stereo Kid.   If you would run those, please.

18               THE COURT:   I'm not going to have to watch people being  
19      pierced, am I?

20               THE WITNESS:   Yes, Your Honor.

21               MR. NEWBOLD:   Should I shut it off?   This is the  
22      outrageous part.

23               (Video being shown.)

24               MR. NEWBOLD:   Now run Stereo Kid.

25               (Video being shown.)

1 BY MR. NEWBOLD:

2 Q. And were those two ads run as part of your program, sir?

3 A. Yes, they were.

4 Q. Now, I'm directing your attention to JD 020637 and JD

5 020638. Can you tell the court what those are, please?

6 A. Yes. These are the print executions that I believe we ran  
7 in the first wave of the program. Two of them, these would  
8 appear in magazines.

9 Q. Now both of these ads, both the TV ad, Mr. Milstein, and  
10 these ads are pretty shocking, particularly the TV ad with the  
11 Piercing Parlor.

12 Can you tell the court what the idea was behind having  
13 an ad like Piercing Parlor shown that would tend to discourage  
14 kids from smoking?

15 A. Well, I think the shock value is something that we assessed  
16 as to whether or not it would be effective, and frankly that was  
17 one of the things that we found to be very good about these  
18 spots because they did catch the kids attention.

19 It's very difficult -- it was very difficult for me as  
20 a 40-something person to relate to that commercial, especially  
21 Piercing Parlor, and to some of these executions, but we did  
22 find that the kids related to them; that they were very catchy  
23 and impactful.

24 And while I share with the Judge her aversion to the  
25 piercing aspect of it, and we were very conscious that we didn't



1       want to glorify piercing in any way, we did feel that was a  
2       message they could relate to. In fact, the research showed us  
3       they did relate to it and that it was well received. They knew  
4       exactly what kind of message we were trying to get across and it  
5       got across very, very effectively.

6       Q. Insofar as these print ads were concerned, were these the  
7       ads that were run in the print out about Tobacco is Whacko if  
8       You're a Teen?

9       A. Yes.

10      Q. Now directing your attention to U.S. 55311. That's not the  
11      right one. This should be... Was there a TV ad called Little  
12      Girls and a print ad called Stork?

13      A. Yes. Under the parent campaign we did a 30-second TV ad  
14      called Little Girls and a print ad called Stork.

15      Q. Would you please hand the witness Joint Defense Exhibit -- I  
16      mean JD Exhibit 02066.

17                Would you turn to the second page of that exhibit? Can  
18      you tell the court what that is, please?

19      A. That is the print ad Stork that ran as part of our parents'  
20      campaign under the Take 10 banner.

21      Q. I now direct your attention to U.S. Exhibit 55311 and turn  
22      to Bates number 8044, please. It talks about something called  
23      Teen HIP Awards. Was this part of your Youth Smoking Prevention  
24      Program?

25      A. Yes, it was. The Teen HIP Awards. HIP stands for Teens

1       Helping Influence People was a scholarship program. I believe  
2       we gave out ten \$10,000 scholarships.

3               The participants would write an essay telling us why  
4       they should get it, get the award. Why they stand out in  
5       sports, arts, community services and why they've pledged not to  
6       smoke.

7               This was a very, very well received program. We got  
8       many, many more applications than we anticipated, hundreds and  
9       hundreds, when the program was launched. And I think we  
10      continued that program for several years.

11              THE COURT: But you've stopped it now, haven't you?

12              THE WITNESS: Yes. The Teen HIP Awards I believe have  
13      been stopped. The campaign has changed and, again, in an effort  
14      to keep current and an effort to keep fresh we are always  
15      looking at this campaign and trying to make changes.

16              We've also now gotten out of the -- gotten out of the  
17      business, if you will, of speaking directly to youth in this  
18      campaign. We have taken the approach that really has been urged  
19      on us by others that we should stick to the part of the campaign  
20      that speaks to parents and that is what the campaign does at  
21      this point.

22              THE COURT: If the program was so successful, why did  
23      you stop it?

24              THE WITNESS: I think that the criticism was  
25      interfering with the effectiveness. We had several occurrences

1 or several events that were interfered with in our minds by  
2 other organizations that I think were trying in a way to kill  
3 our program, to make it ineffective.

4 We were sponsoring an NBA Hoop It Up event, which was  
5 an event sponsored by the NBA where they would bring kids in and  
6 they would have a contest of throwing the ball into the basket.

7 We were sponsoring that. An organization came along  
8 and had signs up at the event and urged people, not only not to  
9 listen to us, but also criticized the NBA for cosponsoring with  
10 us or allowing us to sponsor this event.

11 It became a detraction to the sponsorship. It, in our  
12 opinion, made the sponsorship controversial or the whole program  
13 controversial where there was enough negative publicity about  
14 the program we felt it was interfering with the message we were  
15 trying to get. So, what we did, instead of trying to counter  
16 that in some way, we -- we tried very hard to answer our critics  
17 with the attorneys -- through the Attorneys General and others,  
18 but we decided in the end that the criticism was going to be a  
19 real problem for us and that the whole program suffered because  
20 of it. So we shifted our resources into the other portion of  
21 the campaign which dealt with the parents.

22 BY MR. NEWBOLD:

23 Q. Will you turn then to Bates number 8045 in the same exhibit  
24 which does talk about the parenting program? Can you tell the  
25 Judge about the parenting program that was sponsored by

1 Lorillard Tobacco Company?

2 A. Yes. The parent component of the program had to do with  
3 magazines, basically, and again I believe there was one  
4 television commercial.

5 The Take 10 program was designed to give parents a way  
6 to talk to the kids about not smoking through Dr. Michael  
7 Popkin, an educational booklet was authored. We allowed him to  
8 go out with that booklet and do a media tour.

9 We established a toll free hot line and a website. He  
10 was also on television and in other venues where the message was  
11 gotten out: Take 10 minutes; talk to your kids about not  
12 smoking; use his booklet on "how to" practical advice on how to  
13 do that. And that program was continued for some time under  
14 Dr. Popkin's direction.

15 Q. I'll hand you what has been marked as JD 025065. Is this  
16 the CV and biography of Dr. Popkin?

17 A. Yes. This appears to be from his website, Active Parenting  
18 Publishers.

19 Q. Will you tell the court why you thought that Dr. Popkin was  
20 the right person to help Lorillard Tobacco Company to devise a  
21 program to speak to parents so that the parents would then tell  
22 the kids not to smoke?

23 MR. BRODY: Objection, leading. Leading.

24 THE COURT: I'll allow it. Go ahead, please.

25 A. Yes. Dr. Popkin had extensive experience practicing family

1 therapy in Atlanta. He worked with parents and with kids on a  
2 whole host of issues.

3 He was the right person for our program. He was very  
4 articulate. He was good on television. He was good on his  
5 feet. He was convincing and authoritative because he was real  
6 in our mind and sent the message out in a very effective way.

7 And we liked him and was -- were able to get along with  
8 him. And when he volunteered -- when he was hired and  
9 volunteered to actually write the catalogue or the brochure, we  
10 allowed him to do so without our interference. It was a good  
11 match between our objectives and his qualifications.

12 Q. I'll hand you what has been marked as Joint Defendant  
13 020643. Is this the pamphlet that Dr. Popkin created for  
14 Lorillard in this Youth Smoking Prevention Program?

15 A. Yes, it is.

16 Q. Would you turn to page 3 of that document, please? Would  
17 you read that for the record?

18 A. It's a letter from Dr. Popkin. At the beginning of the  
19 brochure, "Dear Parents. Think your son or daughter is too  
20 young to consider trying cigarettes or other tobacco products?  
21 Think again. Chances are they'll be asked by friends to try it  
22 not once, but repeatedly.

23 "So, like all parents, if you want your children to  
24 grow up healthy and strong, it's best to start talking to them  
25 about how you'd feel if they did try a cigarette. The

1 suggestions in this booklet are just the beginning. The  
2 important thing is to talk to your children early on and make  
3 your point of view clear before they try a cigarette."

4 Q. And did he also prepare a video that he would hand out to  
5 parents?

6 A. Yes.

7 Q. Did he then go on a tour across the United States to hand  
8 out his video and to spread the message that kids shouldn't  
9 smoke?

10 A. Yes, I believe he's done several tours since 1999.

11 Q. I want to hand you what has been marked as Joint Defendants'  
12 Exhibit 020648, 020644, 020647, and 020646. Can you identify  
13 those, please?

14 A. 0646 is a proclamation from the city of Charlotte, North  
15 Carolina, proclaiming Take 10-Day. These are efforts we made  
16 with mayor's and governors and other officials in different  
17 states and cities to help us launch the program and to make  
18 people aware that it was an effort that was ongoing.

19 The second one I'm looking at --

20 Q. Let me ask you this, and I can speed it up. Do you have  
21 proclamations then from the Mayors of the City of Chicago;  
22 Dallas, Texas; Philadelphia, and Charlotte proclaiming Take  
23 10-Day?

24 A. Yes, that's what these are.

25 Q. Now, Mr. Milstein, I'd like to talk to you about the test

1       that Bozell ran on these ads that we've been looking at, the  
2       Piercing Parlor, the Stereo Kid, the print ads, everything that  
3       we've been looking at. I want to take a look at the research  
4       that Lorillard did on these ads prior to the time that they were  
5       run.

6               In order to do that, I would like to hand you  
7       Exhibit 55311, which you have. It's already on your desk. It's  
8       probably buried there. Do you have that?

9       A. Yes.

10      Q. Does that exhibit report the results of the tests that you  
11      ran on the ad before you ran them?

12      A. Yes.

13      Q. I direct your attention to Bates number 80318040 of those  
14      test results. Would you please read that for the court as to  
15      how these ads tested out for its intended audience?

16      A. Yes. The research -- or the report indicates that, "The  
17      proposed advertising clearly communicated the don't smoke  
18      message. The ads had a measurable effect on attitudes regarding  
19      smoking, specifically smoking perceived as less cool. The ads  
20      were different from other advertising and other antismoking ads.  
21      They were relevant, believable and interesting. They had  
22      stopping power."

23      Q. Will you now turn to 8041 and the results of the parenting  
24      Take 10 ads?

25      A. Yes. The report indicates that, "The proposed advertising

1 clearly communicated, Talk to Your Kids message. There was a  
2 measurable increase in intent. The ads were relevant and well  
3 liked. While the sponsor's motives were not clear, the  
4 initiative was viewed as positive and responsible."

5 THE COURT: You say there was a measurable increase in  
6 intent. I don't see anything in there that says that there was  
7 a measurable increase in the amount of communication?

8 In other words, in terms of results of the program, to  
9 increase communication between parents and children about  
10 smoking.

11 THE WITNESS: Well, this report, Your Honor, was done  
12 before we actually launched the program. This was the focus  
13 groups and mall surveys and other quantitative research that we  
14 did.

15 There was a tracking study that was done after the  
16 program was launched some months later, and I believe that there  
17 we see -- we were able to measure the number of parents, for  
18 instance, that called the hot line, the number of parents that  
19 attended these events that were sponsored by Lorillard with  
20 Dr. Popkin.

21 So this is on the parenting program. And intent, I  
22 believe here, was that after parents in the research viewed the  
23 Take 10 program and the material in that program, there was an  
24 increase in their intent to talk to their children.

25 After reading it and saying "yes, now we understand how



1 to do it, we're going to do it." So this is again --

2 THE COURT: Do you think many parents would have told  
3 your, quote, researchers, unquote, that they didn't intend to  
4 talk to their children?

5 THE WITNESS: No. I think we started out with the  
6 baseline and asked them, Did you ever, have you ever, do you  
7 intend to?

8 After they read the material, become familiar with the  
9 program, we asked them, Are you more now -- are you more likely  
10 now to do so?

11 And that is the increase in intent on the part of the  
12 parents to become involved and talk to their kids.

13 BY MR. NEWBOLD:

14 Q. I'm reminded by one of my colleagues that I may have  
15 misspoke and I may have said "the research was done by  
16 Lorillard." This research was done by Bozell, was it not?

17 A. Yes.

18 Q. Since the Judge, Her Honor, asked the question about any  
19 research that had been done after the ads had been run to see  
20 how effective they were, I would like to call your attention to  
21 U.S. Exhibit 057524.

22 Now, is this the studies that had been done for  
23 Lorillard to see how effective your youth smoking program --  
24 Youth Smoking Prevention Program turned out to be?

25 A. Yes. This is a Wave 2 of tracking studies done in March --

1 or the report is issued March 22, 2000, looking at the results  
2 of the first campaign, first several months of the campaign.

3 Q. And turn your attention to Bates number 99120363, and under  
4 Summary and Conclusions, Kids, could you please read the first  
5 two bullet points?

6 A. "The Lorillard Youth Smoking Prevention Campaign achieved  
7 remarkable awareness given its moderate media weight and brief  
8 exposure. It also substantially outperformed the competition in  
9 user imagery ratings."

10 Q. Would you read the last bullet points?

11 A. The last points?

12 Q. Yes, sir.

13 A. "Hence, we are in great shape. The current strategy and  
14 executions are breaking through. Continue as planned with the  
15 confidence that we're on track."

16 Q. Turning to the next page, which is Bates number 99120364.  
17 Insofar as the parents were concerned, what did your research  
18 indicate how the parents ads were working?

19 A. "The print ads successfully communicated their message.  
20 Take 10 achieved good awareness for a PR effort. Could reflect  
21 synergy between the print campaign and PR.

22 Q. Now, Mr. Milstein, Mr. Brody talked to you about  
23 quantitative and qualitative research. Do you recall that, sir?

24 A. Yes.

25 Q. Was the Wave 1 and Wave 2 research that we've just been

1       talking about summarized in this report, was that quantitative  
2       or qualitative?

3       A.   I believe it was both.

4       Q.   Okay.  What is your understanding of the difference between  
5       quantitative and qualitative?

6       A.   Qualitative is focus groups where you seek to get some  
7       direction, some awareness of attitudes and how attitudes might  
8       change among certain members of the target audience once they --  
9       they are exposed to certain executions, certain ideas; whereas,  
10      quantitative is surveys and things that measure more broadly the  
11      communication, how many people recall it, what their take is  
12      from it.

13                So it's a much broader effort and can give you a  
14      different view of whether or not the thing you're researching  
15      has been effective and memorable and sustaining.

16      Q.   I want to talk to you about the lines that Mr. Brody wanted  
17      to talk to you about which are found on pages 99120365.  If you  
18      would turn to that, please.

19                Now, this is the qualitative evaluation of the Round 2  
20      Creative; is that correct, sir?

21      A.   Yes.

22      Q.   And turn to page Bates number 99120366.

23      A.   Yes.

24      Q.   Would you please read what the qualitative indicated on this  
25      page?

1       A. This says that: Roommates was appealing due to humor and  
2       unique positioning. Sneaking Out is effective and appealing,  
3       works particularly well with girls.

4               Street Rap delivers the nonsmoking message  
5       across-the-board. Special care must be taken to make it, quote,  
6       authentic.

7               Smoking or Non was very popular. May have strategic  
8       challenges.

9               Operation delivered a nonsmoking message which risks  
10      getting lost in the breast implant discussion.

11              Straight Edge was unappealing to most teens.

12              Documentary style is not attention grabbing.

13              Unfamiliarity of Straight Edge prevents focus on  
14      nonsmoking message.

15      Q. Now, this qualitative research, was this on the ads that had  
16      been run or the ads that were going to be run?

17      A. I think this is on both.

18              Again, we had looked -- well, I believe what we're  
19      talking about here are ads that have not yet been run. We are  
20      looking at the next phase of the program and looking at what ads  
21      to run in 1999 -- I'm sorry -- in 2000 and beyond. These were  
22      executions that we were testing.

23      Q. Now, I want to talk to you about the tag line that Mr. Brody  
24      discussed with you. Would you turn to Bates 99120367?

25      A. Yes.

1 Q. Would you please read that for the court?

2 A. (Reading) Although memorable, respondents said Tobacco is  
3 Whacko detracts from commercials.

4 Quote, the slogan sucks, end quote.

5 Quote, the slogan isn't cool, end quote.

6 If you're a teen resulted in negative responses,  
7 distracting, singles out teens, should apply to everybody,  
8 weakens the power of the message.

9 Q. And then turn to Bates number 0368. And what is the  
10 recommendation insofar as the tag line is concerned?

11 A. "Revisit the tag line Tobacco is Whacko if You're a Teen.  
12 We suggest briefing Creative and asking them to take another  
13 try. Note, however, in this phrase works well in the print as  
14 copy.

15 Now is the best time, we can quantitatively test old  
16 and new.

17 Remember, we never tested tobacco is whacko as a tag  
18 line."

19 Q. Now, remember the e-mails that Mr. Brody showed you between  
20 you and Victor Lindsley.

21 Did Lorillard revisit the issue as to whether they  
22 should drop the tag line Tobacco is Whacko if You're a Teen?

23 A. Yes. We revisited the issue on several occasions based on  
24 the results of several of these research, and again, the  
25 consensus was by the people who were working on the program as a

1 whole that the tag line was effective. It was creative. It got  
2 their attention. It directed the message to the target  
3 audience.

4 If we thought that the tag line was detracting from it  
5 and if we thought that the tag line was going to be an issue in  
6 how well the ads worked, we would never have included it. Our  
7 goal here was, and always has been, to make a campaign as  
8 effective as possible.

9 We were doing this voluntarily. We wanted it to work  
10 as a complement to everything else that was going on in the  
11 country. And we would have never gone forward with the campaign  
12 that was ineffective or worse, communicated an unintended  
13 message.

14 Q. Directing your attention to U.S. Exhibit 57328. Is this yet  
15 another study on your Youth Smoking Prevention Program dated  
16 November 21, 2000?

17 A. Yes.

18 Q. And is this another review by Bozell?

19 A. Yes, it appears to be.

20 Q. I would like to direct your attention to Bates number page  
21 9847119.

22 A. Yes.

23 Q. Would you please read that last bullet point?

24 A. "Ads exhibiting any unintended negative consequences were  
25 dropped from program."

1 Q. What does that mean from any unintended negative  
2 consequences?

3 A. Well, I believe I remember there was an execution that we  
4 were testing that actually the respondents told us that it made  
5 smoking look cool. So we immediately dropped that one.

6 We were very, very concerned, not only in the  
7 kids-based program, but also in the parent program. We weren't  
8 sending unintended negative messages. That the message would be  
9 as we wanted it to be and that was it was being clearly  
10 communicated.

11 Q. Finally directing your attention to Bates numbers 98447156  
12 of the same exhibit in which it says, Key Successes. Any  
13 comments specifically on the one that was probably the most  
14 outrageous, Piercing Parlor? Could you please tell the court  
15 what your outside research organization concluded about Piercing  
16 Parlor?

17 A. Well, I think what they are saying here in this report is  
18 that Ad Age reviewed the ad, gave it three stars out of four,  
19 and actually had made the Ad Age's Best of 1999 List, and then  
20 go -- they go on to cite some statistics about the media  
21 impressions, the website hits, how many teen scholarship entries  
22 there were, how many Take 10 brochures were actually given out  
23 and how many videos were sent.

24 Q. I think you testified earlier you are no longer -- even  
25 though it was successful, you're no longer running the Piercing

1 Parlor ads or the Stereo Kids ads or any other TV commercials;  
2 is that right?

3 A. That's correct.

4 Q. Those are for the reasons that you stated to Her Honor  
5 earlier?

6 A. Yes.

7 THE COURT: I believe no other defense counsel have  
8 questions. Am I right about that?

9 Seeing no hands raised.

10 Mr. Brody, depending on how long your redirect is going  
11 to be, we will either take a break or not. How long do you  
12 think you will be?

13 MR. BRODY: Thirty minutes.

14 THE COURT: All right. I guess we better take our  
15 break now. Fifteen minutes, everybody.

16 MR. NEWBOLD: Wait, Your Honor. I'm sorry. It must  
17 have been a misunderstanding. I have a little more to go.

18 THE COURT: Oh, I did misunderstand you.

19 MR. NEWBOLD: I'm sorry. When I looked at you, it was  
20 sort of should I keep going? That was the signal I was trying  
21 to send. It wasn't the signal that I'm done.

22 THE COURT: Why don't you keep going then? Let's try  
23 and finish cross.

24 MR. NEWBOLD: I should learn to speak up and not do it  
25 with hand signals. I apologize, Your Honor.



1 BY MR. NEWBOLD:

2 Q. I would like to talk next about a topic that Mr. Brody  
3 discussed with you last Friday which had to do with your press  
4 releases. Do you recall that?

5 A. Yes.

6 Q. And I want to talk to you about the three specific press  
7 releases that he talked to you about, which was a press release  
8 in the Broin case, which was the airline ETS exposure case; the  
9 press release in the Gadaleta case, which was a lung cancer  
10 case; and the press release in the Scott case which was a  
11 medical monitoring smoking cessation case.

12 First, let me ask you for the record. Why is it that  
13 Lorillard issues press releases after you either win or lose a  
14 lawsuit?

15 A. Again, I think I've explained to Mr. Brody that the press  
16 release is a convenient, effective device to get the message  
17 out, to get a message out in response to press inquiries which  
18 we inevitable get in litigation development. It's intended to  
19 answer the press inquiries one time with a clear statement of  
20 what we want to convey about the particular development or case  
21 proceeding. And we do it again to facilitate that sort of  
22 communication.

23 Q. You are the in-house general counsel at Lorillard, right,  
24 and you're in Greensboro, North Carolina?

25 A. Yes.

1 Q. How do you get the information about the cases that have  
2 just been won or lost upon which you base your press release?

3 A. I get it from my counsel involved in that particular case.  
4 That's primarily how I receive that information.

5 Q. Do you get -- as Mr. Brody pointed out when I was talking to  
6 the court about your duties, and reporting to the general  
7 counsel, I stated that you get daily trial reports on cases that  
8 are ongoing. Is that a normal course of events?

9 A. Yes.

10 Q. And from time to time do you actually observe trials?

11 A. Yes, that's right.

12 Q. So, as I understand, you get oral reports for the lawyers  
13 who are trying the case, you get written reports on a daily  
14 basis. Do you ever have any of your other associate in-house  
15 counsel sit in on cases and report back to you?

16 A. Yes, that's common. We do that on a regular basis.

17 I have attorneys who report to me that are assigned  
18 specific cases and they follow that case from the beginning to  
19 the end and attend various proceedings.

20 Q. The question is, when you issue a press release, is that  
21 press release meant to be a general statement or a public  
22 statement by Lorillard on the topic of whatever the topic might  
23 be, ETS or lung cancer or smoking cessation, or is that a press  
24 release which is just designed specifically to cover the events  
25 and what happened in that case?

1 MR. BRODY: Objection, leading.

2 THE COURT: Very leading. I'm going to sustain the  
3 objection.

4 BY MR. NEWBOLD:

5 Q. Mr. Milstein, when you write a press release, does your  
6 presence -- is your press release intended to make a public  
7 statement on behalf of Lorillard or is the press release  
8 intended to simply report on that trial that has just concluded?

9 MR. BRODY: Your Honor, I think that's the exact same  
10 question that Mr. Newbold just asked.

11 THE COURT: It is. Let me ask it this way,  
12 Mr. Milstein.

13 When you issue a press release upon the occurrence of  
14 some event in litigation which Lorillard is involved, what's the  
15 purpose of that purpose of that press release?

16 THE WITNESS: The purpose of that press release is to  
17 convey our point of view, our -- a message that we want to send  
18 about that particular case dealing with the facts, with the law  
19 of that particular case.

20 Again, it's intended to respond to press inquiries.  
21 When a verdict comes through or some significant development in  
22 the case occurs, we want to talk about the case and what that  
23 significant development might mean.

24 The press releases are not intended to go to the  
25 general public as a statement of policy or anything else. If we

1 want to talk to the public we use our website. We might use  
2 some other types of devices, including press releases, but not  
3 press releases that I have worked on, that my name appears in  
4 dealing with specific matters in litigation. Those are intended  
5 to convey a message about that specific litigation.

6 BY MR. NEWBOLD:

7 Q. I'd like to turn your attention to the Scott press release  
8 and I direct your attention to U.S. Exhibit 86693.

9 Is that your press release on the Scott case.

10 A. Yes.

11 Q. Was this press release meant to be a general statement on  
12 addiction?

13 A. No, it was not intended to be a general statement on  
14 addiction.

15 Q. Was it case specific?

16 A. Yes, it was very much case specific.

17 Q. Read the first three paragraphs if you will of that press  
18 release.

19 A. "Louisiana jury today decided that Lorillard and other major  
20 tobacco companies are not responsible for funding a medical  
21 monitoring program for present and former smokers in the state.  
22 In a split verdict, the same jury found the companies liable for  
23 funding a smoking cessation program for the class of Louisiana  
24 present and former smokers.

25 "The verdict was rendered in the cast action suit Scott

1 vs American Tobacco Company, which is being tried in a New  
2 Orleans federal district court. Jurors in the case were asked  
3 to decide whether tobacco companies are liable to fund medical  
4 monitoring and smoking cessation programs for Louisiana's  
5 present and former smokers.

6 "We are pleased that the jury rejected the plaintiffs'  
7 principal claim for medical monitoring which is an untested and  
8 potentially dangerous medical scheme that no major medical  
9 organization recommends, said Ronald S. Milstein, vice president  
10 and general counsel for Lorillard Tobacco Company."

11 Q. Where did you get our information about medical monitoring?

12 A. I got it from the case team, including my in-house counsel,  
13 as well as following the trial on a regular basis.

14 Q. Read the first sense of the fourth paragraph.

15 A. "Asking the companies to fund a smoking cessation program  
16 when well over half of the plaintiffs' class no longer even  
17 smokes, just doesn't make sense, said Ronald Milstein."

18 Q. Where did you get that information that over half of the  
19 members of that class did not smoke?

20 A. From the -- again, from the case, following the case,  
21 reading about the case and from case counsel.

22 Q. Read the second sentence of the fourth paragraph.

23 A. "Liability to fund smoking cessation programs should not be  
24 tried in class action lawsuits. Research has shown time and  
25 again that willpower is the only smoking cessation aid that

1 always works. We are confident that the appeal courts will  
2 remedy this situation, added Milstein."

3 Q. Was it Lorillard's position at trial that claims to fund  
4 smoking cessation programs are not appropriate for class  
5 treatment?

6 A. Yes. Here, we had a situation where the issue of addiction  
7 was being tried in a class setting. We maintained that  
8 addiction was an individual issue that should not be tried in a  
9 class action.

10 And here we had a class that was composed of smokers  
11 and former smokers, some who -- those former smokers had quit,  
12 and we were asked to fund a cessation program for people that no  
13 longer smoked and at that point did not need a smoking cessation  
14 program.

15 So the big problem with that case, and as I tried to  
16 say in this press release, was that it should never have been  
17 certified or tried as a class action.

18 Q. In your statement, "research has shown time and time again  
19 that willpower is the only smoking cessation aid that always  
20 works," is that consistent or inconsistent with Lorillard's  
21 position that this type of case should not be tried as a class  
22 action claim?

23 A. It's absolutely consistent. And again, I got that statement  
24 from a reading of plaintiffs' experts in that case who admitted  
25 that -- again, what I said, willpower is the only smoking

1 cessation aid that always works.

2 I never intended it to mean that people do not need  
3 other things, that willpower is all it takes for everybody. But  
4 again in the context of the class action lawsuit and in context  
5 of what I was trying to say in Scott, that statement does -- did  
6 and does make sense.

7 Q. Directing your attention to Joint Defense Exhibit 025070.  
8 This is the trial testimony of Dr. Neal Benowitz in the Scott  
9 case. As you know, Dr. Benowitz also testified in this case.

10 Would you please look at the highlighted portions on  
11 pages 15449 and 15451 as to what Dr. Benowitz said in the Scott  
12 case about this topic? Would you please read that?

13 A. The highlighted portion reads:

14 "Question: The overwhelming majority of smokers who  
15 quit, this 50 million, they quit without any formal smoking  
16 cessation assistance, correct?

17 "Answer: Yes.

18 "Question: They didn't go to clinics, they didn't use  
19 patches or gum they may have taken a couple or three times, but  
20 they quit cold turkey; correct?

21 "Answer: Well, they may have taken four or five times;  
22 but yes, they quit without specific treatment."

23 Q. And turn to page 1551 and see what Dr. Benowitz said about  
24 willpower and quitting smoking.

25 A. "Question: But being motivated is essential to quitting

1 smoking; correct?

2 "Answer: Right. If you can overcome the addiction so  
3 that your desire to quit smoking is greater than the power of  
4 the addiction, then that means you're motivated to quit.

5 "Question: Well, some people can quit smoking if  
6 they're sufficiently motivated without patches or gum; correct?

7 "Answer: Some people do quit smoking without patches  
8 or gum, yes.

9 "Question: And would you agree that if you gave  
10 patches or gum to somebody who was not motivated to quit  
11 smoking, he's probably not going to quit; is he?

12 "Answer: That's correct."

13 Q. Is this some of the evidence that you had in mind when you  
14 issued your press release that says "research has shown time and  
15 time again that willpower is the only smoking sees session aid  
16 that always works"?

17 A. Yes.

18 Q. I'm going to hand you what has been marked as  
19 Exhibit 004673. This is a copy of the 2000 Surgeon General's  
20 Report which was a trial exhibit in the Scott case. Would you  
21 please turn to page 100?

22 Would you read what the Surgeon General says on this  
23 topic?

24 A. The heading is Methods For Managing Nicotine Addiction.

25 The report starts out, "Historically, the great



1 majority of smokers, more than 90 percent, who successfully quit  
2 smoking did so, quote, on their own, end quote, that is, without  
3 the assistance of formal cessation programs."

4 Q. Is that also some of the evidence that you had in mind when  
5 you issued your press release?

6 A. Yes.

7 Q. Did the statements that you made in your Scott press release  
8 accurately reflect your understanding of the evidence that came  
9 in in the Scott case?

10 A. Yes, it did. I was commenting on the verdict as the  
11 evidence was presented to the jury and what the jury did as a  
12 result of that.

13 Q. When you made that statement were you intending to convey  
14 Lorillard's position that cigarette smoking is not addictive?

15 A. No, absolutely not. That was not my intention, and I don't  
16 think that's what that statement does.

17 Q. And where is Lorillard's positions on smoking and health  
18 found?

19 A. Lorillard maintains a website at Lorillard.com that has our  
20 positions on smoking and health.

21 Q. I hand you what has been marked as JD 024979. I'm not going  
22 to ask you to read this entire thing in the interest of time,  
23 Mr. Milstein, but first let me ask you a couple of prefatory  
24 questions.

25 Who sets Lorillard's positions on smoking and health on

1 ETS causation or addiction?

2 A. Martin Orlowsky, the chairman, president and CEO of  
3 Lorillard Tobacco Company does.

4 Q. Are those positions on causation, addiction and ETS set out  
5 fairly clearly and accurately on this website JD 024979?

6 A. Yes, they are.

7 Q. Are these the current positions of Lorillard on those three  
8 topics?

9 A. Yes.

10 Q. And then going back -- and I'm going to truncate this a bit  
11 in the interest of time.

12 Mr. Brody also asked you questions about the Broin case  
13 which was the flight attendant case and ETS. Your press release  
14 on this case stated, "In this specific case medical evidence  
15 made it clear that Mrs. Routh was genetically predisposed to  
16 contract the type of cancer from which she suffered."

17 Where did you get your evidence from that case?

18 A. I'm sorry. Where did I get?

19 Q. Where you get the information upon which you issued your  
20 press release?

21 A. The information on that case was gotten from case counsel as  
22 well as my in-house counsel assigned to the Broin cases as well  
23 as my review of the trial reports and transcripts.

24 I knew what the facts were in that case. I knew what  
25 the medical evidence was. It dealt with a genetic

1 predisposition that Ms. Routh had to the cancer that she  
2 contracted. That was our defense and apparently the jury agreed  
3 with us. That was one of the instances where I was commenting  
4 in a press release about a litigation development specific to  
5 that case.

6 Q. And was it meant to be a statement on behalf of Lorillard  
7 insofar as the harmful properties of ETS?

8 A. No. It was meant to be statement specific as to that case.

9 Q. How many of those Broin cases does Lorillard have, these ETS  
10 airline attendant cases?

11 A. Currently pending?

12 Q. Yes, sir.

13 A. Approximately 2800 or so.

14 Q. And once again is your position on ETS set forth on your  
15 website?

16 A. Yes, it is.

17 Q. Then going to the Gadaleta case which is U.S. Exhibit 89286.  
18 Would you put that up, please, and hand it to him?

19 Was this press release meant to be a general statement  
20 on cigarette smoking and whether or not it causes lung cancer?

21 A. No. The press release was a specific comment on the  
22 evidence as presented in the jury's verdict in that case, as I  
23 say in the third paragraph.

24 Q. Would you please read that press release?

25 A. Do you want me to read the entire thing?

1 Q. No, just the highlighted part.

2 A. Quote, we are pleased with the jury's finding that Kent  
3 cigarettes are not responsible for the claimed injury, end  
4 quote, commented Ronald S. Milstein, Lorillard's vice president  
5 and general counsel.

6 Quote, the evidence overwhelmingly showed that  
7 plaintiff's occupational exposure to asbestos and not his  
8 smoking caused his lung cancer, end quote, he added.

9 Quote, the plaintiff failed to prove that tobacco smoke  
10 was a factor in causing his injury, because he quit smoking many  
11 years before he developed lung cancer, end quote.

12 Q. Was that meant to be a general statement on whether or not  
13 cigarette smoking causes lung cancer generally or simply a  
14 statement by you as a press release in this specific case?

15 A. This statement was specifically related to the Gadaleta case  
16 and the evidence that was presented in that case and the jury  
17 finding in that case, including the fact that he had quit  
18 smoking many years before he developed lung cancer, which was  
19 part of the evidence and which was a substantial factor in the  
20 jury's verdict.

21 MR. NEWBOLD: Your Honor, I have one more --

22 THE COURT: I think we better -- brief recess at this  
23 point, everybody. Fifteen minutes, please.

24 (Recess began at 11:13 a.m.)

25 (Recess ended at 11:32 a.m.)

1                   THE COURT: Mr. Newbold, do you just have one more  
2 subject matter area?

3                   MR. NEWBOLD: Yes, Your Honor.

4                   THE COURT: Good.

5 BY MR. NEWBOLD:

6 Q. Mr. Milstein, on Friday Mr. Brody asked you questions about  
7 the We Card program. Do you recall that?

8 A. Yes.

9 Q. Could you give the court just a very short, just a thumbnail  
10 definition of what We Card is, and then we can get into it more?

11 A. We Card is a program designed to train retail clerks to ask  
12 for identification before they make a sale of cigarettes to  
13 people under the legal age.

14                   It's done through signs and posters and other  
15 information that's tailored in a way to not only be visible at  
16 retail to the purchaser, but also assist the clerks, like  
17 calendars and things to make it easy for them to ask for and to  
18 receive information and know what to do with that information  
19 once they receive it.

20 Q. I'll hand you what has been marked as JD 024170. Would you  
21 please identify this document for the court?

22 A. This appears to be a 2003 year-end report of the We Card  
23 program.

24 Q. Calling your attention to the fourth page of the document,  
25 which is Bates number 1997. What are some of the training and

1 educational highlights that are described on this page?

2           You don't have to read them all, but just some of the  
3 highlights as to what We Card does insofar as the training of  
4 retail clerks.

5           MR. BRODY: Objection, Your Honor. He said "what are  
6 some of the highlights," and is he asking the witness to -- I  
7 mean, he just reads some of them. It's kind of an imprecise way  
8 to go about this.

9           MR. NEWBOLD: I agree and I withdraw it. I was trying  
10 to truncate the question which would truncate the answer to save  
11 time.

12 BY MR. NEWBOLD:

13 Q. What I would like for you to do is just read the three  
14 paragraphs under Training.

15 A. "The We Card program has provided training to more than  
16 75,000 retail employees in more than 1500 classroom training  
17 sessions held across the country. And those trained reported  
18 that they would go on to train another 800,000 back in their  
19 stores and companies."

20 Q. Are the highlights as described on this page, are they  
21 consistent with your understanding of how the We Card program  
22 works?

23 A. Yes. The two components are training and educational tools.  
24 As I stated, this summarizes the eight years of retail training  
25 and education that the We Card program has provided.

1 Q. On Friday you told Mr. Brody you weren't quite sure when We  
2 Card started. Does this document refresh your recollection as  
3 to when the We Card program started?

4 A. Yes. Apparently it started in 1996.

5 Q. And has Lorillard provided financial assistance to the We  
6 Card program?

7 A. Yes, we have.

8 Q. I'm now going to hand you what is U.S. Exhibit 89180. Can  
9 you identify that document, please?

10 A. This is a memorandum from Read deButts, who is the executive  
11 director of the We Card program, to representatives of the  
12 companies that support the program: Brennan Dawson from Brown &  
13 Williamson, I believe at that time in 1999 she was with Brown &  
14 Williamson; Ellen Merelow from Philip Morris; myself from  
15 Lorillard, and Tommy Paine from Reynolds.

16 Q. Does that document indicate that there would be a  
17 decrease -- that the draft budget for 1999 would be a decrease  
18 from the previous year?

19 A. Yes.

20 Q. I want to hand you another exhibit which Mr. Brody showed  
21 you, which is U.S. Exhibit 90077. This is the We Card program  
22 spending 1996 through 2001; is that correct?

23 A. Yes. It has a 2002 budgeted amount but not an actual.

24 Q. Does this document indeed indicate the spending for We Card  
25 was down in 1999 compared to 1998?

1 A. Yes.

2 Q. But if you look at the spending for We Card in 2000, does  
3 that indicate that the spending in 2000 reflects an increase  
4 over the amount spent in 1999?

5 A. Yes, it does.

6 Q. Does this document indicate that spending for We Card was  
7 higher in 2000 than it was in 1998?

8 A. Yes, it does.

9 Q. How about the year 2001? Does this document indicate that  
10 the spending was higher in 2001 than it was in 2000?

11 A. Yes, it does indicate that it's higher in 2001 than it was  
12 in all previous years, except for the first year, and I assume a  
13 lot of that budget was due to startup costs.

14 Q. In your opinion, sir, does -- is the We Card program funded  
15 adequately to accomplish its goals?

16 A. Yes, it is. We would not have it any other way.

17 The We Card program is important to us and to the other  
18 members of the coalition. We intend to -- we do and we intend  
19 to continue to fund it so that it is as effective a program as  
20 it could be.

21 Q. Do you recall last Friday Mr. Brody was asking you questions  
22 as to whether the We Card signs were as effective or less  
23 effective than the state-required signs?

24 A. Yes.

25 Q. Is it Lorillard's intention that if We Card comes into a



1 store, that the state signs would then disappear or is it your  
2 intention that they would be used together?

3 A. No. It's our intention that they would be used together.

4 The retailer is obligated under law to post whatever  
5 signs the state requires. The We Card signage would be in  
6 addition to those signs. And as a way to help reinforce that  
7 message and the training and the other material that's offered  
8 through We Card would help them actually in the transaction  
9 making sure that the person who is attempting to buy tobacco  
10 products is not under the legal age.

11 Q. I now want to ask you some questions about how you make sure  
12 that your stores conform to the We Card policies, and for that I  
13 will show you what has been marked as JD 020659.

14 Can you tell me what that is, please?

15 A. This appears to be a memo from Kathy Sparrow, our vice  
16 president of sales, to all field sales management dealing with  
17 the issue of legal youth access.

18 Q. Would you -- to whom -- would you please read the second  
19 paragraph that's highlighted?

20 A. "In support of our position against youth access to tobacco  
21 products, we will contact state and local enforcement  
22 authorities and request that they provide us with written  
23 notification when a retailer is fined or convicted of selling  
24 cigarettes to minors."

25 Q. Would you read the last paragraph that says "retail

1 outlets"?

2 A. "Retail outlets: Lorillard will terminate all merchandising  
3 contracts and promotional support with any retail store for a  
4 period of one month if the retailer is fined for or convicted of  
5 selling cigarettes to minors and refuses to participate in the  
6 We Card or a comparable program.

7 "Subsequent violations will be similarly treated even  
8 if the retailer is participating in such a program. We reserve  
9 the right to indefinitely suspend our programs with persistent  
10 offenders.

11 "In addition, if we determine that a retail outlet is  
12 selling Lorillard products to consumers via the Internet, by  
13 mail order or over the telephone without a reliable age  
14 verification procedure, all merchandising contracts and  
15 promotional support will be terminated with that store until we  
16 determine that the violation of this policy is corrected."

17 Q. Would you now take a look at JD 020682?

18 Can you tell me -- can you tell the court what that is,  
19 please?

20 A. This is a letter to our retail customers from Lorillard  
21 Tobacco Company explaining our commitment to supporting  
22 initiatives that prevent youth access to cigarettes and  
23 eliminate youth smoking.

24 Q. What does that letter indicate to the retailer as to what  
25 will happen to them if they are in violation of the state laws

1       insofar as selling cigarettes to minors?

2       A.   We repeat what I just read, I believe, from the memo from  
3       Ms. Sparrow about retail outlets and the We Card or comparable  
4       program requirements.

5       Q.   Now, look at U.S. Exhibit 89183.  This is an e-mail string  
6       that Mr. Brody showed you when he examined you on Friday.  Would  
7       you please read the highlighted portion of that e-mail?

8       A.   "As of November 1, 2001, Lorillard has received information  
9       (cited, fined or convicted) from four states and has  
10       subsequently taken the following action."

11       Q.   And then what type of action does it then describe?

12       A.   It describes that we got information from various states,  
13       four states, that it shows how many stores were reported by the  
14       states, how many of those matched to our system, how many  
15       letters were sent to stores for first notification and how many  
16       e-mails were sent to Lorillard managers to take appropriate  
17       action under our policy for second or subsequent violations.

18       Q.   And did Lorillard actually send the letters and take the  
19       action that was required under its policy when you discovered  
20       that these stores were in violation of the state laws in selling  
21       cigarettes to minors?

22       A.   Yes, we did.

23       Q.   You testified -- and I would like for you to expand on that  
24       a bit -- that you're really not getting that much cooperation  
25       from the various states under your We Card program.  Why is

1       that?

2       A.   I think part of it is logistical.

3               I think that the way that these -- this information is  
4       reported in states varies.  Some states do it on a statewide  
5       basis as we see here, but most states do not collect it  
6       statewide or collect it piecemeal from counties or other  
7       municipalities or other districts, jurisdictions that take care  
8       of these sorts of things.  So it's hard for them to get the  
9       information.

10              My understanding is it's hard for them to compile it.  
11       Sometimes they don't even do that.  And when they do it, even  
12       when they do it, we have found that these have been reluctant to  
13       share it with us, for whatever reason, I really don't know.

14              MR. BRODY:  Just a point of clarification.

15              The question asked about obtaining information under  
16       the We Card program.  Is that what the question -- it sounded  
17       like the answer related to something else.

18              MR. NEWBOLD:  No.  That was the question.

19       A.   I'm sorry.  The information we got was not related to the We  
20       Card program.  It's information from the states that we then  
21       used in the enforcement of our merchandising agreements and what  
22       they say about We Card.

23              So, this information is just about stores that were  
24       cited, fined or convicted of selling to minors.  We use it to  
25       help our own internal efforts.

1 Q. Would you take a look at Exhibit U.S. 28535?

2 Is this an example of a letter that Lorillard sends to  
3 one of its retail customers when they are found to be in  
4 violation of state laws selling cigarettes to minors?

5 A. Yes, it is.

6 Q. Do you know, Mr. Milstein, whether Lorillard has actually  
7 ever suspended a retailer from its retail promotions for repeat  
8 violations or refusal to participate in the We Card program?

9 A. Yes.

10 Q. Approximately how many retailers has Lorillard suspended to  
11 your knowledge?

12 A. Hundreds. I think it's over 400 at this point.

13 Q. Mr. Milstein, on Friday Mr. Brody asked you some general  
14 questions about Lorillard's Excel program. Can you explain to  
15 the court what Lorillard's Excel program is, please?

16 A. The Excel program is our program that we run for retailers  
17 that provides them promotional support in exchange for certain  
18 obligations that they have to promote our product, give us shelf  
19 space, and participate in buy down programs and other discounts  
20 on price.

21 Q. In order for a retailer to take advantage of the Excel  
22 program, do they have to be a member of the We Card program as  
23 well?

24 A. Well, the requirement in the Excel contract is they have the  
25 signage available for We Card or any similar comparable state

1       program, and once they are cited or fined or convicted, then we  
2       do require them to go through the training part of the We Card  
3       program, which would be in addition to whatever the state  
4       training requirements might be.

5       Q.   You told Mr. Brody that in your -- in his questions to you  
6       about the effectiveness of the We Card program, you said that  
7       you were aware of Attorney Generals and Governors who have  
8       supported the We Card program.  Is that correct?

9       A.   Yes.

10      Q.   I'm going to hand you what has been marked as Joint Defense  
11      Exhibit 022904 and 022905.  And what is JD 022904?

12      A.   This appears to be a recap of governors' support of We Card  
13      where certain governors and former governors have been  
14      supportive of We Card, and we recount their support by state and  
15      exactly what they did to express their support.

16      Q.   And what is JD 022905?

17      A.   I'm sorry.  I don't have -- oh, I'm sorry, I have it.

18                 This appears to be something setting forth six  
19      Attorneys General support of the We Card training efforts by  
20      name and state and one former Attorney General.

21      Q.   Mr. Milstein, now I'd like to direct your attention to Joint  
22      Defense Exhibit 024170 which is the We Card year-end report  
23      which you should have still in front of you and directing your  
24      attention to the third page.  I'm sorry.  Yes, the third page,  
25      which is Bates number 99521996.

1 A. Yes.

2 Q. Do you have that, sir?

3 This is a document where they describe the national  
4 average retail violation rates for the years 1997 to 2002. Is  
5 that correct?

6 A. Yes.

7 Q. And the source for this document is the federal government's  
8 Center for Substance Abuse Prevention?

9 A. Yes.

10 Q. Do the results reported here show a consistent decline in  
11 the average retail violation rates since 1977?

12 A. Yes, it does.

13 Q. Looking at the rightmost bar of the graph, which I've  
14 highlighted here, what is the retail violation rate for the last  
15 year reported, 2002?

16 A. 16.8 percent.

17 Q. Now, I'm handing you what has been marked as Joint Defense  
18 Exhibit 025067. This is a document from the United States  
19 Department of Health and Human Services, Substance Abuse, Mental  
20 Health Services Administration. It's a news release of  
21 December 13th of 2004. Is that correct, sir?

22 A. Yes.

23 Q. Directing your attention to the first paragraph of the  
24 document. Do you see the reported violation rates for 2003 and  
25 2004?

1 A. Yes, I do.

2 Q. And what was the retail violation rate in 2003 according to  
3 SAMHSA?

4 A. In 2003, according to SAMHSA, the rate was 14.1 percent.

5 Q. What was the retail violation rate in 2004 according to  
6 SAMHSA?

7 A. 12.8 percent.

8 Q. Is this document consistent with your understanding that the  
9 rate of retail violations in the United States has been  
10 declining and continues to decline?

11 A. Yes.

12 Q. In your opinion, sir, does the We Card program, as you know  
13 it and as you've been involved with it, has it had an effect on  
14 this decrease in retail violations of kids buying cigarettes in  
15 the United States?

16 A. Yes. I believe it's been an important part of that effort.

17 MR. NEWBOLD: No further questions, Your Honor.

18 THE COURT: Mr. Brody, please.

19 MR. NEWBOLD: Your Honor, at this time do you want to  
20 deal with the exhibits now or when Mr. Brody concludes or  
21 tomorrow?

22 THE COURT: When we conclude with Mr. Brody's redirect,  
23 I'll find out whether you need the lunch break to work out any  
24 differences over exhibits, and hopefully right after the lunch  
25 break or before we break for the day we can make a final



1 decisions on the exhibits.

2 MR. NEWBOLD: Thank you, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. BRODY:

5 Q. Mr. Milstein, can you read the -- we may as well start with  
6 the exhibit that we were just looking at, 025067, which is the  
7 SAMHSA news release. Do you have that?

8 A. Yes.

9 Q. Can you read the headline there?

10 A. "Fewer retailers selling cigarettes to youth under state  
11 enforcement efforts."

12 Q. That's under state enforcement efforts, not under the We  
13 Card program they are referencing; right?

14 A. I believe that's what it says, yes.

15 Q. And there's nothing in this news release that says anything  
16 about the effectiveness of the We Card program as opposed to  
17 state or government enforcement efforts, is there?

18 A. No, I don't see it in here.

19 I do know that states have, as I just saw in one  
20 exhibit, endorsed the We Card effort. And not every state has  
21 their own program. Some of them in fact have endorsed We Card  
22 and are using the We Card program.

23 Q. And on that exhibit that we looked at, that was a total of  
24 10 governors or former governors, about a total of 20 percent;  
25 and six out of 50 Attorney Generals, so a total of about

1 12 percent. Right?

2 A. I believe your math. I wouldn't know offhand what the  
3 percentages are.

4 Q. SAMHSA, the organization that -- the Substance Abuse and  
5 Mental Health Service Administration that issued this release  
6 that Mr. Newbold used, they are the organization that reports on  
7 smoking rates amongst kids aged 12 to 17; right?

8 A. I don't know that for a fact or not.

9 Q. We can look at an exhibit. I think, Charles, if we can pull  
10 up 63109.

11 This is a summary of findings from the 2000 National  
12 Household Survey on Drug Abuse; right?

13 A. Yes.

14 Q. And you see who it's published by there up at the top?

15 A. Yes.

16 Q. And who publishes this?

17 A. SAMHSA.

18 Q. And this is the 2000 survey. So this covers the time that  
19 you were Lorillard's executive level manager designated to  
20 reduce youth access and consumption of tobacco products; right?

21 A. Yes, until September of 2000 I had that title.

22 Q. And if we go to page 42 of the document. The Bates number  
23 at the bottom is U.S. X2612349. Let me know when you get there.

24 A. Yes.

25 Q. And we see in the report under the Usual Brand Used, there's

1 information reported there, and there we see a year into your  
2 tenure Newport was reported by 23.4 percent of the youth smokers  
3 as their usual brand; right?

4 A. Yes.

5 Q. Now, the other document that we looked at on retail sales  
6 trends, which you probably also still have in front of you, JD  
7 024170 which is the We Card 2003 year end report.

8 A. Yes.

9 Q. The chart there at the bottom that Mr. Newbold directed your  
10 attention to, that doesn't say anything about the effectiveness  
11 of the We Card program as compared to state programs -- state  
12 enforcement programs and state warning signs; right?

13 A. No. I believe this chart is information from the central  
14 report that you just referenced, or an earlier report, perhaps,  
15 detailing '97 through 2002.

16 It's never been our intention --

17 Q. I'm sorry, Mr. Milstein. I didn't ask any question about  
18 your intentions. I simply asked you whether that chart  
19 reflected certain information. So, if we can continue to move  
20 through, we should --

21 A. I'm trying to be responsive to your question, Mr. Brody.

22 MR. BRODY: I want to -- if I can proceed, Your Honor.  
23 I think my question was answered.

24 THE COURT: You may.

25 MR. BRODY: Thank you.

1 BY MR. BRODY:

2 Q. I want to ask you a couple of questions about the press  
3 release that Mr. Newbold focused on for a fair period of time,  
4 the statement in U.S. Exhibit 86693. And we have it up on the  
5 demonstrative there, so why don't I just pull this down.

6 And again your statement there was, "Research has shown  
7 time and time again that willpower is the only smoking cessation  
8 aid that always works." Correct?

9 A. Yes.

10 Q. Mr. Newbold showed you a portion of JD 4673, the 2000  
11 Surgeon General's Report. Do you recall that?

12 A. Yes.

13 Q. And I think you indicated that you thought your statement  
14 was consistent with that report?

15 A. It's hard for me to keep track of all these documents, I  
16 just don't remember.

17 Q. Let's take a look at part of it. And this is page 97, and  
18 you see at the bottom that this section of the report, which is  
19 entitled Reducing Tobacco Use, is called Management of Nicotine  
20 Addiction.

21 And we can see there that the Surgeon General  
22 indicated, "Cessation represents a desired end result to what is  
23 usually a lengthy, demanding, and often frustrating undertaking.  
24 Data on cessation should be interpreted in light of the fact  
25 that for every successful attempt to quit using tobacco, many

1 more attempts fail. Although millions of American say they want  
2 to quit smoking, studies suggest that only about 6 percent of  
3 persons who try to quit smoking at any given time are successful  
4 for more than one month."

5 Did I read that correctly?

6 A. Yes.

7 Q. And that statement is inconsistent with an assertion that  
8 research has shown that willpower is the only smoking cessation  
9 aid that always works; correct?

10 A. No, that's not correct.

11 Q. The testimony that you were shown from the Scott case of  
12 Dr. Benowitz is also inconsistent with your statement; correct?

13 A. I don't think so.

14 Q. Dr. Benowitz did not say that research has shown that  
15 willpower is the only smoking cessation aid that always works,  
16 did he?

17 A. I think what he said is consistent with what I said, and  
18 that is that the -- that willpower is a smoke cessation aid that  
19 always works.

20 There are other aids that work with people. We're not  
21 saying that willpower alone always works, nor are we saying that  
22 smoking cessation programs, no matter if it's just willpower or  
23 part of a very, very elaborate scheme, always works.

24 This was not intended to be a general statement on  
25 addiction. It was intended to talk about the evidence in the

1 Scott case and the peculiar aspects of the class action in Scott  
2 where half of the class had already quit without any smoking  
3 cessation devices. A campaign paid for by the companies.

4 Q. Your press release that appears on Lorillard's website  
5 today --

6 THE COURT: Today?

7 MR. BRODY: Today.

8 BY MR. BRODY:

9 Q. -- the statement in this press release, which is still today  
10 on Lorillard's website; correct?

11 A. I believe so. I think we have an archive on our website of  
12 all press releases.

13 Q. And somebody goes to this press release in the website --  
14 and we can see it as U.S. Exhibit 86693, if we can bring that  
15 up, Charles.

16 It doesn't say in your press release that your  
17 statement about what research shows is limited to the evidence  
18 that was presented in the Scott case, does it?

19 A. I believe it does.

20 I'm talking about the Scott case. The sentence  
21 preceding it talks about the Scott case. The sentence after it  
22 talks about the Scott case. That sentence talked about the  
23 Scott case.

24 If somebody wants to go on our website and get  
25 information about Lorillard's position on addiction, they should

1 go to the home page where clearly stated is our position on  
2 addiction, as was read before.

3 This is not intended to serve as a guide to anybody  
4 about our position on addiction generally. This is a comment  
5 about a lawsuit.

6 Q. There's nothing in this press release that directs someone  
7 to Lorillard's website, is there?

8 A. No, Mr. Brody, there's nothing in the press release that  
9 directs us to the website.

10 Q. And --

11 A. Although --

12 MR. NEWBOLD: Objection, Your Honor. The witness had  
13 not concluded his answer.

14 THE COURT: Sustained. He may finish.

15 A. I would hope that if anybody wants to find out about  
16 Lorillard, they would go on the website -- they would actually  
17 have to go on the website and hit the home page, and the options  
18 on the website that would offer them the statement that I just  
19 mentioned.

20 Q. The first thing that comes up when you go to Lorillard's  
21 website are the most recent press releases; right? That's the  
22 first thing somebody sees.

23 A. I don't remember exactly what the first thing is. I believe  
24 that there's a left-hand column that has different categories of  
25 information that you could go to.

1 Q. We have Webb access here at counsel table, we can pull up  
2 Lorillard.com. And if we go back to the first page,  
3 Lorillard.com. We see that the first thing that somebody who  
4 visits the website sees are the press releases under the heading  
5 Latest News; right?

6 A. Yes, under Latest News. On the left-hand side you see the  
7 various parts of the website that you would be directed to.

8 Q. Now, I want to go back to 86693, just to make sure we are  
9 clear here. I want to ask you a question about it.

10           Somebody who read this press release -- first of all,  
11 when the press release goes out, the press release doesn't say,  
12 "Visit our website to see what our real position is on this  
13 issue," does it.

14 A. No. Again, if people want to know what Lorillard's position  
15 is on a specific general issue they should know to go to  
16 Lorillard's website as is common today. If you type in  
17 Lorillard you will get the Lorillard website.

18 Q. And you're saying that somebody who read this press release  
19 as it was picked up by newspapers around the country should have  
20 read it to say that "research that was discussed specifically in  
21 the Scott case supports the position that willpower is the only  
22 smoking cessation aid that always works and has shown that time  
23 and time again"?

24 A. I would hope that somebody who reads this press release  
25 would realize that they are dealing with a press release



1       commenting on the Scott verdict, which is what the title of it  
2       is and which is what the entire press release deals with.

3               There's never -- there is not in this press release a  
4       general statement regarding Lorillard's position on addiction.  
5       This is purely a comment on the Scott verdict.

6       Q.   You would agree with me that there is a general statement  
7       about what you assert research has shown time and time again,  
8       wouldn't you?

9       A.   There is a statement about the research, again derived from  
10      the Scott case itself, that has to be read in the context of the  
11      press release and in the paragraph specifically where it occurs.

12      Q.   Dr. Benowitz, in fact, testified, in response to the very  
13      next question after what Mr. Newbold showed you in his  
14      cross-examination, he was asked the motivation is more important  
15      than the patches or gum in terms of quitting; correct?

16             And he said that "while motivation is essential,  
17      patches and gums help, patches and gums can make someone who  
18      wants to quit make it easier for them because it helps reduce  
19      the severity of addiction. The availability of patches and gums  
20      can sometimes enhance someone's motivation."

21             He did not say that "research has shown time and time  
22      again that willpower is the only smoking cessation aid that  
23      always works."

24             In fact, he said just the opposite; that willpower is  
25      aided by smoking cessation aids as a result of addiction to

1 nicotine.

2 A. I disagree.

3 And if you want me to go through the entire transcript  
4 of Dr. Benowitz and all other Scott experts in the case to find  
5 justification for that statement, I will do that.

6 I really do believe that is the research -- I'm sorry,  
7 that is the evidence that was given in the Scott case. That is  
8 what their experts were saying.

9 And our issue with that had to do with the fact that it  
10 was a class action. Half of the class had already quit smoking  
11 and did not need cessation because they had quit.

12 Q. You know, I'm tempted to take you up on the offer, but I  
13 don't know if we have time to have you go through the entirety  
14 of Dr. Benowitz's testimony, but I would be interested in  
15 hearing how his testimony when read, any portion of it or as a  
16 whole, could support that statement, but I'm going to pass on  
17 that in the interest of time since it is somewhat lengthy.

18 MR. NEWBOLD: I object to that, Your Honor. That's  
19 purely -- pure argument, it wasn't a question. I object. I ask  
20 that it be stricken.

21 THE COURT: It was.

22 Mr. Brody, go ahead, please.

23 BY MR. BRODY:

24 Q. I want to ask you some follow-up questions about the Youth  
25 Smoking Prevention Program in response to what you were asked by

1 your counsel.

2 These ads -- as I think we said, these ads that we  
3 looked at, the Piercing Parlor, Stereo Kid, those were part of  
4 the media campaign. The scholarship program was an additional  
5 part of it and then we had the parenting part of it; right?

6 A. Yes. It was also print ads.

7 Q. And the print ads.

8 And when we talked about, early this morning, the  
9 budget for the program being between 11 million and 14 million  
10 per year, that was for the program as a whole. That money  
11 supported all of it.

12 So any money that was being spent on -- say, the  
13 television advertisements was not being, you know, there's not  
14 additional money in that for the parenting program; right?

15 A. No. I believe what you quoted me, if those are the fair  
16 numbers, was for the entire budget, what was the entire budget  
17 for the entire program.

18 Q. Now, as I think we've said, you had the -- we had Piercing  
19 Parlor and Stereo Kid. And the Stereo Kid ad showed a kid with  
20 an electric guitar and a stereo, and is that the right -- am I  
21 getting the right one?

22 A. Yes.

23 Q. And that was to, I guess, appeal to kids and their interest  
24 in music?

25 A. No. I don't agree with that.

1           That was to show that there are better things that they  
2       could be and should be doing with their money. The idea was  
3       that the kid was playing music on an instrument, and the  
4       voiceover was first -- I don't quote it exactly -- but first you  
5       start bumming cigarettes from others, then you pay for it  
6       yourself and there goes your money before, you know -- you know,  
7       you don't have any money left.

8       Q. There goes your money for your stereo?

9       A. Yes.

10      Q. There goes your money for your electric guitar?

11      A. Yes.

12      Q. At the same time that Lorillard was running this Stereo Kid  
13      ad, Lorillard was also promoting the Newport Rhythm and Sound  
14      events around the country, right, as a promotional event?

15      A. Yes. I think it was the same time period. I don't remember  
16      exactly when Rhythm and Sound ran.

17      Q. Can you tell the court what the Rhythm and Sound Program  
18      was?

19      A. Yes. That was a program that occurred in bars, age-  
20      restricted facilities, that featured music and was an  
21      opportunity for us to promote our product in that age-restricted  
22      setting.

23      Q. I want to try to get the timing down.

24           I show you an exhibit and ask if it refreshes your  
25      recollection on the time that you were running that promotion.

1 This is U.S. Exhibit 22212. And the court actually saw this  
2 exhibit in the context of Ms. Smith's testimony last week.

3 My question is, if you take a look at the whole  
4 document, whether this refreshes your recollection as to the  
5 timing in which Lorillard was running the Newport Rhythm and  
6 Sound Program? I'll direct your attention to page 2.

7 MR. BERNICK: I object, Your Honor. This is not in  
8 evidence. It can't come into evidence. It may, but it so far  
9 hasn't come into evidence with this witness, so I object to  
10 showing this document to the witness unless there's a foundation  
11 for it.

12 MR. BRODY: That's what we are getting to, Your Honor.

13 THE COURT: The objection is overruled.

14 And it's not in yet, let me make that clear, but  
15 certainly he can -- Mr. Brody can lay a foundation or try to.

16 MR. NEWBOLD: Your Honor, I have an additional  
17 objection which is why I was a little tardy.

18 I do not believe that this was on the list of exhibits  
19 that was submitted to us as part of the examination of  
20 Mr. Milstein.

21 THE COURT: But that was a list --

22 MR. BRODY: That was a list.

23 THE COURT: -- of direct examination exhibits. We are  
24 on redirect, and given the fact that this is an adverse witness,  
25 we are on impeachment of the witness.

1 MR. NEWBOLD: I don't understand --

2 THE COURT: Also, this is a Lorillard document. And  
3 the previous -- I think she was the previous witness, maybe two  
4 witnesses ago from Lorillard testified about it.

5 MR. NEWBOLD: Thank you, Your Honor.

6 THE COURT: Go ahead.

7 A. Mr. Brody, this is not a Lorillard document. This has to do  
8 with Lucky Strike, which is a Brown & Williamson brand. It's a  
9 Brown & Williamson document.

10 Q. Let's take a closer look at it.

11 First of all, if you look at the Bates number. Do you  
12 see the Bates number 98600273?

13 A. Yes.

14 Q. If I told you that Mr. Bernick, counsel for Brown &  
15 Williamson, had represented that this was a Lorillard document  
16 based on a Bates number, would you disagree with him?

17 A. No.

18 Q. If you look at the second paragraph here, do you see the  
19 indication, "Beth and I left and went to the Newport Rhythm and  
20 Sound Event at Excalibur." Do you see that?

21 A. Yes.

22 Q. And there's further indication, "after attending the  
23 competitive events, and then attending our event, it was very  
24 clear that our event was far superior."

25 And that's referring to the last event there, the

1 Newport Rhythm and Sound Event; right?

2 A. Yes, and then they go on to talk about a Marlboro event as  
3 well.

4 Q. Right. And they say the Marlboro event was very poor in  
5 their opinion, right. Cheap and pointless.

6 A. Yes.

7 Q. And so they are touting the Newport event, our event as the  
8 best one; right?

9 A. It says it was very clear that our event was far superior.  
10 I guess that's what they are saying, yes.

11 Q. And you're aware, Mr. Milstein, this is something that the  
12 Marketing Department does at Lorillard. The Marketing  
13 Department sends representatives like -- let's see, on the first  
14 page here we see David M. DeSandre to various events of its  
15 competitors in order to assess how Lorillard's promotional  
16 events stack up against the promotional events of its  
17 competitors; right?

18 A. I don't know. It's possible. I don't think from this  
19 document I can determine that. I'm not seeing that these were  
20 Newport people going to a Brown & Williamson event. It seems to  
21 be Brown & Williamson people going to a Newport event.

22 Although I don't know. I've never seen this document  
23 before, so I really don't know.

24 Q. Have you seen the Lorillard Tobacco Company glossary of  
25 names that was served by counsel for Lorillard in this case?

1 A. I don't know if I have or not.

2 Q. I want to show you the seventh page of this served  
3 February 5, 2002, by counsel for Lorillard. We can see on the  
4 screen the indication, D.M. DeSandre, Lorillard assistant brand  
5 promotion manager.

6 Do you have any reason to doubt that Mr. DeSandre is an  
7 assistant brand promotion manager at Lorillard?

8 A. That he was at the time that his name is referenced in this  
9 document, no. I don't believe he is today.

10 Q. Do you have any reason to doubt that Lorillard sent various  
11 employees from its Marketing Department to the events of its  
12 competitors in order to assess how the competitors' events  
13 compared to those that were being sponsored by Lorillard?

14 A. No, I don't have any reason to doubt that.

15 Q. Lorillard's current Youth Smoking Prevention Campaign  
16 website is no longer the Butt Out Now dot com website that we  
17 saw referenced in a couple of the documents you were shown on  
18 cross; right?

19 A. Yes, I believe that's right.

20 Q. Yes, correct, that website no longer exists; right?

21 A. I think that it does no longer exist.

22 Q. And the only youth smoking prevention website that Lorillard  
23 currently maintains is one called Keep Kids From Smoking dot  
24 com; right?

25 A. Yes, I believe that's right.



1 Q. And that deals with the parenting program; right?

2 A. Yes.

3 Q. And that's the parenting program that we talked about of  
4 Dr. Popkin?

5 A. Yes.

6 Q. It's nothing at all on that website that tells parents they  
7 should stop smoking themselves, is there?

8 A. I don't know what's currently on the website.

9 I do know that Dr. Popkin in his presentations and I  
10 believe in the brochure talks about the difficulty of smoking  
11 parents, specifically, talking to their kids about not smoking.

12 Q. Let's take a look at that. And this is in -- you should  
13 have it up there -- this is JD 020643. And you identified this  
14 as Dr. Popkin's brochure.

15 If you will turn to, I think it's two pages in from the  
16 back. The pages are not numbered. You see the proposed  
17 question there, "What if I'm a smoker?"

18 And the answer doesn't tell a parent that they can help  
19 their -- that they should quit smoking, does it?

20 A. No. The objective of the campaign here is to speak to  
21 parents about how they can get their kid to not smoke.

22 Q. So the campaign -- now, the campaign as a whole is premised  
23 on a recognition of parental influence as a factor in youth  
24 smoking; correct?

25 A. Yes.

1 Q. And despite that recognition, there is no advice that a  
2 parent, as an example to their kids, should quit smoking in  
3 order to influence their kids' decisions to smoke or not to  
4 smoke; right?

5 A. Not as I'm reading this brochure.

6 I know that Dr. Popkin speaks about that when he's in  
7 groups of parents. I know his position on that because I asked  
8 him and he told me.

9 And there was never any discussion that Lorillard would  
10 not want him to say that, would not want him to promote the idea  
11 that if you quit smoking you will set an example for your  
12 children.

13 Again, this brochure as well as the program as a whole  
14 for the parents was designed by Dr. Popkin without our  
15 interference, and it is his writing, it is his analysis or his  
16 end work product.

17 Q. We're going to talk a little bit about what Lorillard wanted  
18 Dr. Popkin to say and what Lorillard didn't want Dr. Popkin to  
19 say, but I want to continue to look at this document.

20 There's only one reference -- actually, two references  
21 in here to the health consequences of smoking, right, in this  
22 brochure?

23 A. I don't know. I don't have it actually in front of me.

24 Q. We can take a look at one of them. It's a page that says  
25 "conversation starters."

1                   And you can see the second bullet point there  
2 indicates, "When you see smokers portrayed in the media as  
3 strong, healthy and sexy, remind them that just the opposite is  
4 true. Health professionals have said smoking may have harmful  
5 effects including: Cancer, heart disease, coughing and  
6 emphysema, as well as bad breath and yellow teeth."

7                   Did I get that correctly?

8           A. Yes.

9           Q. So the brochure doesn't even say that smoking does cause  
10 those diseases; it merely says that health professionals have  
11 said that it may; right?

12          A. That's what it says, yes.

13          Q. If we turn to a page that indicates Talking About Ways to  
14 Say No, what is emphasized is not anything about what might --  
15 primarily emphasized are things like teeth being yellow,  
16 cigarette not going with an outfit. I guess those are offered  
17 as humor. Not being cool. Asks questions about why would I  
18 want to try something that smells that bad? Do you know any  
19 professional athletes who smoke?

20                 The only reference -- and it's -- to anything to do  
21 with health is Why would I want to do that to my lungs; right?

22          A. Yes, from what you're showing me, that portion of it, that's  
23 the reference to health. Again, the message -- this is a  
24 message to parents. And the message that he wants the parents  
25 to send apparently does not involve the health message, because

1 coming from the parent that is not going to be any more  
2 effective as coming from anyone else. Again, this is  
3 Dr. Popkin's approach to this issue.

4 Q. In conducting the Take 10 Program, one of the things that  
5 Lorillard was concerned about was making sure that it received  
6 positive media coverage for Lorillard as opposed to simply  
7 receiving coverage for the youth smoking message; right?

8 A. No, that was not my concern at all.

9 We didn't expect to receive positive messages or  
10 positive input from anybody for this program. We did it because  
11 we thought it was the right thing to do and knew that we would  
12 be criticized for it.

13 Q. Lorillard specifically gave media training to Dr. Popkin  
14 before his interviews; right?

15 A. I believe we did, yes, although I believe he was already  
16 media trained to some extent.

17 Q. The company then organized media tours; right?

18 A. Yes, we did.

19 Q. How much money has Dr. Popkin made from Lorillard as a  
20 result of this program?

21 A. I -- I don't know exactly. I believe at this point after  
22 four years of the program it's in excess of a couple of hundred  
23 thousand. I believe he was -- I just don't remember exactly,  
24 but I think that's right.

25 Q. And he also uses the media tours to promote his books and --

1 books which are published by the active parenting group that we  
2 saw on the website with his biography; right?

3 A. When I was involved with the program, I don't think that  
4 issue came up. It's very possible that he does, yes.

5 Q. Now, Lorillard utilized the services of a public relations  
6 firm, BSMG, to organize the media tours; right?

7 A. Yes, we did.

8 Q. And BSMG also assisted in preparing Dr. Popkin to be sure  
9 that everything he said would be consistent with Lorillard's  
10 public relations goals; right?

11 A. No. I think the preparation of Dr. Popkin was so that he  
12 can do a better job at communicating the message of the  
13 parenting campaign.

14 Q. I want to take a look at an e-mail and an attached  
15 memorandum concerning the preparation that we've marked as U.S.  
16 Exhibit 90096. This is an e-mail from Katy Homburger at BSMG;  
17 right?

18 A. Yes, it appears to be.

19 Q. And she worked on the media tours at BSMG for Lorillard;  
20 right?

21 A. Yes, apparently she did.

22 Q. She's writing here to Victor Lindsley, who we identified as  
23 the senior brand manager for Newport, and to Steve Watson, who  
24 is the vice president of external affairs at Lorillard; right?

25 A. Yes.

1 Q. And she indicates, "Good afternoon. Attached are several  
2 documents for your review." And included there are supplemental  
3 media questions and suggested responses, based on our recent  
4 media training with Dr. Popkin. Do you see that?

5 A. Yes.

6 Q. If you turn to the following page, it's the next Bates  
7 number, we see a memorandum from Ms. Homburger and Tamera  
8 Windfree to Victor Lindsley; right?

9 A. Yes.

10 Q. And they indicated, "We identified several questions based  
11 on recent news reports Dr. Popkin may be asked during his  
12 upcoming SMT."

13 That's satellite media tour; right?

14 A. I believe so, yes.

15 Q. "And future media tours. These additional questions and  
16 answers are attached for your review."

17 If we turn the page, we see a Take 10, supplemental  
18 media questions and suggested responses.

19 First question there is a reference to Newport  
20 cigarettes as the brand of choice for teens, and a suggested  
21 response; right?

22 A. Yes.

23 Q. And BSMG suggest that Dr. Popkin sidestep the issue rather  
24 than specifically addressing the fact that Newports are the  
25 second leading brand choice amongst young smokers age 12 to 17;

1 right?

2 MR. NEWBOLD: I object to the form.

3 THE COURT: Objection is overruled.

4 A. I wouldn't agree with sidestep, your characterization of  
5 this as sidestep.

6 I think this is a perfectly reasonable suggested  
7 response, and it's been my experience with Dr. Popkin that we  
8 don't need to suggest responses to him. He knows what to say.

9 Q. The response is consistent with Lorillard's Youth Smoking  
10 Prevention Program as a whole in that it does not address  
11 Lorillard marketing specifically; correct?

12 A. Yes. The program does not address Lorillard marketing  
13 specifically.

14 Q. The fifth question -- go down to the bottom of the page --  
15 contains a reference to the effectiveness of the program, and  
16 proposes an answer for Dr. Popkin in case he's asked whether the  
17 program is working; right?

18 A. Yes.

19 Q. And the proposed answer suggests that it would be impossible  
20 at that point in time to evaluate the effectiveness of the  
21 program; right?

22 A. The answer says that "the Take 10 effort is still a  
23 relatively new initiative. As the program gains momentum over  
24 the years we can better evaluate its impact. What I do know is  
25 that education works," and then goes on from there.

1           So, again, this was a suggested response utilizing his  
2 background and experience.

3       Q.   Suggested by the public relations' firm?

4       A.   Yes. I think that if we look at this in context, and  
5 knowing Dr. Popkin as I do, this is something that's less --  
6 less than a formal training.

7           In other words, Dr. Popkin did not need us to tell him  
8 how to answer questions about youth behavior and how to talk to  
9 parents about youth behavior. That's why we hired him. He was  
10 an expert in the field. He's very articulate and engaging and  
11 he does a great job for us.

12       Q.   If he knew what to say, why was Lorillard preparing him with  
13 the assistance of the public relations' firm for his media  
14 tours?

15       A.   I think Lorillard's effort was to enhance his abilities, to  
16 focus him on program, and to make sure that he was getting the  
17 message out that we thought we needed to get so that our  
18 objectives and his conduct and his experience would be the same  
19 and would work together.

20       Q.   One of the things that Dr. Popkin was trained to do was  
21 mention Lorillard in all of his interviews; right?

22       A.   I don't know if it's fair to say he was trained to do that.  
23 We wanted Lorillard mentioned.

24           Again, we didn't want this to be a situation where  
25 people didn't know where this program was being funded and from



1       where it came.

2               It was very important to us that we identify ourselves  
3       and anything we were doing, because if we tried -- if we did  
4       not, I think it would be fair to say we would be much criticized  
5       for trying to hide behind some effort.  Nothing --

6       Q.  I'm sorry.

7       A.  Nothing we do can be looked at as hiding or deceptive or  
8       anything less than totally transparent.  And we were very much  
9       aware of that for this program.

10      Q.  You wanted Lorillard mentioned in all the news stories  
11      rather than just the Talk to Kids About Smoking message so that  
12      no one could accuse Lorillard of a lack of transparency.  Did I  
13      get that right?

14      A.  We wanted Lorillard mentioned prominently.  Any time this  
15      program came up, any time there's any discussion about the  
16      program, it's critical that we are identified as the sponsor of  
17      the program.

18      Q.  And that was -- you didn't want to just be identified as a  
19      sponsor of the program, but you wanted to make sure that  
20      Lorillard was mentioned in all -- any news story that might run  
21      connected with the Take 10 program; right?

22      A.  For the same reason, Mr. Brody.

23               If you're implying that Lorillard wants to take some  
24      credit for this program, I think you're wrong.  I don't think  
25      Lorillard ever expected to take credit.  Obviously, we are not

1       being credited with this program.

2               It's a damned-if-you-do, damned-if-you-don't situation.  
3       Just like in many other instances in this industry. You do the  
4       right thing because we feel it's the right think to do, not  
5       because we expect anybody to say, "Good job. Thank you for  
6       doing that."

7       Q. Mr. Milstein, Lorillard's interest in positive public  
8       relations exposure pushed the company far enough as to hire the  
9       Anzalone Research Group to do national polling on public  
10      perceptions of tobacco industry Youth Smoking Prevention  
11      Programs; right?

12     A. Yes. It was very important for us to find out how these  
13     things were going to be received, to anticipate the criticism,  
14     to know whether or not it would be even effective for a tobacco  
15     company, like Lorillard, to do an anti-smoking campaign.

16             We live in a society where these issues are very much  
17     present and we need to be aware of them and responsive to them.

18     Q. I want to show you some of the research marked as U.S.  
19     Exhibit 90095. This is a memorandum from John Anzalone,  
20     Incorporated to the Lorillard team containing a summary of  
21     national polling results; right?

22     A. Yes. That's what it appears to be.

23     Q. If we turn to the third page of the document. You were  
24     familiar with this research when it was being done; right?

25     A. Yes, I was, although I have not seen this document in a very

1 long time, and I'm just not familiar with it any longer. But I  
2 do remember Mr. Anzalone.

3 Q. Bullet point number 3 on page 3 of the document, "The public  
4 sees more effectiveness in anti-teen smoking campaigns." Do you  
5 see that?

6 A. Yes.

7 Q. And the second paragraph there, we see that Anzalone  
8 reported that a majority of those polled felt that anti-teen  
9 smoking advertising by tobacco companies was effective compared  
10 to 36 percent the previous year. Did I get that right?

11 THE COURT: What paragraph? Are you on the second  
12 paragraph?

13 MR. BRODY: Second paragraph, yes.

14 THE COURT: All right.

15 A. Yes.

16 Q. Lorillard was testing public perceptions, not the actual  
17 effectiveness of any of the tobacco company campaigns with this  
18 particular survey research; right?

19 A. I believe this research is designed to determine whether or  
20 not the public as a whole feels that antiteen smoking by tobacco  
21 companies could be effective.

22 Q. The Monitoring the Future study subject to surveys has never  
23 cited Lorillard's Youth Smoking Prevention Program as  
24 contributing to the declines in youth smoking rates amongst 8th,  
25 10th and 12th graders, has it?

1 A. I don't know if it has or not.

2 Q. Another thing that you were polling on -- if we look up a  
3 page here, number two -- is an indication that public's  
4 knowledge -- page 3, number two -- "Public's knowledge still  
5 soft on national settlement."

6 I want to talk just a little bit about this before we  
7 wrap up in response to the questions you got from Mr. Newbold  
8 about the corporate principles.

9 There's a handwritten note there that indicates, "More  
10 they know about MSA the more positive feelings." Do you see  
11 that?

12 A. Yes.

13 Q. And that's what the research from Anzalone showed to  
14 Lorillard; right?

15 A. I'm sorry. Could you say that again? Would you ask that  
16 again?

17 Q. Sure. That handwritten note, "The more they know about MSA,  
18 the more positive feelings." That's consistent with the  
19 research that Anzalone did, the polling that Anzalone did, for  
20 Lorillard; right?

21 A. Yes. Again, I have not seen this for a very long time. And  
22 I believe now that I'm reading more parts of it, that this was  
23 not directly related to the Youth Smoking Prevention Campaign;  
24 it might have been related to another effort that Lorillard made  
25 to educate the public about its MSA commitment in 1999 which we

1       referred to as a Corporate Communication Campaign that consisted  
2       of ads that ran in certain newspapers.

3               I just don't have a clear recollection as to what this  
4       research was really commissioned for, but my sense is that it  
5       was the latter, it was the Corporate Communication Campaign and  
6       not the Youth Smoking Campaign. Again, I could be wrong, but  
7       that's my recollection at this point.

8       Q. Lorillard wanted to use the fact of the MSA -- the existence  
9       of the MSA for public relations gains; right?

10      A. I think we wanted the public to be aware of the MSA.

11              We felt the MSA was a very, very significant event in  
12      our history and in our society. And yes, we wanted the public  
13      to be aware that we had made this commitment under the MSA.

14              The public knew what was going on for years and years  
15      with the proposed resolution in the McKean bill. The MSA was  
16      the ultimate resolution or the ultimate outcome of all of that  
17      activity.

18              And yes, I think it was our decision or our judgment  
19      that the public should know about the settlement and should know  
20      that we were paying billions of dollars, and that we were going  
21      through this kind of change in corporate culture and otherwise.

22      Q. Lorillard went so far as to hire the public relations firm  
23      Powell Tate in Washington, DC to prepare glossy brochures  
24      touting the company's entry into the MSA and its Youth Smoking  
25      Prevention Program; right?

1 A. We hired Powell Tate, yes, to get the word out -- to help us  
2 get the word out about the MSA, to educate the public as part of  
3 the Corporate Communications Campaign.

4 Q. And one of those brochures we can see marked as U.S.  
5 Exhibit 90091; correct?

6 A. Yes, I believe so.

7 Q. And if you go to the last page of that, you can see the  
8 business card of Tom Sadowski, senior vice president and  
9 creative director of Powell Tate?

10 A. Yes.

11 Q. The indication there, Powell Tate is a Weber Shandwick  
12 Company; right?

13 A. Yes, that's what it says.

14 Q. And BSMG, the company that oversaw the media tours for the  
15 Take 10 Program, they are also a Weber Shandwick Company; right?

16 A. Presently, I don't know what their affiliation is, and I  
17 don't remember whether they are related to Weber Shandwick at  
18 the time we used them for the Youth Smoking Prevention Campaign  
19 or not. They keep going through different iterations of  
20 corporate parents.

21 Q. We talked a little bit about Bozell, looked at some Bozell  
22 reports.

23 Bozell is sister company of Avrett, Free & Ginsburg,  
24 Lorillard's tobacco brand advertising agency, isn't it?

25 A. Yes, I think they were, if they are not still owned by the

1 same ultimate parent in the advertising business.

2 MR. BRODY: Thank you, Mr. Milstein. That's all I  
3 have.

4 THE COURT: All right. Mr. Milstein, you may step  
5 down.

6 Because this was direct testimony, I think that's the  
7 reason for there being a much shorter list of exhibits. Now, I  
8 don't know whether counsel have done any consulting at all yet  
9 about the exhibits. I don't think that I have any statement of  
10 objections from Lorillard. I could be wrong about that. I do  
11 have it --

12 MR. BRODY: You had a statement of two authenticity  
13 objections. That was all that they filed. I think we can cure  
14 those.

15 The one thing that we do agree on is that we can  
16 definitely use the lunch break in order to figure out where we  
17 have objections and where things are unobjected to.

18 MR. NEWBOLD: I agree.

19 THE COURT: All right. I think I remember seeing your  
20 two authenticity objections, but I sure can't lay my hands on  
21 them right now. So I will check for those during the lunch  
22 break, and then we -- I would assume we can resolve everything  
23 right after lunch.

24 And Dr. Biglan will be here this afternoon, right?

25 MR. BRODY: Yes, he will.

1 THE COURT: I would again assume that it won't take you  
2 too long to resolve the exhibit matters. Is that a fair  
3 assumption?

4 MR. BRODY: I think that's a fair assumption.

5 MR. NEWBOLD: Agreed.

6 THE COURT: I'd rather take just an hour for lunch and  
7 then really break at 4:30, which we tend not to do, I know. So  
8 a quarter of 2:00, everyone, please.

9 (Lunch recess began at 12:43 p.m.)

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15

16 \*\*\*\*\*

17 CERTIFICATE  
18 I, EDWARD N. HAWKINS, Official Court Reporter, certify  
19 that the foregoing pages are a correct transcript from the  
record of proceedings in the above-entitled matter.

20 Edward N. Hawkins, RMR  
21

22  
23  
24  
25



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	January 10, 2005
	.	
Defendants.	.	
. . . . .	.	

VOLUME 46  
AFTERNOON SESSION  
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS  
BEFORE THE HONORABLE GLADYS KESSLER,  
UNITED STATES DISTRICT JUDGE

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1                   AFTERNOON SESSION, JANUARY 20, 2005

2                   THE COURT: Good afternoon, everybody. Okay, exhibits.

3                   Mr. Brody, do you want to start?

4                   MR. BRODY: There are, I believe, either two or four,  
5                   Mr. Newbold can tell me, objections that need to be resolved, and  
6                   the authenticity objections that were filed by Lorillard are not  
7                   at issue. It's Mr. Newbold's making the objections, he may as  
8                   well explain the basis for it.

9                   THE COURT: All right. Mr. Newbold.

10                  MR. NEWBOLD: Thank you, Your Honor, Bill Newbold for  
11                  Lorillard. There are two charts, U.S. Exhibit 17520 and 17522,  
12                  both of which were used with Dr. Chaloupka, and Your Honor has  
13                  not yet ruled, but we simply think this should be held for your  
14                  ruling on when you rule whether or not they are admissible under  
15                  the Dr. Chaloupka testimony.

16                  THE COURT: I think that's appropriate.

17                  MR. BRODY: If may, Your Honor, I don't think there was  
18                  any objection made to the admission of those exhibits with  
19                  respect to Dr. Chaloupka, and because they were used in the  
20                  examination of Mr. Milstein, and because he agreed that they  
21                  comported with his understanding of the data reported by the FTC,  
22                  we'd like to see them come in now.

23                  THE COURT: But, Mr. Newbold is saying there were  
24                  objections and that I haven't ruled on them.

25                  MR. BRODY: I think he was just saying they were submitted

1 with Dr. Chaloupka's testimony, I don't think he was saying that  
2 they were objected to when they were provided to Dr. Chaloupka's  
3 testimony.

4 THE COURT: I'm sorry, I misunderstood you. I thought you  
5 said that there were objections I hadn't ruled on.

6 MR. NEWBOLD: I believe that to be correct, Your Honor.  
7 That is my understanding of the record.

8 THE COURT: Well, you all figure that out. If there are  
9 objections to be ruled on, then I do think it's appropriate to  
10 defer until we take care of that issue. If there were no  
11 objections raised, then those exhibits, for all practical  
12 purposes, are in and the witness, Mr. Milstein, didn't have any  
13 problems with the substance of the exhibit. So you two figure  
14 out what happened with Dr. Chaloupka and then, depending on that,  
15 I'll either defer or these will be admitted at this time.

16 MR. NEWBOLD: Thank you, Your Honor.

17 THE COURT: All right. Your next two, please.

18 MR. NEWBOLD: The next one is U.S. Exhibit 77457.

19 THE COURT: Wait, 77457?

20 MR. NEWBOLD: 457, yes, ma'am, this is used with  
21 Mr. Milstein, purports to be a research letter pertaining to the  
22 rate of illegal tobacco sales to minors varying by the sign type  
23 in California. I objected on a foundation basis at that time and  
24 I renew that objection. There's no proper foundation for the  
25 admission of this document.

1 THE COURT: Would you pass that up, please?

2 And the government's position?

3 MR. BRODY: Your Honor, we think that the fact that that  
4 research exists, and existed as of 2000, was published in a major  
5 publication, is something that is very relevant to the subjects  
6 that were discussed with Mr. Milstein to what he said he did and  
7 did not know about the effectiveness of the We Card Program.  
8 It's -- and for that reason, we think that the substance of the  
9 testimony as a whole, and his testimony about his role and  
10 responsibilities that he assumed under the MSA, make the analysis  
11 that existed at that time of the We Card Program relevant to his  
12 testimony.

13 THE COURT: Did he testify about this particular article?

14 MR. BRODY: He was asked questions about the article. He  
15 testified that he didn't recall whether he was aware of it at the  
16 time that it came out. We think that it's very significant for  
17 that reason, and because so much of the testimony concerned  
18 whether he knew of any research to support the effectiveness of  
19 the We Card Program, as opposed to other programs, makes the fact  
20 that he couldn't recall whether he was aware of, or even looked  
21 at, that issue at the time very significant and it should come in  
22 for that purpose.

23 THE COURT: Mr. Newbold?

24 MR. NEWBOLD: No, Your Honor, the questions that he was  
25 asked, he was simply shown the document. He testified he had

1 never seen the document before, didn't know anything about it,  
2 and it was simply those questions like doesn't this document say  
3 this and then the witness said yes, the document says this, and  
4 that was the whole line of questioning, and that's not the proper  
5 foundation for the introduction of evidence. As I said at the  
6 time, and Your Honor said, well, we'll cross that bridge when we  
7 talk about proper foundation. There's been no one who has taken  
8 the stand and who has identified the document and given the  
9 proper foundational basis for its admission.

10 THE COURT: The objection's going to be sustained to that  
11 document, which is 77457. And the last one?

12 MR. NEWBOLD: The last one is U.S. Exhibit 22212, which is  
13 the document which had a Lorillard Bates stamp number.

14 THE COURT: What's the number again, please?

15 MR. NEWBOLD: I'm sorry, Your Honor, it's U.S. 22212. And  
16 the heading is Lucky Strike, and Mr. Brody asked Mr. Milstein a  
17 lot of questions about this document, but Mr. Milstein said that  
18 he had never seen the document before, wasn't even sure what it  
19 was, and therefore I don't believe there's been a proper  
20 foundation for this document either.

21 MR. BRODY: Your Honor, Mr. Milstein testified that he was  
22 familiar with the Newport promotional program that is described  
23 in the document. He said it's his recollection that that program  
24 existed around that time --

25 THE COURT: Objection's overruled as to this Document.



1 One of the attendees was Mr. Desandre, who worked for Lorillard,  
2 and more relevantly worked on this particular program. It is  
3 true that Mr. Milstein said he hadn't seen this document before,  
4 but he definitely understood what it was. Obviously he knew  
5 about the subject matter, and it's clearly relevant to the  
6 testimony that he was giving. So the objection's overruled as to  
7 22212.

8 Now, I would just note, everybody, that exhibit is not on  
9 the list you submitted.

10 MR. BRODY: Right. That was a redirect exhibit as opposed  
11 to a direct examination exhibit. We will check on the issue with  
12 respect to objections related to Dr. Chaloupka's testimony that  
13 applies to the two demonstrative exhibits, and we will submit a  
14 proposed order, as we have been in the normal course.

15 THE COURT: All right. Thank you we're ready for  
16 Dr. Biglan then?

17 MS. BROOKER: Yes, Your Honor, we are. Dr. Biglan, do you  
18 want to come up and take the stand?

19 (ANTHONY BIGLAN, Ph.D. GOVERNMENT'S WITNESS, SWORN)

20 DIRECT EXAMINATION OF ANTHONY BIGLAN, Ph.D.

21 BY MS. BROOKER:

22 Q. Renee Brooker, for the record, on behalf of the United  
23 States. Good afternoon, Dr. Biglan.

24 A. Good afternoon.

25 Q. You have your testimony up there; is that correct?

1 A. I do.

2 Q. Okay. And I would ask you if, at this time, is that  
3 testimony that's before you your testimony that you drafted and  
4 filed in this case?

5 A. Yes, it is.

6 Q. And at this time, do you formally adopt that testimony as  
7 your own?

8 A. I do.

9 MS. BROOKER: Your Honor, at this time, the United States  
10 would ask that Dr. Biglan be qualified as an expert in psychology  
11 and prevention science.

12 MR. BERNICK: Your Honor, we would have no objection as to  
13 that scope of -- description of his scope of expertise. I would  
14 like to object for the record, however, with respect to the  
15 proffered testimony, and I don't know that my objection's really  
16 going to require -- or it would be wise for the Court to take  
17 time to deal with it now, but I want to make sure that the record  
18 is there. Two things: One is that it was drawn to my attention  
19 that at page 452, there is testimony concerning, what I guess the  
20 doctor believes, are insufficiencies in the MSA. And in reading  
21 through this testimony again, it occurred to me that this reads  
22 an awful lot like its --

23 THE COURT: Wait, 4 what?

24 MR. BERNICK: 452. 52. It reads a lot like these are  
25 really suggestions to the Court about what the Court might do by

1 way of relief in the case. At least that's how I took them as I  
2 read through them again. Going back to his expert reports, his  
3 expert reports don't really speak to the issue of relief at all,  
4 and as concerns the MSA, they make note of the MSA but the  
5 essence of what Dr. Biglan then testifies to is defendants'  
6 continuing conduct after the MSA. These particular comments with  
7 respect to what he believes to be insufficient sees of the MSA,  
8 these views are not expressed in the expert report at all, and  
9 what we would do is ask that the Court not accept the proffered  
10 testimony that appears at the bottom of page 452. I guess it's  
11 really just the second half of the page. That's one request. I  
12 don't intend to ask any questions about that, so I'm not worried  
13 about, you know, opening any doors. But I do think that that is  
14 significant.

15 And then secondly, the -- I guess I don't -- I guess I  
16 object. The demonstratives that appear at the back end of this  
17 testimony, are really not demonstratives at all. They're not  
18 illustrations, they're not explanations of technical matters.  
19 What they are is kind of highlighting with respect to the  
20 documents that he's reviewed, quotes that he finds to be  
21 particularly instructive. They've denominated them as  
22 demonstratives, but they're not really demonstratives. I don't  
23 think that they should be -- I don't think they should be  
24 submitted in the record as being demonstratives at all. Now,  
25 demonstratives in any event would not be admissible into the

1 evidence but --

2 THE COURT: But just a minute. There are two kinds of  
3 demonstratives. There are the demonstratives that were  
4 submitted, how shall I put it, at didn't points in the direct  
5 testimony.

6 MR. BERNICK: Yes.

7 THE COURT: Then, there is this very large group of  
8 demonstratives which were submitted at the very end, physically,  
9 of all the testimony.

10 MR. BERNICK: Correct.

11 THE COURT: And certainly as to the large group, as I have  
12 flipped through it and I've gone through it, there isn't any  
13 question that they're appropriate demonstratives. As to the  
14 first group, many, but not all, of those demonstratives were  
15 essentially charts summarizing the literature upon which  
16 Dr. Biglan relied. Demonstratives don't come in any way. That's  
17 number one. They are designed to make it easier for the finder  
18 of fact to follow along. To the extent that I needed to go back  
19 and check quotes, it would be -- those would be useful. So I  
20 don't see anything wrong with them.

21 MR. BERNICK: The only concern I have, and I can't say  
22 this is something that I feel dramatically strongly about, but  
23 it's in essence an effort, I think, by the government to kind of  
24 provide a road map for the support, that is, the literature that  
25 supports the witness's views, and I don't think that that's a

1 proper use of the scientific literature. If it really supports  
2 his views, he should point to it and illustrate his testimony,  
3 and I don't think it's a demonstrative in the sense that it  
4 doesn't really elucidate any principle, it simply here's all I've  
5 got to support -- I've stated my objections there, Your Honor.

6 THE COURT: All right. Let's proceed, Ms. Brooker.

7 MS. BROOKER: Your Honor, would you like me to respond to  
8 either of those, the first one about the MSA?

9 THE COURT: No.

10 BY MS. BROOKER:

11 Q. Dr. Biglan, did you prepare some demonstratives to  
12 discuss before the Court today?

13 A. Yes, I did.

14 Q. And just please describe briefly the content of the  
15 demonstratives which you are about to show the Court.

16 A. All but one of them are reproductions of advertisements  
17 for various brands that target adolescents, and many of them  
18 have quotes from documents from them as well.

19 Q. And are they defendants' cigarette advertising brands?

20 A. They are.

21 Q. And how did you prepare or select these demonstratives  
22 that we will show the Court?

23 A. Well, as I was going through advertisements and looking  
24 for them, I tried to put aside some that I could use in this  
25 one hour live in order to further explain to the Court the kinds

1 of themes and images that the defendants use in appealing to  
2 adolescents.

3 Q. Okay. If we could show the first slide. And Dr. Biglan,  
4 I'm going to cite for the record before I ask you a question  
5 each time, just so you know what the U.S. exhibit number is, so  
6 I get that clear in the record.

7 The first exhibit is U.S. Exhibit 17648. Can you please  
8 describe to the Court this demonstrative?

9 THE COURT: Well, just a minute now. I'm not sure I've  
10 got the same order. What's the number again?

11 MS. BROOKER: 17648, Your Honor, and we disclosed many  
12 more demonstratives than we will actually use here today, given  
13 the time.

14 THE COURT: Okay.

15 BY MS. BROOKER:

16 Q. Doctor --

17 MS. BROOKER: Would you like Dr. Biglan to proceed?

18 THE COURT: Yes, go ahead please.

19 BY MS. BROOKER:

20 Q. Dr. Biglan, could you please describe briefly to the  
21 Court this demonstrative?

22 A. Well, this is one that's designed to elaborate the  
23 central role that popularity and pure acceptance place in the  
24 motivations of adolescents, motivations that appeal to in the  
25 defendants' advertising. And basically what it shows is that

1 many of the other psychological needs, that I talked about in my  
2 written direct, are ones that are also important because of  
3 their contribution to popularity and peer acceptance. If you  
4 take, for example, a positive self image, one of the reasons  
5 that adolescents are motivated to have a positive self image,  
6 and to have a self image that their peers view positively, is  
7 because it contributes to their acceptance by their peers.

8 Q. Okay. Let's go to the next slide, please.

9 Dr. Biglan, please describe what is depicted in slide  
10 U.S. Exhibit 17592.

11 A. Well, this is an ad for Marlboro from Sports Illustrated  
12 in 1986. And it's a fairly typical ad from the Marlboro  
13 campaign. One of the fundamental processes in human learning is  
14 association. If I say the word cup, the image of a cup comes to  
15 mind. If I say a cup with coffee, coffee comes to mind.  
16 Humans' ability to learn language is based on their ability to  
17 associate things. One of the things that happens in adolescent  
18 exposure to a wide variety of advertisements is that any given  
19 advertisement is associated with all the others. And so what  
20 you find, for example, in the research done -- reported in this  
21 study, is that all of these different attributes are associated  
22 with the Marlboro brand and with smokers of the Marlboro brand,  
23 not simply as a function of the exposure to a single add, but as  
24 a function of the exposure to all of the advertisements and  
25 other marketing that the person's been exposed to.

1 Q. And for each slide have you indicated where the  
2 advertisement appears?

3 A. This is in Sports Illustrated in 1986.

4 Q. Okay. So that I don't have to repeat that question and  
5 we can move through quickly, is that true of all of the slides,  
6 have you indicated on each slide?

7 A. Yes.

8 Q. At least one magazine in which the advertisement appeared  
9 and the date?

10 A. That's correct.

11 Q. Now, if we could please go to the next slide, Chris.  
12 Dr. Biglan, how does this next slide relate to the  
13 conclusions you've reached in this case, and the U.S. exhibit  
14 number is 17581?

15 A. This is an advertisement, two page, from Unlimited  
16 Magazine in fall of 2000, and this is another dimension of the  
17 Marlboro campaign. This is a picture of Marlboro Country. You  
18 can see here very small the cowboy and horses in this vast and  
19 beautiful expanse. This conveys that Marlboro Country is a  
20 place, as it says down here, of fantasy and escape, a mythical  
21 place state of mind where you choose -- where you are who you  
22 choose to be, command your own destiny and do what only others  
23 only dream about. This is an aspect of the Marlboro campaign  
24 that communicates to all adolescents, not just boys, but girls  
25 as well, that being a Marlboro smoker is -- what one gets in



1   that is being independent and being who you choose to be, so  
2   it's part of the development of an adolescent self image.  
3   Q.     What is the Unlimited Magazine, Dr. Biglan?  
4   A.     It is a magazine which Philip Morris mails to  
5   approximately 750 to 800,000 people each year, at least  
6   according to the testimony I've read.  
7   Q.     Which testimony?  
8   A.     I believe it was the testimony of Mr. Dudreck.  
9   Q.     And who is Mr. Dudreck?  
10  A.     He works for Leo Burnett.  
11  Q.     Now, are you aware of whether Mr. Dudreck was the  
12  corporate designee on behalf of Leo Burnett in this case?  
13  A.     That's my understanding.  
14  Q.     Let's turn to the next slide, please. I'm sorry, did I  
15  interrupt you?  
16  A.     No, I was going --  
17  Q.     Please describe what is depicted here and how it relates  
18  to your conclusions regarding U.S. Exhibit 17588.  
19  A.     This is another ad from Sports Illustrated, and it's  
20  another dimension of Marlboro Country and the image of Marlboro  
21  smokers. This one's about excitement and adventure. Here we  
22  see a cowboy trying to control a horse. This helps convey that  
23  the Marlboro smoker is somebody who lives a life of excitement.  
24  Q.     Can we go to the next slide, please?  
25  A.     And this is another example of --

1 Q. Excuse me Dr. Biglan, that's okay. It's U.S.  
2 Exhibit 17586, for the record, and if you would please describe  
3 this demonstrative.

4 A. This is another advertisement. And in this, Marlboro is  
5 using racing to further dimensionalize the Marlboro image. What  
6 this is is a race car coming into the pit. It's going to stop  
7 right there, indicating they're going to put four new tires on  
8 it, fill it with gas. This is an example of an ad that's sort  
9 of high in sensation value, it's surprising, shocking, it's  
10 designed to appeal to people who are high into sensation  
11 seeking, and adolescents are particularly high in sensation  
12 seeking.

13 Q. Let's turn to the next slide, please. Dr. Biglan, this  
14 is U.S. Exhibit 17593. Please describe this slide.

15 A. In 1992, the Eckman Group did a series of focus groups  
16 among 18-to-24-year-olds because there was concern at Philip  
17 Morris about the success of the Joe Camel campaign, and this is  
18 one of the conclusions that they reached. One of the things  
19 they found was that the Joe Camel Campaign was particularly  
20 successful in communicating to young people that the Camel  
21 smoker was an admired social person, and so they felt that --  
22 they recommended that the Marlboro image persona be changed, but  
23 slowly, so that they didn't lose all the other associations that  
24 were established with the brand. So they said it could be  
25 viewed as an unwarranted tampering with the significant

1 tradition if they did it suddenly, but to ignore the impetus of  
2 Camel could also be gambling with the entry level smoker in the  
3 future of the Marlboro franchise.

4 Q. Now Dr. Biglan, that slide indicates that the research is  
5 among the 18-to-24-year-old segment; is that correct?

6 A. That's right.

7 Q. Now, when you have seen documents that refer, for  
8 example, to the 18-to-24-year-old segment, how is it that you  
9 have concluded that Marlboro is also appealing to and aimed to  
10 people under the age of 18?

11 MR. BERNICK: It's a compound question. Could we break  
12 those two things out? They're quite different.

13 MS. BROOKER: I think Dr. Biglan could answer that  
14 question.

15 MR. BERNICK: If he would then answer it separately that's  
16 fine with --

17 THE COURT: He has to answer it separately, so pose it  
18 separately, make it easier for him, please.

19 MS. BROOKER: Certainly.

20 BY MS. BROOKER:

21 Q. Dr. Biglan, that refers to research of the 18-to-24-year  
22 old segment. How is it that you have concluded, then, that  
23 Marlboro is appealing, first of all, to adolescents under the  
24 age of 18 as well?

25 A. Well, my conclusion about that is based on a lot of

1 literature that I've reviewed and cited in my testimony, but I  
2 would also add that there's not a bright line between 17 and 18,  
3 and as a matter of the development of adolescents, and so the  
4 themes and images that are successful and can be developed  
5 through research with 18-to-24-year-olds, you can be confident  
6 will also be effective with those under 18.

7 Q. Now, when the research here is based on the  
8 18-to-24-year-old segment, how is it that you have concluded  
9 that --

10 MR. BERNICK: I'm sorry, I'm sorry to interrupt. The  
11 prior answer I don't think was -- "as a matter" rather than "in  
12 the matter of development." The witness said, "no bright line  
13 between 17, 18 in the matter of development of adolescents," and  
14 it was transcribed as "as a matter of development in  
15 adolescents." That one is an important answer and I want to be  
16 very clear, if that's all right with the Court.

17 THE COURT: Was your testimony "in the matter of?"

18 THE WITNESS: I have no idea. I'm not sure that I would  
19 make the distinction, but I guess --

20 BY MS. BROOKER:

21 Q. Could you elaborate, Dr. Biglan, so everybody is clear?

22 A. If I clarify, it would be that there is not a clear break  
23 between 17 years old and 18 years old in terms of the needs of  
24 adolescents.

25 MR. BERNICK: Thank you.

1 BY MS. BROOKER:

2 Q. Dr. Biglan, when you look at a document, such as this one  
3 that refers to the 18-to-24-year-old segment, how is it, in  
4 looking at those types of documents, that you have concluded  
5 that Philip Morris aims its Marlboro advertising and imagery and  
6 marketing at people you under the age of 18, as well as the  
7 18-to-24-year old segment?

8 A. Well, the research shows that the themes and images are  
9 important to adolescents, that advertisements from the Marlboro  
10 campaign appeal to adolescents, the market share of Marlboro is  
11 among adolescents is very high, and there are numerous documents  
12 from the '70s and '80s that show that Philip Morris was  
13 targeting this age group.

14 Q. And have you also looked at more recent documents since  
15 that time?

16 A. Well, in fact, there are documents from the '90s that  
17 show that they're interested in starters and Philip Morris  
18 understands that the majority of starts are those under 18.

19 Q. Now, can we please turn to the next slide?

20 If you could take a look at U.S. Exhibit 17590. How does  
21 this document, or this demonstrative, relate to your conclusions?

22 A. Well, this is simply an example of the move toward a more  
23 sociable Marlboro Man in light of the research that the company  
24 did, and I think in the interest of time, that's all I should  
25 say about it.

1 Q. And when you say the company, you're referring to Philip  
2 Morris?

3 A. Yes, I am.

4 Q. Let's turn to the next slide, please. This is U.S.  
5 Exhibit 17591.

6 Can you please describe what this demonstrative depicts?

7 A. Well, this is another example of the effort to sort of  
8 soften the masculine image and make the Marlboro cowboy more  
9 sociable. Here they are, basically, playing with some puppies.

10 Q. What was the purpose of making the Marlboro imagery more  
11 sociable?

12 A. Well, as I indicated, there was research that Philip  
13 Morris had that showed that the Joe Camel campaign was  
14 succeeding, in part, because it conveyed that the Joe Camel  
15 smoker was a more sociable person.

16 Q. Let's turn to the next slide please, this is U.S.  
17 Exhibit 17592.

18 Dr. Biglan, is there empirical research on the influence  
19 of the Marlboro campaign on adolescent smoking?

20 A. Yes. I can think, for example, of a study by Arnett 2001  
21 in which they found that adolescents 12 to 17-years old who were  
22 asked to rate two ads from the Marlboro campaign rated both of  
23 them as being more appealing than an ad for a Merit brand, which  
24 is a brand that is not popular among young people.

25 THE COURT: Merit brand advertisements had very few people

1 in them to humanize them, didn't they?

2 THE WITNESS: That's true, Your Honor. This one, however,  
3 did have a picture of a young woman on it, but it was rated as  
4 less -- liked less by the adolescents than the Marlboro ads.

5 THE COURT: Of course she was neither glamorous, sexy,  
6 unusual looking, nor wearing any piercings, right?

7 THE WITNESS: I would say so.

8 THE COURT: That refers to some former testimony we heard  
9 today.

10 I have another question: In looking over all of these  
11 many many advertisements for Marlboro, and of course, I recognize  
12 the fact that Marlboro is the leading brand smoked by 18-to-  
13 24-year-olds, what strikes me as curious is that, at least to my  
14 perception, the individuals pictured are substantially older than  
15 18 to 24-years old. Again to my perception, they look either  
16 late 20s or early to mid 30s.

17 THE WITNESS: Yes.

18 THE COURT: I'm curious as to why adolescents totally  
19 relate to a figure that is substantially older than they are.

20 THE WITNESS: Well, I think that's an important point,  
21 Your Honor, and I can think of two things that I think are  
22 relevant to it. One is a memo from Diane Burrows, at R.J.  
23 Reynolds, who pointed out that one of the things that adolescents  
24 are seeking in smoking Marlboro is maturity, and she pointed out  
25 that many of the models are just as you say, older. And there

1 was a second point. Oh, and it is this, that I think that it is  
2 important to distinguish between what I would call topographical  
3 demarcations, such as a model must be over 25, and functional  
4 effects. The key question here is what are the functional  
5 effects of an ad, and the fact is that these ads depicting older  
6 men, this man is, I think, obviously over 25, the key issue is  
7 what's the functional effect of that, and what you find is that,  
8 and very often these distinctions, 17 versus 18 over 25 and so  
9 on, there's no evidence that those are functionally important  
10 distinctions.

11 BY MS. BROOKER:

12 Q. Now, Judge Kessler just noted that Marlboro is the  
13 leading brand smoked by people between the ages of 18 to 24.  
14 What is the leading brand smoked by adolescents under the age of  
15 18?

16 A. It's also Marlboro.

17 Q. And you referred to -- and one last question on this  
18 line, you referred to the Arnett study. Is this one of the  
19 advertisements studied in the Arnett study that you referred to?

20 A. This specific ad is not. There were two other ads. One  
21 was, if I recall correctly, a cowboy herding some horses, and  
22 another one was a cowboy by a camp fire lighting a cigarette.

23 Q. Let's turn to the next slide, please.

24 If you could please describe what is depicted in U.S.

25 Exhibit 17632.



1 A. This is an ad from the Parliament campaign. This is from  
2 Vogue in 1999, and it shows four young people of indeterminate  
3 age on a beach around a camp fire. This conveys to adolescents  
4 that the Parliament smoker is somebody who enjoys escape,  
5 relaxation and good times with friends.

6 Q. Now, I meant to ask you a question, one more follow up  
7 question in response to the questions about Marlboro imagery.  
8 Where, if at all, does Philip Morris advertise or use its  
9 Marlboro imagery today?

10 A. Well, the Marlboro imagery is found in quite a number of  
11 marketing media. The Unlimited Magazine and much other direct  
12 mail, as well as in point of sale in stores, and signs at  
13 stores, and also they've recently added the -- there was a just  
14 last week the packs have cellophane that has the cowboy on  
15 there. I think this is important, because when you see just  
16 even the outline of the cowboy in the store, I come back to the  
17 notion of the association, that that evokes all of these images  
18 because the person has been exposed to this diverse set of  
19 images across the marketing mix.

20 Q. Now, Dr. Biglan, you just referred to the cigarette packs  
21 which now contain Marlboro imagery. Is this an example of one  
22 of those packs (indicating)?

23 A. Yes.

24 Q. Now, for the record, I'll just state that we have some  
25 cigarette packs here, I would like to show the Court and

1 Dr. Biglan, and for the record, we photocopied these and  
2 produced them to defendants as U.S. Exhibit 17655 and U.S.  
3 Exhibit 17655 -- excuse me, 656, and not all of the packs were  
4 copied, but these are some of them. And let me ask you,  
5 Dr. Biglan, I'm going to pass up some to the Court and to  
6 Dr. Biglan, and ask you when these cigarette packs were  
7 purchased?

8 A. I purchased three packs at the CVS at, I think, 14th and  
9 Pennsylvania Avenue on, I think, Wednesday of last week.

10 Q. And were some of the other cigarette packs purchased for  
11 you?

12 A. Yes.

13 Q. Okay. Do you have an understanding of what jurisdictions  
14 they were purchased in?

15 A. I understood that some were purchased in Florida and some  
16 were purchased somewhere in the Washington metropolitan area.

17 MS. BROOKER: Your Honor, may I approach Dr. Biglan?

18 THE COURT: Yes.

19 MS. BROOKER: Thank you.

20 And if I may approach the Court.

21 BY MS. BROOKER:

22 Q. Dr. Biglan, please tell the Court all of the information,  
23 because I know it's very little information that you have about  
24 these cigarette packs, but please inform the Court of what you  
25 do know about them in terms of their sale and distribution.

1 A. Well, I don't know very much. They were available in  
2 stores last week when I purchased the ones at CVS, they were all  
3 lights, and apparently the Marlboro Red -- what wasn't in  
4 cellophane, though, I went to another store next to the Marriott  
5 Hotel and purchased Marlboro Reds there, so it was in both.

6 Q. And what, if any, value is there in that imagery to  
7 people under the age of 21, including adolescents, as you would  
8 conclude?

9 A. Well, as I suggested, any image that's associated with  
10 the campaign, you'll often see Marlboro ads that simply have  
11 part of the word "Marlboro", with all of the extensive  
12 advertising that they've done, any given stimulus like this can  
13 evoke, as I said, all of the images that are associated with the  
14 Marlboro brand.

15 Q. Now, for the record, could you just give a brief  
16 description of some of the advertising packs so that it's clear  
17 on the record what you are seeing on those cigarette packs?

18 A. Well, on this Marlboro Red I see a cowboy on a horse  
19 that's bucking, not unlike the one we saw. The other side is a  
20 similar picture, and it says "celebrating 50 years of flavor" on  
21 one side and "thanks" on the other.

22 The second one is a cowboy roping a steer on one side and  
23 some cowboys racing on the other.

24 Another one is a cowboy riding on a horse, and the last  
25 one's the same.

1 Q. And are these cellophane wrappings that can be removed  
2 from the cigarette pack?

3 A. Yes, they can.

4 Q. Now, if we could turn to the next slide, please, U.S.  
5 Exhibit 17633.

6 If you could please describe that for the Court.

7 A. This is another ad from the Parliament campaign "the  
8 perfect recess" is the slogan. And here you see a young couple,  
9 attractive and clearly attracted to each other, enjoying  
10 themselves in sunshine. A lot of the documents from Philip  
11 Morris on the research on this campaign showed that it was  
12 successful in conveying that the Parliament smoker is a person  
13 who enjoys escape and relaxation and romance.

14 Q. And if we could turn to the next slide please.

15 If you could please describe U.S. Exhibit 17635.

16 A. This is an advertisement from Virginia Slims. It's a  
17 woman thing campaign from Glamour in 1998. And what it says  
18 here is "it takes time to get over a break up. Fortunately a  
19 new boyfriend can cut that time in half." And this is certainly  
20 a theme that's very important to many adolescent women. The ad  
21 says that if you're a Virginia Slim smoker, your relationships  
22 with young men will be more successful. The quote is from a  
23 document from Leo Burnett about the Virginia Slims campaign that  
24 says "a timeless truth about young adulthood is gaining the  
25 confidence to be yourself and a desire for independence" and

1 when I read that I was struck that it would be, perhaps, more  
2 accurate to say a timeless truth about adolescence is gaining  
3 the confidence to be yourself and a desire for independence.

4 Q. If we could turn to the next slide.

5 Dr. Biglan, please describe U.S. Exhibit 17634.

6 A. This is an ad from the subsequent campaign, the Find Your  
7 Voice campaign for Virginia Slims that shows a young attractive,  
8 thin, self confident woman who smokes Virginia Slims. There  
9 was -- there were at least two studies that have used Virginia  
10 Slims advertising to evaluate its effect on adolescents. There  
11 was a study by Pechmann and Ratneshwar who put a Virginia Slims  
12 ad and two other ads into a magazine and just had some  
13 adolescents assigned randomly to read the magazine and were  
14 exposed to those ads briefly, and the other adolescents weren't  
15 exposed to the ads. The adolescents that were exposed to them  
16 were significantly more likely to have positive thoughts about  
17 smokers.

18 Q. If we could turn to the next slide, please.

19 Please describe U.S. Exhibit 17595 and how it relates to  
20 your conclusions.

21 A. This is a quite typical ad from the Newport campaign, and  
22 it shows an attractive couple in a playful situation. This  
23 communicates to adolescents that the Newport smoker is somebody  
24 who has -- who's attractive, who has good relationships with the  
25 opposite sex and has a good time. The quote states that those

1 who see their brand involving social acceptance, or associate  
2 the brand they smoke with social acceptance are mostly Newport  
3 smokers.

4 Q. If we could turn to the next slide, please, U.S.  
5 Exhibit 17596.

6 A. This is another example of the Newport campaign that  
7 shows young people having a good time. The quote is from one of  
8 the studies that Lorillard did. They found that Newport smokers  
9 were viewed as party goers, those that do their own thing, fun  
10 loving.

11 Q. And can we turn to the next slide, U.S. Exhibit 17599.  
12 Could you please describe what this demonstrative depicts?

13 A. That is Newport ad in which three people are on roller  
14 blades. It looks like they're about to start a race. They're  
15 smiling, they're having a good time. This ad effectively  
16 associates the Newport brand, not only with sociability and  
17 having a good time, but also with a fun and athletic activity.  
18 I've listed here other athletic activities that I've observed  
19 are convey -- or associated with the Newport brand in other  
20 advertisements from the campaign.

21 Q. If we could please turn to the next slide, Chris.  
22 This is U.S. Exhibit 17598, could you describe this  
23 demonstrative, please?

24 A. This is another ad that's fairly typical of a young  
25 couple enjoying each other, having a good time in the snow.

1 It's from the -- the slogan Alive With Pleasure. An ad like  
2 this was in the study by Pechmann and Knight, in which they took  
3 three ads and had them in a videotape and they randomly assigned  
4 some adolescents to see that videotape and other adolescents to  
5 not see the videotape, and the adolescents who saw the videotape  
6 had the Newport ad and two our ads were significantly more  
7 likely to develop positive beliefs about smokers. In a  
8 condition in which adolescents saw both the ads and adolescents  
9 depicting smoking, they were significantly more likely to  
10 increase their intentions to smoke. So it's some experimental  
11 evidence of the impact of cigarette advertising on adolescents'  
12 intentions to smoke.

13 Q. Dr. Biglan, is Newport one of the three leading cigarette  
14 brands smoked by adolescents, including those under the age of  
15 18?

16 A. Yes, it is.

17 Q. And if you could please turn to the next slide, Chris.

18 We have U.S. Exhibit 17614. If you could please describe  
19 what this demonstrative depicts?

20 A. This is from the Kool advertisements from Brown &  
21 Williamson that was in Rolling Stone in 1984, and this is from  
22 the Biker campaign. You can see, although not well, a  
23 motorcyclist on a motorcycle, and then you see a handsome young  
24 man with dark glasses lighting a cigarette. The Brown &  
25 Williamson, as well as R.J. Reynolds, did research showing that

1 the motorcycle was something that conveyed excitement, freedom,  
2 independence, and so it was used in this campaign.

3 Q. If you could please turn to the next slide, U.S.  
4 Exhibit 17617.

5 Dr. Biglan, can you please describe how this demonstrative  
6 relates to your conclusions?

7 A. Brown & Williamson continued to have trouble in appealing  
8 to a younger target audience, so they developed the Be Kool  
9 Campaign. This is one ad from that campaign that shows an  
10 attractive young woman, apparently, in a club scene. You can  
11 barely see a woman in the background, and she's looking at a  
12 young man whose got a pack of Kools in his hand. This ad  
13 conveys that the Kool smoker is somebody who gets the girl, who  
14 is attractive to attractive young women.

15 Q. If we could turn to the next slide, please.

16 U.S. Exhibit 17618, can you please briefly describe this  
17 exhibit?

18 A. This is another ad from the Kool campaign. It shows a  
19 young woman with a young man, apparently with a young man,  
20 looking beyond him at the Kool smoker who has Kool cigarettes in  
21 his hand. This ad was one that was studied by Arnett who found  
22 that this ad was rated a significantly more appealing than a  
23 Merit ad, and also was rated as making smoking significantly  
24 more appealing than the Merit ad.

25 Q. If you could turn to the next slide, Chris.



1           U.S. Exhibit 17619, Dr. Biglan, please describe what is  
2 depicted in this demonstrative.

3     A.       This is an ad from the Be Kool Campaign in which they  
4 introduced racing. This is another pit stop. They're putting  
5 gasoline in the car. And the materials I reviewed from Brown &  
6 Williamson indicated that this -- they added the sponsorship of  
7 racing in order to add a dimension of excitement to associate  
8 the dimension of excitement with the Kool brand.

9     Q.       If you could turn to the next slide, please.

10           U.S. Exhibit 17624, please describe this demonstrative.

11     A.       This is an ad from the Kool Mixx Campaign in 2001, and it  
12 advertises an appearance by Ludicrous, who must be a famous  
13 rapper, because I heard of him, and the ad associates the Kool  
14 brand with hip-hop music, which is a -- which is the most  
15 popular form of music currently among teenagers.

16     Q.       What is going on in the picture there with the hand?

17     A.       Oh, well, this is a grand master DJ doing what is  
18 referred to as scratching. They take the vinyl record and they  
19 go like that with it as part of the performance, and they  
20 actually have two turntables, and they do that and get the  
21 record to jump and repeat parts of it.

22     Q.       And if you would turn to the next slide please.

23           U.S. Exhibit 17447, please briefly describe the imagery  
24 depicted in this demonstrative.

25     A.       Well, the imagery is of a grand master here on the right,

1 and this is on a pack of cigarettes, and the other one is a  
2 little less clear, but it's, apparently, a club scene, people  
3 are dancing and having a good time. With this promotion, Brown  
4 & Williamson associates the Kool brand with the music, which is  
5 currently very popular among adolescents under the age of 18.

6 Q. If we could please turn to the next slide.

7 Now we move to R.J. Reynolds. If you could please  
8 describe U.S. Exhibit 17603.

9 A. Well, the Joe Camel campaign was particularly successful  
10 in increasing the market share for the Camel brand among those  
11 under the age of 18. And both research from Reynolds and  
12 research from Philip Morris showed that it was quite successful  
13 in communicating that the Camel smoker was an accomplished, and  
14 particularly important, an admired person who was highly skilled  
15 in doing quite a number of things and lived a really interesting  
16 and attractive life. Here he is in his dark shades smoking a  
17 cigarette and playing a piano, he's wearing his tux.

18 Q. Can we go to the next slide?

19 U.S. Exhibit 17604, could you please describe this?

20 A. Here's Joe Camel, the Kool smooth character, he's got his  
21 shades, he's lighting a cigarette and he's playing pool.

22 Q. And in the picture, is he leaning up against the pool  
23 table?

24 A. He is, in a kind of -- what the research shows is that  
25 communicates he's a confident Kool person.

1 Q. If we could turn to the next slide, Chris.

2 U.S. Exhibit 17605, please briefly describe this  
3 demonstrative.

4 A. Here we see Joe associated with the excitement and  
5 adventure of a jet airplane, an aircraft carrier, woman in the  
6 background looking admiringly at him. One of the documents  
7 referred to Joe as having the cat that swallowed the canary  
8 look. This conveys that if you're a Camel smoker, you are doing  
9 exciting things and you're admired by those around you.

10 Q. If we could turn to the next slide.

11 U.S. Exhibit 17606, please describe this demonstrative.

12 A. Well, here Joe's in a club and he's playing roulette.  
13 You can see his reflection. He's got lots of chips, he's a  
14 winner. He's got some buddies around them, they're all in their  
15 Kool dark shades, and one of them has got a hand on him. This  
16 is an example of the kind of ad that conveys that the Kool  
17 smoker is successful at a lot of things that adolescents are  
18 interested in, gambling being an exciting thing of interest to  
19 many adolescents, and he's an admired person.

20 Q. If we could turn to the next slide.

21 U.S. Exhibit 17607, please describe what this  
22 demonstrative depicts.

23 A. Well, here Joe is burning up the track. He's apparently  
24 racing. In fact, the motorcycle is still moving. He's got a  
25 cigarette in his hand, he's got a helmet in his hand. This,

1 again, conveys that Joe is an admirable character, an exciting  
2 character, who leads a life that most adolescents would be quite  
3 pleased to live themselves, or many adolescents.

4 Q. Please turn to the next slide.

5 U.S. Exhibit 17608, please describe this demonstrative.

6 A. This is a multi-page ad from Rolling Stone about Joe's  
7 Place. These are the doors to Joe's Place, and these are the  
8 pages in the magazine you open it up, and if you go to the next  
9 slide you can see Joe's Place.

10 Q. And for the record, excuse me, for the record it's 17609.

11 A. And here at Joe's Place you see -- and you can't really  
12 see much detail here, but here's a young woman sliding a pack  
13 down, he's catching it. Here's a guy whose spilling his drink,  
14 apparently, looking at the woman. If you could blow this up you  
15 would see that this guy is moving one of the pool balls, he's  
16 sort of cheating at pool, and there's all kinds of interactions,  
17 people having a good time. One of the studies that the Reynolds  
18 company did on this showed that this ad was more successful than  
19 the run of ads that they compared it with in terms of  
20 communicating that the Camel smoker was self confident and  
21 romantic, and several other attributes which escape me at the  
22 moment.

23 Q. Is there any other empirical research on the influence of  
24 this advertisement on adolescents?

25 A. Oh, yes. This was one of the ads that Pechmann and

1 Knight included in their study where they found a brief exposure  
2 to three ads increased positive beliefs about smokers and when  
3 the adolescents saw the ads and saw other adolescents smoking,  
4 they're intentions to smoke were increased.

5 Q. And when you say "adolescents" in that study, do you  
6 recall the ages in the study?

7 A. They were all under the age of 18, and I'm not -- I won't  
8 be more precise, because I'm not sure.

9 Q. And if we could turn not next slide.

10 U.S. Exhibit 17612, please describe this.

11 A. Well, this is another ad for the Joe Camel campaign.  
12 Here Joe is popping out of the picture, handing you the Camel  
13 cigarettes. This competes directly with the Marlboro campaign.  
14 Here we see the Marlboro Man in the background looking sort of  
15 forlorn and lonely. This ad says that if you smoke Camel you  
16 won't be bored, and implies you will if you smoke Marlboro.

17 Q. If we could turn to the next slide.

18 U.S. Exhibit 17613, can you please describe this  
19 demonstrative?

20 A. Well, here we see Joe in repose. He's got, what looks  
21 like, a pretty expensive stereo system. Joe's typically shown  
22 to be an affluent person, and it's about 4:30 in the afternoon.  
23 He's lying back, apparently, listening to music, smoking a  
24 cigarette. Many adolescents are searching for ways in which  
25 they can relax and deal with stress. Many adolescents are

1 experiencing stress for the first time in their lives, and so  
2 they're looking for cues as to how to relax and this is one.

3 Q. The next slide, please.

4 U.S. Exhibit 17627, please describe this demonstrative.

5 A. This ad has been called Farmer's Daughter. It shows a  
6 young man, who's apparently just had a liaison with the farmer's  
7 daughter running from the house. The farmer has a shotgun in  
8 his hand. Here's an attractive young man. This ad conveys that  
9 you can be attractive, you can get the girl, and you can  
10 irritate older people of authority if you smoke the Camel  
11 cigarette. There are a subset of adolescents that particularly  
12 find the Camel brand appealing because of its association with  
13 rebellious themes. Many adolescents are particularly  
14 rebellious, and so this is particularly appealing to them. This  
15 ad was found in the Arnett study to be rated as making smoking  
16 more appealing than a Merit ad, and also to be liked better than  
17 a Merit ad.

18 Q. And what is the caption on the document, on the  
19 advertisement?

20 A. It says "viewer discretion advised", and the "SS" is  
21 satisfied smoking, the second one is farm violence and the third  
22 is animal nudity. There's a chicken there.

23 Q. If you could please turn to the next slide.

24 U.S. Exhibit 17628, what is depicted there?

25 A. This is one of the campaigns that followed the Joe Camel

1 campaign. This ad is what you're looking for, shows a young  
2 woman. There's a Camel brand, or camel right there, apparently  
3 drinking a martini. This ad was also found in the Arnett study  
4 to be rated as significantly more appealing than an ad for  
5 Merit, and also to make smoking significantly -- make smoking  
6 more appealing than the Merit ad.

7 Q. And was that also the same study which used people under  
8 the age of 18?

9 A. Yes. They were 12 to 17 years old.

10 Q. If you could turn to the next slide.

11 U.S. 17629, please describe this slide.

12 A. This is a young woman from the No Bull Campaign and she  
13 says, "do blonds have more fun, if you can find one ask her"  
14 this one was also in the Arnett study and was found to be more  
15 appealing than the Merit ad.

16 Q. Can we turn to the next slide.

17 17603, please describe what is depicted here, Dr. Biglan.

18 A. And the same is true for this one. This was in the  
19 Arnett study and it was found to make smoking more appealing  
20 than the Merit ad. Here she's saying "yeah I got a tattoo, and  
21 no you can't see it." One of the issues for many adolescent  
22 females is developing self confidence and feeling like they're  
23 attractive and feeling like they are in control. This ad  
24 conveys that if you are a Winston smoker you have all of those  
25 qualities.

1 Q. And if we could turn to the last slide, please.

2 Could you please describe for the Court what is depicted  
3 in this slide?

4 A. This is the latest Winston ad, and it's from Rolling  
5 Stone in 2004, and it's the Leave The Bull Behind. Here we see  
6 a couple of indeterminate age running to the beach. The caption  
7 is "casual Friday". The implication seems to be that they are  
8 so casual that they have no clothes on. There are many  
9 adolescents who aspire to have these kinds of experiences. This  
10 ad says that if you're a Winston smoker you will have these  
11 kinds of experiences.

12 Q. And is this Leave The Bull Behind a Winston campaign --  
13 is it a campaign?

14 A. Yes, it is.

15 Q. This is one advertisement in a campaign; is that correct?

16 A. That's correct.

17 MS. BROOKER: I have no more questions, Your Honor.

18 THE COURT: All right. Mr. Bernick, please.

19 MR. BERNICK: Yes, it's going to take us a couple of  
20 minutes to set up things. I would like to ask for the Court's  
21 indulgence.

22 CROSS-EXAMINATION OF ANTHONY BIGLAN, Ph.D.

23 BY MR. BERNICK:

24 Q. Can you see that or is that too low, Dr. Biglan?

25 A. I can see about half of it.



1 Q. Okay. Let's raise it up again, then. I'll try to write  
2 on the upper portion, Dr. Biglan, if that's all right. I think  
3 that's fine.

4 Good afternoon, Dr. Biglan.

5 A. Good afternoon.

6 Q. As I understand it, you've been doing scientific research  
7 on preventing smoking initiation for over 20 years; is that  
8 correct?

9 A. That's correct.

10 Q. And much of the work that you've done has been original  
11 scientific research where you gather data, analyze the data and  
12 draw conclusions, correct?

13 A. That's correct.

14 Q. Would it be fair to say that one of the hallmarks of the  
15 articles that you've written is your insistence on doing  
16 rigorous, proper science?

17 A. Yes, I have tried to do science according to the accepted  
18 norms of the scientific community.

19 Q. Okay. That's fine. Let me write that down here for just  
20 a minute here. The accepted norms.

21 And, in fact, isn't it true that with respect to some of  
22 the editorial comments that you've offered from time to time,  
23 you've kind of -- you've prothetized a little bit, you've  
24 suggested that others who are doing work in your area show  
25 similar respect for the accepted norms for doing scientific work,

1 correct?

2 A. I'm not sure I understand the question. Can you --

3 Q. Isn't it true that when it comes to doing research with  
4 respect to preventing smoking initiation, that you've written  
5 pretty clearly and carefully that people who do work in this  
6 area, it's pretty important that they adopt and follow the same  
7 kinds of norms that you do?

8 A. Yes, I think my writings have generally promoted those  
9 norms to the extent I could.

10 Q. When you started to say with respect to developing  
11 proposals and doing work in this area, unless you do proper  
12 science, it's very difficult to get reliable data?

13 A. Well, one of the hallmarks of doing science is trying to  
14 get reliable data.

15 Q. And in terms of actually crafting programs that work,  
16 that have an effect, that, again, is something that's a goal  
17 that's best served if you can have good scientific quality,  
18 correct?

19 A. Well, if you can evaluate what you do in terms of the  
20 intended impact, that's important, and is typically done.

21 Q. I'm going to talk about three features in particular, and  
22 ask if you agree if these are rules that you tried to abide by  
23 yourself when it comes to doing your research. One is to follow  
24 established scientific methods for gathering and analyzing data.  
25 Is that one of the parameters that people should follow if they

- 1 want to follow accepted norms?
- 2 A. Yes.
- 3 Q. Would another be to acknowledge limitations, limitations  
4 and weaknesses of the results?
- 5 A. Yes, that's important, particularly for identifying how  
6 the next round of research can improve our understanding of  
7 whatever the problem is we're working on.
- 8 Q. And lastly, would you agree that it's important to stay  
9 within your area of expertise?
- 10 A. I'll have to be more cautious in answering that since I  
11 think of my own career over the last 25 years I've -- as I've  
12 entered new areas, I've tried to do that following -- by reading  
13 the literature and understanding it and so on, but certainly  
14 it's -- I guess you'd have to better define what you mean by  
15 "stay within your area of expertise."
- 16 Q. Stay within the area where you can properly hold yourself  
17 out to the scientific community as an expert.
- 18 A. I don't think that that's -- that's certainly not a norm  
19 that I've heard articulated. It's not uncommon for scientists  
20 to move into new areas, and when they do, they try to follow,  
21 among other things, your first two dicta and use the scientific  
22 methods as they understand them and apply them to the area that  
23 they're working in.
- 24 Q. Well, you've been proffered today, and as part of your  
25 testimony you've supported that proffer, as an expert in

1 psychology and, I think, it's preventative medicine or words to  
2 that effect, correct?

3 MS. BROOKER: Prevention science.

4 BY MR. BERNICK:

5 Q. Prevention science. That's a proffer of use saying these  
6 are areas in which you are an expert, correct?

7 A. That's correct.

8 Q. Okay. And those are areas where you have also published  
9 extensively, correct?

10 A. That's correct.

11 Q. So the proffer matches your background and your  
12 publication history and your training, correct?

13 A. Yes.

14 Q. Okay. Now, in this case, I think this is the first time  
15 that you have taken the bold step of becoming an expert for  
16 litigation purposes, correct?

17 A. That is correct.

18 Q. And we can see that there's just no debating it, you've  
19 been extremely diligent, and you have followed -- you have  
20 analyzed tremendous numbers of studies and documents, you filed  
21 no less than three different expert reports in this case,  
22 correct?

23 A. That's correct.

24 Q. And you attended -- you sat for a deposition that  
25 probably went on for far longer than you would have preferred,

1 correct?

2 A. That is correct.

3 Q. Okay. And is it also true that --

4 THE COURT: How long was that deposition, Mr. Bernick, I'm

5 curious?

6 MR. BERNICK: I take no responsibility whatsoever. This

7 is the first time that the good doctor and I have had the

8 pleasure of meeting, I think he'll testify to that.

9 THE WITNESS: It was 19 hours.

10 BY MR. BERNICK:

11 Q. Well, we'll make good use of some of that testimony that

12 you've offered, you can be assured of that Dr. Biglan, but let

13 me point out, you were also sitting in the back of the

14 courtroom, as I recall, during the trial testimony of

15 Dr. Krugman, correct?

16 A. Dr. Krugman, correct.

17 Q. Dr. Krugman. And I think I saw you kind of taking notes

18 and watching to see what happened, correct?

19 A. I did take notes.

20 Q. Okay. And did you discuss your testimony with

21 Dr. Krugman after his appearance?

22 A. Did I discuss my testimony?

23 Q. Discuss his testimony with him?

24 A. No.

25 Q. Did you discuss with the government what he had testified

1 to?

2 A. Yes, I had some discussions with them.

3 Q. Whose idea was it that you sit in the back of the  
4 courtroom and take notes during Dr. Krugman's testimony?

5 A. It was mine.

6 Q. It was yours.

7 Now, with all the benefit of, what I'm assuming, are  
8 literally hundreds of hours of work, correct?

9 A. Yes.

10 Q. The benefit of three expert reports, a deposition, being  
11 able to come in and watch live testimony, you then sat down to  
12 craft your answers to the questions that were posed to you by  
13 the government on direct examination, correct?

14 A. I may not have tracked all of what you said in that  
15 question.

16 Q. That's fair enough, I'll withdraw it.

17 You had the benefit of a tremendous amount of work, you  
18 then had the opportunity to sit down and make sure that in  
19 answering the questions you fairly represented the work that you  
20 had done and accurately did so, correct?

21 A. Well, I think that gets to why I hesitate. My testimony  
22 was virtually entirely written by the time I got to Court, so I  
23 didn't want to characterize my --

24 Q. Fair enough.

25 A. -- being here as contributing to my testimony.

1 Q. I wouldn't suggest that. But certainly, before you filed  
2 that testimony, or asked that it be filed, you did have the  
3 opportunity of being here, you had the opportunity of sitting  
4 through the deposition to see what questions had been asked, and  
5 you had the opportunity of doing hundreds of hours of work and  
6 you wanted to make sure that you got your testimony that you  
7 gave to the Court right, correct?

8 A. I certainly endeavored to make my testimony as accurate  
9 and helpful to the Court as possible.

10 Q. And the resulting testimony, particularly when it comes  
11 to the conclusions that you reached and how you worded them,  
12 were you real careful to make sure that you worded the  
13 conclusions in your report to accurately set forth your opinions  
14 in this case?

15 A. Yes.

16 Q. Okay. Now, did you also, when you sat and answered all  
17 those questions, did you also make sure to abide by the same  
18 accepted norms that you've now described for us as being  
19 applicable to your scientific work? Do you understand the  
20 question?

21 A. Yes, I did, and I'm going to remind you that I haven't  
22 agreed to the third of those things on your list.

23 Q. Okay. But you think that you've complied in your work  
24 for this litigation -- it would be important, would it not,  
25 Dr. Biglan, for you, in connection with your work in this

1 litigation, to follow the same set of rules, the same set of  
2 requirements and norms that apply to your work in the scientific  
3 arena?

4 A. Yes I applied the standards of science to the issues I  
5 was asked to address in this case.

6 Q. I'm going to put up a series of things. I've got little  
7 magnets here, so we can keep things a little lively here this  
8 afternoon, and I'm going to put magnets on JDEM 010199, and I'll  
9 represent to the Court, and I'm sure you'll recall this one,  
10 this is an icon taken from one of the other demonstratives you  
11 developed for this case, correct?

12 A. That's correct.

13 Q. The other demonstratives that we received kind of had  
14 similar coloring to the one you've shown the Court. Were these  
15 demonstratives demonstratives that you crafted yourself, that is  
16 the diagrammatic ones?

17 A. Yes, they are.

18 Q. Is there any problems with the accuracy of the  
19 demonstratives that you developed but chose not to show, given  
20 the short period of time that you had? Is there any problem  
21 with the accuracy?

22 A. Not that I'm aware of.

23 Q. Okay. Let's start off with defendants' cigarette  
24 marketing and put that up there for just a moment. I want to  
25 ask about some of the rules that you described here in



1 connection with the work that you've done to analyze the  
2 defendants' cigarette marketing.

3 Is it correct that your direct testimony describes no  
4 established scientific method which governed how you gather data  
5 on the historical practices of the cigarette industry?

6 A. Could you repeat the question?

7 Q. Yes. Part of your expert report, indeed a huge portion  
8 of your expert report, talks about the defendants' cigarette  
9 marketing practices, correct?

10 A. That's correct.

11 Q. And in doing so it goes back, literally, for decades,  
12 your report covers data going back for decades, true?

13 A. That's correct.

14 Q. And isn't it true, in your report, if we want to find a  
15 description of how you gathered that historical data and  
16 analyzed that historical data, that is a description of how you  
17 went about getting it, we can't find anywhere a description of  
18 the method that you followed, correct?

19 MS. BROOKER: If I could just ask Mr. Bernick to clarify.  
20 When you are using the word "report", do you mean to say "report"  
21 or do you mean to say "direct testimony"?

22 MR. BERNICK: Direct testimony.

23 BY MR. BERNICK:

24 Q. You can't find in your direct testimony any description  
25 of the scientific method that you followed for gathering

1 historical data.

2 A. Well, many of the documents -- most of the documents that  
3 I looked at were research documents, they were documents on  
4 research having to do with adolescent smoking. And I used the  
5 same approaches that I would use in reading other research. So  
6 I applied my understanding of the scientific methods to the  
7 reading of those documents.

8 Q. Well, I didn't ask you that. I asked how did you go  
9 about -- what was the method that you used -- actually what I  
10 precisely asked you was: Isn't it a fact that nowhere in your  
11 direct testimony do we find even a description of the method  
12 that you used in gathering those documents to begin with? It's  
13 just not there.

14 A. I believe that that's correct. I didn't describe a  
15 method of sampling the documents, if that's what you're talking  
16 about.

17 Q. That's what I'm talking about. In fact, isn't it true  
18 that there are literally millions of documents that have been  
19 produced by these companies in connection with litigation?

20 A. That is my understanding.

21 Q. And isn't it true that notwithstanding the length of your  
22 report, you've identified a very, very small percentage of  
23 documents that, for whatever reason, were important to you in  
24 connection with giving your testimony in this case, correct?

25 A. That's correct.

1 Q. And isn't it true that you nowhere describe a scientific  
2 method for how you made that selection?

3 A. I believe that's correct.

4 Q. Okay. Is it also true that when it comes to the  
5 historical data that is available about the defendants'  
6 marketing practices, that those marketing practices, literally,  
7 have been described in dozens upon dozens of pieces of sworn  
8 testimony by the people who were involved?

9 A. That's correct, and they've also been studied through the  
10 very methods that you're concerned with.

11 Q. Well, I just asked you whether it's a fact that the  
12 historical practices have been described in literally dozens  
13 upon dozens of pieces of testimony, and I think your answer is  
14 yes; is that correct?

15 A. That's correct.

16 Q. Okay. And is it also true that in connection with your  
17 analysis of Philip Morris's history, you do cite a couple,  
18 three, four depositions, correct?

19 A. I do cite depositions from Philip Morris.

20 Q. In connection with Reynolds, and in connection with  
21 Reynolds I would be -- I think you only cite the testimony --  
22 one piece of testimony from one marketing individual in the  
23 entirety of your report, correct -- not report, your testimony?

24 A. I don't know.

25 Q. And isn't it true that with respect to Lorillard and

- 1 Brown & Williamson, you cite absolutely no deposition testimony  
2 whatsoever?
- 3 A. I don't believe that's correct.
- 4 Q. You don't believe that's correct. Well, maybe on a break  
5 you can go back and look and find out where you cite the  
6 deposition testimony of any witness of Brown & Williamson or  
7 Lorillard. Could you do that for us when you get a chance?
- 8 A. I can tell you I believe that I cited the testimony of  
9 Sharon Smith, deposition testimony.
- 10 Q. Sharon Smith deposition testimony. Did you cite it as a  
11 deposition testimony or just as a U.S. exhibit number?
- 12 A. Well, I may have cited videotape -- a videotape that she  
13 did about the Be Kool Campaign, but I read the deposition  
14 testimony in the context of working on that. So I guess I would  
15 have to check.
- 16 Q. Isn't it a fact that you nowhere describe anywhere in  
17 your direct testimony a scientific method that you used in terms  
18 of how it was that you went about selecting the deposition  
19 testimony?
- 20 A. That's correct.
- 21 Q. You're not an expert historian, are you?
- 22 A. No, I'm not.
- 23 Q. You're not an expert in marketing practices, are you?
- 24 A. No.
- 25 Q. And, in fact, there's nowhere in your entire direct

1 testimony where you even attempt to reconstruct the actual  
2 process that the companies used in bringing a particular ad  
3 campaign to market. Can't find that in your direct testimony,  
4 can we?

5 A. No.

6 Q. Let's talk about -- we talked a lot about whether you  
7 identify scientific methods. Let's talk about the second point,  
8 which is acknowledging limitations and weaknesses. I looked  
9 through your articles over the years, and you're very diligent  
10 in every article to point out limitations in your work, correct?

11 A. That's correct.

12 Q. And you're very diligent in your articles in pointing out  
13 areas where the results were a little bit disappointing or they  
14 haven't been well supported, correct?

15 A. That's correct.

16 Q. And on the basis of that practice that you followed in  
17 your scientific work, you've fairly gone on to advocate the  
18 conduct of additional work, correct?

19 A. Yes, I -- I have generally tried, as most scientists do,  
20 to not only identify what we know, but to identify the  
21 weaknesses and the evidence that we have, and to -- I specify  
22 the ways in which we can strengthen our understanding of  
23 particular issues.

24 Q. Okay. Isn't it true that if we go to your testimony in  
25 this case concerning defendants' cigarette marketing practices,

1   that we nowhere find even a single expression of limitation on  
2   the work and the methodology that you used?

3   A.     Well, once again, I would note that much of the -- many  
4   of the -- most of the documents that I relied on are themselves  
5   research documents, so it would be equivalent to reading and  
6   reviewing scientific literature in a particular area and trying  
7   to summarize what's there.

8   Q.     Tell me what fraction of the marketing documents that you  
9   wrote actually constituted marketing research, that is,  
10   gathering, analyzing data, what fraction?

11   A.     I can't give you a specific fraction.

12   Q.     Maybe like four or five percent?

13   A.     Could you clarify the question?

14   Q.     Yes. Actual marketing research where you got a report  
15   that recites data from focus groups, analyzes the data, reaches  
16   a conclusion, that kind of research constitutes only a very  
17   small fraction of the documents that you reviewed, correct?

18   A.     No, I don't agree.

19   Q.     Is there anywhere where you acknowledge any limitation on  
20   the scope or quality of the research, or the results that you  
21   have proffered, in connection with your direct testimony?

22   A.     I don't recall.

23   Q.     Let's talk about staying within your area of expertise,  
24   and you've properly pointed out that you're not totally  
25   comfortable with that proposition. So I'll go over it a little

1 bit here.

2 Let's talk about marketing in particular. I think you've  
3 been fair enough to say that you're not an expert in marketing,  
4 correct?

5 A. That's correct.

6 Q. Never held yourself out as being an expert in marketing,  
7 correct?

8 A. That's correct.

9 Q. Never published in the field of marketing, correct?

10 A. That's probably correct.

11 Q. Okay. And in your deposition you were asked, as part of  
12 those many hours, a series of questions -- and I think that --  
13 let me see if I can get through it quickly. You've never  
14 conducted any research concerning historical marketing practices  
15 of the defendants in this case with respect to radio and  
16 television, correct?

17 A. Yes, that's correct.

18 Q. You've never conducted research concerning historical  
19 marketing practices of any of the defendants in this case  
20 relating to magazines, correct?

21 A. Well, I -- the reason I hesitate is because I think it  
22 would be correct to say that the research that I did, that I  
23 have done in the work on this case, has been research looking at  
24 the, as I said, the research documents. So what I -- much of  
25 what I learned about the historical marketing practices has been

1 in looking at those documents.

2 Q. I'm not talking about on-the-job training, Dr. Biglan,  
3 I'm talking about your historical, professional and scientific  
4 background. Didn't you answer this question as follows in your  
5 deposition?

6 "Question: You've never conducted research concerning  
7 historical marketing practices of any of the defendants in this  
8 case related to magazines, correct?"

9 "Answer: That's correct."

10 Was that the answer that you gave in your deposition?

11 A. Yes, and that is correct.

12 Q. Okay. Well, that's the question that I think I asked  
13 you. Let me go on to the next one. Is the same thing true with  
14 respect to billboards?

15 A. Yes.

16 Q. Store advertising?

17 A. Yes.

18 Q. Coupons and value-added promotions?

19 A. Yes.

20 Q. Sports sponsorships?

21 A. Yes.

22 Q. Product placement and forms?

23 A. Yes.

24 Q. Pricing decisions?

25 A. That's correct.

Scott L. Wallace, RDR, CRR  
Official Court Reporter



1 Q. Promotional programs?

2 A. That's correct.

3 Q. Let's talk more generally, Dr. Biglan, about the  
4 question: You have never held yourself out prior to your  
5 appearing in this case, isn't it true that you never held  
6 yourself out as an expert in tobacco marketing practices?

7 A. Well, I certainly wrote about tobacco marketing practices  
8 before my involvement in this case. I -- as the research has  
9 developed over the last 20 years in that area, I've kept up with  
10 that research, and there were certainly quite a number of things  
11 that I -- quite a bit of the literature -- quite a number of  
12 things that I wrote that talked about that and our smoking  
13 prevention program since at least the late '80s contained  
14 components that were designed to counter the effects of  
15 cigarette marketing on adolescents.

16 Q. I didn't really ask you any of those questions. We're  
17 going to get to your writings and teachings and speaking in a  
18 minute. I simply asked you for a fact. Have you ever held  
19 yourself out to the scientific community as an expert in tobacco  
20 marketing practices?

21 MS. BROOKER: Objection, asked and answered.

22 THE COURT: I'm not clear. I'll give you a second chance.

23 THE WITNESS: Well, it's ambiguous. I mean, you have to  
24 have some understanding of the tobacco marketing in order to  
25 develop smoking prevention programs. I will say that I've

1 learned a lot in my involvement in this case and its influenced  
2 the way I go about smoking prevention.

3 BY MR. BERNICK:

4 Q. I really didn't ask you that. Let me try to get a little  
5 bit more clarity to my question, Dr. Biglan.

6 Often people go and give speeches in expert conferences,  
7 or make presentations, and they're introduced by somebody and so  
8 and so says, Dr. Biglan, he is truly an expert when it comes to  
9 prevention of youth smoking initiation. I'm sure that's  
10 happened to you, correct?

11 A. It has.

12 Q. You've been introduced as an expert psychologist,  
13 correct?

14 A. I think so.

15 Q. An expert in prevention science?

16 A. Well, I have to say the term "expert" doesn't come up in  
17 my world, but, yes.

18 Q. But somebody who's authoritative, whose written,  
19 published. Isn't it true that you've never written a single  
20 peer review publication that actually does research with respect  
21 to cigarette marketing -- defendants' cigarette marketing  
22 practices?

23 A. No, that's not correct if you include the work that I did  
24 in developing tobacco marketing -- tobacco prevention programs  
25 that were based on our understanding of the influence of tobacco

1 marketing.

2 Q. But I didn't ask you that. I said have you ever before  
3 written a peer review paper that goes back over the history of  
4 the defendants' cigarette marketing practices and says here's  
5 what they did and I've analyzed it. Have you ever done that?

6 A. Yes.

7 Q. How many industry documents had you read before you began  
8 doing your work in this case?

9 A. This case?

10 Q. Yeah.

11 A. I think I would have to say very few. I relied on  
12 published research on those documents. Of course, much of that  
13 has been developing in recent years.

14 Q. Have you spoken to groups detailing how it is that the  
15 defendants did their advertising, put together their advertising  
16 campaigns?

17 A. Yes, I have frequently spoken to groups about the  
18 influence of cigarette advertising on adolescents, pretty much  
19 in terms I did today.

20 Q. But I'm sorry, I didn't ask you about influence. I'm  
21 asking about analysis of historical practices where you say as  
22 an expert, I'm going to tell you how the defendants put together  
23 their different advertising campaigns, Joe Camel, Marlboro Man,  
24 you published articles that describe that?

25 A. Well, I have published articles in my 1995 book I discuss

1 the marketing practices of the tobacco companies. Now, I will  
2 acknowledge that I certainly didn't do the kind of in-depth  
3 research that someone like Michael Cummings has done where he  
4 systematically sampled documents, but came to the same  
5 conclusions I had.

6 Q. I didn't ask you about Cummings or the conclusions he  
7 came to. You never sampled documents before you came to do work  
8 in this case, correct?

9 MS. BROOKER: Objection, he's being very argumentative and  
10 Dr. Biglan is trying very hard to professionally answer the  
11 question.

12 THE COURT: Sustained.

13 BY MR. BERNICK:

14 Q. Dr. Biglan, I want to turn now to one more piece on the  
15 chart. Let's put smoking on the map and talk a little bit about  
16 your history in dealing with this relationship here. Isn't it  
17 true that you've never published research on the subject of how  
18 adolescents choose the products that they purchase?

19 A. That's correct.

20 Q. Isn't it true that you've never published research on how  
21 adults choose the products that they use?

22 A. That's correct.

23 Q. You've never published on brand switching by consumers of  
24 any consumer product, correct?

25 A. That's correct.

1 Q. You never published research on brand switching by  
2 cigarette smokers, correct?

3 A. That's correct.

4 Q. Isn't it true that when it comes to the relationship  
5 between cigarette marketing and smoking, you've never personally  
6 conducted a study published in a peer review journal in which  
7 you concluded that cigarette promotions caused smoking  
8 initiation?

9 A. I'm sorry, I hesitate to answer that because I don't  
10 typically use the term "cause". So, no, I haven't published  
11 articles about any variable causing another one.

12 Q. Well --

13 A. I --

14 Q. I don't want to interrupt. Go ahead.

15 A. Well, go ahead. I don't mean to be argumentative.

16 Q. Okay. Isn't it true that you've never even published any  
17 empirical research that looked at the relationship between  
18 cigarette promotion and initiation?

19 A. I have not -- that's correct, I have not personally done  
20 empirical research on the influence of exposure to cigarette  
21 marketing on adolescent smoking.

22 THE COURT: I think, Mr. Bernick, unless you're in the  
23 middle of an area, if you want to finish a particular topic  
24 that's fine, otherwise we ought to take our break now.

25 MR. BERNICK: I've got one more question.

1 BY MR. BERNICK:

2 Q. Isn't it true that you've not published any peer review  
3 research on the impact, if any, of cigarette marketing on  
4 smoking among adult or -- excuse me, on smoking among adult  
5 smokers?

6 A. Yes, I think that's correct.

7 Q. And the same thing's true with respect to continuation --  
8 on market -- on continued smoking among underage persons, true?

9 A. I don't believe that's correct. If the --

10 Q. Do you remember giving this question in response to this  
11 answer at page 38 of your deposition: "If not published peer  
12 reviewed research on the impact of cigarette marking --  
13 cigarette marketing on continued smoking among underage persons,  
14 that's correct?" "That's correct."

15 A. No, that's not correct. I published a number of things  
16 in which I -- and I must say before my involvement in this case,  
17 in which I reviewed the literature on the impact of cigarette  
18 marketing on adolescents. I think what I said a moment ago was  
19 that I haven't published empirical research that I myself  
20 conducted on the influence of exposure to cigarette marketing on  
21 adolescent smoking. That is true.

22 Q. Is the answer that you gave in the deposition correct or  
23 not?

24 MS. BROOKER: Your Honor, if I could just ask, Dr. Biglan  
25 you now have the transcript up there, and I would just note that

1   there have been four very lengthy days of depositions, Dr. Biglan  
2   has given in this case, so if we could be clear about which  
3   deposition it might be helpful to Dr. Biglan.

4           MR. BERNICK: The first day of the deposition, page 38.

5   BY MR. BERNICK:

6   Q.     I'm just asking whether the testimony on the screen is  
7   correct.

8   A.     Well, I think I've clarified in what I just said what the  
9   facts of the matter are.

10   Q.     My question is whether the answer that you gave is true?

11   A.     Then I think I would have to go back and look at the  
12   context on this about whether or not I was being asked about  
13   empirical research, because as I have acknowledged, I have not  
14   done empirical research on that.

15   Q.     You answered the same form of the question twice,  
16   published peer reviewed research, published peer reviewed  
17   research, and you never made the qualification, did you?

18           MS. BROOKER: Dr. Biglan, you have the transcript up there  
19   if you would like to look at it.

20           THE WITNESS: What page?

21   BY MR. BERNICK:

22   Q.     It's page 38.

23           MR. BERNICK: I'm sorry, Your Honor, I thought he was  
24   done.

25           THE WITNESS: I'm asking, what time are we adjourning?

1 THE COURT: Well, we'll adjourn at 4:30.

2 THE WITNESS: No, that's in the transcript of my  
3 deposition.

4 THE COURT: I see, okay.

5 THE WITNESS: Well, I was asked on the previous page and  
6 this was -- I was given homework between the first and second  
7 days, but this is on the first day. I was asked if I had  
8 published anything on this -- on cigarette marketing on the  
9 previous page and I said I didn't know, and on the subsequent day  
10 I provided the -- Mr. Beach with information about papers I had  
11 published regarding cigarette marketing and its influence on --

12 BY MR. BERNICK:

13 Q. So these two statements here are both false?

14 A. I guess they are.

15 MR. BERNICK: It's a good point to break, Your Honor.

16 THE COURT: All right, we'll take just 10 minutes,  
17 everybody.

18 (Thereupon, a break was had from 3:20 p.m. until  
19 (3:34 p.m.)

20 THE COURT: All right, Mr. Bernick.

21 MR. BERNICK: Thank you, Your Honor.

22 BY MR. BERNICK:

23 Q. Dr. Biglan, I kept up on the screen the testimony that we  
24 just went over where you testified previously that you hadn't  
25 published peer reviewed research on the impact of -- on the



1 impact of cigarette marketing on continued smoking, et cetera,  
2 et cetera. Let me go back and ask you a couple follow-up  
3 questions so I can be clearer on your answer here.

4 It's true, is it not, that literally for the better part  
5 of over 40 years, research has been conducted on the question of  
6 whether cigarette marketing causes kids to start smoking,  
7 correct?

8 A. I wouldn't agree with that because I -- because I have a  
9 problem with the term "cause." There has been research  
10 conducted certainly on the influence of cigarette advertising as  
11 one of the factors that influences adolescents to start smoking.  
12 Most of that research has been done since 1990, so there's been  
13 an increasing volume of research in recent years.

14 Q. Well, first of all, let me take the word "cause" out and  
15 then I'll tell you, I'm going to put it back in. But I'll take  
16 "cause" out of my question.

17 Isn't it true that literally for a period of about  
18 40-plus years, extensive research has been done on the question  
19 of the relationship between defendants' cigarette marketing on  
20 the one hand and the smoking initiation of adolescents on the  
21 other?

22 A. No, I don't agree with that. If I had to characterize  
23 "extensive research," I would say that it's in the last 15 years  
24 that extensive research has been done.

25 Q. Fair enough. Isn't it true that people have looked, for

1 example, at the question of whether adolescents are familiar  
2 with the ads at the time they start to smoke?

3 A. That's correct.

4 Q. Isn't it true that people have also analyzed the question  
5 of the relationship between smoking initiation and advertising  
6 expenditures?

7 A. I believe that's correct, but that's not a literature  
8 that I'm --

9 Q. I'm just asking the question.

10 A. I believe it's correct.

11 Q. People have looked at that, correct?

12 A. I believe so.

13 Q. Isn't it true that there's been research directed to the  
14 question -- to the issue of the effects of exposure to  
15 advertising on adolescents?

16 A. That's correct.

17 Q. Research has been conducted to the issue of the  
18 adolescent share of voice in ads; that is, the extent to which  
19 youth -- was is said to be youth-oriented advertising is  
20 represented in advertising expenditures?

21 A. "Share of voice" being the studies of the proportion of  
22 the advertised -- total advertising spent by a particular  
23 company on advertising. Yes, there has been research on that.

24 Q. Now, you've not conducted any of the research on  
25 familiarity with cigarette ads, correct?

1 A. That's correct.

2 Q. You've not done any research or published any studies on  
3 advertising expenditures and the effect on smoking, correct?

4 A. That's correct.

5 Q. Nor have you done any research directed to the issue of  
6 the effects of exposure to advertising on adolescents, have you?

7 A. I have not published any research on that.

8 Q. Nor have you done any research on share of voice,  
9 correct?

10 A. That's correct.

11 Q. Nor have you done any research directed to the issue of  
12 the Marlboro Man or Joe Camel, correct?

13 A. The impact on adolescents -- I haven't done research  
14 myself on that.

15 Q. My question was not that. My question was: Nor have you  
16 done any research directed to the issue of the Marlboro Man or  
17 Joe Camel, correct?

18 A. Yes, I have not done empirical research on --

19 Q. You've not done any research on that, correct?

20 MS. BROOKER: Objection.

21 Were you finished your answer, Dr. Biglan?

22 THE COURT: Objection's sustained.

23 THE WITNESS: I just want to clarify that I have done  
24 research -- when you say "the issue of Marlboro advertising," the  
25 issues involved in -- advertising for youth-popular brands has

1    been a key focus of our smoking prevention work as we've tried to  
2    reduce the impact of that advertising. So I just want to make  
3    that clear.

4    BY MR. BERNICK:

5    Q.     Well, you can make that clear, but it's not really  
6    responsive to my question. I asked you the question twice.  
7    I'll ask it again just so we're real clear on the question.

8           Nor have you done any research directed to the issue of  
9    the Marlboro Man or Joe Camel, correct?

10          MS. BROOKER: Objection, asked and answered.

11          THE COURT: The witness did answer.

12          MR. BERNICK: I don't believe that he provided me with a  
13    responsive answer, Your Honor.

14          THE COURT: Well, he told you what he did and what he  
15    didn't do.

16          MR. BERNICK: Well, I don't think that in his answer, I  
17    got anything that was specific to the Marlboro Man or Joe Camel  
18    at all.

19          THE COURT: Well, I've ruled. I'm sorry. Go ahead,  
20    please. Next question.

21          MR. BERNICK: Well, does Your Honor --

22          THE COURT: I'm sustaining the objection.

23          MR. BERNICK: Sustaining the objection.

24    BY MR. BERNICK:

25    Q.     Isn't it true that when it comes to this relationship

1 between defendants' cigarette marketing and smoking, that you  
2 have never conducted a study published in a peer reviewed  
3 journal in which you concluded that cigarette promotions cause  
4 smoking initiation, correct?

5 A. Again, I hesitate to answer because of the term "cause."  
6 I have not -- I'm sorry.

7 Q. It's not a question of being sorry, Dr. Biglan. Go ahead  
8 and answer.

9 MS. BROOKER: Objection. Please don't interrupt  
10 Dr. Biglan.

11 THE COURT: You may finish your answer.

12 THE WITNESS: I have published in peer reviewed journals  
13 articles in which I concluded that cigarette marketing influences  
14 adolescents to smoke.

15 BY MR. BERNICK:

16 Q. So is this statement true or false that you testified?

17 A. It's apparently false.

18 Q. Did you have an opportunity to review your deposition and  
19 make sure that you went back and corrected any errors in your  
20 deposition?

21 A. I reviewed the depositions, yes.

22 Q. Did you re-review your deposition before you showed up to  
23 testify here today?

24 A. Yes.

25 Q. Have you ever given notice to the defendants in this case

1 or their lawyers or asked the Justice Department to give us  
2 notice that any of the answers in the deposition were false?

3 A. Well, I believe -- well, yes, in the second day of that  
4 deposition -- I was asked on the first day to provide -- to  
5 indicate where I had published papers that had to do with my  
6 conclusions regarding the influence of tobacco marketing on  
7 adolescent smoking, and on the second day of that deposition I  
8 provided those. So I think in that sense, I was providing the  
9 same information that I think you're asking about now.

10 Q. I just asked very simply whether you ever asked the  
11 Justice Department to notify the defendants that any of the  
12 answers that you gave in your deposition were false?

13 MS. BROOKER: Objection. Asked and answered with respect  
14 to what he did the second day of the deposition, when he was  
15 given homework by defendants.

16 MR. BERNICK: With due respect, Your Honor --

17 THE COURT: No, the objection's overruled.

18 Other than the information you just gave us, what is the  
19 answer to the question that was just asked of you?

20 THE WITNESS: I never asked the Justice Department to give  
21 that information to the defendants.

22 BY MR. BERNICK:

23 Q. How many other questions and answers, with the benefit of  
24 hindsight, in the deposition that you gave are false?

25 A. I don't know.

1 Q. Now, again, to be very clear, a lot of your work has  
2 looked at the issue of what interventions have an effect on  
3 smoking initiation, correct?

4 A. That's correct. That's really been the core of my  
5 smoking -- my research on adolescent smoking.

6 Q. In that respect, when you're trying to find out what  
7 effect, if any, interventions have on smoking initiation, you  
8 have to look for the contribution of other variables to smoking  
9 initiation, correct?

10 A. Variables other than --

11 Q. The intervention.

12 A. Yes. You attempt to control for other possible  
13 influences on adolescent smoking in an analysis of the impact of  
14 the intervention on adolescent smoking.

15 Q. And some of the variables that you try to control for,  
16 for example, are peer influence?

17 A. Yes.

18 Q. Parental influence?

19 A. You could control for those, yes.

20 Q. Okay. And a variety of other variables that you think  
21 may also affect the outcome, correct?

22 A. Yes.

23 Q. Okay. Now, isn't it true --

24 A. Can I --

25 Q. I just asked you a question. Did you complete your

1 answer to the question?

2 A. Well, I thought of something else. Can I --

3 Q. Well, maybe we'll get to it later on. If you don't,  
4 you'll have an opportunity through counsel for the government.  
5 That's not a problem if you want to --

6 MS. BROOKER: Objection. Could I just -- if that's a  
7 follow-up to the answer he gave, he should be permitted to give  
8 it.

9 THE COURT: You may finish your answer.

10 THE WITNESS: Well, all I was going to say is that in the  
11 interventions that we do, they're targeted at trying to affect  
12 the peer influence process and, typically, to mobilize parents to  
13 influence their adolescents not to smoke. And so those are less  
14 variables that you control than they are variables that you are  
15 directly trying to affect through your intervention.

16 So you look at whether or not you can affect, let's say,  
17 the perception that other peers smoke and, as a result of  
18 affecting that, reduce the prevalence of smoking.

19 BY MR. BERNICK:

20 Q. But in the research, researchers often make sure to try  
21 to control for these variables so they understand that their  
22 contribution is to the full picture, correct?

23 A. That would be an appropriate procedure.

24 Q. Now, I'm going to ask you two questions that go back to  
25 defendants' cigarette marketing.



1           Isn't it a fact that when it comes to your own research,  
2   you have not in any of your published studies actually gathered  
3   data with respect to the variable of defendants' cigarette  
4   marketing?

5   A.       That's true except for the research that we're currently  
6   doing.

7   Q.       Well, I didn't -- I said "published research."

8   A.       Published, you're correct.

9   Q.       In your published research, just so we're clear, you've  
10   never gathered information that relates to the variable that is  
11   defendants' cigarette marketing for purposes of your research,  
12   correct?

13   A.       That's correct.

14   Q.       Now, that variable -- that variable has been extensively  
15   studied by others in the sense that they have gathered data with  
16   respect to that variable specifically, correct?

17   A.       There has been growing -- yes, there has been growing  
18   literature in the last 15 years on the influence of that  
19   variable on adolescent smoking.

20   Q.       And when you say that you've never actually published, or  
21   when you said in your deposition that you've never actually  
22   published empirical information, what you mean to say is that  
23   you've never published actual research data analyzing the  
24   variable that is cigarette marketing, correct?

25   A.       That's correct.

1 Q. And as a consequence, you in your papers have never  
2 actually, from a scientific, methodological point of view,  
3 determined the actual impact of defendants' cigarette marketing  
4 on smoking initiation, correct?

5 A. That's correct. In the research that I've conducted, the  
6 empirical research that I've conducted, we have not studied the  
7 influence of that variable in studies we've published thus far.

8 Q. And you have never held yourself out to the scientific  
9 community as an expert in the contribution that defendants'  
10 cigarette marketing makes as a variable in the smoking  
11 initiation equation, correct?

12 A. No, I've -- I would certainly defer to others in the  
13 smoking prevention field on that issue.

14 Q. Fair enough. And the others that you would defer to  
15 would be people like, for example, Dr. Pierce, is a very well  
16 known researcher in that area, correct?

17 A. He's one.

18 Q. Okay. Well, would you defer to him or not?

19 A. Yes.

20 Q. Okay. Well, what others would you defer to in this area?

21 A. Well, the people that I cited in my demonstratives,  
22 especially 6 and 7, are people who have done research on the  
23 influence of cigarette advertising on adolescent smoking.

24 Q. Isn't it true that in your published work, you've never  
25 published data demonstrating that defendants' cigarette

1 marketing makes an independent contribution to smoking  
2 initiation?

3 A. That's correct.

4 Q. You've never offered that opinion in any published paper  
5 based upon research data, correct?

6 A. I have offered that opinion in numerous papers, based on  
7 research data. I have not conducted that research.

8 Q. With respect to the data that others have gathered --  
9 Dr. Pierce's gathered data, correct?

10 A. That's correct.

11 Q. Dr. Biener and Siegel have gathered data, correct?

12 A. That's correct.

13 Q. And they're among the better known studies, correct?

14 A. Those are frequently cited studies, yes.

15 Q. And isn't it true that you have never actually asked for  
16 access to that data in order to analyze it for yourself,  
17 correct?

18 A. No, I've relied on peer reviewed published papers.

19 Q. Well, just so we're clear, the answer to my question is  
20 you've never actually looked at the data yourself?

21 A. I have not analyzed the data from those papers myself.

22 Q. And therefore, based upon your own review of the data,  
23 you've never expressed the conclusion that defendants' cigarette  
24 smoking actually independently -- cigarette marketing actually  
25 independently contributes to smoking among adolescents, correct?

1 MS. BROOKER: Objection. This has been asked and answered  
2 twice now.

3 MR. BERNICK: No, different question. He said before --

4 THE COURT: Objection's overruled.

5 THE WITNESS: I --

6 BY MR. BERNICK:

7 Q. Do you want me to rephrase the question to be clearer  
8 or --

9 A. Well, I'm hung up on your word "data." I have published  
10 things based on my review of the empirical literature in this  
11 area, which is what scientists do.

12 Q. Well, scientists review articles, correct?

13 A. Pardon? Yes, review articles.

14 Q. Okay. And then they do articles that are actual  
15 research, correct?

16 A. That's correct.

17 Q. And you have never, based upon any actual research data,  
18 the hard data itself, analyzed the data -- whether you gathered  
19 it or not, analyzed the data and demonstrated that defendants'  
20 cigarette marketing has independently contributed to adolescent  
21 initiation, have you?

22 A. That's correct, but I want to be clear --

23 Q. But that is correct, is it not?

24 MS. BROOKER: Objection. Can Dr. Biglan please finish  
25 his --

1 THE COURT: He may finish his statement.

2 THE WITNESS: I want to be clear that it would be highly  
3 unusual for someone to demand the data from other people and  
4 re-analyze the data. The way science proceeds is, as you say,  
5 through review articles and meta analyses, relying on published  
6 papers.

7 BY MR. BERNICK:

8 Q. Well, the meta analyses also require access to the  
9 underlying data, do they not?

10 A. My understanding is that they typically use the data that  
11 are published and they sometimes will go to an investigator to  
12 get additional information, but I'm unaware of a meta analysis  
13 that went back and got the raw data and re-analyzed it.

14 Q. Have you ever done a meta analysis yourself?

15 A. No, I haven't.

16 Q. Let's focus, then -- I want to shift now from your  
17 background and expertise to talking a little bit about your  
18 analysis of the marketing practices themselves.

19 And if somebody could try to spray or do whatever here to  
20 get this off, it would be useful. We did an experiment on the  
21 break to see if I could smudge it out and it seemed to work  
22 better here. It's supposed to be dry erase.

23 Let's talk about the marketing portion of this, in any  
24 event. We have heard from marketing experts in prior testimony  
25 in this case -- Dr. Dolan, for example. Do you know him to be a

1 marketing expert?

2 A. That's my understanding, yes.

3 Q. Did you read his testimony?

4 A. Yes, I did.

5 Q. The testimony in his deposition or the testimony at

6 trial?

7 A. I read his written direct testimony.

8 Q. Did you read the cross-examination?

9 A. Yes, I did.

10 Q. Okay. Now, I want to talk about some things that relate

11 to marketing in particular before we then go back to trace out

12 some of these relationships.

13 Dr. Dolan, as you know, indicated in his testimony, at

14 page 7843, that he knew of no evidence that Reynolds conducted

15 any taste tests on teenagers from 14 to 17. Do you see that?

16 A. Yes.

17 Q. And that he had no knowledge of Reynolds testing any

18 advertising campaigns with teenagers from 14 to 17. And then he

19 basically repeated that same testimony with respect to all the

20 other companies. Do you recall that in his testimony?

21 MS. BROOKER: Could we please ask if Dr. Biglan could have

22 a copy of the transcript so we don't race through this?

23 Mr. Bernick, I think you pointed to two pages. Can you

24 cite so Dr. Biglan knows what pages?

25 MR. BERNICK: I did. 7843 and this is 7844.

1           Here, I'll tell you what. We'll do it like this.

2   (Indicating).

3   BY MR. BERNICK:

4   Q.     Do you recall that testimony?

5   A.     I don't recall it, but I am reading it.

6   Q.     And isn't it true that you don't have any evidence that,  
7   with respect to any of the brand marketing ads that you've  
8   analyzed, that any of them was test-marketed among anybody under  
9   the age of 18, correct?

10   A.     I cannot at the moment think of a document that showed  
11   that Reynolds tested a campaign on those under 18.

12   Q.     Well, first of all, my question is not confined to  
13   Reynolds.

14   A.     Oh.

15   Q.     Remember, it said any of the others as well.

16           My question to you, and I'll repeat it: Isn't it true  
17   that you do not have any evidence with respect to any of the  
18   brand marketing ads in your work that any of them was  
19   test-marketed among anybody less than 18?

20   A.     And I am not -- yes, I am not aware of any research by  
21   any of the companies on the impact of a particular campaign on  
22   anyone under the age of 18.

23   Q.     Isn't it also true -- we heard from Dr. Krugman and,  
24   again, you've told us that you've read -- have you read his  
25   testimony as well?

1 A. Yes.

2 Q. Okay. In this trial?

3 A. Yes.

4 Q. Did you read the cross-examination thereto?

5 A. I read some of it, but I was here for it --

6 Q. Right.

7 A. -- as you pointed out.

8 Q. Right. Okay. Well, then you'll recall that he was shown

9 this demonstrative, which was a list of research techniques that

10 he identified as being research techniques that were used in the

11 marketing field. And he was asked whether he was aware of any

12 of the manufacturing defendants in this case using these

13 techniques with respect to people under the age of 18 and he

14 said no. Do you remember that?

15 A. Yes.

16 Q. And as I look through your expert testimony, I don't see

17 any evidence that you've cited to the Court that any of these

18 research techniques were deployed with respect to people under

19 the age of 18, correct?

20 A. I believe that's correct, although I would like to -- I

21 would want to look back on what his definition was of "field

22 tests," because certainly the defendants have tracked the impact

23 of their campaigns at times on those under 18 through survey

24 research -- well no, it's surveys. Through survey research, so

25 I put that under "survey."



1 Q. Okay. Any other research that you're aware of -- these  
2 research techniques being used on people that were less than 18,  
3 apart from the surveys you've indicated?

4 A. Not that I recall.

5 Q. Isn't it true that with respect to the advertising  
6 plans -- you know that from Dr. Dolan's testimony, Dr. Dolan  
7 says that the advertising plan for a particular campaign is a  
8 very important document, correct?

9 MS. BROOKER: Objection to the use of the words  
10 "advertising plan." I think that's not quite accurate,  
11 Mr. Bernick.

12 BY MR. BERNICK:

13 Q. Brand plan, marketing plan, advertising -- any of those.  
14 Those are important documents, correct?

15 A. Yes.

16 Q. And you're familiar with the fact that Dr. Dolan  
17 testified that if we go to every single one -- this is at page  
18 7842 -- if we go to every single one of the plan documents cited  
19 in his testimony with respect to Reynolds, that where there is  
20 an age range specified for the target, it's always 18 and above.  
21 Do you remember that?

22 A. I believe that's true. And I would add that -- I would  
23 remind you of the comment I made about there not being a bright  
24 line between 17 and 18.

25 MR. BERNICK: Again, I move to strike that as being really

1 non-responsive, Your Honor. That's a factual question.

2 THE COURT: The last sentence may be struck.

3 Go ahead.

4 BY MR. BERNICK:

5 Q. Is that an accurate statement -- an accurate recitation  
6 of the testimony there?

7 A. I believe it is.

8 Q. And it's true that you yourself have not found plan  
9 documents from any of the defendants in this case where, when  
10 they call out an age range for a target, the age range is less  
11 than 18, correct?

12 A. There is certainly marketing -- there are certainly  
13 documents concerning marketing plans in which they're talking  
14 about targeting those under 18.

15 Q. I said -- you restated the question and changed a key  
16 term. I said "plan documents." "Plan documents." Not  
17 documents relating to plans, but the plans themselves.

18 Have you seen any document -- a brand plan, marketing  
19 plan document, the final document, where, when it calls out the  
20 target and specifies an age range, that the age range includes  
21 people who are less than 18?

22 A. Well, asked in that -- when you narrowly focuses on  
23 marketing plans as you define them, I cannot name a document.

24 Q. In fact, if we go through -- and if we can just pull up  
25 here.

1           We tried in kind of short order to pull out all of the  
2 documents that you actually referred to in the text of your  
3 direct testimony, and we've got them here as JDEM 010200, where  
4 the document actually specified an age range. And where the  
5 document related to tracking -- that is, tracking data -- we  
6 marked it with a "T."

7           And isn't it true that, particularly as we go into the  
8 1980s -- that is, '81 and thus and forth -- we have some  
9 continued tracking during these early years, although we don't  
10 see it, but consistently over time, unless it's for tracking  
11 purposes, the age range specified is 21 or above?

12           Isn't that your own experience in reviewing the  
13 documents?

14           MS. BROOKER: Your Honor, I would just object to the use  
15 of this demonstrative. Obviously, it's a complicated  
16 demonstrative where many numbers were pulled out and  
17 Mr. Bernick -- you know, defendants would have had to add some  
18 interpretation to these documents to determine which ones were  
19 for tracking, as Mr. Bernick is saying, or whether ages were in  
20 there for another reason.

21           And to that extent, I think it's unfair to ask Dr. Biglan  
22 to just comment on this without having seen or having had an  
23 opportunity to review it, which would take a substantial period  
24 of time.

25           MR. BERNICK: I don't think that's really what the

1 document's being used for. We're not submitting it as a summary.  
2 What we're saying is we spent a lot of time going through,  
3 reading his direct testimony. As I'm sure Your Honor  
4 appreciates, you go through document after document where the  
5 text of the direct examination gives the age ranges.

6 So all that we did was we went back through all the  
7 documents that he cited in the body of his text to see if somehow  
8 the documents that he was picking out were not representative and  
9 there were in fact a lot of other documents that included ages  
10 less than 18 and we didn't find that.

11 And that's all that I'm asking the witness to verify, is  
12 that in fact overwhelmingly, the documents that he himself has  
13 cited in his direct testimony, when they specify an age range,  
14 specify an age range 18 and over unless they're tracking  
15 documents. That's the question.

16 THE COURT: The objection's overruled.

17 You may answer.

18 THE WITNESS: Is the question whether I can verify that  
19 this is accurate?

20 BY MR. BERNICK:

21 Q. Do you want me to ask the question again, Dr. Biglan?

22 A. That would be helpful. Thank you.

23 Q. The question is whether it is in fact true that  
24 overwhelmingly -- in fact, I'll say with rare exceptions, the  
25 documents that you yourself discuss in the body of your direct

1 testimony, when it comes to specifying an age range, those very  
2 documents specify an age range of 18 and above, with the  
3 exception of certain of the tracking documents, which include  
4 lesser ages?

5 Is that statement correct or not?

6 A. I think that's correct.

7 Q. Now, I want to go to --

8 We're done with that. Thanks.

9 I want to go to a very particular term, which is called  
10 "targeting." Because you read the testimony of Dr. Dolan,  
11 you're familiar with the fact that in his own direct  
12 examination, he explained that "targeting" was part of the  
13 regular marketing process, correct?

14 A. Yes.

15 Q. And in fact, he had a diagram in his direct testimony  
16 which discussed how a target audience or market is identified  
17 and then, kind of working back from that, the marketing people  
18 put together appropriate plans for a campaign that's designed to  
19 achieve that target. Do you recall that?

20 A. Yes.

21 Q. Would it be fair to say that, based upon his testimony,  
22 your understanding of "targeting" in the marketing world refers  
23 to an intentional communication or intentionally seeking out  
24 people as customers?

25 MS. BROOKER: Objection. I would say that's a

1 mischaracterization of Dr. Dolan's testimony. And I think  
2 Mr. Bernick could, if he wants to show Dr. Biglan where it is in  
3 Dr. Dolan's testimony that he defines "targeting," which is not  
4 in those terms, he should put that specifically before Dr. Biglan  
5 and ask Dr. Biglan about it.

6 THE COURT: The objection's sustained. You should proceed  
7 in one of two ways. Either you give a definition of "targeting"  
8 that you want to use --

9 MR. BERNICK: Sure. That's fine.

10 THE COURT: -- and have the witness agree or disagree with  
11 it or use Dr. Dolan's exact testimony.

12 BY MR. BERNICK:

13 Q. Dr. Biglan, based upon the work that you've done, isn't  
14 it true that in the marketing world, "targeting" means an  
15 intentional -- an intentional communication with a group of  
16 people with a view to making them customers?

17 A. Well, "intentional" is a complicated word to a behavioral  
18 scientist. I would agree that the marketing plans of the  
19 tobacco companies typically specify an age range that they say  
20 that they are targeting and that that age range is after --  
21 documents that specify age seldom specify an age under 18.

22 However, many documents specify a purpose of marketing to  
23 reach starters, to reach new smokers, to get the 18-year-old  
24 smokers smoking their brand.

25 Q. Again, I would like you to focus on the question, if you

1 could. First of all, I didn't ask you specifically about  
2 cigarettes or tobacco. And secondly, I asked you about the  
3 meaning of the word "targeting" in the marketing area. And if  
4 you don't know that because it's not your field, you can also  
5 say that, too.

6 But the question to you is whether, as you understand it,  
7 "targeting" in the marketing field means intentionally  
8 communicating with a group of people with a view to making them  
9 your customers?

10 A. It is -- I don't claim to be an expert on marketing, but  
11 that is generally my understanding of what "targeting" means.

12 Q. Now, it's true, is it not, that Dr. Dolan, again,  
13 specifically looked to see whether the defendants were targeting  
14 people who are under 18, correct?

15 A. He did discuss that and he was cross-examined about the  
16 ages that were specified in marketing plans.

17 Q. Isn't it true that Dr. Dolan's testimony was this -- and  
18 this is at page 7849 and 7850:

19 "Question: Do you know of any documents that say no,  
20 these companies are going further; they are specifically  
21 targeting that portion of new smokers who are less than 18? Any  
22 document that says that?"

23 His answer is: "Well, as I've -- I think I've already  
24 answered this question, that I know of no document that says  
25 that there are 16-, 17-year-olds that they are specifically

1 targeting within that new user population.

2 "Question: Under the age of 18?

3 "Answer: I said 16 and 17."

4 Are you familiar with that testimony?

5 MS. BROOKER: Your Honor, I would just object because even

6 the answer itself indicates that Dr. Dolan's already answered

7 that question and I think Dr. Biglan should be allowed to look at

8 the context in which the question and answer was given and have a

9 copy of this testimony so he can review it.

10 MR. BERNICK: He's got the testimony there. He's read the

11 entire testimony.

12 THE COURT: The objection's overruled.

13 BY MR. BERNICK:

14 Q. Are you familiar with that testimony by Dr. Dolan?

15 A. Yes, I am.

16 Q. And isn't it a fact that you yourself have not -- well,

17 let me just put it this way: You told me earlier that when you

18 crafted the direct -- your answer to the direct questions that

19 were put to you on your direct testimony here, that you were

20 careful on exactly how you framed your conclusions. Isn't that

21 true?

22 A. Yes.

23 Q. And when you framed those conclusions and submitted them

24 to Court, you were already familiar with Dr. Dolan's testimony

25 that he didn't see documents saying that they were specifically



1 targeting people under 18? You were familiar with that, were  
2 you not?

3 A. When I wrote my testimony, no.

4 Q. When you submitted your testimony?

5 A. Yes.

6 Q. And you were also familiar with Dr. Krugman's testimony  
7 on exactly the same subject, were you not?

8 MS. BROOKER: Objection as to when he submitted it or when  
9 he wrote his testimony.

10 MR. BERNICK: When he submitted it.

11 THE WITNESS: Yes.

12 Q. And when you decided to put your own -- and you knew --  
13 let me just ask you flat out. You knew from the  
14 cross-examination that the issue of whether the defendants  
15 specifically targeted people under 18 was an extremely important  
16 issue to the defendants in this case, correct?

17 A. That's correct.

18 Q. And that's certainly something that you knew when you  
19 submitted your direct testimony, correct?

20 A. That's correct.

21 Q. And isn't it true that when you stated the conclusions  
22 for your direct testimony, you said as follows: "What did you  
23 conclude?" And this is at pages 36 and 37: "The tobacco  
24 companies understand what motivates adolescents to smoke such as  
25 desires to be popular, masculine, independent, cool, rebellious,

1 or to have excitement. The companies use their understanding of  
2 adolescent needs to create images in marketing their brands, for  
3 example, Marlboro, Camel and Newport, that convey to adolescents  
4 that they can achieve such desired outcomes by smoking these  
5 brands. In short, tobacco companies market cigarettes to  
6 adolescents by exploiting the psychological needs of  
7 adolescents." That's how you frame your conclusion, correct?

8 A. That's correct.

9 Q. And you nowhere framed your conclusion by using the word  
10 "targeting," did you? Can't find it there?

11 A. It's not in this paragraph.

12 Q. In fact, isn't it true that nowhere do you reach the  
13 conclusion in those words that the defendants specifically  
14 targeted, targeted underage smokers -- underage adolescents,  
15 people less than 18, you never used those words, correct?

16 A. I did not use the term "targeting," but I did conclude  
17 that they are marketing to those under age 18.

18 Q. I think the answer to my question was, no, they did not  
19 use that language, correct?

20 MS. BROOKER: Objection, asked and answered.

21 THE COURT: The objection is sustained.

22 BY MR. BERNICK:

23 Q. Isn't it true you said this afternoon, they said, well, I  
24 believe that the defendants aimed, aimed at people who were  
25 under the age of 18? Again, those words nowhere appear in your

1 direct testimony, correct?

2 A. I don't know.

3 Q. Isn't it a fact that in your direct testimony you nowhere  
4 cite a document that Dr. Dolan didn't find and says we are  
5 targeting, we are specifically targeting people who are under  
6 the age of 18, correct?

7 A. I did cite documents that talk about marketing to those  
8 under 18.

9 Q. Targeting. The target was set to be people who were  
10 specifically under the age of 18. You nowhere identify a single  
11 document that Dr. Dolan hasn't identified, did you?

12 A. I don't know about that. I have identified documents  
13 that make it clear that the companies are directing their  
14 marketing and advertising and other marketing to those under 18.

15 Q. Again, maybe I'm not being clear. I'm not talking about  
16 documents from which you can interpret to mean that they were  
17 doing something or another. I'm talking about documents that  
18 use the language. This is a marketing document case, and  
19 targeting is a marketing term. You have nowhere identified any  
20 document that Dr. Dolan had not identified that demonstrates  
21 these defendants were actually targeting specifically people  
22 under 18, have you?

23 MS. BROOKER: Objection. I believe Mr. Bernick is  
24 switching another question and being very argumentative with  
25 Dr. Biglan who is trying to answer the questions over and over

1     again.

2             THE COURT:  The objection's overruled.  The doctor may  
3     answer if he can remember the question.

4             THE WITNESS:  Yes, I have cited documents that show that  
5     the tobacco companies are targeting those under 18.

6     BY MR. BERNICK:

7     Q.       And the conclusion that you set forth here today, "aim"  
8     and "target," aim and target, isn't it true that you  
9     specifically decided not to use that language when you submitted  
10    your direct testimony?

11    A.       No, that's not true.

12    Q.       So, even though you knew that those terms were of  
13    critical importance, that the defendants would be completely  
14    focused on whether you used the words or not, you decided not to  
15    use those words in your direct testimony but to come in and  
16    testify to those words live?

17            MS. BROOKER:  Objection, calls for speculation as to what  
18    defendants would be focusing on here today.

19            MR. BERNICK:  He's already told us he knew what we were  
20    focused on.

21            THE COURT:  The objection's overruled.

22            THE WITNESS:  Could you repeat the question?

23    BY MR. BERNICK:

24    Q.       What you did was you knew the defendants were completely  
25    focused on those words, that the cross-examination had focused

1 specifically on the question of whether there was evidence of  
2 targeting, you decided not to use those words in your direct  
3 testimony, and you decided yourself, you decided today to use  
4 those words for the first time on the stand, correct?

5 A. No.

6 Q. When have you previously in this case, in this case said  
7 specifically in those words the defendants here set out  
8 specifically to target people who are under the age of 18?

9 A. Well, Mr. Bernick, you asked me a question several  
10 minutes ago which I answered by pointing to documents that I  
11 characterized as showing that they are targeting adolescents,  
12 and you said you wanted to restrict the discussion to marketing  
13 plans.

14 MR. BERNICK: I move to strike. That has nothing really  
15 to do with anything. I'll state the question again.

16 Isn't it a fact that prior to today, you have never  
17 actually set down in writing in this case that the defendants set  
18 out specifically to target people who are under the age of 18,  
19 you never used those words in this case, correct.

20 THE WITNESS: I never used the word "targeting," but I  
21 certainly said very clearly, I believe, in my written direct that  
22 I believed that the defendants were engaging in marketing  
23 practices designed to get those under 18 to smoke.

24 BY MR. BERNICK:

25 Q. You never even used the words that you just said. We

1 can't go to your direct examination and find that you used that  
2 defendants set out with the design to get the business of people  
3 who are under the age of 18, did you? You used a different  
4 word, which is design, that we designed to do something; you  
5 didn't use that in your direct testimony, did you?

6 A. What I just said is that their practices are designed to  
7 get adolescents to smoke.

8 Q. And what I'm saying is we can't find those words in your  
9 direct testimony, can we?

10 A. Well, it's -- in my view it's the same substance.

11 Q. Okay. So we now have, you said today, targeted, aimed,  
12 and designed, and all three of those words you're now saying  
13 from the stand, and none of those three words are in your direct  
14 testimony, are they?

15 A. I don't know.

16 Q. Okay. Let's cover one more subject in order to finish  
17 out the day, because I set myself a goal, Your Honor, to get  
18 done within a certain period of time and I would like to do it.  
19 Let's go down and take this one off here.

20 Kathie, could you try to do that, Kathleen, I'm screwing  
21 it up again.

22 THE COURT: Mr. Bernick's assignment for overnight is  
23 going to be to learn how to handle that board so that he himself  
24 can manage to wipe it off instead of his paralegal.

25 MR. BERNICK: Your Honor, you say that, but you cannot

1 underestimate the amount of abuse I generally take on subjects  
2 like this.

3 THE COURT: And I may just be contributing to it; I  
4 haven't witnessed any from anybody else, at least not in open  
5 court.

6 BY MR. BERNICK:

7 Q. Let's talk a little bit about another thing from your  
8 demonstrative, which is psychological needs, okay.

9 And you gave some very important testimony again from the  
10 stand with respect to psychological needs, and what I would like  
11 to do is to put up the other board. If you could put this one  
12 over there, I think we can get this done in 15 minutes.

13 I want to talk about adolescence (sic) psychological  
14 need. That's one of the principle subjects of your testimony,  
15 correct?

16 A. Yes.

17 Q. And we know that you've listed them in your report, and  
18 you've also illustrated them this afternoon in connection with  
19 the demonstratives, but I want to ask you a related question,  
20 and the question will begin with this: Focusing on adults,  
21 that's people over the age of 21, isn't it true that with  
22 respect to adults it is a need, a psychological need that adults  
23 have to be popular with the opposite sex?

24 A. Well, I would have to say that with adults it's more  
25 limited. Those who are in a committed relationship are often

1 concerned to not be popular with the opposite sex. With  
2 adolescents, it's --

3 Q. It's not a statement about marriage, is it?

4 A. It is.

5 Q. Never mind. I've been married for a long time, so I can  
6 make that joke, it's not too bad. I didn't really ask you that.  
7 I asked you whether, with respect to people over the age of 21,  
8 whether one of their needs is to be popular with the opposite  
9 sex?

10 A. And as I said, it is -- for those who are not married, it  
11 can often be a very important need; for those who are married,  
12 that need gets much more limited.

13 Q. I see. Okay. Well, you would agree with me then, when  
14 it comes to single adults, those folks who are 21 and over and  
15 have not yet reached the blissful stage of matrimony, for them  
16 it's very important to be popular with the opposite sex,  
17 correct?

18 A. Well, if they're not in a committed relationship, but  
19 the -- as people are getting older, these things are becoming  
20 more limited.

21 Q. Really just stick with my questions. Twenty-one and  
22 over, I'm going to ask the same question again and again.  
23 Twenty-one and over, twenty-one and up -- I know there are  
24 probably a gazillion qualifications -- I'm just asking is it  
25 important. So with respect to this one, would it be accurate to



1 say that both adolescents and adults, at least some adults over  
2 the age of 21, they all have a need to be popular with the  
3 opposite sex? We should put that one in the middle?

4 MS. BROOKER: Objection. That's been asked and answered.

5 THE COURT: The objection is sustained. The answer wasn't  
6 the desired answer, but that's Mr. Bernick's issue.

7 BY MR. BERNICK:

8 Q. Okay. Well, I'll rest with the record. That's fine.  
9 Let's talk about "Cope with negative emotions, anxiety and  
10 depression." Don't people who are adults, don't they have to  
11 cope with negative emotions, including anxiety and depression?

12 A. They very often do.

13 Q. With respect to success in school, sports and social  
14 activities, is it true that that too is an area where people 21  
15 and over have that need; not all of them, but many of them have  
16 that need?

17 A. I will certainly agree that that is a need that many  
18 adults experience. School, of course, is more limited, but it's  
19 far more likely to be an important need among adolescents.

20 Q. Again, I didn't ask you relative importance, I'm just  
21 asking you whether this is important to people 21 and over?

22 MS. BROOKER: Objection, asked and answered.

23 MR. BERNICK: I didn't ask a question. There's no  
24 question pending?

25 THE COURT: The next question.

1 MS. BROOKER: Then I object to that comment.

2 BY MR. BERNICK:

3 Q. "Feminine attractiveness," is that something that also

4 remains important for women who are 21 and over?

5 A. Yes.

6 Q. "Fun, adventure excitement and risk-taking," is that also

7 something that is important to people who are 21 and over?

8 A. The research on risk-taking and interest and excitement

9 shows that the -- that adolescence is a point at which a desire

10 for high levels of sensation, risk-taking and excitement

11 increases dramatically and that it trails off into the 20s and

12 so on. So it clearly -- it's higher during adolescence.

13 Q. Higher during adolescence, but it's still there with

14 respect to people who are 21; in fact, can be very strong with

15 respect to people who are 21, correct?

16 A. I think if you put it on the other side of your other

17 column, it would be more accurate.

18 Q. What I'm trying to say is we know you would put -- you

19 would agree that all of these apply to people with respect to

20 people who are adolescents, correct?

21 A. Yes.

22 Q. And I'm asking you -- and I'm presuming to say they're

23 all strong with respect to adolescence, I'll give you that,

24 that's fine, we don't have a disagreement.

25 A. I'll accept that.

1 Q. What I'm asking you is whether there are also needs that  
2 are shared with people who are 21 and over sometimes strongly.  
3 Would you agree with me that fun, adventure, excitement and  
4 risk-taking is a need that's shared with people who are 21 and  
5 over?

6 A. Very definitely.

7 Q. Masculinity, same answer?

8 MS. BROOKER: Objection. I was going to say, what is the  
9 specific question?

10 MR. BERNICK: Whether this is a psychological need that is  
11 shared with people who are 21 and over.

12 THE WITNESS: It is certainly not as compelling an issue  
13 as it is for many adolescent males.

14 BY MR. BERNICK:

15 Q. Is it shared?

16 MS. BROOKER: Objection, asked and answered.

17 THE COURT: Sustained.

18 THE WITNESS: Certainly --

19 MR. BERNICK: I'm sorry, Your Honor, I don't think he gave  
20 me a -- he said it's not as strong, but he didn't say that it was  
21 a factor at all with respect to people over 21.

22 THE COURT: Well, why don't you ask it that way.

23 MR. BERNICK: I'm sorry.

24 BY MR. BERNICK:

25 Q. Isn't it a fact that masculinity is an important

1 psychological need for people who are 21 and over?

2 A. It is an issue for many adults, males, yes.

3 Q. "Popularity and peer acceptance." Again, is that a  
4 psychological need that is important for people who are 21 and  
5 over?

6 A. Yes, with the same qualification as I put on all the  
7 others.

8 Q. Is "rebel against authority" the same question -- same  
9 answer?

10 A. Well, if you want me to --

11 Q. If you say no, I'll put it on the other side.

12 MS. BROOKER: Dr. Biglan should finish his answer.

13 THE WITNESS: I mean, rebellion is almost a -- it's a core  
14 issue of adolescents.

15 Q. Core issue?

16 A. I suppose there are rebellious adults, but it's certainly  
17 much less than it is in adolescents.

18 Q. That didn't show up very well. I just want to be clear  
19 that the chart relates to people, adults who are 21 and over.  
20 What about "independence," is that a psychological need that's  
21 shared by people who are 21 and over?

22 A. Well, I suppose that adults who find themselves in  
23 situations where their independence is being impinged on becomes  
24 concerned about that issue. That's not -- that happens to  
25 adults, yes.

1 Q. But I'm asking whether it's an important psychological  
2 need that's shared by people 21 and over?

3 MS. BROOKER: Objection, asked and answered.

4 MR. BERNICK: I'm sorry, what? I didn't use the word  
5 "important" in my first question.

6 THE WITNESS: To some adults, yes.

7 BY MR. BERNICK:

8 Q. And then finally, "positive self-image," is that  
9 something that's a psychological need that are important to  
10 people 21 and over?

11 A. Yes, it is for -- certainly a smaller proportion of  
12 adults. Most adults have gotten to a self-image that they're  
13 reasonably comfortable with.

14 THE COURT: Is that at 21?

15 THE WITNESS: 21.

16 THE COURT: At 21, you think?

17 THE WITNESS: Well, there are certainly people continuing  
18 to struggle with that issue, but it's a core issue for  
19 adolescents.

20 BY MR. BERNICK:

21 Q. Let me just get to that. With respect to adolescence,  
22 you would certainly -- I think one of the reasons why you wanted  
23 to make qualifications, would it be fair to say that in all  
24 these cases; that is, with respect to popularity with the  
25 opposite sex, coping with negative emotions, success in school,

1 feminine attractiveness, positive self-image, independence,  
2 rebellion, popularity, masculinity, and fun, adventure,  
3 excitement and risk-taking, that they're all needs that are also  
4 felt, important needs that are felt by people 21 and over, but  
5 they're, in your view, more strongly felt by adolescents?

6 A. That's correct.

7 Q. Okay. Now, let's pursue that just one step further. You  
8 said this morning or this afternoon -- I tried to get your words  
9 down very precisely. I want to fill in this chart to refer to  
10 people who are 18 to 21. You told us this afternoon, and this  
11 is when I asked for clarification on how the record was  
12 transcribed, that there was no bright line between 17 and 18 in  
13 terms of needs of adolescents, correct?

14 A. That's correct.

15 Q. So, if we talked about an 18-year-old versus a  
16 17-year-old, you would say there's no bright line, and therefore  
17 you would expect that 18-year-olds would have these various  
18 needs strongly.

19 A. Strongly?

20 Q. Yes. You said that adolescents had these needs more  
21 strongly than adults. You've now said that there's no bright  
22 line between 17 and 18, and I therefore take it that as to  
23 18-year-olds, you would expect that they would have these very  
24 psychological needs strongly?

25 A. Well, a fundamental concept in behavioral science is

1 variability. For example, when I talk about puberty, puberty  
2 begins anywhere from 10 to age 15. The same is true for most of  
3 these needs, that they -- an adolescent might be 14 when they  
4 first experience the need to figure out how to deal with stress;  
5 they could be 18, although it's less likely. So, you know, I  
6 certainly agree with you that there's a continuum here and that  
7 there's a tendency for these needs to diminish as a function of  
8 the person's circumstances, but their age is not a particularly  
9 good guide to that.

10 Q. That's my whole point, is that you would expect for the  
11 same reasons you say adolescents have these needs very strongly,  
12 this long list of needs, you would expect that these needs would  
13 be strongly important needs for most 18-year-olds because  
14 there's no bright line between 17 and 18, fair?

15 A. Yes, and that's why the tobacco companies' strategy of  
16 developing and marketing on the basis of 18-to-21-year-olds is  
17 effective with those under 18.

18 Q. Okay. Well, we're going to get right to that, but that's  
19 not really why I asked you the question. The question, so we're  
20 clear, I think you've answered, which is that these various  
21 psychological needs also are likely to attach to 18-year-olds,  
22 and I think your answer was yes, correct?

23 A. That's correct.

24 Q. In fact, isn't it true that you don't consider people who  
25 are 18 to 21 to be adults at all?

1 A. Well, there are many meanings of the term adult. I think  
2 it would depend on what the context was.

3 Q. Hasn't your sworn testimony in this case been that you  
4 don't consider 18-to-21-year olds to be adults?

5 THE COURT: Is that the deposition testimony?

6 MR. BERNICK: That's the deposition testimony at page 310,  
7 Your Honor.

8 THE WITNESS: Well, that's what I said.

9 BY MR. BERNICK:

10 Q. And therefore, all of these different psychological  
11 needs, these ten psychological needs are all needs that you  
12 would expect people under the age -- between 18 and 20, you  
13 would expect people between the ages of 18 and 20 to have these  
14 various needs strongly because they're still not yet adults,  
15 correct?

16 A. No, I didn't equate the term "adult" with the level of  
17 those needs. I mean, the term adult is defined -- you know,  
18 there's a legal age for drinking, there's a legal age for the  
19 purchase of cigarettes, there's a legal age for going into the  
20 Army. I mean, there are a variety of criteria.

21 Q. All those are 18.

22 A. Drinking?

23 Q. Going into the Army and smoking cigarettes are 18.

24 A. That's right.

25 Q. Right. And what you meant in your deposition when you



1 referred to that is that you meant psychologically people are  
2 not adults until they're 21, correct? You said they're not  
3 adults until they're 21.

4 A. I did not -- I did not relate the term adult to the  
5 psychological need status. I stand on what I said here about  
6 the variability and the continuity of these needs across these  
7 ages.

8 Q. Isn't it a fact that these various needs, these ten needs  
9 are, in fact, felt strongly by people who are 18, 19 and 20?

10 A. Well, I think to answer your question I would need to go  
11 through them and point out the ways in which strongly is -- that  
12 I wouldn't agree with strongly.

13 Q. You wouldn't agree with strongly?

14 A. Well, these are vague terms. The issue, it seems to me,  
15 is what -- how strong are they or how likely are they to be an  
16 issue for a given person who's 18 versus a given person who's  
17 15, and I think --

18 Q. Why a given person? We're talking about a whole group of  
19 people who are adolescents and a whole group of people who are  
20 adults. I'm just asking you whether as a group, recognizing  
21 variability, that --

22 A. -- well --

23 Q. -- I'm sorry, recognizing variability as a group, people  
24 who are 18, 19 and 20 have these different needs strongly. And  
25 if the answer is no, the answer is no; if the answer is yes,

1 it's yes.

2 MS. BROOKER: I object because Dr. Biglan was not  
3 finished. His last answer he was cutoff by did Mr. Bernick and  
4 then Mr. Bernick asked his next question.

5 THE COURT: The objection's overruled, although the doctor  
6 may answer this question and he may answer it as fully as he  
7 needs to.

8 THE WITNESS: Well, there are really two senses. I mean,  
9 we haven't talked about this, but there are really two senses of  
10 saying a person -- you know, that a need is a strong need at a  
11 particular age. There is the proportion of the population at  
12 that age that has that need, and then there's the degree to which  
13 any given person who has that need has it strongly, and I think  
14 with respect to each of those needs, the proportion of the  
15 population for whom it is an important need is greater among  
16 adolescents than it is among 18-to-21-year-olds, and it's greater  
17 for the 18-to-21-year olds than it is the 21 plus, but there are  
18 going to be people in each of those groups for whom issues of  
19 masculinity are not a problem and people for whom they are a  
20 pretty important problem. The prevalence of the concern is  
21 stronger in adolescents than it is in older groups.

22 BY MR. BERNICK:

23 Q. Doctor, I just have a few more questions. I know Your  
24 Honor wants to wrap up, and I would like to finish this if I  
25 can. If I can't, I can't and I'll wait until tomorrow.

1 Dr. Biglan, isn't it true that close to -- that -- strike  
2 that. Isn't it true that approximately 25 percent of people who  
3 become established smokers become established smokers between  
4 the ages of 18 and 21?

5 A. I don't know. I haven't seen the data that you appear to  
6 be citing.

7 Q. Would you agree with me that the marketplace for people  
8 who start to smoke between the ages of 18 and 21 is a very  
9 significant marketplace?

10 A. I would certainly agree that it is a market, that there  
11 are those between 18 and 21 who begin smoking.

12 Q. Well, I know that, but I'm asking whether it's a very  
13 significant marketplace?

14 A. I don't know.

15 Q. Isn't it a fact that it's completely legal in the United  
16 States for these defendants to market specifically to people who  
17 are between 18 and 21?

18 MS. BROOKER: Objection, calls for a legal conclusion or  
19 asks for a legal conclusion.

20 THE COURT: The objection's overruled. If the doctor  
21 knows the answer, he may give it.

22 THE WITNESS: I am aware of laws regarding the illegal  
23 sales of minors to -- illegal sales of tobacco to those under 18  
24 in all but three states and three states in which the age is 19.  
25 I don't -- there are -- I certainly don't know the law in other

1 aspects of marketing in locality -- in states and local  
2 communities.

3 BY MR. BERNICK:

4 Q. Isn't it true that you can't find any document showing  
5 that a specific ad or campaign of these defendants was designed  
6 to fulfill adolescent identity needs by associating smoking with  
7 images of success, maturity, popularity, or social skills and  
8 the like? You haven't found such a document?

9 MS. BROOKER: Do you mean popularity?

10 MR. BERNICK: Yes.

11 MS. BROOKER: Okay.

12 MR. BERNICK: Yes, success, maturity, popularity, or  
13 social skill and the like.

14 THE WITNESS: Could you repeat the question?

15 BY MR. BERNICK:

16 Q. Yes. You have not found any document which shows that a  
17 specific ad or campaign was designed to fulfill adolescent  
18 identity needs by associating smoking with images of success,  
19 maturity, popularity, or social skill and the like?

20 A. I think I've cited many documents that show that the  
21 marketing research of the defendants has been designed and  
22 frequently quite successful in communicating that the smokers of  
23 those brands can fulfill those needs, social skill -- yeah, even  
24 that.

25 Q. Do you recall your testimony at page 426, being asked

1 this question and giving this answer: "You don't recall, in  
2 fact, a document which says that a specific ad or campaign was  
3 designed to fulfill adolescent identity needs by associating  
4 smoking with images of success, maturity, popularity, or social  
5 skills and the like?" Your answer was: "I have not find --  
6 found a document that says precisely that." Was that your  
7 answer under oath to that question?

8 A. We might have to go back and look at the context, but I  
9 take this to be a statement that I hadn't found a specific ad or  
10 campaign that expressly said that, but I'm not sure.

11 Q. Well, can we agree with that, that you have not found a  
12 document where it said that a specific ad or campaign was  
13 designed to fulfill adolescent identity needs in the way it's  
14 indicated?

15 A. I can think of documents that made it clear that those  
16 needs needed to be addressed in marketing. I can think of  
17 documents that show very clearly that the marketing campaigns  
18 were designed to meet those needs.

19 Q. Well, is the answer here then again false?

20 MS. BROOKER: Objection. Dr. Biglan already answered the  
21 question of what he understood that question to be and his answer  
22 to mean, so asked and answered.

23 THE COURT: The objection's overruled, the doctor may  
24 answer.

25 THE WITNESS: Well, I think that I tried to clarify what

1 my thinking was in answering that question, and I don't think  
2 it's -- I don't think it's inconsistent with what I'm saying now.

3 BY MR. BERNICK:

4 Q. So this is a true answer, that you have not found a  
5 document that says that a specific ad or campaign was designed  
6 to fulfill adolescent identity needs by associating smoking with  
7 images of success, maturity, popularity, or social skills and  
8 the like, that's true?

9 MS. BROOKER: Objection, asked and answered.

10 THE WITNESS: Perhaps I should look at the deposition  
11 testimony because my recollection is that Mr. Beach was very  
12 precise in insisting that I focus on whether or not there was a  
13 document that said precisely this, and I suspect that my answer  
14 was that I hadn't found one, as I just said, that specifically  
15 said "we will have this ad campaign to fulfill adolescent  
16 identity needs," though I cited many documents in my testimony  
17 that talk about targeting adolescents and doing so by addressing  
18 these needs.

19 BY MR. BERNICK:

20 Q. You then went on and said, Well, I think that I said --  
21 was that I can't identify a document, but then you said,  
22 Although I said in my testimony X Y or Z. Do these documents  
23 exist or not, ones that say this?

24 A. I'm sorry?

25 MS. BROOKER: Objection.

1 BY MR. BERNICK:

2 Q. Do these documents that are described in this question  
3 exist or not?

4 THE COURT: The objection is sustained. The last answer  
5 given by the doctor makes it very clear what his answer is, what  
6 he thought that answer was asking, what he thought he was  
7 answering, and how that relates to the answer he gave today.

8 MR. BERNICK: Isn't it true -- I've got two more  
9 questions, Your Honor.

10 THE COURT: Two more, Mr. Bernick.

11 BY MR. BERNICK:

12 Q. And I -- I still don't understand the last answer, but I  
13 don't want to belabor it here.

14 Isn't it true that you have not identified any company  
15 documents which state that the purpose of any of the ads was to  
16 influence youth in any way, correct?

17 A. Well, I can think of a document I looked at just  
18 yesterday regarding the "Meet the Turk Campaign" that said the  
19 campaign was designed to reach young adults, the 14-to-24-year  
20 olds.

21 Q. Didn't you give this answer? Question at page 312: "You  
22 have not identified any company documents that state that the  
23 purpose of any of those ads was to influence youths in anyway;  
24 isn't that correct"?

25 MS. BROOKER: Could we just know what day of the four days

1 of deposition?

2 MR. BERNICK: It's the same day, page 312 of the same day.

3 MS. BROOKER: Is that the last deposition, Mr. Bernick?

4 MR. BERNICK: March the 12th, 2002.

5 MS. BROOKER: March the 12th, 2002?

6 MR. BERNICK: March 12th, 2002.

7 MS. BROOKER: Okay, that's the first deposition, not the  
8 deposition after the supplemental exhibits were disclosed. I  
9 just want that to be clear.

10 THE WITNESS: The question on line 13, page 312 was: "The  
11 question I'm asking you simply is this sir: With respect to  
12 specific ad executions that you brought with you today, you have  
13 not identified any company documents which state that the  
14 purpose, that any of those ads was to influence youth in any way;  
15 isn't that correct with respect to these executions?"

16 At the time I remember thinking that that didn't -- the  
17 question was so narrowly drawn that I couldn't refer to the  
18 documents regarding the Meet the Turk Campaign because the  
19 question asked about a specific ad and I didn't have a specific  
20 ad.

21 BY MR. BERNICK:

22 Q. Fine. All the ads that you brought with you on the day  
23 of that deposition, isn't it true that with respect to all of  
24 those ads, that you didn't have any document that says that the  
25 purpose of the ads was to influence youth in any way, true or



1 not?

2 MS. BROOKER: Objection, asked and answered.

3 THE COURT: Overruled. The doctor may answer, although I

4 think it is answered, but you may answer again.

5 THE WITNESS: I guess what I would say is that it's clear

6 to me in what I reviewed that the Meet the Turk Campaign was

7 designed to appeal to those under 18, and that it was doing so by

8 meeting adolescent needs.

9 BY MR. BERNICK:

10 Q. You said that was intentional?

11 A. I didn't use the word "intent."

12 Q. Intent. And you don't use that word in your report -- in

13 your direct testimony, do you?

14 A. That's correct.

15 Q. Thanks. That's all I have for today.

16 THE COURT: Mr. Bernick, how much longer do you think

17 you're going to be tomorrow on your cross?

18 MR. BERNICK: I think that I'll probably be -- I think I

19 gave an original estimate of four hours. How much have I used

20 this afternoon?

21 THE COURT: You did approximately two, approximately,

22 maybe more.

23 MR. BERNICK: Whatever it is, I don't think I've got more

24 than two hours and probably less.

25 THE COURT: Are any other defense counsel going to be

1 questioning?

2 MR. WEBB: I will, Your Honor.

3 THE COURT: A rough approximation.

4 MR. WEBB: An hour.

5 MR. MINTON: I may have a half an hour, Your Honor, I'm

6 just not sure.

7 MR. McDERMOTT: I may have, Your Honor. It will be less

8 than an hour.

9 MS. STRAUB: Your Honor, I may have 10 or 15 minutes.

10 MR. WALLACE: The same for me, less than 15 minutes.

11 MR. BERNICK: Your Honor, I know the witness has not been

12 an expert witness before. Could he be instructed that the rules

13 of the process are that there's not to be any communication or

14 work done between now and tomorrow morning.

15 THE COURT: And there are no matters for him to check

16 overnight; is that correct, everybody?

17 MR. BERNICK: I don't think so, that's correct.

18 THE COURT: All right. Dr. Biglan, because you're new at

19 this, although this may be your one and only time after this

20 experience, but in any event, the rules are that you cannot

21 discuss your testimony with anyone, and you can't go back tonight

22 and look over and check over anything related to your testimony.

23 THE WITNESS: I'm happy to comply with those rules.

24 THE COURT: All right. 9:30 tomorrow, everybody.

25 (Proceedings adjourned at 4:43 p.m.)

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C E R T I F I C A T E

I, Scott L. Wallace, RDR-CRR, certify that the  
foregoing is a correct transcript from the record of proceedings  
in the above-entitled matter.

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Scott L. Wallace, RDR, CRR  
Official Court Reporter

Scott L. Wallace, RDR, CRR  
Official Court Reporter

1 I N D E X

2

3

Examinations Page

4

DIRECT EXAMINATION OF ANTHONY BIGLAN, Ph.D. 9514  
BY MS. BROOKER

5

CROSS-EXAMINATION OF ANTHONY BIGLAN, Ph.D. 9545  
BY MR. BERNICK

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10 E X H I B I T S

11 Description Page

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