

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GSK)
	:	October 25, 2004
Plaintiff,	:	
	:	9:30 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 18
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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8 Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription

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10 P R O C E E D I N G S

11 THE COURT: Good morning, everybody. This is United
12 States of America versus Philip Morris. CA 99-2496.

13 Before we begin, is Mr. Redgrave here this morning?
14 No. He's our usual liaison in which case, Mr. Bernick, I'm
15 going to give you an e-mail given to me by my secretary
16 transmitting some concerns from courthouse staff about the
17 defendants.

18 MR. BERNICK: Thank you, Your Honor.

19 THE COURT: I thought it might be more polite if I let
20 you all read that in private. And I don't want to hear about
21 the problem again.

22 Okay. We are ready. Good morning, sir. And you are
23 still under oath.

24 MR. WEBB: Good morning, Your Honor.

25 JOHN GRAHAM ROBERTSON, Government's witness, RESUMS

1 CROSS-EXAMINATION (Cont'd.)

2 BY MR. WEBB:

3 Q. Mr. Robertson, I want to try to -- can you hear me okay?

4 A. Yes, thank you.

5 Q. I want to try to pick it up where we left off last Thursday
6 evening when court recessed. Let me just remind you where I was
7 in my questions and then we will pick it up from there.

8 I was beginning to ask you some questions about the
9 issue of attribution, being how often you disclosed on various
10 occasions your relationship or ties or connections with the
11 Tobacco Institute and I had -- we had stopped.

12 I was asking you some questions about whether you had
13 disclosed your relationship with TI to various legislative and
14 governmental bodies that you had appeared before in connection
15 with providing testimony when you were a consultant with TI, and
16 I was starting to go through some specific examples. I think we
17 went through one example, which I won't repeat.

18 And then would it be fair to say, just to summarize it
19 in a nutshell, that time and time again when you appeared before
20 congressional, legislative or governmental bodies, that you in
21 fact did disclose your relationship to the Tobacco Institute; is
22 that correct?

23 A. That is correct.

24 Q. I'm going to try to quickly go through some examples to show
25 the court that you're correct about that.

1 Let me start with, Jamie, it's tab 43. Could I have
2 the witness, JD 80521?

3 And as you're getting the exhibit, I think what you
4 will see is this is July 25, 1986, testimony before the New York
5 State Department of Health Codes and Legislation Committee. Do
6 you see that on the screen there?

7 A. I do, indeed.

8 Q. And do you recall testifying in front of that body on or
9 about that date?

10 A. I do indeed.

11 Q. Now, just to relate to the disclosure issue. If you go to
12 page 2 of the exhibit, and if we go down to the bottom of page 2
13 I think you will see that a lawyer named Mr. Bishop introduces
14 himself from the law firm of Shea and Gould saying that, "We are
15 attorneys who represent the tobacco industry."

16 Do you see that?

17 A. I do.

18 Q. Let's go to the next page then, at the top of page 3, you
19 will see that reflects at the top that, "The Tobacco Institute
20 was invited to provide certain scientific testimony today with
21 regard to the issue of the public health and smoking, and at the
22 request of the committee, we brought some people who we
23 considered to be amongst the premier experts in the field."

24 Do you see that?

25 A. I do, indeed.

1 Q. And then you are clearly introduced as one of those people
2 affiliated with the Tobacco Institute; is that correct?

3 A. That is correct.

4 Q. It's down just a few lines further; is that correct?

5 A. Correct.

6 Q. Now, I'm not going to go through your testimony, but you
7 then went on to provide testimony to this body after you
8 disclosed your affiliation with the Tobacco Institute; is that
9 correct?

10 A. That is correct.

11 Q. Now, let me go to another example. Could I have -- it's tab
12 44 -- JD 80640, which is being handed to you now, Mr. Robertson.

13 I think you will see that that is June 22, 1989,
14 testimony before the House Subcommittee on Aviation for the
15 Committee on Public Works and Transportation. Did I read that
16 correctly?

17 A. That is correct.

18 Q. Now, if we go to the second page of the document. I believe
19 you -- you see where you disclosed right off the bat that you
20 were testifying today at the request of some of the committee
21 members and the Tobacco Institute and you identify the Tobacco
22 Institute as among the clients of your company.

23 A. That is correct.

24 Q. And again, you went on and provided testimony to that body
25 on that day; is that correct?

1 A. That is correct.

2 Q. Now, next is tab 45. I'm going to hand you JD 047710, which
3 I think you will see is a hearing before a Subcommittee on
4 Public Buildings and Grounds before the House of Representatives
5 on April 22, 1993. Is that correct?

6 A. That is correct.

7 Q. I'm going to direct your attention -- and, Jamie, if you
8 could go to page 325 -- actually, don't do that. Go to page
9 525. Just go to page 525, which I think you will see is your
10 filed testimony before that commission.

11 Have you found -- what I've culled out on the screen so
12 you can read it is where in your filed testimony with this --
13 with your testimony, you disclose, "Today I appear before you at
14 the request and expense of the Tobacco Institute."

15 A. That is correct.

16 Q. Now, let me go to another one, tab 47. Could I hand the
17 witness JD 046977? And I think what you will see is that that's
18 testimony you provided on March 17, 1994, before the House
19 Subcommittee on Health and the Environment of the Committee on
20 the Energy and Commerce -- Energy and Commerce, House of
21 Representatives; is that correct?

22 A. That is correct.

23 Q. If we go to page 382 of the reported proceedings, I think
24 you will see where I've culled out on the screen, and you can
25 see it on the screen, on page -- that's where your testimony

1 begins; is that correct?

2 A. That is correct.

3 Q. And if we go to page 390 of your testimony, sir. If you go
4 to that testimony on page 390, I think you will see what I've
5 culled out on the screen. I'll give you a chance to find it.
6 I've put it on the screen.

7 Do you see where you tell this legislative body, "Today
8 I appear before you at the request and expense of the Tobacco
9 Institute"?

10 A. That is correct.

11 Q. Although you go on to make a statement. "However, I assure
12 you that my findings, statements and recommendations are based
13 on our own independent research."

14 I'm going to come back to this in a little bit when I
15 show you an example of your testimony. But whenever you
16 provided testimony to these bodies, were you always providing
17 testimony on opinions that you actually had formed and developed
18 before you started working for the Tobacco Institute?

19 A. That is correct.

20 Q. On all occasions?

21 A. On all occasions.

22 Q. Let me go to the next one. Could I have tab 48?

23 Could I have handed to the witness JD 53802, which,
24 sir, I believe you will find is August 10, 1994, proceedings
25 regarding OSHA proposed rule making. Do you see that?

1 A. I do, indeed.

2 Q. And I think if you see right on the first page of the
3 exhibit, it shows that you were making a disclosure of your
4 relationship to TI. Is that correct, down at the bottom of the
5 page?

6 A. That is correct.

7 Q. It says, "Moreover, this submittal was prepared at the
8 request of the Tobacco Institute."

9 A. Correct.

10 Q. Now, next one, tab 49. I'm going to show you JD 46990,
11 which is October 14, 1994, testimony, again before OSHA. Do you
12 see that?

13 A. Yes, I do.

14 Q. If you go to the second page of the exhibit, page 3281, I
15 think -- if you go to page 3281, you will see a disclosure where
16 it says, and I'm culling it out on the screen, you identify
17 yourself and you state, "I am here today testifying at the
18 request of the Tobacco Institute."

19 Do you see that disclosure?

20 A. I do, and it is correct.

21 Q. Now, let me move away from legislative appearances and
22 governmental appearances.

23 If I understand what you explained in your direct
24 examination when the government proposed questions to you,
25 Mr. Robertson, that beginning in 1991 my client, Philip Morris,

1 began to sponsor some media tours in which you participated
2 interacting with the press. And I believe the tour was called
3 the Envirosense tours.

4 Do you recall that, generally?

5 A. The Envirosense tours, yes. That is correct.

6 Q. Do I have the right name?

7 A. Envirosense.

8 Q. Envirosense. In connection with that -- and Philip Morris
9 was one of the sponsors of that media tour; is that correct?

10 A. That is correct.

11 Q. And in connection with those media tours, do you recall
12 whether in connection with materials related to those tours,
13 that Philip Morris was actually disclosed as one of the
14 corporate sponsors?

15 A. Yes. In a press release sent out before we made the tour we
16 listed all the sponsors including Philip Morris. And during the
17 presentations, whenever we produced slides showing a design of
18 smoking lounges, that was courtesy of Philip Morris. We had the
19 slide labeled, Courtesy of Philip Morris.

20 Q. Now in fact can you just -- I don't want to get into a lot
21 of detail -- but can you generally describe for the court what
22 you were doing as a consultant for Philip Morris and the tobacco
23 industry on that media tour?

24 A. Yes. All the sponsors of that tour were companies who had a
25 vested interest in having good air quality in the building.

1 People who supplied carpets, paints, control equipment, and
2 Philip Morris, specifically, because they had helped design an
3 improved method of ventilating a dedicated smoking lounge. And
4 there was a great interest at the time in trying to provide
5 smokers a place to smoke their cigarettes inside the building
6 that could certainly preclude any escape of smoke from the
7 smoking area to nonsmoking areas. And their design was
8 something that we were particularly impressed with, partly
9 because some of the design was based on a patent that our
10 company had taken out to provide exceptionally good ventilation
11 in the smoking environment.

12 And Philip Morris had the hope that many companies
13 would take up that design so that they could have dedicated
14 smoking lounges in buildings that only smokers would ever be
15 exposed to smoking. And all the other nonusers, nonsmokers in
16 the building would be totally free of tobacco smoke.

17 So they were certainly hoping that, rather than have an
18 outright ban of smoking in the building, it might be more
19 sensible and practical to have restricted areas, but very well-
20 designed restricted areas.

21 And it's very much in line with the concept that people
22 like the Environmental Protection Agency were suggesting, that
23 if you were going to have smoking in areas, they had to be
24 separate areas that nonsmokers did not go into, and all the air
25 had to be exhausted outside of the building so it couldn't

1 spread into other areas.

2 So that was the whole concept and why Philip Morris
3 were particularly involved in that particular media tour.

4 Q. What generally did you do as a consultant?

5 A. I, in fact. Would give a presentation on the causes of
6 indoor air quality in buildings and showing our standard
7 presentations that we developed since 1980 showing that the real
8 problems in buildings were really problems of ventilation,
9 filtration and hygiene of the HVAC systems.

10 And I would be showing that and producing data to
11 support that concept and explain that if people designed their
12 buildings properly and operated them properly, they could deal
13 with all indoor air pollutants in the building at the same time.

14 Q. Let me show you, I'm going to give you an exhibit, it's tab
15 49B. JD 54283, which I believe is some -- it's informational --
16 an informational piece on the media tour called EnviroSense, and
17 ask you if you recognize what this document is?

18 A. I do, indeed.

19 Q. Please explain to the court what this document is.

20 A. There is a summary about explaining the rationale of why we
21 were doing the media tour. Explaining that we were taking a
22 building systems approach, which is very much a summary of what
23 I just described a moment ago, focusing on ventilation,
24 filtration, et cetera.

25 Q. As far as disclosing Philip Morris's sponsorship, if you go

1 on, I think it's the fourth page of the document, it's Bates
2 3265, I think you will see where it's -- there's a list --
3 there's cosponsors of this -- strike the question.

4 There are a number of sponsors of this program; is that
5 correct?

6 A. That's correct.

7 Q. And Philip Morris is disclosed as one of the cosponsors; is
8 that correct?

9 A. That is correct.

10 Q. Now, you can put that exhibit down.

11 Now, Mr. Robertson, on this issue that the government
12 seemed to focus on in your direct examination as far as whether
13 your relationship or connection to the Tobacco Institute was
14 properly disclosed.

15 Were there actual times when the Tobacco Institute
16 would actually issue a press release showing your affiliation or
17 connection with the Tobacco Institute? If you recall.

18 A. I recall something of that nature. I can't -- I can't -- I
19 can't name a specific incidence.

20 Q. Let me try.

21 MR. KINNER: Objection, Your Honor. May we strike the
22 answer inasmuch as he could not give us --

23 THE COURT: You have to speak up a bit, Mr. Kinner.

24 MR. KINNER: Could we -- I would move -- the United
25 States moves to strike that answer because it was not in the

1 affirmative that he remembered anything. It was very
2 unspecific.

3 THE COURT: It was something of that nature. You can
4 certainly follow up on redirect. I'm going to deny the motion.

5 Go ahead please, Mr. Webb.

6 MR. WEBB: Very well, Your Honor.

7 BY MR. WEBB:

8 Q. Let me try to refresh your memory with a specific example
9 and if it does, you can tell us.

10 I'm going to show you a Tobacco Institute press
11 release, JD 80482, which I will hand to you and give you an
12 opportunity to review this exhibit. I put it on the screen.

13 I believe what you will see is that this is a press
14 release from the Tobacco Institute relating to a study that is
15 referred in your direct examination dealing with restaurants in
16 the city of New York. Do you recall that?

17 A. I do, indeed. And why I didn't remember that immediately is
18 I presumed that was by R. J. Reynolds. I had forgotten that the
19 Tobacco Institute also published that.

20 Q. So here we see a press release from the Tobacco Institute;
21 is that correct?

22 A. That is correct.

23 Q. And if we go down to the bottom. It's revealed that the
24 study was actually conducted jointly by your company, ACVA
25 Atlantic Inc. and the Tobacco Institute; is that correct?

1 A. That is correct.

2 Q. There's clearly a complete disclosure of your relationship
3 to that -- to the Tobacco Institute. Is that fair to say?

4 A. That's correct.

5 Q. Now, in addition to what we've been through already, sir, am
6 I correct that there were -- there are actually frequent media
7 references, public media references to the fact that you had a
8 tie or relationship to the Tobacco Institute; is that correct?

9 A. That is correct.

10 Q. How often did that occur, if you remember?

11 A. Very frequently. And it had an adverse impact because I
12 used to be a favorite speaker at many national associations,
13 such as ASHRAE and indoor air pollution groups who were
14 specialists in an industry, and they did not like the fact that
15 I was identified as a consultant for the tobacco industry and I
16 was rapidly dropped from the speaker list of many of those
17 associations because of my ties, obviously visible ties to
18 tobacco.

19 Q. Did it appear to you that your ties to the Tobacco Institute
20 and the tobacco industry were very well known?

21 A. Very, very well known, indeed.

22 Q. Let me show you some examples. I'll go through kind of
23 quickly what I think are press accounts actually reporting on
24 your relationship with the Tobacco Institute.

25 Let me start with a Newsday story. It's JD -- it's tab

1 49C, JD 54286, which I think is a Newsday story that appeared on
2 October 28, 1985. Do you have that front of you, sir?

3 A. I do, indeed.

4 Q. Do you see the portion I've culled out showing that you
5 are -- that your company -- that is your company; is that
6 correct?

7 A. That is my company, and it's correct.

8 Q. And that you made a study of a proposed regulation -- of the
9 proposed regulation at the request of the American Tobacco
10 Institute; is that correct?

11 A. That's correct.

12 Q. Is this fairly typical of what would appear in the press on
13 occasion?

14 A. It was very common.

15 Q. Let me go to another one. If I could go to JD -- actually,
16 do we have them all together? Just hand them all to him at one
17 time. I might be able to go through them a little more quickly.

18 Sir, I'm going to hand you a group of press accounts
19 and I'll read off the exhibit number and go through them with
20 you. The next one is JD 54287. I think you will see that
21 that's an August 24, 1986, report from the LA Times.

22 A. That is correct.

23 Q. And if you go into that document to what is marked in that
24 document I think as page 25, if you can find page 25, and you go
25 to the second paragraph from the bottom. And I've culled it out

1 on the screen.

2 Do you see the reference to you there, sir?

3 A. I do indeed.

4 Q. It says, "like Balter." Who is that referring to?

5 A. Nancy Balter of the -- one of the scientific witnesses for
6 the tobacco industry.

7 Q. Was she also a consultant at times for the Tobacco
8 Institute?

9 A. She was, indeed.

10 Q. And it says here, "Like Balter, Robertson, who became a
11 part-time witness for the Tobacco Institute only last year, is a
12 nonsmoker." And it goes on to talk about that. Do you see
13 that?

14 A. I do indeed.

15 Q. But clearly a reference to you and your connection to the
16 Tobacco Institute.

17 A. Correct.

18 Q. Go to the next one in the group which I gave you, which is
19 JD 80673, which I think is actually -- this one I pulled up --
20 is a radio show, I think it's called News Radio 88, which is an
21 event that occurred on December 10, 1986. Do you have that in
22 front of you?

23 A. I have it.

24 Q. And I don't have it on the screen, but can you read off or
25 tell the court how that discloses -- I now have it on the

1 screen -- how that discloses your relationship to the Tobacco
2 Institute?

3 A. It does. I am Gray Robertson, President of ACVA Atlantic, a
4 Virginia-based air-quality firm hired by the institute --
5 meaning the Tobacco Institute -- for the study.

6 Q. Now, I'll move to another media, TV.

7 Can I have the next one in your group there I think
8 should be JD 80642, which will be, I think that's a Fox TV show
9 in Washington, DC. Is that correct?

10 A. That is correct.

11 Q. And do you see where you're actually introduced on this show
12 as a consultant hired by the Tobacco Institute?

13 A. That is correct.

14 Q. And I think the last one I'll show you is in the group I
15 gave you is JD 54288, which I believe is actually an article
16 from the Toledo Blade, a local newspaper in Toledo, on June 20,
17 1987. Do you see that?

18 A. I do, indeed.

19 Q. Do you see there that basically what I've highlighted is the
20 story reports that the Tobacco Institute is coming to town with
21 some experts to testify against the smoking ban and that an
22 employee of your company, Mr. Simon Turner of your company, will
23 be one of the witnesses for the Tobacco Institute; is that
24 correct?

25 A. That is correct.

1 Q. Is that fairly typical of the type of media account that you
2 would see over time showing the relationship between you and
3 your company and the Tobacco Institute?

4 A. It was very typical.

5 Q. Now, you can put those down. I'm going to go to a little
6 different topic, Mr. Robertson.

7 During your written direct examination and also during
8 Mr. Kinner's oral examination you were asked a number of
9 questions about the amount of money that your company was able
10 to secure, receive, over the years from the Tobacco Institute.

11 Do you recall those questions?

12 A. Yes, I do.

13 Q. Regardless of that level of compensation, am I correct that
14 whenever you appeared in front of a legislative body, a
15 governmental body, on a media tour, were you always expressing
16 opinions that you had already formed independently before you
17 ever had any connection to the Tobacco Institute?

18 A. Certainly. That is definitely true.

19 MR. KINNER: Objection, asked and answered.

20 THE COURT: I'm sorry?

21 MR. KINNER: Objection, asked and answered, Your Honor.
22 We've been here before.

23 THE COURT: I don't think so. Certainly this is an
24 important point. The objection is overruled.

25 BY MR. WEBB:

1 Q. Go ahead.

2 A. It certainly was the technology and the concepts and the
3 beliefs that I'd held since 1980 four or five years before I met
4 the tobacco industry.

5 Q. And just so we can show the court. I want to use one
6 concrete example to quickly go through and show the court the
7 actual information that you typically communicate in one of
8 these proceedings and we can walk through and see whether or not
9 it reflects opinions and viewpoints that you had formed
10 independent before you received any compensation from the
11 Tobacco Institute.

12 If I could -- I'm going to use -- actually, I showed it
13 to you a moment ago and I'm going to walk you through some of
14 your testimony. JD 80521, which is -- this is the testimony
15 that you gave before the New York State Department of Health.
16 Do you still have that up there with you? If you can see it on
17 the screen.

18 A. It's on the screen.

19 Q. You're generally familiar with that appearance?

20 A. Yes, indeed.

21 Q. And we went through a moment ago that you had disclosed,
22 before you gave testimony, your relationship; is that correct?

23 A. That is correct.

24 Q. Relationship to the Tobacco Institute?

25 A. That is correct.

1 Q. Your testimony begins on page 20, and I'll call it up on the
2 screen.

3 If we go down towards the bottom of the screen, you
4 begin to testify and you relate to this body, basically, you
5 start to explain your background in dealing with indoor air
6 quality problems. Do you see that?

7 A. I do, indeed.

8 Q. You go on to explain the history of your company, is that
9 what you're essentially doing?

10 A. That's correct.

11 Q. If we could go over to the next page. And you complete
12 that -- well, before we cull that out, let's go back to the top
13 of the page.

14 I'm not going to walk through everything on page 21,
15 but you continue to explain your background in the field before
16 you had any contact with the Tobacco Institute. Is that
17 correct?

18 A. That is correct.

19 Q. Now, if you then go to -- Jamie -- I'm going to cull out a
20 portion I highlighted on the screen.

21 Do you see where you explain in your testimony to this
22 body, "We frequently investigate buildings on account of
23 complaints from occupants with symptoms such as" -- and you
24 describe the symptoms; is that correct.

25 A. That's correct.

1 Q. And it goes on to say, "It is frequently assumed by our
2 clients that these symptoms are due to ETS. However, it is
3 clear that identical symptoms may be found in individuals
4 exposed to" -- and then you list some other substances. Is that
5 correct?

6 A. That is correct.

7 Q. Are those opinions and viewpoints that you held before you
8 ever had any contact or received any compensation from the
9 tobacco industry?

10 A. Certainly I've made many testimonies to groups before where
11 I've used exactly the same language. I've always had the same
12 beliefs, and I still do to this day.

13 Q. Could I go to page, the next page?

14 Actually, can we go to -- let's go through this page
15 here. Let's go to the bottom of page 23. Let's go just down to
16 the bottom of page 23 where you're telling the -- you're
17 basically explaining that the symptoms that you have mentioned,
18 you're calling them the Sick Building Syndrome. Do you see
19 that?

20 A. That's correct.

21 Q. And you described earlier in your testimony what that is and
22 I won't repeat that, but you go on to explain, "May result
23 primarily from energy conservation efforts to seal buildings and
24 reduce the natural infiltration exfiltration of air. Such
25 efforts have reduced the natural infiltration of fresh air that

1 previously existed in many buildings, exacerbating the often
2 undiscovered problems of a poorly designed or maintained HVAC."

3 Again, I don't intend to go into a lot of detail, and
4 you explained some of this to the court last week in your
5 testimony, but this issue about the problem of energy
6 conservation and the effect that it's had on indoor air quality
7 issues, are those viewpoints and opinions that you held long
8 before you had any contact or received any compensation from the
9 Tobacco Institute.

10 A. They certainly were. They were back from 1980. And I have
11 found that since then they've been endorsed by many of the
12 government agencies who now accept that these are the real
13 reasons of what had gone wrong at that time.

14 Q. What essentially did you form your opinions about this topic
15 on?

16 A. As early as 1981, -- 1980, 1981, in fact, 1979, I noticed I
17 had started working as ACVA on behalf of the English firm,
18 Winton Laboratories.

19 And certainly the experience I had in the field in '79,
20 '80, '81, convinced me that the real cause of problem buildings
21 was inadequate ventilation, poor filtration and poor hygiene.
22 And I formed my company to investigate those three common
23 denominators and we remain at the forefront of our industry to
24 this day on indoor air pollution issues.

25 Q. What government agencies do you believe agree with your

1 viewpoints on this issue?

2 A. Right now, I know for a fact that the Environmental
3 Protection Agency do.. and I also know that National
4 Occupational Safety and Health, the government agency who
5 invests in indoor air quality also agree with exactly the same
6 premise.

7 Q. Let me move on in your testimony to -- if I could go to page
8 25 to the second full paragraph on page 25. Do you see the
9 paragraph I culled out, sir?

10 A. Yes, I do.

11 Q. Where you state, "The reason environmental tobacco smoke
12 often is blamed for the symptoms associated with Sick Building
13 Syndrome is obvious."

14 You go on to explain, "Environmental tobacco smoke is
15 the only visible indoor air pollutant. ACVA has determined,
16 however, that the presence of high concentrations of tobacco
17 smoke indicates that much more serious problem of -- indicates
18 the much more serious problem of poorly designed and improperly
19 maintained ventilation systems."

20 Is that an opinion and viewpoint that you reached
21 before you had any contact with the tobacco industry?

22 A. It certainly is.

23 MR. KINNER: Objection, Your Honor. He's not qualified
24 as an expert witness, and we made no attempt to qualify him as
25 expert witness.

1 THE COURT: No, I don't think he's testifying as an
2 expert. He's simply saying whether his 1980s opinions were
3 consistent with the opinions that he offered when he was a
4 tobacco industry consultant.

5 But am I correct that you're not asking these questions
6 for the truth or accuracy of the opinion?

7 MR. WEBB: That's absolutely correct. That's why I
8 introduced the topic.

9 I'm simply walking through to establish for the record
10 that these were independently-held opinions prior to the
11 compensation that counsel and the government had made a fairly
12 significant issue about in his testimony.

13 THE COURT: Objection is overruled. I do think you've
14 established it, though, Mr. Webb.

15 MR. WEBB: Then I should move on; shouldn't I?

16 BY MR. WEBB:

17 Q. I'm going to take the court's advice. Let me ask you, I'm
18 just going to -- actually, let me complete my point on this and
19 I'll move on.

20 The opinion or viewpoint that you've expressed on the
21 screen here that you held that opinion before you had any
22 contact with the tobacco industry; is that fair to say?

23 A. That is true.

24 Q. Can you basically tell us what you based that viewpoint on?

25 A. Practical experience. If I walk into a smoke-filled bar and

1 my eyes teared up and I started coughing, I wouldn't be human
2 unless I presumed that it was the smoke doing that to me, and
3 that's typical of many friends who experience that problem.

4 But I'd also now understood why the bar is smoked
5 filled. It should not be. If the bar has a ventilation system
6 that is removing all the contamination from the room and
7 filtering it and diluting the room air with fresh, clean outside
8 ventilation air, the smoke cannot accumulate.

9 My concern always has been that if smoke is trapped
10 every other indoor pollutant must be trapped at the same time:
11 bacteria, fungii, gasses, chemicals, dusts.

12 And all of these trigger the same types of symptoms in
13 people, particularly starting with sore eyes, coughing,
14 headaches, all the symptoms I said that I -- kneejerk
15 reactions -- would immediately attribute to smoke because that's
16 what I can see and smell.

17 And I learned and the Environmental Protection Agency
18 learned the hard way that hanging up a no smoking sign --

19 THE COURT: Excuse me, Mr. Robertson. I'm going to cut
20 you off at this point.

21 The witness has gone beyond responding to the question.
22 And just to make sure the government understands, the testimony
23 that was just given was accepted as a statement of what led this
24 witness as a factual matter to reach his conclusions. It's not
25 being accepted as expert testimony.

1 Go ahead, please, Mr. Webb.

2 MR. WEBB: I will. That's fine.

3 BY MR. WEBB:

4 Q. Mr. Robertson, I'm going to complete this transcript, but
5 this -- the information that you communicated on this particular
6 occasion to the New York State Department of Health on the
7 occasion that we're now walking through your testimony -- your
8 transcript of, is this typical of the type of information and
9 opinions that you communicated as a consultant for the Tobacco
10 Institute when you would appear before legislative bodies,
11 governmental bodies, media appearances, et cetera?

12 MR. KINNER: Objection, Your Honor. I don't think this
13 is proper opinion testimony.

14 THE COURT: Typical. Objection is overruled. He may
15 answer.

16 THE WITNESS: Correct.

17 MR. WEBB: Thank you.

18 BY MR. WEBB:

19 Q. Now, let me go to a little different topic.

20 In your direct examination the government asked you
21 questions and elicited answers on an organization, I believe
22 that is called the Business Council on Indoor Air.

23 Do you recall those questions and answers in your
24 written direct examination?

25 A. Yes, I do.

1 Q. Now, did that organization sometimes get called or referred
2 to by its initials, BCIA?

3 A. Correct.

4 Q. Who created BCIA?

5 A. I believe an individual named Paul Kemma, but I truly can't
6 confirm that.

7 Q. If I ask you -- you and I have never met before your
8 testimony, and it's certainly possible I could ask you questions
9 that you don't know the answer to and just tell me and I'll move
10 on.

11 Could you generally -- am I correct, that organization
12 basically had as its members large chemical companies,
13 pharmaceutical companies and members of various industries? Is
14 that correct?

15 A. That is correct.

16 Q. And, in fact, could I have JD 53800 called up on the screen
17 and handed to the witness.

18 I simply want to show the court, basically, the
19 membership of this organization.

20 And do you have that in front of you now, sir?

21 A. Yes, I do.

22 Q. Does this appear to you to be your understanding of the
23 membership of that organization?

24 A. It does, indeed.

25 Q. Now, tobacco companies are not members of that organization,

1 are they?

2 A. No, they are not.

3 Q. Now, is the primary function of that organization BCIA, was
4 the primary function to express its views on behalf of its
5 members on indoor air quality issues to government regulators
6 and agencies who were involved in indoor air quality issues?

7 A. That is correct.

8 Q. And at some point did you agree that you wanted your
9 company, HBI, to also join and become a member with the people I
10 put on that list?

11 A. They invited me to be a member and I wished to join them.

12 Q. Now, am I correct that as far as your incentive to want to
13 be associated with companies like those on that listing there,
14 were there certain business benefits to HBI to be affiliated
15 with these type of companies in this type of organization?

16 A. Undoubtedly

17 Q. Please explain that.

18 A. Well, I would be with senior executives on the scientific
19 community of these major corporations who saw and asked my
20 opinion on indoor air quality issues, and as a result of that a
21 number of these companies subsequently retained my company's
22 services to inspect some of their own buildings for air quality
23 issues.

24 Q. Did you consider it to be good business for your company to
25 be involved in that organization?

1 A. Yes, I did.

2 Q. Now, as best you can, can you tell the court the time frame
3 that HBI was a member of that organization? That is, when you
4 joined and when you ended your relationship, if you can
5 remember. Approximately?

6 A. I know it was in the mid-90s or early '90s, but I don't
7 remember.

8 Q. That's fine. Did it last for two years, three years,
9 four years, or do you have any recollection today?

10 A. I'd guess three or four years.

11 Q. Now, am I correct as far as your involvement in that
12 organization based on what I believe you testified to in the
13 past, you told all or almost all the members of BCIA that you
14 had a consulting relationship with the tobacco industry; is that
15 correct?

16 A. I know the vast bulk of them knew. I can't remember
17 specifically each group, but it was common knowledge that I was
18 a consultant for the tobacco industry.

19 Q. Did you ever try to hide or conceal that from your fellow
20 members of this organization?

21 A. Certainly not.

22 Q. And, in fact, am I correct that during all the time that you
23 were a member of BCIA, you actually don't recall any
24 environmental tobacco smoke issues actually coming up and being
25 discussed by that organization?

1 A. I don't think there ever were.

2 Q. Did you ever do anything as part of that organization to try
3 to influence that organization to do things that you did that in
4 order to benefit the tobacco industry?

5 A. I'm not sure I understand that. Could you repeat that?

6 Q. As you engaged in activities as a member of that
7 organization, did you ever try to manipulate that organization
8 to do things in order to benefit the tobacco industry?

9 A. Certainly not.

10 Q. Let me go to another topic that you address in your written
11 direct examination, which is a magazine, HBI magazine.

12 Do you recall the questions and answers that are in
13 your written direct examination on that topic?

14 A. I do, indeed.

15 Q. Tell the court what was the name of the magazine.

16 A. It was Healthy Buildings International magazine.

17 Q. How often was the magazine published?

18 A. Approximately every two months, and there were a total of
19 eight issues produced over about 18 months.

20 Q. Now, at the time frame that that magazine existed -- and as
21 I understand, it was in the 1989 to 1991 time frame. Do I have
22 that correct?

23 A. Very close. I think that's correct.

24 Q. Okay. Now, tell the court who was responsible for authoring
25 the articles that were published that that magazine.

1 A. Myself and my staff.

2 Q. And, in fact, do you remember some of the names of the
3 people on your staff who worked with you, if you can remember.

4 A. Yes, I wrote most of the articles. Peter Binnie, my
5 technical manager, wrote some of them. Simon Turner wrote some
6 of them. And later on we had an editor, Nicole Miles, who also
7 wrote some of them.

8 Q. Explain to the court what was the audience that you were
9 directing this magazine to.

10 A. The property management owners and managers as a group, and
11 building engineers in major buildings.

12 Q. And can you describe for the court -- we are not going to
13 walk through all the articles -- but just describe for the court
14 what was the general nature and content of these articles.

15 What is it you were trying to communicate generally to
16 that intended audience?

17 A. Very much the same principles. That if they want to keep
18 their buildings in a healthy and as comfortable environment as
19 possible they must focus on the fundamentals of ventilation,
20 have good filtration and good hygiene.

21 And we would also write specific articles on lighting,
22 noise, temperature, humidity, et cetera, things that we wanted
23 these property managers to optimize to ensure that the tenants
24 and staff in their buildings were comfortable and not exposed to
25 any harmful pollutants.

1 Q. Now, did Philip Morris have any power to edit or control the
2 content of those articles?

3 A. Certainly not.

4 Q. As far as what went in those articles, were those decisions
5 entirely made by you and your staff?

6 A. They were certainly made by myself and my staff.

7 Q. Now, in your direct examination you point out to the court,
8 in response to the government's question, that my client, Philip
9 Morris, did provide funding so that HBI could publish the
10 magazine; is that correct?

11 A. That is correct.

12 Q. I want you to explain to the court your understanding of
13 what benefit Philip Morris was getting by your magazine.

14 MR. KINNER: Objection.

15 A. I would think indirectly they were benefiting.

16 MR. KINNER: Objection, Your Honor.

17 MR. WEBB: Just stop. There's an objection.

18 MR. KINNER: No foundation. How does he know what
19 Philip Morris.... There's been no foundation set for how
20 Mr. Robertson would know what Philip Morris was thinking.

21 THE COURT: He certainly started his testimony with a
22 speculative introduction.

23 MR. WEBB: Let me try to lay a foundation.

24 THE COURT: All right.

25 BY MR. WEBB:

1 Q. Am I correct, sir, you had some conversation with Philip
2 Morris about whether they would fund the magazine; is that
3 correct?

4 A. That is correct.

5 Q. And in those discussions, who were the primary people at
6 Philip Morris that you dealt with to the best of your
7 recollection?

8 A. Well, I know certainly Mr. Roberts of Covington & Burling
9 was the first person that brought it to my attention, and I
10 believe we spoke with a Ms. Potter, corporate affairs, and there
11 were other people in Philip Morris corporate affairs whose names
12 escape me at the moment, but they were the types of people I
13 spoke to.

14 Q. From those discussions did you at least generally learn that
15 Philip Morris believed that if buildings had proper ventilation
16 that might lessen concerns about ETS?

17 A. There was no question. That was the hope and wish, and I
18 think was then and still is.

19 Q. By -- strike the question. So that magazine then ends up
20 getting published to try to communicate to the audience the
21 benefits of better ventilation?

22 A. That is correct.

23 Q. Now, was there anything in any of those articles that
24 appeared in that magazine that was ever false or misleading?

25 A. Certainly not.

1 Q. And since Philip Morris had no control over the content and
2 nature of the articles that were published, did you see any
3 reason why the magazine needed to disclose that Philip Morris
4 provided financial funding to HBI to publish the magazine?

5 A. It had not occurred to me and I didn't think it was an
6 issue.

7 Q. Now, did you even think it was an issue until this case?

8 A. Only when I'm being asked and people making allegations that
9 because Philip Morris had paid for it and I hadn't revealed it,
10 that it was something wrong with it.

11 Q. At the time were you focused on that issue, back at the time
12 of the publication of the magazine?

13 A. Never occurred to me at that time.

14 Q. Now, was the original plan between you and Philip Morris was
15 for the magazine to become self-supporting so that Philip Morris
16 would not have to provide financial support?

17 A. That was the goal. That was the intention. We tried to
18 develop a subscription list to people to pay a monthly fee or a
19 per issue fee, and that was our goal. That's what we tried to
20 do.

21 Q. What happened?

22 A. We couldn't. We had an awful lot of people very, very keen
23 to get the magazine, but they weren't very keen to sign up an
24 annual fee.

25 Q. Who made the decision to terminate the magazine?

1 A. I made that decision because it was taking up far too much
2 of my time.

3 Q. And the total number of editions of the magazine over that
4 time period was approximately what?

5 A. Eight.

6 Q. Let me go to a different topic.

7 Mr. Robertson, in your direct examination you answered
8 a number of the government's questions and provide information
9 about a HBI employee by the name of Jeffrey Seckler who
10 eventually sued HBI; is that correct?

11 A. That is correct.

12 Q. And I want you to -- I want to talk about Mr. Seckler for a
13 bit here this morning.

14 It's Mr. Seckler's allegations that eventually led to a
15 congressional investigation and at least, in part, then led to a
16 Department of Justice investigation; is that correct?

17 A. That is correct.

18 Q. So let's start at the beginning with Mr. Seckler.

19 First of all, would you please generally describe for
20 the court his job or position while he worked at HBI?

21 A. We hired Mr. Seckler specifically to be trained as a sales
22 representative of the company to visit building owners, building
23 managers, building engineers, and explain the principles of HBI,
24 what our offering services were, how we conducted our
25 inspections, and to try and retain new contracts and extend

1 existing contracts with our client base.

2 Q. Now, how long did he work for your company, to the best of
3 your recollection, approximately?

4 A. About 2 years, I would think.

5 Q. And was he terminated from your company in approximately
6 September of 1991?

7 A. That's correct.

8 Q. I'm going to show you an affidavit you filed to help to walk
9 through what happened with Mr. Seckler.

10 Can I have JD 54?

11 MR. KINNER: Objection, Your Honor. There's been no --
12 the record has not been established. There's no foundation for
13 whether or not he recalls before he's being shown a statement.

14 THE COURT: I didn't hear the last part of that. No
15 record -- I'm sorry, no foundation for what?

16 MR. KINNER: His question, I believe, was just -- did
17 not ask for whether he could recall things --

18 MR. WEBB: I'll strike the question.

19 MR. KINNER: -- rather they were going to go straight
20 to the affidavit.

21 THE COURT: Sustained.

22 MR. WEBB: I'll strike it.

23 BY MR. WEBB:

24 Q. I'm going to show you an affidavit you filed and you can
25 tell us if you have any relationship to Mr. Seckler. I want to

1 show you JD 54106.

2 MR. KINNER: Same objection, Your Honor. We still
3 haven't established a foundation.

4 THE COURT: The question was whether it has any
5 relationship to Mr. Seckler. The objection is overruled.

6 Go ahead. And this is Mr. Robertson's affidavit,
7 though.

8 MR. WEBB: It is.

9 THE COURT: I thought it was going to be Mr. Seckler's.

10 MR. WEBB: No. Mr. Robertson's affidavit.

11 MR. KINNER: Thus there's been no foundation
12 establishing that he doesn't recall. He can ask him questions
13 without showing him the affidavit.

14 THE COURT: What purpose are you using the affidavit
15 for?

16 MR. WEBB: Actually, the reason I was using it was to
17 more quickly get through the Seckler story because it sets forth
18 in a few paragraphs in this affidavit. I was simply trying to
19 move through the story and not take up an enormous amount of
20 time. If you want me to do it in a different way, I'll do it.
21 It's not a big deal to me.

22 He sets forth essentially what happened here, and he
23 has dates and times in here, and my guess is that, because I've
24 never talked to the witness, this will help get through the
25 story quickly. It's a affidavit that was filed I believe in

1 front of the Congressional Subcommittee during the course of the
2 Waxman proceedings.

3 MR. KINNER: Your Honor, we attempted the same thing
4 with Reginald Simmons earlier. I believe he was the witness --

5 THE REPORTER: I'm sorry. I cannot hear you.

6 MR. KINNER: I'm sorry. I worry about turning it on at
7 the table.

8 So the defendants objected, Your Honor sustained that
9 objection to that affidavit. So, I believe that, although it
10 may take time, the proper way to elicit this testimony from
11 Mr. Robertson is first to ask him questions and establish that
12 he has no current recollection or to tell us what his current
13 recollection is.

14 THE COURT: All right. The objection is sustained.
15 Let's proceed.

16 MR. WEBB: Take that down.

17 BY MR. WEBB:

18 Q. Sir, would you please explain to the court in your own words
19 your recollection of the facts and events that occurred that led
20 to Mr. Seckler's termination by HBI.

21 A. Mr. Seckler was meant to be running a small branch of our
22 business in an office in New England, and over a 9-month period
23 there his sales performance was appalling, so much so that I
24 recalled him to the office. We reduced his salary. We told him
25 that he was on a few months' notice.

1 He returned and I noticed then that there was some
2 fraudulent dealing in his expenses. He was cheating with his
3 expense accounts.

4 MR. KINNER: I'm sorry. But could we remove the
5 affidavit from the witness stand, please?

6 MR. WEBB: I'm sorry. I didn't know it was there.
7 It's gone.

8 BY MR. WEBB:

9 Q. Are you testifying from your own independent recollection
10 now, sir?

11 A. I am indeed.

12 Q. Go ahead. Explain what happened. You were talking --

13 A. I mentioned then that we found that he was cheating on his
14 expense accounts. He was changing dates when he was -- deleting
15 dates at weekends when he was in restaurants and putting it down
16 as business expenses midweek.

17 And we recalled him back to the office and told him
18 that that was the final straw; that because of his poor
19 performance and now this repeated habit of expense fraud was
20 beyond -- he had gone beyond the pale, and I fired him.

21 Q. Can you recall approximately when his employment terminated
22 as best you can recall.

23 A. I guess right around 1991 or so.

24 Q. Now, did Mr. Seckler then, after he left your company in the
25 fall of 1991, did he form his own business called capital

1 B-E-S-T?

2 A. I didn't know the name of the company he formed, but he did
3 form a business and he did start offering consulting service on
4 indoor air quality, I believe.

5 Q. Do you know whether he began contacting several of HBI
6 clients in the tobacco industry to solicit business?

7 A. I know that for a fact. He definitely went to Philip Morris
8 and R.J. Reynolds Tobacco Company.

9 Q. What is your recollection or understanding of what you
10 understood happened at that time?

11 A. He said that owing to the fact that I personally was so
12 involved in running the business I couldn't devote all my time
13 and effort to promote the concepts of indoor air quality, of
14 good ventilation, et cetera, and that he, being independent and
15 having no ties to any company, could work full time, and he
16 offered to take over any of that consulting work and act as a
17 spokesperson for the tobacco industry on a full-time basis.

18 Q. Now, as he was contacting your clients to try to solicit
19 work from them, did you do anything to interfere with his right
20 to do that?

21 A. No.

22 Q. At any time?

23 A. No, I didn't even know it was going on until after the fact.

24 Q. Now, in approximately March of 1992 did you get a letter
25 from a lawyer indicating the lawyer was representing

1 Mr. Seckler?

2 A. Yes, I did.

3 Q. Can you tell the court essentially what that letter was to
4 the best of your recollection?

5 A. I remember getting a letter from Mr. Pires stating that Jeff
6 Seckler who was making allegations that we were distorting our
7 data and working for the tobacco industry fraudulently and that
8 we either pay them some money or they would sue my company. I
9 vaguely remember that was the type -- that was the nature of the
10 letter, I believe.

11 Q. Did you have conversations with Mr. Seckler's lawyer over
12 time after that?

13 A. Yes, I did.

14 Q. Were there any communications to you as to what
15 Mr. Seckler's lawyer would do regarding press activity if you
16 didn't settle with him?

17 A. Yes. He promised and actually carried through with his
18 promise of going to all media, radio, television, newspapers,
19 and tell them that Healthy Buildings International was changing
20 data and making fraudulent statements about our consulting work
21 for the tobacco industry.

22 Q. Did you, after having that dialogue with his lawyer, did you
23 decline to make any payment of money?

24 A. I certainly did.

25 Q. Why?

1 A. Because I -- I don't like the thought of blackmail. I think
2 it's wrong. And I had done nothing wrong and would happily see
3 him in court and sort it out in court.

4 Q. That's exactly what happened; is that correct?

5 A. That's correct.

6 Q. Did Mr. Seckler's company sue HBI in April of 1993 to the
7 best of your recollection?

8 A. Yes, they did.

9 Q. Let me show you that complaint.

10 If I could have JD 54251, please. That's tab 62. I
11 don't intend to walk through this entire document, but I just
12 want -- a couple of things I want to ask you about.

13 If you notice at the top of the document in what we
14 call the heading of the pleading of this complaint, Mr. Seckler
15 files the name of the lawsuit in the name of the United States
16 of America Ex Rel Jeffrey Seckler. Do you see that?

17 A. I do.

18 Q. Did you learn, Mr. Robertson, that because of the nature of
19 that type of lawsuit being filed in the name of the United
20 States of America, that the government had an obligation to
21 review the allegations of fraud on the government and decide if
22 they would take over the lawsuit?

23 A. That is correct.

24 Q. And what happened?

25 A. They didn't take over the lawsuit. They left it to Jeffrey

1 Seckler.

2 Q. They declined to participate; is that correct?

3 A. That's correct.

4 Q. And Mr. Seckler then proceeded on his own in that lawsuit;
5 is that correct?

6 A. That's correct.

7 Q. Now, as far as what the gist of this lawsuit was, would you
8 just go to the first paragraph.

9 If I can cull out the first paragraph where it says
10 "this complaint".

11 Do you see the portion I culled out on the screen?

12 A. Yes, I do.

13 Q. Again, I'm not going to go through a lot of detail of
14 everything in this complaint. It certainly gets carried over
15 into these other investigations.

16 But let's take -- the complaint in the first paragraph
17 states that your company, HBI, first obtained contracts with the
18 United States of America to do inspections of the interiors of
19 federal buildings under fraudulent and false pretenses.

20 Sir, is that statement factually true?

21 A. Certainly not.

22 Q. And as this litigation proceeded, can you identify any
23 evidence that Mr. Seckler ever produced that would establish
24 that there's any validity to that allegation?

25 A. There was none whatsoever, and in the end Mr. Seckler

1 himself agreed that he knew there was none.

2 Q. We will come to that in a minute. But you don't recall any
3 evidence he produced to support that allegation that I just read
4 off on the screen; is that correct?

5 A. There was no evidence whatsoever.

6 Q. Let me go to the second allegation, which is that HBI
7 fraudulently conducted inspections and submitted inspection
8 reports that were fraudulent and false.

9 Was there any factual truth to that allegation?

10 A. None whatsoever.

11 Q. During the course of this litigation, did Mr. Seckler ever
12 produce any evidence or witnesses that would establish it's
13 true?

14 A. None whatsoever.

15 Q. Now, as that case proceeded did Mr. Seckler ever identify
16 any government entity that would testify that HBI had in fact
17 defrauded that government entity or mislead that government
18 entity?

19 A. Never.

20 Q. Did any such government witnesses ever testify in the
21 proceeding that they were defrauded by anything that you had
22 done?

23 A. None whatsoever.

24 Q. Did that lawsuit go on for years?

25 A. Yes, it did.

1 Q. And at some point did you and your attorneys submit a
2 document called a Motion For Summary Judgment where you
3 discussed the lack of evidence that had been submitted by
4 Mr. Seckler?

5 A. We did, indeed.

6 MR. WEBB: I'd like to show the witness, it's tab 62A,
7 JD 80638.

8 Q. And I'll hand that document to you and we can get it here in
9 a minute. And I put the first page up on the screen. Do you
10 see that, what I have on the screen, sir?

11 A. Yes, I can.

12 Q. Do you recall that at some point during the litigation,
13 after Mr. Seckler had all the chances of taking whatever
14 discovery and finding out anything he wanted to find out, that
15 you filed this motion?

16 A. We did, indeed.

17 Q. And I'd like to go to, if I could, page 8 of that motion.
18 And I've yellow highlighted a portion which I've highlighted
19 where you state in this document, "they," referring to the
20 plaintiff, "cannot point to a single inspection of a federal
21 government building that was conducted by HBI in a false or
22 fraudulent manner. Nor can any of these witnesses point to a
23 single inspection report with respect to a federal buildings
24 that was building to a federal government client with false
25 information, much less knowingly false information."

1 Now the witnesses you're referring to there are
2 Mr. Seckler and Mr. Simmons; is that correct?

3 A. That is correct.

4 Q. By the way, to the best of your knowledge, is that
5 absolutely true that no one ever pointed to any inspection
6 report in respect to any Federal Building that was presented
7 that had any false information in it?

8 A. That is very true.

9 Q. It goes on to say specifically, "Relator, Mr. Seckler,
10 cannot identify any changes made by HBI in the test results of
11 any federal government building inspection."

12 A. That is correct.

13 Q. And that's a truthful statement on your part?

14 A. Absolutely.

15 Q. It goes on to say, "Further, relator cannot identify a
16 single specific government contract that HBI secured
17 fraudulently. In addition, relator, with respect to his
18 assertion that, according to one of HBI's employees, HBI
19 undertook as a standard practice the alteration of inspection
20 reports. He cannot identify the source of this allegation or
21 any specific report or reports to which this allegation
22 referred, much less connect the contention to HBI reports on
23 federal buildings."

24 MR. KINNER: Objection, Your Honor, relevance.

25 We've let it go on for a fairly long time, but there

1 was no smoking in government buildings at this time, so I'm not
2 sure how this has any relevance to second-hand smoke, ETS, or
3 anything, except the temporal one of the lawsuit preceded the
4 congressional investigation.

5 MR. WEBB: Your Honor.

6 MR. KINNER: If that.

7 MR. WEBB: I'm sorry. The government goes into great
8 detail throughout the direct examination on this very issue.
9 This gentleman has a right to explain what happened.

10 MR. KINNER: That's simply not true, Your Honor.

11 We went into great detail on inspections conducted --
12 inspections conducted that were put in proceedings' papers,
13 inspections conducted that were part of the 585 Building Study.

14 There is no allegation in this lawsuit that they had
15 any reason to falsify a report to the government on a building
16 where there was no smoking permitted in the first place.

17 MR. WEBB: Your Honor, actually, this complaint
18 actually contains allegations dealing with the 585 building
19 report which takes up about 30 pages of the government's
20 examination.

21 MR. KINNER: But it's not part of his lawsuit.

22 MR. WEBB: Well, Your Honor, the Seckler allegations
23 lead to a congressional investigation that lead to this DOJ
24 proceeding that counsel made a big deal about last Thursday.

25 I certainly have a right to let this witness defend

1 himself as to what happened and to put in the record what
2 actually happened so that the record is clear on this point when
3 we get down to entering findings of fact, because the government
4 undoubtedly is going to want to submit findings of fact relating
5 to HBI and whether HBI engaged in some type of fraudulent
6 conduct. And I'm trying to put in the record evidence that we
7 can deal with when it comes to that time.

8 And this is clearly relevant. In fact, the government
9 actually pointed out on direct examination in their oral direct
10 last week that Philip Morris paid for his legal fees in
11 connection with defending this litigation. They chose to bring
12 that out during their oral direct examination last Thursday
13 morning.

14 So certainly I have a right to bring out what actually
15 happened in the litigation and to establish that Philip Morris
16 wasn't doing anything wrong when they paid legal fees for
17 someone who had been their consultant who they did not believe
18 had done anything wrong.

19 THE COURT: Mr. Kinner, finally.

20 MR. KINNER: Your Honor, we did not bring up
21 Mr. Seckler's lawsuit at all. Our focus has been on what his
22 positions were before he met the Tobacco Institute, what he said
23 in his proceedings papers as they progressed through time.

24 THE COURT: It was certainly mentioned in the direct
25 testimony, though, Mr. Kinner.

1 MR. KINNER: Only in the sense that Mr. Webb mentioned
2 at the end, which is, yes, we did ask him questions about who
3 paid his legal fees during both the Seckler congressional
4 investigation and the Department of Justice.

5 THE COURT: Let me say this. I can't swear that it's
6 in the written direct. I knew about it. I only know about it
7 from what I get from all of you. So I knew there was a False
8 Claims Act case brought against him. Of course, I didn't know
9 any details, which I'm now getting.

10 I'm going to allow it in in part because I don't know
11 what the government is going to be arguing in its proposed
12 findings of fact.

13 Clearly, the reputation of HBI and Mr. Robertson are in
14 issue at this point and that's a significant fact. So,
15 therefore, while it may turn out not to be an important issue, I
16 think at a minimum I want the record clear as to what happened
17 in the lawsuit.

18 But, Mr. Webb, I would suggest that we get to judge --
19 I think it's Judge Bryant's case from the initials on the
20 screen -- that we get to what the judge decided.

21 MR. WEBB: I'm going right there. That's all I
22 intended to do.

23 THE COURT: Let's do it that way, please.

24 But the objection is overruled because, as I've
25 indicated, the certainly attack on the accuracy of -- and

1 reliability of HBI's findings have been made -- that attack has
2 been made much of by the government and this lawsuit appears to
3 be a strand in that evidence.

4 It may turn out not to be relevant, given what the
5 government argued, but I'm not at all sure of that at this
6 point. I would rather have the record perhaps a little more
7 complete than it may turn out is necessary rather than less
8 complete.

9 So go ahead, please, Mr. Webb.

10 BY MR. WEBB:

11 Q. Now, you mentioned a moment ago in your testimony that
12 eventually at the end of this case Mr. Seckler himself admitted
13 that he had no evidence to support his allegations; is that
14 correct?

15 A. That is correct.

16 Q. Would you please tell the court what happened?

17 A. The case was settled.

18 MR. KINNER: If I may, Your Honor. Move to strike the
19 previous question and answer. The case was settled. What took
20 place in the course of a settlement can't be introduced in this
21 case.

22 THE COURT: Well, let me ask some questions.

23 Mr. Robertson, did the judge make a ruling on your
24 motion for summary judgment?

25 THE WITNESS: Yes, he did. It never went further.

1 THE COURT: Did he grant it?

2 THE WITNESS: No, he did not grant it.

3 THE COURT: Did he deny it?

4 THE WITNESS: He denied it.

5 THE COURT: You're sure that he actually denied it?

6 THE WITNESS: Yes, I am.

7 THE COURT: Do you remember whether an opinion was
8 written by Judge Bryant?

9 THE WITNESS: I have to believe that one was. There
10 was one, but I cannot remember it.

11 THE COURT: That, we can find out.

12 You said the case was settled. Was any kind of consent
13 order adopted by the court or was the case simply dismissed?

14 THE WITNESS: I'm not quite sure. Certainly the
15 settlement was on condition that Mr. Seckler sign a sworn
16 statement that he was lying and knew he was lying and had no
17 evidence --

18 THE COURT: Were those papers filed in the court
19 docket?

20 THE WITNESS: They were, indeed.

21 THE COURT: You may question about anything that was
22 filed and ruled on by the court, but certainly not the
23 outside -- certainly not the details of the settlement that did
24 not appear in any court proceedings.

25 MR. WEBB: I will do that.

1 BY MR. WEBB:

2 Q. Is it your understanding that the settlement agreement --
3 that the case was dismissed with prejudice by the judge after a
4 settlement agreement was submitted to the judge?

5 A. That is correct.

6 Q. Let me show you the agreement that was submitted to the
7 judge that led to the dismissal with prejudice of the lawsuit.

8 Can I have JD 80212 handed to the witness, which is tab
9 63? And is this the motion to dismiss with prejudice filed with
10 the court.

11 A. Yes, it is.

12 Q. I'm only going to direct your attention to -- if you go to
13 page 2 of that document to -- actually, page 2 is the next page,
14 I believe. I want to go to paragraph H under the preamble.

15 This deals with the acknowledgement that Mr. Seckler
16 made; is that correct?

17 A. It does, indeed.

18 Q. And here it says that, "Relator expressly acknowledges that
19 to his knowledge HBI did not falsely and fraudulently obtain
20 contracts from the United States, and did not falsely and
21 fraudulently perform indoor air quality inspections of the
22 United States Government buildings, and did not falsely and
23 fraudulently report to the United States on the indoor air
24 quality inspections it performed on government buildings.
25 Relator also represents and warrants that he has no information

1 other than that which he has alleged in this qui tam action upon
2 which to bring any action on behalf of the United States."

3 Now, that statement by Mr. Seckler, does he sign this
4 document? If you can go to the end -- is this document signed
5 by him?

6 A. It is, indeed.

7 Q. And I put that up on the screen and it's signed by you also;
8 is that correct?

9 A. That's correct.

10 Q. And filed with the court?

11 A. That's correct.

12 Q. Now, let me go to another issue or related issue.

13 Do you recall in your written direct examination the
14 government asked you some questions about an employee of HBI by
15 the name of Reginald Simmons? Do you recall those questions?

16 A. I do, indeed.

17 Q. Do you have your testimony there at all? If I call it up on
18 the screen. Can I call up page 32 of Mr. Robertson's direct
19 examination.

20 And do you see there? I culled out that you're shown a
21 statement by the government during the course of their written
22 questions to you; is that correct?

23 A. That is correct.

24 Q. And that's a statement of Mr. Reginald Simmons; is that
25 right?

1 A. That's correct.

2 Q. Are you familiar with that statement?

3 A. Indeed.

4 Q. I believe -- you're not -- I will generally tell you that
5 Mr. Simmons testified in this proceeding I believe last week.

6 MR. KINNER: Your Honor, I object to Mr. Simmons'
7 testimony.

8 THE COURT: Sustained.

9 MR. WEBB: I'll strike it myself.

10 THE COURT: I didn't know where you were going,
11 Mr. Webb, and I didn't want you going anywhere.

12 MR. WEBB: I'm not going there.

13 BY MR. WEBB:

14 Q. The statement that the government called to your attention,
15 would you please tell the court your understanding of the
16 circumstances of the creation of that statement?

17 MR. KINNER: Objection, Your Honor. There's no
18 foundation.

19 MR. WEBB: Your Honor, they showed him the statement in
20 their direct examination. "They" being the government showed
21 him a statement that they are now --

22 THE COURT: Wait, Mr. Webb. Are you saying that the
23 government showed Mr. Robertson Mr. Simmons' statement?

24 MR. WEBB: Yes, this statement right here,
25 Exhibit 65093. That's the government showing to the witness in

1 his direct examination a statement of Mr. Simmons.

2 THE COURT: All right. Mr. Kinner.

3 MR. KINNER: But the question to Mr. Robertson to which
4 I'm only -- I'm only objecting on the grounds of lack of
5 foundation, there was a jump to, what was your understanding of
6 the circumstances surrounding the statement -- to taking of the
7 statement? Well, first, there's no showing that he had any
8 personal knowledge.

9 THE COURT: Ask him how he knows or what he knows. Not
10 what, but how he would know anything.

11 MR. WEBB: The government asked you here whether or
12 not--

13 BY MR. WEBB:

14 Q. The statement itself I can pull it up. When you saw the
15 statement that the government referred to, did you then go look
16 at the statement?

17 A. I did, indeed. I knew exactly what it was. It came up in
18 the Seckler case and in the investigation by the Department of
19 Justice, and I was very familiar with it.

20 Q. Was this an affidavit that he filed in connection with the
21 congressional matter?

22 A. Yes, it was.

23 Q. Let me ask you some questions about Mr. Simmons. Did he
24 work for HBI during some point in time?

25 A. Yes, he did.

1 Q. And did he stop working for HBI in approximately October of
2 1989?

3 A. Yes, he did.

4 Q. How long did Mr. Simmons work for HBI?

5 A. I would estimate maybe two years, three years, perhaps.

6 Q. Would you please explain to the court what Mr. Simmons' job
7 or position was with your company, HBI?

8 A. He started as a field technician. That's an individual who
9 is one of our inspection teams who went into buildings to take
10 samples of different indoor pollutants and to visually inspect
11 the ventilating systems and filtration systems and building
12 conditions.

13 Q. Now, in 1989 -- strike the question.

14 In 1989 before he left the employment of your company,
15 did an incident occur in Florida that necessitated you
16 interacting with Mr. Simmons?

17 A. Yes, indeed.

18 Q. Please explain what happened.

19 A. I remember it was one of those unusual jobs that I mentioned
20 on my testimony on Thursday when we were asked would we do some
21 duct cleaning which our company had wanted to get out of
22 repeatedly.

23 And when on site Mr. Simmons had three staff with him
24 and he decided, you know, actually, that he didn't want to do
25 this duct cleaning, and he brought his team of four people back

1 to the office and left the clients literally up in the air of
2 not knowing what was going on and said that he wasn't going to
3 do that type of work.

4 And that caused me to ask my operations manager,
5 Mr. Madaris, to return to Florida at considerable expense and go
6 in and do the clean up work that was required and fortunately
7 managed to pacify and satisfy the client.

8 And that certainly caused me to read the riot act to
9 Mr. Simmons and tell him that I wouldn't tolerate anything like
10 that again. I think I was in need of an experienced pair of
11 hands at that time, so I was in my own judgment stupid in
12 tolerating that individual in my company for the period. But
13 that's what happened at the time.

14 MR. KINNER: Objection, Your Honor, to this line of
15 questioning. I believe if Your Honor recalls that this was all
16 gone over with Mr. Simmons himself.

17 THE COURT: You believe what?

18 MR. KINNER: That this was all gone over -- I'm
19 sorry -- all gone over with Mr. Simmons himself and --

20 THE COURT: It was, but that certainly doesn't preclude
21 Mr. Webb from going over it with a different witness who will --
22 well, maybe obviously have a different point of view.

23 MR. KINNER: Very well, Your Honor.

24 BY MR. WEBB:

25 Q. I don't get into any details, but were there some issues of

1 alcohol?

2 A. Yes. In fact, I believe that alcohol was involved the first
3 time with that particular issue in Florida. And the end point
4 of Mr. Simmons' career at HBI; it was the fact that he rang me
5 one morning at about 2:30, 3:00 o'clock in the morning and told
6 me that I could stuff the job because he's fed up with it, and
7 he was stoned out of his mind.

8 I told him that the job's gone. I want to see him
9 first thing in the morning in my office. And when he came in I
10 had a letter of resignation signed and handed to him and told
11 him to leave my company.

12 Q. And he did?

13 A. He did.

14 Q. On page -- I'm going to cull up certain allegations that
15 Mr. Simmons has made which are in your direct examination that
16 the government asked you about.

17 Could I have page 32? It's tab 69. This would be page
18 32 of your direct examination. Do you have your direct
19 examination there?

20 A. Yes.

21 Q. Thank you. On page 32, do you see, the government calls to
22 your attention an allegation made by Mr. Simmons on page 2 of
23 his statement? Do you see that?

24 A. Yes, I do.

25 THE COURT: 33 everybody for the record.

1 MR. WEBB: Actually, can I come back? There's a
2 different.... is this page 32?

3 THE WITNESS: That's page 32 now, you have.

4 BY MR. WEBB:

5 Q. Page 32. I'm looking for the allegation about air samples.

6 A. That's on page 32.

7 Q. I have that here. Can I cull that out, please?

8 The government showed you this. You say they showed
9 you the statement of Mr. Simmons and then they direct your
10 attention to page 2, the middle paragraph. Do you see that?

11 A. Yes, I do.

12 Q. Where it says, "Mr. Simmons states that one of the
13 instructions he received at ACVA was, when taking air samples
14 for nicotine tests, we were instructed to take air samples in
15 lobbies and other easily accessible areas where the circulation
16 was best, thus reducing the readings." The government wanted
17 you to answer that question with a yes.

18 Do you see that?

19 A. I do, indeed.

20 Q. You did not answer with a yes, did you?

21 A. Of course not.

22 Q. Let's go through your answer.

23 You went on to explain, "That's what it says, but I
24 believe it's nonsense. In our focused studies of environmental
25 tobacco smoke," I want to stop there for a moment.

1 When you say "focused studies of tobacco smoke," what
2 are you referring to?

3 A. This is mainly the 525 Building Study when we were looking
4 for smoking areas to contrast them with nonsmoking areas.

5 Q. So just as you're talking about -- when you say -- explain
6 to the court what was the basic thing you were trying to do. I
7 think it's the 585 Building Study.

8 A. I stand corrected. 585.

9 Q. Explain to the court basically what was being studied and
10 what were you trying to do with the 585 Building Study.

11 A. The whole premise was to try and find what concentrations of
12 environmental tobacco smoke were present in designated smoking
13 areas of buildings and contrast them with the readings in
14 nonsmoking areas and to find the differential between the two.

15 Q. Then that means so whoever is doing the testing, what
16 Mr. Simmons says here is partially true. You do test in areas
17 where there's nonsmoking?

18 A. Yes. Part of the instructions to Mr. Simmons and all the
19 inspectors doing that study was you must find a designated
20 smoking area. Once you do, you must then find the nearest
21 adjacent nonsmoking area to test, is there any smoke escaping
22 from the smoking to the nonsmoking area?

23 Q. And you go on to explain that to the court in this answer;
24 is that correct?

25 A. That is correct.

1 Q. And so am I correct, Mr. Simmons gave a partially correct
2 answer but misleading. Is that fair to say?

3 A. It was taken out of context to deliberately mislead.

4 Q. Because, am I correct, he would be -- he would be testing
5 sometimes in lobbies and accessible areas?

6 A. That is correct.

7 Q. But that was to be done to compare it to the smoking area?

8 A. It was precisely the reason.

9 Q. Now, let me go over to page 33, at the top of page 33 where
10 the government asked you a question about a second allegation
11 that Mr. Simmons makes; is that correct?

12 A. Yes, that's correct.

13 Q. And here it says in that same paragraph, Mr. Simmons also
14 states that one of the instructions he received at ACVA was, in
15 quotes, if asked, always recommend to clients that air pollution
16 problems could be solved by better ventilation.

17 Do you see that?

18 A. I do, indeed.

19 Q. And then the government wanted you to answer it yes and you
20 removed that and you gave this answer; is that correct?

21 A. That's correct.

22 Q. And your answer which the court can see there, I'm not
23 belaboring it. What is it you're trying to explain to the court
24 on this issue?

25 A. Well, certainly we always advise all our technicians in the

1 field, don't jump to conclusions. Wait until we have all the
2 data in before we give recommendations to our clients. And much
3 of that data will be laboratory results that we would only
4 collect hours or days after the inspection.

5 So, rather than have anyone jump to conclusions, we
6 always, and still, advise all our technicians to essentially
7 keep your mouth shut in the field. Obviously, answer questions
8 if you're asked, but by and large, wait until all the data is in
9 before we present our findings.

10 Now, in fairness to Mr. Simmons, our findings often
11 were, yes, improve the ventilation or the filtration if that's
12 what our results were. But none of the technicians were ever
13 encouraged, and in fact, they were outright advised not to talk
14 to the clients in the field.

15 Q. Let me go through the process that's followed.

16 After -- first, as far as Mr. Simmons' job itself, is
17 it part of his job to make final recommendations to your client
18 as to how they should remedy any air quality problems that might
19 be detected during the inspection?

20 A. Certainly not.

21 Q. Why not?

22 A. He's not qualified to do that. He doesn't have the depth of
23 experience and he needs to get all the facts in before you jump
24 to conclusion.

25 Q. Sir, inside your company who were the people that had the

1 responsibility to actually advise clients on how to remedy air
2 quality problems that were detected during the course of a field
3 study?

4 A. We had a small group and we still have them to this day.

5 The business managers would be myself. The manager of
6 business and sales. The manager -- the technical manager. At
7 the time it would be myself, Mr. Binnie who was technical
8 manager of the company and the founder of the company with me.
9 And the sales manager, Mr. Simmons -- Mr. Simon Turner. And
10 also a technical writer who would have been one of the senior
11 inspectors who had been with us a long time who was trained by
12 us to interpret the data and draw conclusions and make
13 recommendations.

14 Q. Now, that group of people, when they actually make
15 recommendations to a client to remedy air quality problems, is
16 there an actual written report that gets issued by your company
17 to the client?

18 A. Always.

19 Q. And is that written report the report that puts forth what
20 the final recommendation is of your company as to how to remedy
21 any air quality problem?

22 A. That is correct.

23 Q. Did Mr. Simmons play any role in the process of drafting
24 those final reports?

25 A. He did not write the final reports.

1 Q. Now, if I could go further down on page 33, I think we come
2 to the last allegation that the government calls to your
3 attention by Mr. Simmons, where the government calls to your
4 attention an allegation Mr. Simmons is making that one of the
5 instructions he received at ACVA was that banning or restricting
6 tobacco use or smoking was never to be recommended.

7 The government wanted you to answer that yes, and
8 instead you gave an explanatory answer which is on the screen
9 right now; is that correct?

10 A. That is correct.

11 Q. Would you please expand upon what were you trying to
12 communicate to the court to address that allegation by
13 Mr. Simmons?

14 A. First of all, I'm working in commercial buildings for
15 clients who already have policies that might include smoking and
16 nonsmoking and they would frequently ask me if the smoking areas
17 were working properly, and we would test them.

18 And in some cases have made suggestions that rather
19 than have discretionary smoking in the space, it would be
20 smarter to split the areas to have a smoking area in one section
21 and a nonsmoking in the area.

22 So, making recommendations on restricting smoking was
23 not unusual at all for my company. In fact, we designed smoking
24 areas specifically to do precisely that.

25 There were a few examples, and there were not many,

1 where, for technical reasons, we did advise clients that they
2 should ban smoking in certain areas.

3 And I would use any areas where you're making drugs, a
4 clean room area that has to meet extremely tight federal
5 specifications with respect to air quality, and computer rooms,
6 mainframe computer rooms, where cigarette smoke in the air could
7 be attracted to the magnetic drives and the tapes and cause
8 damage, and we recommended banning smoking in such facilities.

9 Q. Now, let me leave Mr. Simmons behind. Let me now go to this
10 building study called the 585 Building Study in which you talk
11 about quite a bit during your direct examination; is that
12 correct?

13 A. That is correct.

14 THE COURT: Are you going to be a while on this?

15 MR. WEBB: I will be a while on this topic.

16 THE COURT: All right. Let's take a break at this
17 point. But tell me, when do you anticipate concluding your
18 cross?

19 MR. WEBB: I'm just looking here quickly. This is my
20 last topic, the 585 building topic is my last topic. I'm going
21 to say 30 minutes, maybe, or 40 minutes to get through this
22 topic.

23 THE COURT: Okay. We will take a 15-minute recess
24 everybody.

25 (Recess began at 10:57 a.m.)

1 (Recess ended at 11:10 a.m.)

2 THE COURT: Mr. Webb, please.

3 MR. WEBB: Thank you, Your Honor.

4 BY MR. WEBB:

5 Q. Mr. Robertson, let me pick it up right where we left off
6 when we took our recess. I'm going to ask you some questions
7 about the 585 Building Study that you talked about during the
8 course of your direct examination. Let's start at the
9 beginning.

10 Who funded the 585 Building Study?

11 A. Philip Morris and -- Philip Morris, I'm sure.

12 Q. Did CIAR have any involvement in funding?

13 A. Oh, I stand corrected. It was the Center for Indoor
14 Research funded it, I misquoted it before.

15 Q. That's fine. I think you talked about it in your direct
16 examination; is that correct?

17 A. I do, indeed.

18 Q. In fact, let me direct your attention to page 44 of your
19 direct examination and I think you will see there you
20 actually -- you get asked the question by the government to
21 describe to the court what is the Center for Indoor Air Research
22 and you give the answer there; is that correct?

23 A. That is correct.

24 Q. And so you indicate that "CIAR was a research organization
25 funded by diverse interests, including tobacco companies. They

1 occasionally published advertisements in the Indoor Air Quality
2 Press seeking projects to fund to further the cause of indoor
3 air quality. I viewed CIAR as a good opportunity to gain much
4 needed funding for meaningful indoor air research. No more, no
5 less."

6 That was your answer?

7 A. That is correct.

8 MR. KINNER: Objection, Your Honor. There's no
9 foundation for that answer. He doesn't give any indication of
10 how he knows the answer to that question.

11 THE COURT: I'm sorry, Mr. Kinner, I don't understand.

12 Mr. Webb was reading the response that was given in the
13 direct examination. Isn't that right?

14 MR. WEBB: That's correct. I'm just going to ask a few
15 questions to follow up on what he said in his direct.

16 MR. KINNER: Yes, Your Honor, but he doesn't give any
17 foundation in his answer for his ability to recite his answer.

18 THE COURT: Well, that may have been a problem with the
19 direct examination, but the fact of the matter is the testimony
20 is in as direct examination and so certainly Mr. Webb can follow
21 up on it.

22 Go ahead, please.

23 BY MR. WEBB:

24 Q. When you say you viewed CIAR as a good opportunity to gain
25 funding, am I correct over time your company, HBI, submitted to

1 CIAR several requests seeking research for projects; is that
2 correct?

3 A. That is correct.

4 Q. And just so we make a record here. Sometimes CIAR funded
5 your projects and sometimes they did not. Is that fair to say?

6 A. That's correct.

7 Q. In fact, is it your best recollection that you submitted
8 four different requests for funding to CIAR and they eventually
9 decided to fund two of your projects, one of which was the 585
10 Building Study; is that correct?

11 A. That is correct.

12 Q. And another one, which I won't go into, involved plants.

13 A. Yes. The Landscape Gardens of America, that's correct.

14 Q. That study, which I won't go into any detail, you were
15 trying to figure out whether if you put plants in an office
16 building, does that help air quality problems?

17 A. That was exactly what it was for.

18 Q. That doesn't seem to be an issue in this case, so let me go
19 to the 585 Building Study. That is a study that CIAR funded and
20 you understood that tobacco companies provided grant money to
21 that organization; is that correct?

22 A. That is correct.

23 Q. Did you understand that you were just one of many, many
24 researchers across the country that are trying to interest CIAR
25 in using grant money to fund your projects?

1 A. That is correct.

2 Q. You were competing against a lot of other researchers?

3 A. Correct.

4 Q. Sometimes you got grant money and sometimes you didn't?

5 A. Correct.

6 Q. Now, the 585 office building study -- let's start with,
7 explain to us what was the goal or purpose of that study?

8 A. There seemed to be a dearth of information in the country
9 about what real levels of smoking were present in commercial
10 buildings.

11 Because of the nature of our business and our ongoing
12 contractual relationships with many property owners and building
13 managers across the country, we knew we had access to many, many
14 buildings to sample for any indoor pollutants whatsoever.

15 So it occurred to us that we could use that database to
16 approach CIAR and ask them would they be interested if we could
17 gather real data about the concentrations of smoke in smoking
18 areas and also to find how good was it to designate areas as
19 smoking or nonsmoking. In other words, did smoke escape from a
20 smoking area to a nonsmoking area?

21 And that was our premise that we could inspect hundreds
22 of buildings and gather that data and then put it in a form to
23 present it as a peer review paper.

24 Q. And did you make a formal proposal to CIAR to see if they
25 would fund that project?

1 A. We did, indeed.

2 Q. And did CIAR agree to fund that project?

3 A. They did, indeed.

4 Q. Can you tell us approximately how much funding did HBI
5 receive from CIAR, if you remember?

6 A. I can remember the unit price was around \$550 per series of
7 tests in the building, and we must have done 585. So the
8 multiple --

9 Q. I haven't done that math, but that would be about what the
10 funding was?

11 A. That's correct.

12 Q. Now, when was this research project conducted?

13 A. In the early '90s. I can't remember the dates off the top of
14 my head.

15 Q. That's fine. How long did it take, approximately?

16 A. I think approximately a year, just over a year, but maybe
17 one full year.

18 Q. Now, as far as who -- as far as who the principal scientific
19 researchers or investigators were that were on that project, I
20 know their names appear on a peer review article later; is that
21 correct?

22 A. That's correct.

23 Q. Tell the court who they were.

24 A. The leader from Healthy Buildings International was Simon
25 Turner who is my -- he's a director of my company.

1 Q. Would you please explain his background?

2 A. Mr. Simon Turner was a scientist who, when I first met him,
3 was working in South Africa for the South African government on
4 various environmental issues. I think specifically he was doing
5 radioactive materials in the air in South Africa.

6 He had a very good training and background in science.
7 I believe he's a chemist by profession, working in Great Britain
8 before he went to South Africa. And he had made up his mind
9 that he was looking to further his developments.

10 I believe he was tossing up whether to go to Australia
11 or America when I met him and liked him and hired him, and then
12 indoctrinated him by training in the field hundreds of studies
13 in the field of indoor air quality. He had a hands on in every
14 single test method we have, every instrument we used.

15 He progressed to being a senior technical report
16 writer. And at the time I believe he would be in sales and
17 manager of business administration for Healthy Buildings
18 International at the time of that paper.

19 Q. At the time of the 585 Building Study -- you don't need to
20 go into a lot of detail -- but basically what was his job
21 responsibility in connection with that study?

22 A. Well, first of all, we knew from the outset that this was to
23 be a peer-reviewed paper, so we had to make absolutely certain
24 that all the techniques we were going to use -- the methodology
25 of the tests, the methods for sampling them, the selection of

1 sample sites, et cetera -- had to be documented and put forward
2 for review, and we had to stand the test of that being
3 constrictively critiqued by independent scientists in the course
4 of the peer review paper.

5 So Mr. Turner's job was to write up the whole
6 methodology, the instrument, proposed instrumentation, and how
7 the tests were going to be done and what conclusions he was
8 hoping to gain from a result of that study.

9 Q. Now, was another researcher that was involved in that
10 project a Dr. Lewis, and is it C-y --

11 A. Cyir.

12 Q. C-y-i-r for the record?

13 A. That's correct.

14 Q. Explain to the court who he was and what his background was.

15 A. He was a statistician. I think it was with North Carolina
16 University. And he and his other colleague, whose name I have
17 forgotten but a third party, were independent statisticians that
18 we called after the testing was complete and asked them, because
19 of the massive amounts of data we had gathered, if they could
20 help us do a statistical analysis of the data and to test those
21 different methods that statisticians can use to test the
22 veracity of the information we got, and that's why they were
23 involved.

24 Q. Now, as far as the actual day-to-day methodology that was
25 actually used in the buildings to do the tests, describe for the

1 court -- I'm not going to get into a lot of detail technical-
2 wise -- but what are the tests that are being done?

3 A. First, remember, we've identified a designated smoking area.
4 That could be a discreet area enclosed in a room with its on
5 exhaust or it could be just a group of tables in a cafeteria
6 where people were told you can smoke in that area.

7 So whichever the area, we would go with a set of
8 instruments. We would measure, first of all, carbon dioxide
9 concentrations, just -- that's an indication of overall
10 ventilation rate. It's a good indicator.

11 We measured the nicotine concentration, the
12 respirable-sized particulate concentration, and the carbon
13 monoxide concentration in the area. Those being, we believe,
14 good markers of the levels of tobacco smoke in that space.

15 Q. Now, that's the test done in the smoking area.

16 A. Correct.

17 Q. Then what about the adjacent nonsmoking area?

18 A. Repeated everything precisely the same, using the same
19 instruments.

20 Q. Now, as far as how to carry out that study and what tests to
21 do and how it was actually conducted, are those all decisions
22 and responsibility that rested with your company, HBI?

23 A. Definitely.

24 Q. And did the tobacco companies have anything to do with that?

25 A. None whatsoever.

1 Q. Now, when the research project was completed -- strike the
2 question.

3 558, does that stand for the number of buildings that
4 eventually get included in the study?

5 A. Number of buildings -- I believe it's number of buildings.
6 It could have been a few cases where there were separate smoking
7 areas in one building, so there might be some overlap in that
8 way.

9 Q. When the research project was complete, were the results of
10 the research published?

11 A. Yes, they were.

12 Q. What was the name of the journal in which they were
13 published, if you remember?

14 A. I think it was Environment International.

15 Q. Explain to the court, what is Environmental International?

16 A. It's a highly-respected paper that publishes many peer
17 reviewed papers of different researchers on anything that has an
18 impact on the environment in the United States.

19 Q. And is Environmental International what's known as a peer
20 review journal?

21 A. Yes, it was.

22 Q. Did your article go under the peer review process?

23 A. It certainly did, it had to.

24 Q. Can you explain generally to the court what process was
25 followed with your particular article before it was accepted for

1 publication?

2 A. Basically, the paper, the draft paper, would be sent to
3 Environmental International editors who, they chose independent
4 scientists across the country to read the paper and
5 constructively critique it, see if they agreed that the
6 methodology was correct, if the controls were accurate enough,
7 good enough; was the rationale of value, was the data meaningful
8 for that paper. And we had no direct contact with any of those
9 independent scientists.

10 They rendered an opinion back to Environmental
11 International as a result of which we were asked to delete one
12 or two sets of data because they thought that that had a query
13 over it or they didn't understand what it was or we duplicated
14 something.

15 And the final result was that it was formally accepted
16 as a peer reviewed and quality article that could be published
17 in a magazine.

18 Q. Was it, in fact, published?

19 A. Yes, it was.

20 Q. Let me show you the article.

21 Could I have as tab 75, U.S. Exhibit 20572 given to the
22 witness if I could, please?

23 And I put it up on the screen, sir, so that the court
24 can see it. What I have on the screen is the first page of this
25 peer-reviewed published article entitled The Measurement of

1 Environmental Tobacco Smoke in 585 Office Environments." Is
2 that correct?

3 A. That is correct.

4 Q. And that is the study you've been referring to in your
5 testimony; is that correct?

6 A. That is correct.

7 Q. Now, I'm not going to walk through this in detail, but I
8 notice on the first page there's what's known as an abstract; is
9 that correct?

10 A. That is correct.

11 Q. That's always in small print. It's hard to read for some
12 reason. Why is that? Strike the question.

13 In any event, it's in small print. Does this describe
14 the methodology?

15 A. Yes, it does.

16 Q. And does it essentially describe the methodology that you've
17 already described to the court in your testimony?

18 A. It does, indeed.

19 Q. Now, I want to direct your attention to the last page of the
20 article for the conclusion. Can you generally -- not the
21 acknowledgement, I'll come to that in a minute.

22 Can I cull out --I'd like to cull out on page 8786. Do
23 you see at the end -- is your conclusion set forth at the end of
24 the article?

25 A. They are, indeed.

1 MR. WEBB: Can I cull out the end of the article on
2 8786, the last paragraph.

3 Thank you.

4 Q. Does this essentially summarize your conclusion?

5 A. That's part of the conclusion.

6 Q. Point out to us where the conclusion is in the article so we
7 can look at it.

8 A. It's the paragraph ahead of that I think.

9 Q. We will cull it out.

10 Tell the court essentially the conclusion reached.

11 A. Well, basically, the fact was that in the case of smoking
12 areas that were well ventilated, the levels of environmental
13 tobacco smoke that were present were extremely modest and far
14 below any existing standards that were present at the time.

15 There were a few cases where smoking had spilled into
16 nonsmoking areas, and we pointed out that that was because of
17 faulty design of the smoking and nonsmoking areas.

18 Q. Now -- and then if we go to the bottom of that page, you
19 show that funding was received from CIAR; is that correct?

20 A. Yes, we do, indeed.

21 Q. Now, let me ask you this question. You can take that down.

22 The Seckler lawsuit that we just have been through, did
23 that lawsuit and allegations made in that lawsuit eventually
24 cause HBI to find itself swept up into an investigation
25 conducted by Congressman Waxman's staff?

1 A. That's correct.

2 Q. And so we can get the time frame. What year are we in when
3 Congressman Waxman's staff conducted the investigation that you
4 referred to during your direct examination?

5 A. I'd have to guess at around 1985, I believe. Mid-'90s. It
6 was a bit earlier, but I can't remember the date.

7 Q. That's your best recollection?

8 A. Yes.

9 Q. I think the record would reflect 1994. Would that be
10 consistent with your recollection?

11 A. Yes, I said about '95.

12 Q. Now, would you just tell court at least your understanding
13 from HBI's standpoint what was the staff looking at?

14 A. They had been -- somebody had sent to Mr. Waxman's staff a
15 copy of many of the field notes that we had used in gathering
16 the data for the 585 Building Study and had made allegations
17 that the data had been manipulated or some of the data had been
18 changed and that was the main issue.

19 Remember, at the time Mr. Seckler had made the
20 statements that we routinely change data. And I think that was
21 to try and prove that this is an example of that type of data
22 changing.

23 Q. Now, I won't go through the details, but I do want to get in
24 the record.

25 Did you and your attorney file some detailed written

1 responses to the Waxman Committee to address head-on what you
2 thought the allegations were?

3 A. Very detailed on every single allegation that was made. We
4 certainly followed up.

5 Q. I'm going to show you three exhibits.

6 If I could hand him JD 54245. I'll do one at a time,
7 it will make it easier. So first JD 54245, and then also hand
8 him JD 54247, and then hand the witness JD 54246.

9 Now, sir, do the exhibits I've just handed you, do
10 these represent responses by the lawyers that you had engaged to
11 try to address what was understood to be the allegation?

12 A. That is correct.

13 Q. And I don't intend to walk through those, but those were
14 submitted for the staff's review; is that correct?

15 A. Correct.

16 Q. Did you also -- did your lawyer interact with the staff, if
17 you know, to address these issues?

18 A. Yes, indeed.

19 Q. In a significant way?

20 A. Yes. Met with them, interviewed them, and went through them
21 line by line.

22 Q. Now, as things unfolded did the Waxman Congressional
23 Subcommittee staff begin to use a consultant by the name of
24 Dr. Alfred Lowrey, L-o-w-r-e-y?

25 A. They did, indeed.

1 Q. I want you to tell the court, who was Dr. Lowrey?

2 A. To the best of my knowledge, he was a physicist who worked
3 for the government who had a hobby of dabbling in research on
4 tobacco smoke in buildings and he produced several papers with a
5 colleague -- where he produced data claiming what the levels of
6 tobacco smoke were in buildings. But I said a hobby.

7 The sort of tests he did, because I read all his
8 reports, was he would take tobacco smoke readings in bingo halls
9 and smoking areas of clubs and restaurants, and the only office
10 that I know he investigated in those early days was one office
11 in his own building where he had about 23 people smoking a
12 cigarette in one hour. He took some samples and decided that he
13 now knew what the levels of environmental tobacco smoke were in
14 typical office areas and he published it.

15 Q. Now, I don't intend to get into a lot of detail, but as far
16 as Dr. Lowrey becoming a consultant to that committee, in your
17 585 office environment study in the article itself that we just
18 showed the court you actually are critical of some earlier works
19 by Dr. Lowrey. Is that fair to say?

20 A. Very much so.

21 Q. And you're fairly critical of his work; is that correct?

22 A. We've published several articles to that effect.

23 Q. And then he became critical of you in connection with this
24 committee; is that correct?

25 A. That is correct.

1 Q. And as far as the validity or methodology -- strike the
2 question.

3 As far as the results that you published in the 585
4 study, did you understand that basically you were being accused
5 of somehow adjusting your test results to downplay the role or
6 effect that smoking has on the quality of indoor air?

7 A. That was the allegation that Lowrey made.

8 Q. Now, let me ask you this. After the 585 study was
9 completed, a few years later did some employees of the EPA
10 actually publish a study of buildings that they had done which
11 basically reported on the effect of tobacco smoke on the quality
12 of indoor air?

13 A. Several such studies, that's correct.

14 Q. And were they doing essentially the same -- in other words,
15 they were doing essentially what you were doing: trying to
16 figure out what effect smoke, tobacco smoke, has on the quality
17 of indoor air; is that correct?

18 A. That is correct. In fact, there were a total of 40 studies
19 done by different scientists who, on the average differential
20 between smoking and nonsmoking in those 40 studies, had a
21 difference between smoking and nonsmoking of 19.3 micrograms per
22 cubic meter. We had actually found a differential of
23 26 micrograms, which is 33 percent higher.

24 So, in fact, we found that our data was very, very much
25 reflected in every subsequent study; and, if anything, we found

1 slightly more smoke than the median of all those other studies.

2 Q. So what I want to make sure I understand is that all these
3 other studies that get published that are studying the effect of
4 tobacco smoke on the quality of indoor air, there's you think 40
5 of those published?

6 A. There were 40 published.

7 Q. And the results -- as far as trying to figure out whether
8 you're downplaying the effect of smoke on the quality of air,
9 most of those studies showed they had a greater impact on the
10 air than you did?

11 A. That's the average of them, definitely.

12 Q. Let me show you two of those. Are you generally familiar
13 with a study done by some EPA employees, if you remember?

14 A. If I see the names of them I probably will know it.

15 Q. Let me see if you do, and if you don't, I won't go any
16 further. I think I made my point.

17 Let me show you JD 54292 and JD 54291, and I believe
18 this is two publications involving the same study. Am I correct
19 on that?

20 A. Girman and Womble Study. That's what we referred to it as.
21 That is correct.

22 Q. Now, were these folks employees of the EPA?

23 A. Yes, they were.

24 Q. And is this two studies or one study?

25 A. I believe -- what happened this was an ongoing study. They

1 were trying to develop a baseline of what the levels of
2 pollutants were in buildings, and I think they published results
3 after they had done about 13 buildings and then subsequently
4 expanded it in a second paper as they completed studies of more
5 buildings

6 MR. KINNER: Objection, Your Honor, and motion to
7 strike. His answer started out, "I believe," and therefore it
8 lacks foundation and he doesn't know.

9 THE COURT: Do you know that for a fact?

10 THE WITNESS: I do know it for a fact.

11 THE COURT: How do you know that?

12 THE WITNESS: Well, I've seen these studies and read
13 them and researched them before.

14 THE COURT: Go ahead, please.

15 BY MR. WEBB:

16 Q. And that EPA study and the exhibits I just put before you,
17 is this an example of where someone else did a study very
18 similar to what you did and actually came up with results that
19 showed even more impact of smoke on the quality of air than your
20 studies showed?

21 A. That's correct.

22 Q. I think I may have misspoke when I asked you about the other
23 40 studies.

24 Those studies showed a lesser impact from tobacco smoke
25 than yours showed; is that correct.

1 A. 33 percent less than we showed, that is correct.

2 THE COURT: I'm glad you corrected that, Mr. Webb,
3 because I read the transcript over and over, and I couldn't
4 decide either you or I have misunderstood. So, good, it's
5 clear.

6 MR. WEBB: I made a mistake, and I'm glad my colleague
7 has pointed it out to me.

8 BY MR. WEBB:

9 Q. Now, when counsel was asking you questions last Thursday on
10 his oral examination, you explained to counsel that the
11 subcommittee staff issued a report; is that correct?

12 A. That is correct.

13 Q. That is Congressman Waxman's staff issued a staff report; is
14 that correct?

15 A. That is correct.

16 Q. Let me show it to you. Counsel showed it to you. It's
17 United States Exhibit 38593, which I will hand to you.

18 MR. KINNER: Your Honor, not exactly an objection, but
19 we were using JD Exhibit 2910. It seems to me we probably ought
20 to stick with a single exhibit number just to prevent confusion.

21 THE COURT: Is that what the government was using?

22 MR. KINNER: Yes. We figured that inasmuch as joint
23 defendants had put in a copy and there might be a dispute over
24 the admissibility of the document, that it would make more sense
25 to use joint defendants' exhibit number.

1 THE COURT: Mr. Kinner, I can tell our court reporter
2 is having trouble hearing you.

3 MR. KINNER: I keep forgetting about the on and off
4 switch.

5 THE COURT: I don't see any problem with continuing
6 with the joint defendants' number, so we will do that.

7 MR. KINNER: 2910.

8 MR. WEBB: I'll use 2910 as my exhibit number. I'm
9 also told I misspoke again, so I'm going to try to correct the
10 record if I could. I don't know how many "misspokes" I get
11 today.

12 BY MR. WEBB:

13 Q. But when I was asking you about the EPA study, I want to
14 make sure it's clear in the record. That is an example of other
15 investigators doing a similar methodology of studying buildings
16 when they -- their studies show less impact from tobacco smoke
17 than your 585 Building Study showed; is that correct?

18 A. I believe that was correct.

19 Q. Now, as far as the staff report is concerned, let me just go
20 to the conclusion of the staff report, which I believe will be
21 on page 16 of the staff report. And if I could cull out the
22 conclusion on the screen.

23 THE COURT: Are you still seeking to exclude those
24 staff reports? There was an objection filed to it.

25 MR. WEBB: No, Your Honor.

1 Well, you mean -- oh, yes, we are still trying to
2 exclude it, but I want to conduct my examination on it not
3 knowing what your ruling is going to be.

4 As I understood, I'm supposed to proceed on the
5 assumption that it will be denied. If it turns out that we
6 argue it and you grant it, the testimony will be struck.

7 THE COURT: All right. Don't make it too long, though.

8 MR. WEBB: I don't intend to.

9 Q. All I wanted to do was call your attention -- this paragraph
10 was shown to you by the government during your oral testimony
11 last week; is that correct?

12 A. Correct.

13 Q. And the conclusion that they reached, which is that they
14 could not reach any conclusion unless further investigation was
15 done. Do you see that?

16 A. I do.

17 Q. And I think you told counsel that further investigation was
18 done; is that correct?

19 A. It was indeed.

20 Q. And that was the Department of Justice investigation; is
21 that correct?

22 A. That is correct.

23 Q. And again, I think you said this on your direct, so I don't
24 intend to belabor it, but how long did the Department of Justice
25 investigation go on?

1 A. About two years.

2 Q. And did the Department of Justice actively investigate the
3 allegations?

4 A. They looked at every single document that existed in the
5 history of my company.

6 Q. Let me break it down. Let's start with, did you produce to
7 them and they received and reviewed, to your knowledge, all
8 relevant documents from your company?

9 A. Every document that was in the company was available -- made
10 available to them.

11 Q. And did they interview any and all employees of the company
12 that they wanted to interview?

13 A. I believe they interviewed virtually everyone on my staff
14 and we freely cooperated with them.

15 Q. And did they also have -- did they interview anyone they
16 wanted to from the government that allegedly was defrauded or
17 misled?

18 A. They met many of my clients, government employees.

19 MR. KINNER: Objection, Your Honor, no foundation. He
20 asked whether the government interviewed every one of the
21 government --

22 THE COURT: Well, the answer was a more limited answer,
23 which was that the investigators met with his clients. I think
24 you should either rephrase your question or limit your question.

25 MR. WEBB: I will.

1 BY MR. WEBB:

2 Q. We talked about your employees; right?

3 A. Correct.

4 Q. Did you also learn, though, as you were monitoring what the
5 DOJ was doing, that they were interviewing, for example,
6 customers of yours?

7 A. Many of my customers contacted me to that effect.

8 Q. And as far as you know, did the government do any and all
9 investigative work they wanted to do to find out if the
10 allegations were true?

11 A. They did everything they possibly could and we cooperated
12 with them.

13 Q. And there was a letter that counsel showed you, which you
14 called an exoneration letter. Do you recall that?

15 A. I do, indeed.

16 Q. Let me show that letter to you again. Can I have JD 80190,
17 please?

18 This is a letter received by the law firm of Crowell &
19 Moring on November 26, 1996; correct?

20 A. Correct.

21 Q. This was after about a 2-year investigation to the best of
22 your recollection?

23 A. That's correct.

24 Q. And after all these witnesses had been interviewed and all
25 the documents looked at, this is what the Department of Justice

1 notified your lawyer; is that correct?

2 A. That's correct.

3 Q. It says, "With respect to the above-referenced
4 investigation, based on the evidence presently available to us
5 and the standards of proof applicable in a criminal case, we
6 have closed the file without prosecution."

7 A. That's correct.

8 Q. Can you tell the court why as a lay person you viewed that
9 as an exoneration?

10 A. I had been accused of having a company that deliberately
11 misguided my clients, and we changed our data presumably to help
12 in that misdirection. And I was very relieved and pleased that,
13 having turned over every single document that existed in my
14 company, every piece of data, every floppy disc and every hard
15 drive in every computer and having every one of my employees
16 examined by the government, that they decided they found nothing
17 wrong. I would point out the 585 Building Study as an example.

18 They went through every single document, every single
19 page of everything, and agreed that it was all in order. And
20 finally, sent us this letter saying that this case is over as
21 far as they are concerned. There's no evidence of anything
22 wrong. And I'm a pretty simple person, I took that as an
23 exoneration.

24 Q. Has the Department of Justice ever tried to reopen that
25 investigation?

1 A. No. The only dealings I've had with the Department of
2 Justice after that is they retained my services to inspect some
3 of their buildings.

4 Q. You've done work for the Department of Justice after this
5 investigation?

6 A. Yes, I have.

7 Q. In your professional capacity?

8 A. Yes.

9 Q. And your company is still in business today?

10 A. Yes, indeed.

11 Q. And you're still doing a substantial amount of work for the
12 federal government. Is that true?

13 A. We are the only company in the country that has a proactive
14 indoor air quality program on GSA schedules.

15 MR. WEBB: I have no more questions, Your Honor.

16 THE COURT: Mr. Kinner.

17 MR. KINNER: Thank you, Your Honor.

18 THE COURT: I'm always asking counsel for estimates.

19 How long do you think you will be?

20 MR. KINNER: About 30 minutes.

21 THE COURT: By the way, were there any other questions
22 from the defense side?

23 (No response)

24 All right.

25 REDIRECT EXAMINATION

1 BY MR. KINNER:

2 Q. Mr. Robertson, at the conclusion of the Seckler case, you
3 paid money to Mr. Seckler; isn't that correct?

4 A. Correct.

5 Q. And that figure was a six-figure total; isn't that correct?

6 A. That wasn't to Mr. Seckler. Mr. Seckler got about \$20,000,
7 I believe. His attorneys got some, and the government got some.
8 Total was a hundred thousand dollars split between them.

9 Q. It was over a hundred thousand dollars.

10 A. If it was, it was -- I believe it was almost exactly a
11 hundred thousand dollars.

12 Q. During the pendency of that case, did you ask Mr. Madaris to
13 contact Mr. Simmons and warn him about offering testimony
14 against HBI?

15 A. Certainly not.

16 Q. During your -- during the questioning of -- that Mr. Webb
17 engaged in you talked about an EPA publication called Indoor Air
18 Facts colon Sick Building Syndrome.

19 MR. KINNER: Your Honor was correct. I guess you're
20 never going to throw that cough.

21 THE COURT: Just continue, please.

22 BY MR. KINNER:

23 Q. Do you recall my question?

24 A. I recall that, yes.

25 Q. The Environmental Protection Agency has never stated that

1 second-hand smoke is adequately addressed by ventilation. Isn't
2 that correct?

3 A. I do not know if they've ever used those words per se.

4 Q. Thank you.

5 During Mr. Webb's questioning we talked about the
6 relationship between the Tobacco Institute and Healthy Buildings
7 International; correct?

8 A. Correct.

9 Q. And when that relationship became -- first became, what,
10 publicly stated in a legislative appearance; is that right?

11 A. That's correct.

12 Q. And that was June 1986 in the House Subcommittee Hearings;
13 is that correct?

14 A. I think we also had it in the trial in 1985 in the -- we
15 represented the tobacco company in a trial in West Virginia, I
16 believe. But certainly '86 I know beyond doubt we repeated
17 several times, yes.

18 Q. But you recall that we talked about a House Subcommittee
19 Hearing before Mr. Waxman in June of 1986; correct?

20 A. That's correct. I believe that was the date.

21 Q. And the reference that was made there to the Tobacco
22 Institute was by --

23 A. Mr. Waxman.

24 Q. -- Representative Waxman himself; is that correct?

25 A. That's correct.

1 Q. And your prepared statement didn't reference the Tobacco
2 Institute; isn't that right?

3 A. That's correct, because Mr. Waxman knew and was going -- he
4 invited me to talk on behalf of the Tobacco Institute.

5 MR. KINNER: Could I have, Mr. Jackson, 21646? And
6 Ms. Butler, could you provide that to the witness, please?

7 BY MR. KINNER:

8 Q. Do you have US 21646 before you, Mr. Robertson?

9 A. Yes, I do.

10 Q. And that is an inter-office correspondence at Philip Morris;
11 correct?

12 A. It appears to be so, correct.

13 Q. Marked Strictly Confidential?

14 A. Correct.

15 Q. The date is May 26, 1987; is that right?

16 A. That's correct.

17 Q. And that's subsequent to the time of the June 1986 House
18 Subcommittee Hearings before Representative Waxman; isn't that
19 right?

20 A. That's correct.

21 Q. And, let's see. This is -- can we establish the date?
22 Okay.

23 So this was written by Philip Morris employees for
24 Philip Morris employees; isn't that right?

25 A. It seems like Philip Morris Europe, yes, for their people.

1 Q. And so if we can go to the page that has Bates number 473 --
2 I'm sorry -- 4739 which is the next to the last page of the
3 document. If you look at the arrow and the circling. If you
4 could fly that out, Mr. Jackson. It's the fourth bullet out
5 under Remarks.

6 "At that point in time, after the Waxman hearings,
7 Philip Morris employees are saying to each other, ACVA" -- which
8 is the same thing as Healthy Buildings, Inc.; right?

9 A. That's correct.

10 Q. I'm sorry. Healthy Buildings International, Inc.

11 "ACVA must be perceived to be at arm's length from the
12 industry, including in media briefings. Its role at most should
13 seem as yet another third party expert amongst others." Right?

14 A. That's what someone in Philip Morris Europe wrote at that
15 time; that's correct.

16 THE COURT: And I want to be clear about something.
17 Let's go back to the first page of that document.

18 I have to admit that all of the -- I think the word is
19 anagrams -- sometimes get me confused, but I believe -- could we
20 get that brought forth?

21 I'm not sure, but do you know, Mr. Robertson, what
22 those initials stand for before the word strategy meeting? ETS
23 obviously, we know. But what are the first group of initials,
24 if you know?

25 THE WITNESS: I haven't the remotest idea.

1 THE COURT: All right. Go ahead.

2 MR. KINNER: Now, if we could have Exhibit 85631,
3 please?

4 BY MR. KINNER:

5 Q. Mr. Robertson, do you have before you United States
6 Exhibit 85631?

7 A. Yes, I do.

8 Q. And that is a letter that you wrote; is that correct?

9 A. That's correct.

10 Q. And your letter was written to Mr. Guy Smith, vice president
11 corporate affairs also at Philip Morris?

12 A. That's correct.

13 MR. WEBB: Your Honor, I object.

14 My only objection goes to -- this document, I don't
15 object -- the document was used. This is repeating exactly
16 what's in the direct examination. The last document they used
17 in the direct exam which is part of the record. This document
18 is part of the record.

19 And my understanding is that just repeating the direct
20 examination is not what this redirect is supposed to be about.
21 So I object to repeating the direct.

22 THE COURT: Are we just going back over things?

23 I mean, certainly, you can argue -- I think I know what
24 you're trying to prove at this point, but that's a subject of
25 argument, isn't it, if you've already gotten this into the

1 record?

2 MR. KINNER: Your Honor, the point that was -- well, I
3 don't know that the letter is in the record yet inasmuch as it
4 has not been admitted.

5 But the point that was brought out by Mr. Webb was
6 relationship to the Tobacco Institute. I hesitate to say more
7 than that.

8 THE COURT: All right. Go ahead, please.

9 MR. KINNER: I'm going to ask two more questions on
10 this document and we will move right along.

11 BY MR. KINNER:

12 Q. This was a letter that you wrote to Philip Morris; is that
13 correct?

14 A. That's correct.

15 Q. And it was blind copied to Stuntz at TI and that would be
16 Spabar at TI?

17 A. That's correct.

18 Q. And to John Rupp at Covington & Burling?

19 A. Correct.

20 Q. And to a member of the staff of Fleishman Hillard; correct?

21 A. That's correct.

22 Q. If we could go to the second page, please.

23 If we could look at the -- bring up the first full
24 paragraph on the page. It is the first paragraph.

25 And if we could focus on just "despite massive media

1 attention." Wait a minute. No, that's okay. Thank you.

2 This was a request that you engage in additional media
3 tours; correct?

4 A. It was specific media tour in the name of Philip Morris.
5 That's what they wanted to do.

6 Q. And your response was, however, despite massive media
7 attention, no -- I'm sorry -- to date no one has identified such
8 a link, which reflects well on the tact and diplomacy of our
9 public relations firms of Fleishman Hillard. Correct?

10 A. Yes, but that's tied to the fact that at the time I was
11 being dropped off all the lists of speakers' engagements with
12 people such as ASHRAE or Architects of America, different
13 institutes because of my association, my seen, known association
14 with the tobacco industry.

15 And when I agreed to the media tour with the Tobacco
16 Institute, it was on the condition only that we only talk about
17 my company and the Sick Building Syndrome and indoor air
18 pollution issues, nothing else, and that's what we did.

19 And now when Philip Morris came in and said that we
20 would like now to get you to do another media tour sponsored,
21 promoted, and press released given out that it's on behalf of
22 Philip Morris, I said, "No way, I couldn't take it. My personal
23 business would be damaged far too much." That's what I was
24 concerned about.

25 Q. Moving to the next topic which is, "You were also asked

1 about when you last worked for the Tobacco Institute;" is that
2 correct?

3 A. That's correct.

4 Q. And your answer was, "In the period 1997 to 1998;" is that
5 correct?

6 A. I think that was correct.

7 Q. And that would have been when you were aware that the
8 Tobacco Institute was terminated as a result of a Master
9 Settlement Agreement; is that correct?

10 A. I don't think I've ever worked for them after I knew it was
11 terminated.

12 Q. Okay. You don't know exactly what year they were terminated
13 by?

14 A. That's correct.

15 Q. If we could have Exhibit 87341, please.

16 Do you have Exhibit 87341, Mr. Robertson?

17 A. Yes, I do.

18 Q. Do you recognize that document?

19 A. I think that's a copy of our Web page. It's some years
20 back.

21 Q. March 14, 2004; is that right?

22 A. I think that would be the date.

23 Yes, I remember now. It was in my written, that's
24 correct.

25 Q. And this is -- this Web page is your, what? Representation

1 to the world about Healthy Buildings International?

2 A. Yes, it is. It's one of them.

3 Q. Would you go to page 7, please?

4 If you look under Notable Clients about the bottom
5 third you will see Philip Morris. Could we highlight that,
6 please? It's under Newspapers, Inc. It's under Philadelphia.

7 If we go -- just skip Procter & Gamble and go to R.J.
8 Reynolds Tobacco Company. And so in March 2004 you were still
9 representing -- you were still representing to the world that
10 your clients were Philip Morris and R.J. Reynolds; isn't that
11 correct?

12 MR. WEBB: Your Honor, I object to the form of that
13 question.

14 Counsel has to at least show him -- the start of this
15 document says clients in the last 10 years. And so he has shown
16 him a page three pages in under a heading that he did not show
17 the witness and I object to the form of the question because
18 it's misleading to the witness not to show him what the heading
19 is with a listing that appears on the page that he shows. And
20 the heading is right here. It's clients within the last
21 10 years. I object to the form of the question.

22 THE COURT: Do you have the whole document to show him?

23 MR. KINNER: He has the whole document, Your Honor, and
24 it is his Web page.

25 THE COURT: All right. You may ask the question. And

1 the witness obviously, if he needs to, may look at the document.

2 THE WITNESS: I have looked at the document, Your
3 Honor.

4 THE COURT: All right.

5 BY MR. KINNER:

6 Q. And your answer is?

7 A. They were certainly clients in the last 10 years and I was
8 proud to be working for both of them. We studied their
9 buildings, their headquarters, their factories, and we continued
10 to study their factories when they asked us to.

11 Q. Do you recall there were some questions about -- let's see.
12 Perhaps I need to put my -- I'm not sure whether we have this
13 one since it was just used today.

14 Do you still have your exhibits from the defendants'
15 examination?

16 THE COURT: From the cross-examination.

17 BY MR. KINNER:

18 Q. It would be Joint Defendants 80521. It's the State
19 Department of Health testimony.

20 A. I can read it while I'm here. I'm sure it's in here.

21 Q. You would agree with me that what we're going to talk about
22 is Joint Defendants 80521; is that correct?

23 A. Correct.

24 Q. And that is testimony that involved testimony, including
25 your own testimony, before the New York State Department of

1 Health in July -- on July 25, 1986; is that right?

2 A. That is correct.

3 Q. And July 25, 1986, would be about a year and a half after
4 you met the Tobacco Institute; isn't that right?

5 A. That is correct.

6 Q. And among the testimony that you were asked about was your
7 testimony on page 21, and I have highlighted just a piece of
8 what was highlighted before.

9 You said to the New York State Department of Health,
10 "It is frequently assumed by our clients that these symptoms are
11 due to ETS." Is that right?

12 A. That's what I said and what I believe, yes.

13 Q. Do you have your corrected testimony up there?

14 A. I believe so.

15 Yes.

16 Q. Mr. Jackson, could we have page 21, please? If you could
17 fly out the first question and answer.

18 My question was, "At the time that you first
19 established a relationship with the Tobacco Institute in 1985,
20 ACVA had not yet received any complaint from its clients about
21 the presence of tobacco smoke in buildings and you were not
22 aware that indoor tobacco smoke was a public health issue;
23 correct?"

24 A. That's correct.

25 Q. And you indicated, contrary to the impression left, that

1 somehow the Department of Health testimony reflected your views
2 before you met the Tobacco Institute, ACVA had not received any
3 clients -- any complaints from its clients regarding tobacco
4 smoke in office buildings it had inspected; isn't that right?

5 A. That's what I was saying, correct.

6 Q. And so when you said to the Department of Health in New York
7 State, "It is frequently assumed by our clients that these
8 symptoms are due to ETS," that was false, wasn't it?

9 A. That is not false. In fact, it was very much the case that
10 many times people have said to me that we thought we had a
11 problem with tobacco smoke. And when we've gone in and studied
12 it, we found it wasn't tobacco smoke that was the cause of the
13 problem, that was the symptom of the problem.

14 Q. Your testimony was, on page 21, ACVA had not received any
15 complaints from its clients regarding tobacco smoke in office
16 buildings it had inspected?

17 A. That would be the property managers placing contracts with
18 us asking us to inspect their buildings. And very few of those
19 the property managers, the building engineers who had given us
20 contracts, very few of those were raising any issue about
21 tobacco smoke at that time, that's correct.

22 MR. KINNER: Thank you. That concludes our
23 examination.

24 Is it appropriate to move the exhibits in at this time
25 that we listed in our list of exhibits?

1 THE COURT: Is there any reason that the witness can't
2 step down and be excused at this time while we deal with the
3 exhibits?

4 MR. KINNER: Not from the United States, Your Honor.

5 MR. WEBB: No, I have no objection.

6 THE COURT: Mr. Robertson, you may be excused. Thank
7 you.

8 And let me deal with the objections now. The
9 government is moving in what at this point?

10 MR. KINNER: Your Honor, we would move the list of
11 exhibits that we supplied with -- that we supplied with the
12 notice of Mr. Robertson's testimony.

13 And whatever exhibits we used -- I think during the
14 course of our examination we used some of -- we used some of
15 defendants exhibits, and we would also move those that we used
16 during the course of our examination.

17 THE COURT: Is it fair to say that the major objection
18 voiced by defendants is to the admission of the staff committee
19 report of the Waxman Committee?

20 MR. FREDERICK: Your Honor, for the record, Tom
21 Frederick representing the Philip Morris defendants.

22 That's a fair statement. Your Honor, there are also
23 some other hearsay objections to documents that I would consider
24 significant objections, but certainly the staff committee report
25 is a major one.

1 THE COURT: Well, let me deal with the staff committee
2 report first because that, unlike a lot of the issues raised,
3 actually had some law on it.

4 I don't want people to repeat what's in their papers.

5 Mr. Kinner, do you want to add anything at all?

6 MR. KINNER: The only point we would make, Your Honor,
7 is that we believe that the staff committee report itself is
8 admissible. And we also moved the exhibits that are
9 specifically referenced in the footnotes to the staff
10 investigation.

11 We have seen the defendants use the three letters from
12 Exhibit 31, which is the final exhibit of the staff report, in
13 their examination.

14 So from a standpoint of completeness we believe the
15 staff report -- the staff investigatory report itself is
16 admissible. It doesn't attempt to reach a conclusion. It's not
17 politically motivated. It's authorized by law.

18 And then there are the attached exhibits, which we
19 moved as a matter of completeness, and indeed the defendants
20 used the responsive letters that they wrote to the committee
21 during their examination of Mr. Robertson.

22 So we tried to present a balanced -- I hesitate to say
23 fair and balanced, given the -- but in our view we tried to
24 present the report and a fair and balanced view of all of the
25 documents that had been noted specifically by Congress -- or by

1 the staff in the report.

2 MR. FREDERICK: Your Honor, briefly.

3 The documents were used, first of all, we are
4 responding to their written direct examination of Mr. Robertson.

5 Second, they were used to lay a foundation for
6 questions asked of Mr. Robertson based on that examination. And
7 the point of the objection is clearly they cannot be offered for
8 the truth of the matter asserted. But the staff committee
9 report itself states on page 3 it doesn't reach any final
10 conclusions. There are no findings of fact whatsoever in that
11 report.

12 So to the extent it's being offered under some public
13 record exception it doesn't come in just for that reason alone,
14 putting aside the lack of guarantees of trustworthiness related
15 to the report.

16 So it clearly cannot come in, and there are also
17 witness statements Mr. -- the counsel for the government just
18 referenced that are clearly hearsay statements. They were used
19 to lay a foundation for questioning, but they are certainly not
20 admissible on their own.

21 THE COURT: Enough, Mr. Frederick.

22 Mr. Frederick: Thank you.

23 THE COURT: The staff report is not going to come in.

24 Number one, it has no findings of fact. So, as
25 Mr. Frederick said, for that narrow reason it doesn't come in.

1 It doesn't fit within the exception to the hearsay rule. It is
2 pure and unadulterated hearsay.

3 Judge Flannery wrote an extremely thoughtful opinion,
4 perhaps a little more candid than most of us write these days,
5 in *Pierce vs E.F. Hutton Group* which is at 653 Fed Supp 810,
6 emphasizing in no uncertain terms how partisan congressional
7 documents are.

8 I think I can take judicial notice of the fact that, if
9 anything, congressional life in Washington has only become more
10 partisan over recent years.

11 Certainly the Waxman report has had much controversy
12 about it, but that's certainly not the basis of my ruling. The
13 fact of the matter is it is pure hearsay. There were no
14 findings of fact. And it is not particularly -- or let me say,
15 not sufficiently reliable and trustworthy to take it outside of
16 any of the ordinary rules of evidence.

17 I have no independent knowledge of whether that staff
18 did a thorough job or a not thorough job. It's certainly not an
19 adjudicatory body.

20 Sometimes staff reports are for the purpose of getting
21 press releases or alerting the public or satisfying interest
22 groups. I'm not saying any of that was true here, but what I am
23 saying is that it doesn't meet any of the basic rules applicable
24 to admission of evidence.

25 And in terms of the questioning that was done by

1 Mr. Webb about that staff report, I clarified with him that
2 questioning was because at that point there had been certainly
3 substantial questioning by the plaintiff. The defendants didn't
4 know what way I was even leaning, no less how I was going to
5 rule on it, and it was protective questioning and certainly not
6 questioning that waived the making of this objection.

7 That exhibit doesn't come in. I'm not overly persuaded
8 at this point about any of the other objections. But,
9 Mr. Frederick, I'll hear from you and you may be more specific
10 than you were in your papers. So go ahead.

11 MR. FREDERICK: Your Honor, just briefly, and I don't
12 want to belabor the point. There are some lengthy objections,
13 some of which we withdraw, we withdraw at this time relating to
14 the authenticity.

15 Once we got the witness's testimony, we understood what
16 the document was. There's no reason to object to it. I don't
17 know if you want me to just provide a list as to those.

18 THE COURT: I do.

19 MR. FREDERICK: As to the others, briefly.

20 There are statements offered from the congressional
21 proceedings from Mr. Simmons, Mr. Wulchin, and Mr. Seckler that
22 are obvious hearsay.

23 THE COURT: From the congressional report.

24 MR. FREDERICK: No, Your Honor, I'm sorry. They were
25 submitted to the subcommittee.

1 THE COURT: Oh, those definitely do not come in.

2 MR. FREDERICK: I'll read off the exhibit numbers if
3 you would like.

4 THE COURT: Let me make sure I haven't missed an
5 argument. Mr. Kinner.

6 MR. KINNER: No. I was going to say that I understood
7 Your Honor's ruling then would apply to both the staff report
8 itself and the -- I believe it's 31 exhibits that are referenced
9 in the staff report.

10 THE COURT: It would, unquestionably.

11 MR. FREDERICK: Thank you, Your Honor. And those are
12 the only issues I need to highlight, Your Honor.

13 THE COURT: I thought we could take care of it pretty
14 quickly.

15 Mr. Kinner.

16 MR. KINNER: Your Honor, I'm not sure what the status
17 is with regard to joint defendants' exhibits that they used
18 today, whether they were moving their admission or whether they
19 were --

20 THE COURT: Other than those connected with the staff
21 report, which don't come in, are you moving any others in?

22 MR. WEBB: I am, Your Honor. The process I had been
23 following with the other witness I've been examining, I haven't
24 stopped to offer them one at a time and I then have been
25 submitting a list to the court of what I'm offering.

1 With this particular witness, I don't want to offer any
2 of the submissions to the Waxman Committee that I did have the
3 witness identify as you said as a protective measure, so I'm not
4 offering those.

5 But I believe every other exhibit that I marked, the
6 joint defense exhibits that I've marked I am offering into
7 evidence, although I don't mind -- what I did the last time with
8 Mr. Simmons is I went back and looked at it and then gave to
9 Your Honor a list so that we -- and then the government let me
10 know whether they objected or not. Is that process okay?

11 THE COURT: That's fine. That's fine.

12 I think it may be more productive, because when
13 Mr. Kinder looks at the list you may find you don't have a
14 problem with them.

15 I believe that now concludes all matters in terms of
16 Mr. Robertson's testimony. And I see Ms. Hightower looking at
17 the exhibit list.

18 You will get a list from the government of all the
19 exhibits coming in. You will get a list of proposed exhibits
20 from the defendants. And then we will hear back from the
21 government as to whether there's any objections to them.

22 MR. KINNER: Thank you, Your Honor.

23 THE COURT: Let me just get all my papers together,
24 everybody.

25 Now, Dr. Schwartz is going to be the government's next

1 witness, am I correct?

2 MS. EUBANKS: That's right, Your Honor.

3 THE COURT: Okay.

4 MS. EUBANKS: That's correct.

5 THE COURT: Do you want to start him now or do you want
6 to take a lunch break?

7 MS. EUBANKS: I believe the -- the witness is here,
8 Your Honor, and, if possible, we could start now.

9 THE COURT: How long do you think his direct will be?

10 MS. EUBANKS: 15, 20 minutes.

11 THE COURT: Oh, well, then maybe we can get through his
12 direct before the lunch break and then we will really know where
13 you're going.

14 Your next witness after that will be Ms. Blackie; is
15 that right?

16 MS. EUBANKS: That's correct, Your Honor.

17 THE COURT: We are certainly going to get to her this
18 afternoon, I believe.

19 MS. EUBANKS: It depends obviously on the
20 cross-examination of Professor Schwartz.

21 (Pause)

22 MS. EUBANKS: Your Honor, we are -- we went into the
23 hallway to get the witness. He is here this morning. We will
24 be able to start as soon as he enters the courtroom. If we
25 could just have a moment. Thank you.

1 THE COURT: And would counsel please identify yourself
2 for the record?

3 MS. GREIF: Good morning, Your Honor, my name is
4 Michele Greif for the United States.

5 I would like to call to the stand Sorell Schwartz.

6 THE DEPUTY CLERK: Please remain standing and raise
7 your right hand.

8 SORELL L. SCHWARTZ, Government's witness, SWORN

9 THE DEPUTY CLERK: You may be seated.

10 DIRECT EXAMINATION

11 BY MS. GREIF:

12 Q. Good morning, Professor Schwartz. My name is Michele Greif.
13 We met this morning for the first time; is that correct?

14 A. That's correct.

15 Q. Would you state your full name for the record, please?

16 A. Sorell L. Schwartz.

17 Q. You are here today pursuant to a subpoena from the United
18 States; correct?

19 A. That's correct.

20 Q. The week before last, did you receive a written direct
21 examination that was written in a question and answer format?

22 A. I did.

23 Q. And who provided that document to you?

24 A. It came through my attorney's office.

25 Q. Did he e-mail it to you?

1 A. Yes.

2 Q. Was that the first time that you had seen it?

3 A. That's the first time, yes.

4 Q. And who is your attorney?

5 A. Mark Cummings.

6 THE COURT: Is Mr. Cummings present, just so I know?

7 MS. GREIF: Yes, Your Honor.

8 MR. CUMMINGS: Right here, Your Honor.

9 THE COURT: Thank you.

10 BY MS. GREIF:

11 Q. The week before last, the week that you received the United
12 States' testimony, your testimony, proffered testimony, you made
13 some changes to that document; correct?

14 A. I did.

15 Q. And that was done by adding italicized responses to -- in
16 place of responses that you chose to modify?

17 A. I caused that to be done. Actually, I sent the changes that
18 I wanted made to the attorney, and I think somebody in the
19 attorney's office did the actual editing.

20 Q. And then was that document sent back to you with your
21 responses?

22 A. It was sent back to me and then I commented on a number of
23 typographical errors.

24 Q. So you reviewed it and sent your comments back?

25 A. I did. Well, I didn't send comments back. I conveyed them

1 by telephone.

2 Q. And all of your comments were the type -- were limited to
3 typographical errors; correct?

4 A. After my initial corrections -- after my initial revision,
5 yes.

6 Q. And that resulted in a document that is entitled Corrected
7 Testimony of United States Written Direct Examination of Sorell
8 L. Schwartz Submitted Pursuant to Order 471; correct?

9 A. That is correct.

10 THE COURT: I do have a document that is entitled
11 Supplemental Corrected. Are you getting to that?

12 MS. GREIF: Actually, I will explain that now.

13 BY MS. GREIF:

14 Q. After you reviewed the document and notified -- what was
15 initially filed with the court was the corrected testimony of
16 the United States' written examination -- written direct
17 examination of Professor Schwartz, and then you reviewed it and
18 you found some typos and notified your attorney's office who
19 resubmitted the written direct examination, so that was refiled
20 last Wednesday.

21 And so now it's entitled Supplemental Corrected
22 Testimony of United States' Written Direct Examination of Sorell
23 L. Schwartz Submitted Pursuant to Order 471A.

24 And, actually, I'd like to show you that document.

25 So you have the document in front of you?

1 A. Yes, I do.

2 Q. I have just gone ahead and jotted page numbers on the bottom
3 of it in my own handwriting, just for ease of reference here
4 today.

5 A. I don't see any page numbers.

6 Q. There are no page numbers?

7 MR. WEBB: I have no objection of putting page numbers
8 on it because it's going to be hard for us not to ask questions.
9 So, whether the witness or counsel, however you want to do it, I
10 have no objection to that.

11 THE COURT: I did it on about half of mine and then I
12 forgot to continue.

13 MS. GREIF: I have here -- may I approach the witness?

14 THE COURT: All right.

15 BY MS. GREIF:

16 Q. If you would just take a look at it and confirm that that is
17 your testimony.

18 A. Yes, except they misspelled my name.

19 Q. I was going to note that, also. Your name has one L, your
20 first name?

21 A. No. It's one R and two Ls.

22 Q. One R and two Ls?

23 A. Don't worry. That's the same way they misspelled it on my
24 bar mitzvah certificate.

25 THE COURT: But not on your Ph.D.; is that right?

1 THE WITNESS: Very definitely not on that.

2 BY MS. GREIF:

3 Q. Professor Schwartz, do you adopt this corrected testimony as
4 your testimony?

5 A. I do, other than in review there was one -- there was one
6 answer that I didn't catch. And do you want me to tell you what
7 that is?

8 Q. Yes, please.

9 A. On page 17 where it says -- the third question down -- "Were
10 all of the participants scientists?" The answer to that
11 question should have been yes.

12 Q. Okay.

13 MR. WEBB: I don't know if mine are numbered the same
14 way then. How does that page begin?

15 MS. GREIF: This is the one he changed.

16 MR. WEBB: I'm fine. Thank you.

17 BY MS. GREIF:

18 Q. Okay. So you adopt it?

19 A. With that change.

20 Q. Okay.

21 MS. GREIF: Your Honor, I offer this written direct
22 examination of Sorell L. Schwartz as corrected by him pursuant
23 to Order 471A into evidence at this time.

24 THE COURT: It will be accepted.

25 BY MS. GREIF:

1 Q. Now, Professor Schwartz, I'm going to ask you some questions
2 about just a few of the modifications that you made on your
3 direct testimony.

4 If you would just turn to page 4. At the top, the
5 first question and answer there, we're discussing -- you were
6 discussing Exhibit 62245, and I'll just show you that exhibit.

7 This is a letter dated October 11, 1984, from Edward
8 Dunkelberger of Covington & Burling to you as CEHHT director.
9 And in the letter, your first paragraph -- the second half of
10 the first paragraph, you agree to review literature in order to
11 assess the author's positions on smoking and health for the
12 tobacco industry and to prepare a summary.

13 And in your testimony you stated that you have no
14 recollection of having done that, and rather you recalled that
15 you used a different approach to identify potential consultants.

16 That's your testimony; correct?

17 A. Yes, ma'am.

18 Q. What was the approach that you used to identify the
19 potential consultants?

20 A. We sent out literature to them. We first identified them
21 based on the scientific literature, people who worked in the
22 area. We sent out literature to them without identifying who my
23 particular client was and then we asked for responses from them.

24 And then I don't know the number, total number, that we
25 sent, but all but one or two of them had responded to having

1 some question about the causal inferences that were made. It's
2 somewhat hazy.

3 After that, I then gave the names of everybody I
4 contacted with all their responses to the -- to Covington and
5 then they indicated to me which ones they would like to talk to.

6 And I contacted them and arranged for them to meet
7 with, I guess it was John Rupp, it may have been Ed
8 Dunkelberger. It may have been both. I don't recall.

9 Q. If you would turn to page 6.

10 THE COURT: Before we do that, Professor Schwartz,
11 would you look at the next to the last question and answer,
12 there's a word there that is either a typo or that I'm not
13 familiar with.

14 You were looking for scientists to support the tobacco
15 industry's view that second-hand smoke did not present a danger
16 to humans; correct? That is not an accurate portrayal. And
17 then?

18 THE WITNESS: Dissentient view.

19 THE COURT: The dissenting --

20 THE WITNESS: Which is another expression for
21 dissenting.

22 MS. GREIF: It's in the dictionary. I looked it up.

23 THE WITNESS: Thank you.

24 BY MS. GREIF:

25 Q. Professor Schwartz, in your third answer down -- in the

1 third answer down to the third question we're talking here about
2 who was -- about the scientific witness team. And in the second
3 sentence you state, you state: In about 1988 our group of
4 academics disengaged from providing testimony because of
5 conflicting views with TI.

6 Now, the group of scientists that you're referring to
7 here, is that by IAPAG?

8 A. Yes, as I knew them, not as indicated in the exhibit.

9 Q. That was discussed later in your testimony?

10 A. That's correct.

11 Q. I'm going to ask you about that in a little bit. Okay.

12 So what were these conflicting views that you referred
13 to?

14 A. That the -- that TI wanted us to take a more advocative
15 position.

16 Q. What do you mean by that, advocative?

17 A. Well, our charge that we received from Covington originally
18 was essentially to have an open discussion of the science. And,
19 for example, when we testified before a legislative hearing we
20 made it quite clear that we were not testifying as to the
21 legislation, we were testifying as to the findings on which the
22 legislation was based, meaning the scientific studies. And
23 that -- that was our position.

24 As time went on we had some conflicts with the TIPR
25 people, not the state association people who were quite -- quite

1 willing to go along with your quirks, but with the PR people who
2 felt that we were not being cooperative enough.

3 Q. The PR people wanted you to be more advocative?

4 MR. WEBB: Your Honor, I going to object to the form of
5 the question. If we're talking about some conversation or
6 event, there's no foundation laid for a conversation between
7 this witness and the PR people. So I object to the form of the
8 question.

9 THE COURT: You may follow up.

10 BY MS. GREIF:

11 Q. Did you have discussions with the PR people?

12 A. Yes.

13 Q. Do you recall who these people were?

14 A. I believe one was Susan Stuntz and another, Pete -- I think
15 it's Sparber, but I'm not sure. They were -- I think Sparber
16 was Stuntz's boss or vice versa, I don't recall, but I did -- I
17 did have conflicts with them.

18 Q. They were the people who urged you to be more advocative?

19 A. They were urging me to be more advocative, and in
20 correspondence I saw they were also urging Covington that we
21 should be more advocative, which was not passed on to me by
22 Covington. In other words, that did not come from Rupp who I
23 worked with, it came -- it came from TI.

24 Q. Would you please turn to page 8 of your direct testimony?
25 And the bottom, your last -- the second to last question, but

1 your last answer, and actually this is where you were discussing
2 the list of IAPAG members where you took issue with the fact
3 that -- you took issue with the fact that Gray Robertson was
4 listed as one of the members.

5 A. Well, I don't take issue because the stationery was from the
6 Center. But I don't know the pedigree of that particular
7 document because, in reality, Gray Robertson was specifically
8 not included as an IAPAG member. I had been requested by either
9 TI or Covington to put him on and I declined to do that.

10 Q. Why did you resist Robertson as a member of IAPAG?

11 A. Well, for the most part, that people on our panel were
12 academics who had published in the areas and so forth like that.
13 This was -- his particular area of interest or expertise didn't
14 fit with what we were trying to do with the IAPAG, which was to
15 have a group of academics who had published -- who had published
16 in the scientific literature and who could review scientific
17 literature and who could discuss these things. He just didn't
18 fit that particular pattern. Plus he had direct
19 relationships -- I believe he came to me through TI and maybe
20 even through Covington -- to Covington through TI, so, again it
21 just didn't fit in with what we were trying to do.

22 Q. Robertson didn't have the background, you're saying, to
23 assert any sort of scientific views; is that right?

24 A. With respect to our group, yes.

25 Q. And I just have, on page 16, a typo. I think what appears

1 to be a typo. I just wanted to clarify it.

2 At the very top, there's an answer and in the last
3 sentence of your answer, it reads, "When I appeared publicly, I
4 did so to present the science as I saw it." That's not the
5 question.

6 "TI expected me and other" -- it says "MAG member to do
7 whatever they said because they were paying the bill." Should
8 that read IAPAG member?

9 A. That should read IAPAG. When I corrected the -- when I
10 received -- there were a number of those, and I found out what
11 had happened is that apparently someone had scanned it and they
12 didn't do a good job of editing the scan, the -- you know, the
13 optical recognition software.

14 Q. They appear to be typographical errors.

15 A. I think they op-scan errors. I don't think anybody really
16 typed them in.

17 MS. GREIF: I have nothing further.

18 THE COURT: Who will be the doing the questioning?

19 MR. WEBB: I will, Your Honor.

20 THE COURT: Mr. Webb, give me an estimate.

21 MR. WEBB: I think originally I had said two to three
22 hours. I think probably two hours is more like it.

23 THE COURT: All right. Well, hopefully, we will get to
24 Dr. Blackie this afternoon. Hopefully.

25 Let's take a lunch recess now, everybody, and let's

1 come back at five of 2:00, please.

2 (Lunch recess began at 12:36 p.m.)

3 INDEX

4 WITNESS: PAGE:

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6 CROSS-EXAMINATION 3463
7 REDIRECT EXAMINATION 3550

8 SORELL L. SCHWARTZ
9 DIRECT EXAMINATION 3571

10 *****

11 *****

12 CERTIFICATE
13 I, EDWARD N. HAWKINS, Official Court Reporter, certify
14 that the foregoing pages are a correct transcript from the
15 record of proceedings in the above-entitled matter.

16 Edward N. Hawkins, RMR

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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.
	.	October 25, 2004
	.	
Defendants.	.	
.	

VOLUME 18
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 AFTERNOON SESSION, OCTOBER 25, 2004

2 P R O C E E D I N G S

3 (1:56 p.m.)

4 THE COURT: Good afternoon, everybody. Counsel, I hate to
5 inconvenience people more than they need to be inconvenienced.
6 Our next witness, I know, is coming or has come, obviously, from
7 across half the world or a quarter of the world. If there's not
8 a realistic possibility of getting to that person this afternoon,
9 then we ought to tell her to come at 9:30 tomorrow morning. You
10 said two hours, Mr. Webb, right?

11 MR. WEBB: That's my realistic assessment. I mean, I'll
12 get up and do it as fast as I can, but that's probably a fairer
13 estimate.

14 THE COURT: And then there has to be a little redirect.

15 MR. WEBB: There does.

16 THE COURT: It sounds to me like we're pretty safe. I
17 don't want to lose time either, but what does the government
18 think?

19 MS. EUBANKS: Well, Your Honor, we leave that up to you.
20 We'd be prepared to start with her this afternoon, but it is a
21 long distance to travel and she may want to start fresh in the
22 morning. So we leave that to you. We're prepared to start even
23 with 15 minutes and maybe going through with the procedure with
24 the written directs as we have. Whatever's your pleasure.

25 THE COURT: How long do you think your direct of her will

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1 be?

2 MS. EUBANKS: I think it will be at least three hours,
3 Your Honor.

4 THE COURT: Your direct?

5 MS. EUBANKS: Yes.

6 THE COURT: I'm not really surprised. It was a great deal
7 of information in that direct.

8 MR. BERNICK: David Bernick. I would appreciate Your
9 Honor's focus on the convenience of Dr. Blackie. We really do
10 and will convey that, obviously, to Dr. Blackie. It will be very
11 meaningful to her, because she's faced this circumstance before.
12 She has to be out of the courtroom at 3:00 tomorrow afternoon in
13 order to be able to get back. She's just -- she'll be happy to
14 explain it to the Court. I'm not going to explain it to the
15 Court, because I think she can do a better job.

16 In any event, I will have a fairly significant examination
17 of Dr. Blackie, and here's what I would propose -- and maybe we
18 can think about it and --

19 THE COURT: You better give me the abbreviated version of
20 her reasons so I can at least start absorbing them.

21 MR. BERNICK: She has a series of commitments to people
22 with whom she has relationships, professional relationships, in
23 Scotland, and she was under the impression she was actually going
24 to be put on on a date certain, today, which was the undertaking
25 that was made to her, that's why her testimony was shifted.

1 THE COURT: And everybody ran longer and Professor
2 Schwartz was kept postponed and postponed.

3 MR. BERNICK: I understand that, but from her point of
4 view she made all of these arrangements significantly in advance
5 in anticipation of being able to testify here this morning, in
6 which case getting out of here by tomorrow morning would not have
7 been really an issue at all. I have a proposal that I think is a
8 fair proposal, which is that first of all, if it's possible to
9 start with her this afternoon, I'm sure, while it's not ideal,
10 she would be more than happy to come in and start this afternoon.
11 Secondly, I think that at the least we'll finish the direct
12 examination and my cross-examination in advance of that 3:00 time
13 tomorrow. She's being called as part of our case, and she will
14 testify to a series of matters as part of our case. She's one of
15 our designated witnesses.

16 THE COURT: So this is her testimony for you?

17 MR. BERNICK: No, this is her testimony -- basically what
18 the government has done in the direct examination of her as part
19 of their case is to focus on ETS.

20 THE COURT: So you're bringing her back?

21 MR. BERNICK: We're bringing her back to talk about other
22 things.

23 THE COURT: Well, then I'm not going worry about you,
24 Mr. Bernick.

25 MR. BERNICK: Well, what I was going to suggest that is

1 maybe you worry about me just a little bit in this respect: If
2 the government takes her through the examination on ETS, while
3 the matter is fresh in Your Honor's mind, I really do think it
4 makes sense to have her complete talking about ETS. If the
5 government is unable to get in any redirect, that's fine. If we
6 approach the witching hour, we know she's going to be back, the
7 government will have all the time to figure out what they really
8 need to ask her about with respect to ETS, and when she comes
9 back she can finish up whatever stub there is on her recross and
10 then testify about a whole series of unrelated matters which
11 have to do with her other work and her other involvement in
12 mainstream smoke issues. And I'm not going to pursue any of
13 those issues in connection with my examination of her tomorrow at
14 all.

15 So we would be able to finish up at the ETS, with the
16 exception, perhaps, of some of my examination possibly, and
17 then possibly whatever recross might be appropriate, although
18 given the extensive nature of the direct examination, I don't
19 believe it will be very lengthy, and then we'll bring her back
20 and she can finish that up and also take care of her own
21 testimony.

22 THE COURT: Can I hear from the government?

23 MR. BERNICK: That's a fair approach.

24 MS. EUBANKS: Well, Your Honor, Dr. Blackie is an expert
25 witness for defendants. I don't know what the situation is with

1 respect to her commitments, but she certainly is a party, she
2 worked for both BATCo and she was employed by Brown & Williamson
3 as well. The government would like to finish its examination of
4 this witness not just while it's fresh on the witness's mind, but
5 to complete any redirect we might have while the witness is here.

6 This is a matter that we took up last week and received
7 word back from the Court that we were going to, in terms of the
8 order of witnesses, complete Professor Schwartz, who had been on
9 hold on a number of occasions, and then move to her. She's a
10 party and we all have other commitments. She's come a long
11 distance, but before the government rests, before the
12 presentation of the defendants' case, we certainly would like the
13 opportunity to explore all areas with this witness before we turn
14 to Mr. Rupp. I mean, we have carefully selected the testimony
15 that we wanted to advance through these witnesses and believe
16 that completion of that in an orderly fashion is necessary.

17 I'll get through the direct as quickly as possible. I
18 won't try to recover areas that she has addressed, but it is
19 lengthy, and it will take some time. I don't like the idea of
20 waiting until an expert comes, because as Mr. Bernick properly
21 notes she is an expert in the area of ETS, she isn't offering
22 those opinions in this case, so to disjunct the testimony that
23 way until such time as she comes back in the defendants case on
24 the schedule that they want really doesn't serve the interests of
25 this Court making determinations in, and it's really not

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1 consistent with the discussion that we had about the treatment of
2 the live testimony and moving through with the case. We'd like
3 to complete it here. We're prepared to stay late and to start
4 this afternoon or whatever is necessary to get it completed in
5 the order that it's been scheduled Your Honor. It's very
6 important.

7 MR. BERNICK: Only one footnote with respect to her status
8 as an expert. She was -- she was and is tendered as an expert on
9 mainstream issues, and the real reason for that is that she
10 doesn't work for us, she's not an employee, she hasn't been an
11 employee for a while. The real reason for that is to make sure
12 she has the freedom, under the rules, to testify to her opinions.
13 So she is not some hired gun who goes around testifying all over
14 the country as a paid expert. She may get compensation for her
15 appearance, but she is not somebody who is completely under our
16 control and, indeed, I had some real concerns that --

17 THE COURT: But she's under my control now.

18 MR. BERNICK: I understand that, and Your Honor will
19 not --

20 THE COURT: And I don't mean that fliply or meanly, but I
21 don't know why we should bend all of the rules for this witness.
22 I certainly weighed, when my law clerk came to me and asked who
23 should go first, Professor Schwartz or Dr. Blackie, I weighed the
24 fact that she was coming to this country, but then I weighed the
25 fact that he had been waiting a while and we worked out the order

1 of witnesses, et cetera, and I let everybody know what the order
2 was. It wasn't perfect, there's never perfect solutions to
3 anything, but I figured maybe she could use another half a day to
4 rest up from a long flight anyway.

5 But she's going to have to be available. She really will.

6 MR. BERNICK: And I understand that and we'll obviously
7 abide by whatever it is --

8 THE COURT: I'll sit, reluctantly everybody, until 5:00
9 today, we'll start her direct.

10 MR. BERNICK: We may well then finish.

11 THE COURT: I don't think we will, but we'll see. We'll
12 do our best.

13 MR. BERNICK: Thank you, Your Honor.

14 THE COURT: All right. Let's proceed with the cross of
15 this witness, please.

16 MR. WEBB: Thank you, Your Honor.

17 CROSS-EXAMINATION OF SORELL SCHWARTZ

18 BY MR. WEBB:

19 Q. Dr. Schwartz, my name is Dan Webb. It's a pleasure to
20 meet you. I have not had the pleasure to meet you before. I
21 represent Philip Morris and I'm going to ask you some questions
22 about your testimony.

23 As you've already told the Court, you retained your own
24 attorney to represent you in connection with your testimony and
25 his name is Mark Cummings; is that correct?

1 A. Yes, that's correct.

2 Q. Okay. And -- let me just go into an issue at the
3 beginning and move on from it. The government is claiming that
4 you are an adverse witness, that is, you are adverse to the
5 government in this case and in favor to the tobacco companies.
6 Do you agree with that assessment?

7 MS. GREIF: Objection, your Honor, defendants have agreed
8 to this -- that Professor Schwartz is adverse to the United
9 States.

10 THE COURT: Well, they've agreed as a legal matter. He
11 certainly corrected his direct testimony and said he did not want
12 to be viewed as an adverse witness to the government. I must
13 say, I didn't really know what that meant, and I think he should
14 be given an opportunity to answer that question.

15 MR. WEBB: The reason I ask that is because I want to give
16 him a chance -- you may answer the question.

17 THE WITNESS: Could you repeat the question?

18 BY MR. WEBB:

19 Q. Yes. I apologize. The government claims that you're
20 adverse and that you're adverse to the government and more
21 favorable to be inclined to be predisposed in favor of the
22 defendants, the tobacco companies, do you agree with that
23 assessment?

24 A. I do not.

25 Q. And just briefly explain to the Court why, and I'll move

1 on.

2 A. Why I didn't want to be an adverse witness or why I'm not
3 going to be more favorable to the tobacco companies?

4 Q. Both.

5 THE COURT: You may have met your match, Mr. Webb.

6 MR. WEBB: I probably have.

7 THE WITNESS: Well, in my deposition I believe the -- at
8 the end of the deposition I was asked by the government's
9 attorney, do you have anything else to say, and my response went
10 something to the effect that I haven't a dog in this fight, I
11 came here with the idea of cooperating, but you've got to ask me
12 the question. I sort of felt that when I got my subpoena, I
13 called the Justice Department, or the name that was on the
14 subpoena, left a voicemail message saying I've got the subpoena,
15 here's where I am, if you want to talk to me, here's my number.
16 I told my attorney also to let the government know. I
17 specifically said I did not want to be interviewed or discuss it
18 with the tobacco industry because I thought that -- there's
19 nothing that I could tell them that they didn't already know that
20 I know.

21 So, I have an interest in science and law, and I've
22 published on it, and maybe on that basis, or maybe on the fact of
23 being a taxpayer, but I just felt that as long as the government
24 was going through the effort of calling me as a witness, that
25 they should get as much help out of me as they could, but they

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1 didn't, and that's why I said I didn't -- I objected to being an
2 adverse witness.

3 BY MR. WEBB:

4 Q. Do you actually view yourself as being independent from
5 both sides, just answering questions as an independent witness?

6 A. That's how I view myself, yes, sir.

7 Q. Okay.

8 A. And that's what I intend to do.

9 Q. And by the way, just to show that independence, am I
10 right when you gave your deposition in this case, you had your
11 own lawyer represent you that you had selected to be your
12 lawyer; is that correct?

13 A. That's correct, Mr. Sheer -- I mean Mr. Cummings.

14 Q. Mr. Cummings, right?

15 A. Yes.

16 Q. And did you give any answers in that deposition, or do
17 anything to indicate that you were adverse to the government
18 during your deposition?

19 A. I guess the -- that's up to the government. I
20 certainly -- certainly nothing that I intended as a preconceived
21 notion, but whether it was adverse or not is really's the
22 government's interpretation, not mine.

23 Q. Okay. Let's go through the written direct examination
24 that you corrected that you've identified as your testimony in
25 this case. Is that something that you worked on as a matter

1 between you and your lawyer without any input or involvement by
2 the tobacco company defendants?

3 A. It wasn't even between my lawyer and me, it was something
4 I worked on myself.

5 Q. Fine. And you did not have any tobacco company
6 representatives working with you as you made the corrections,
7 did you, sir?

8 A. I did not.

9 Q. Now, Doctor, a good part of my questions will be based on
10 a deposition that you gave in this case on May 28th, 2002. Do
11 you generally recall that deposition?

12 A. Generally.

13 Q. Have you had a chance, at all, to review it before you've
14 testified here today?

15 A. I have not.

16 Q. Okay. If I ask you a question about what you said in
17 your deposition and if you want to see it, I'll make sure I
18 provide it to you.

19 Now, as I read over your direct examination, Doctor, it
20 wasn't always entirely clear to me exactly what you did for the
21 tobacco industry and when you did it and so what I would like to
22 do at the outset of your testimony is to kind of walk through in
23 a chronological way for the Court the events that happened in
24 connection with your involvement as a consultant for the Tobacco
25 Institute which appears to be the focus of your direct

1 examination. So, let me start at the beginning as to how you
2 first became involved with the Tobacco Institute on ETS related
3 issues.

4 As I understand it from your deposition, in 1984 you had
5 had some contact with the law firm of Covington & Burling in
6 D.C. because you were working on a project unrelated to tobacco,
7 but you had gotten to know a lawyer there named Ed Dunkelberger;
8 is that correct?

9 A. That's correct.

10 Q. And because you had gotten to know Mr. Dunkelberger to
11 some extent, in 1984 he called you up on the telephone and asked
12 you if you would be interested in consulting for the Tobacco
13 Institute on the subject matter of environmental tobacco smoke;
14 is that correct?

15 A. Whether I would be consulting, I don't know whether he
16 mentioned Tobacco Institute or not, but yes, that's the essence
17 of it, is correct, yes.

18 Q. And you told -- let me actually back up. At least the
19 essence of it was you would be providing some services to the
20 tobacco interests on the ETS issue?

21 A. I was asked that, yes.

22 Q. And you told Mr. Dunkelberger that you did not believe
23 you would be interested because you had heard that ETS can cause
24 some respiratory disease and you really didn't want to become
25 involved in the matter at that point; is that correct?

- 1 A. That's correct.
- 2 Q. And you told that to Mr. Dunkelberger and he said fine
3 and that was the end of the matter, at least at that point; is
4 that fair to say?
- 5 A. Dunkelberger, yes.
- 6 Q. Okay. Now, as I understand it, after the conversation
7 that you had with Mr. Dunkelberger, you had a conversation with
8 one of your scientific partners who's name is Dr. Witorsch; is
9 that correct?
- 10 A. That's correct.
- 11 Q. And he's a leading authority on pulmonary diseases; is
12 that correct?
- 13 A. He's a pulmonologist. I guess he would like to be called
14 a leading authority, I don't know if he is, but he's a
15 pulmonologist.
- 16 Q. Did you consider him at least a colleague that you
17 believed had at least a reasonable amount of knowledge in the
18 area of pulmonary medicine?
- 19 A. I considered him, and still consider him, a very
20 competent colleague in pulmonary medicine.
- 21 Q. And you talked to Dr. Witorsch about a study that had
22 related to ETS causing respiratory disease, which study was
23 conducted by two researches by the name of White and Froeb; is
24 that correct?
- 25 A. Yes, he -- if I remember the conversation, I had said

1 that Mr. Dunkelberger called me and that I told him that I
2 didn't think we'd be interested, and that's when he said to me,
3 he says, you know, I just happen to read that White and Froeb
4 study and I really wasn't very impressed by it. Something to
5 that effect.

6 Q. I won't -- he used some slang terms, but spoke in a
7 failure derogatory term about the White and Froeb study?

8 A. I may -- you can show me that in my deposition. I don't
9 recall that.

10 Q. It's not important. Did he have negative views about the
11 White and Froeb study?

12 A. He did.

13 Q. And did he communicate those to you?

14 A. He did.

15 Q. And based on receiving that information from
16 Dr. Witorsch, did you contact Mr. Dunkelberger at Covington &
17 Burling and talk to him?

18 A. I did.

19 Q. And did you tell Mr. Dunkelberger at Covington & Burling
20 what you had found out, and did you tell him that you at least
21 were interested in at least considering pursuing the matter?

22 A. I did.

23 Q. And did you ask him to send materials to you on the
24 subject matter of ETS so you could review whatever studies
25 existed on the subject matter?

- 1 A. I did.
- 2 Q. And did he do that?
- 3 A. He did.
- 4 Q. Can you recall now, as best you can, what he sent you?
- 5 A. No.
- 6 Q. Was it a fair, large number of studies dealing with the
7 issue of ETS and the causation of lung cancer and respiratory
8 disease?
- 9 A. He sent me materials having to do with ETS and lung
10 cancer, ETS and respiratory disease. I couldn't begin -- I can
11 think of a couple, you know, one particular report that was at
12 issue at the time, and then another publication, but other than
13 that, I just can't begin to recall the papers sent.
- 14 Q. Was it a number of different studies?
- 15 A. I believe so, I believe so, but I'm only -- I was going
16 to say I can't swear to it, but I'm not being asked to swear to
17 it, so I can't tell you for sure.
- 18 Q. That's fair enough. Now, after reviewing the material,
19 did you then contact Mr. Dunkelberger again and agree to become
20 a consultant to tobacco interests in connection with ETS related
21 issues?
- 22 A. I don't think it was quite as straightforward as that. I
23 believe I suggested to him that we get to -- we identify a group
24 of people to review the studies, pretty much as I discussed in
25 my direct testimony this morning. And after I got back

1 responses from those people, that's when I thought, well, that I
2 would be interested. Had people come back and said, well, this
3 really looks pretty solid and so forth, I probably would have
4 taken my original position and backed off.

5 Q. That's fine. Let's me go through what happened, because
6 you and I never met and I may not totally have all the facts, so
7 I'm going to follow your lead.

8 You then contacted -- strike the question.

9 Did you then select a group of scientists that you felt
10 were qualified to look at the same material that you looked at so
11 you could get their viewpoints and opinions?

12 A. I did.

13 Q. And you were the one that made the decision as to who --
14 which scientists to contact; is that correct?

15 A. That's correct.

16 Q. And do you recall, now, approximately how many different
17 scientists you contacted?

18 A. Eight or ten, I'm not certain.

19 Q. And am I correct that you then interacted with those
20 scientists to see if there was a consensus in that group on
21 whether there was sufficient evidence or data to show a causal
22 link between ETS and lung cancer and respiratory disease?

23 A. Actually, I asked them to respond with their opinion
24 without interacting with me.

25 Q. And what happened?

- 1 A. They responded with their opinions.
- 2 Q. And am I correct that right down to the last person, they
- 3 all agreed that the scientific data did not show that ETS caused
- 4 lung cancer or other respiratory disease?
- 5 A. No, that's not correct.
- 6 Q. Do you recall testifying to that in your deposition?
- 7 A. If I testified to that in my deposition, it's not
- 8 completely accurate.
- 9 Q. Go ahead, what is your recollection?
- 10 A. Well, first of all, there were a couple of people who
- 11 thought that -- particularly a pediatrician who thought that
- 12 there was a particular danger to children. And nobody sent back
- 13 anything saying that they did not believe that ETS caused lung
- 14 cancer. The question is, had ETS been demonstrated to have
- 15 caused lung cancer, there's a difference between whether ETS has
- 16 carcinogens in it and, therefore, is theoretically capable of
- 17 causing cancer, and whether it had been demonstrated to have
- 18 caused it, and the view was that it had not been demonstrated to
- 19 have caused it.
- 20 Q. And was that a consensus that that group reached?
- 21 A. In the broadest term of consensus, yes.
- 22 Q. And that was somehow communicated to you?
- 23 A. Certainly, because I received the letters.
- 24 Q. Okay. Now, after you received that information, did you
- 25 then contact Mr. Dunkelberger to let him know that you would

1 agree to become a consultant?

2 A. Well, there was a step in-between that. When I -- after
3 I received these, I called the people back. At the time I had
4 not indicated to them who our client was, and I -- a not
5 insignificant number, if I recall, thought that I was working
6 for the Office of Smoking and Health, or the EPA, and so then I
7 indicated that the tobacco industry was the client and asked if
8 they -- I was going to intend to turn their name over if they
9 agreed to work. There were a couple of people who said they
10 didn't want to do work for the tobacco industry, but I guess
11 there were about in the final six or eight people who said,
12 sure, go ahead, that's when I contacted Mr. Dunkelberger.

13 Q. And what did you tell him when you contacted him?

14 A. I just said here's the group of people, their opinions
15 are this, and then -- well, that's what I told him.

16 Q. Okay. And what happened after that?

17 A. Then he wanted me to arrange to have them come into
18 Washington to be interviewed.

19 Q. And then what happened?

20 A. They came into Washington and were interviewed.

21 Q. And what was the result of that?

22 A. We formed this group Indoor Air Pollution Advisory Group,
23 called IAPAG.

24 Q. So the group called the Indoor Air Pollution Advisory
25 Group resulted from the process you've just described to the

1 Court; is that correct?

2 A. That's correct, that's all to the best of my
3 recollection.

4 Q. Okay. Now, -- and that group sometimes gets called by
5 its, initials I-A-P-A-G or IAPAG?

6 A. IAPAG, yes.

7 Q. Okay. Now, let me show you an exhibit referred to in
8 your direct examination as far as who the members were.
9 Could I have U.S. Exhibit 85522.
10 I'll give you a copy of it, sir.
11 Do you recognize that as the exhibit that you are
12 referencing in your direct examination?

13 A. Yes. Yes, it is.

14 Q. Okay. And go to -- there's a page in there. Could I --
15 if you go to, I think it's -- that first page there you start
16 listing various members of this group; is that correct?

17 A. Well, you're referring to me with the "you", and I'm not
18 certain. As I indicated in my testimony, direct testimony, I
19 don't believe I was the originator of this list because of
20 reasons I mentioned.

21 Q. And I'll come to that. I don't intend to quarrel with
22 that at all. I don't disagree with you. Let's explain to the
23 Court, the letter says: "Center for Environmental Health and
24 Human Toxicology." Do you see the letterhead there?

25 A. I do.

1 Q. Is that an organization that you had an affiliation with
2 at that point in time?

3 A. It was a consulting group that I had with Dr. Witorsch
4 and Dr. Balter.

5 Q. So the three of you operated as a consulting group under
6 this name; is that correct?

7 A. That's correct.

8 Q. And when had you formed that organization?

9 A. Um, either the end of '82 or the beginning of '83. I
10 think the end of '82 it was incorporated.

11 Q. Okay. And essentially what did that organization do?

12 A. It was intended to serve as a means of channeling
13 academic faculty/consulting modeled, strange enough, after the
14 Management Analysis Corporation, or something like that, of the
15 Harvard Business School. The idea of having a place where
16 academic faculty could channel their consulting activities.

17 Q. And just so it's clear in the record, this organization
18 called the Center for Environmental Health and Human Toxicology,
19 that organization was a different organization than this
20 organization called IAPAG that you had formed in connection with
21 your conversations with Mr. Dunkelberger; is that correct?

22 A. Well, it was essentially the parent of IAPAG.

23 Q. Okay. And the members of IAPAG, some of them -- I'm
24 going -- at least the first page that I have on the screen, are
25 those people that you contacted and asked to become members of

- 1 the IAPAG group?
- 2 A. They are.
- 3 Q. Did you consider all the people listed on that page to be
- 4 qualified to address the type of ETS issues that you were going
- 5 to address?
- 6 A. I did.
- 7 Q. Did you consider them to be well qualified?
- 8 A. Yes, I did.
- 9 Q. Now, the -- let's go to the next page. Now, you told us
- 10 this morning that even though Gray Robertson is listed on this
- 11 document on your letterhead, that's not accurate; is that
- 12 correct?
- 13 A. Gray Robertson was not a member of IAPAG.
- 14 Q. All right. And I don't think anyone disputes you on
- 15 that, so it's not an issue. He sometimes -- did he sometimes
- 16 appear on occasions at legislative hearings, et cetera, when you
- 17 or other IAPAG members may be present and he also was there?
- 18 A. To my recollection -- I believe so. To my -- yeah, I can
- 19 think of one in particular, so the answer is yes.
- 20 Q. Okay. Now, setting aside Mr. Robertson, who was not on
- 21 IAPAG. Are the other members listed here members of IAPAG?
- 22 A. On that page?
- 23 Q. On that page?
- 24 A. On that page, yes.
- 25 Q. And did you consider each and every one of them to be

1 qualified?

2 A. I did.

3 Q. You considered them to be well qualified to become

4 involved in ETS consulting issues?

5 A. I did.

6 Q. Now, that's on page 2; is that correct?

7 A. That's correct.

8 Q. Okay. Go to the next page. Now we're on page 3; is that

9 correct, Doctor?

10 A. That's correct.

11 Q. And the people you have listed there, were they members

12 of the Indoor Air Pollution Advisory Group?

13 A. Well, Weeks was, I believe, a friend of somebody -- some

14 regional TI person, and they had asked whether we would include

15 him in our meetings, and such like that, where we discussed the

16 science and orient him on the science. So he was not one of the

17 original people I chose, but on the other hand, after speaking

18 with him and the like, I agreed to let him, if you will,

19 tagalong with what IAPAG was doing.

20 Q. Okay. So the members -- the other names you have on this

21 page 3, were they members of IAPAG?

22 A. No, Myron Weinberg was someone who worked in parallel

23 with us. He was working -- he had a separate consulting

24 arrangement with, I believe, Covington and Shook-Hardy, if I'm

25 not mistaken, and he would go along to legislative hearings sort

1 of as a monitor to provide overall evaluations to us as to how
2 people did and so forth. It was a little bit of feather
3 bedding, but he -- I mean he's a bright guy, I don't mean to
4 imply that, that he wasn't, but he really was not one of the
5 members of IAPAG that I had selected.

6 Q. Okay. But in any event, someone in your organization
7 sent this list to Covington & Burling?

8 A. Somebody certainly did, either that or used our
9 stationery without permission.

10 Q. But you've now corrected who you believe to be the
11 members of IAPAG; is that correct?

12 A. Yes, to the best of my recollection.

13 Q. Now, the members of IAPAG that you selected and became
14 part of this group, as time went on, they did provide testimony
15 to legislative and governmental bodies in connection with the
16 science of ETS; is that correct?

17 A. Among other things, yes.

18 Q. Okay. Now, during the time period from 1985 to the fall
19 of 1987, do you remember, approximately, how many times you
20 testified in connection with ETS related issues before any
21 legislative or governmental body?

22 A. No, I don't remember.

23 Q. Do you have an approximate in your mind? Is it more than
24 three or four?

25 A. More than three or four.

1 Q. Less than 25?

2 A. Less than 25.

3 Q. Okay. But there were a number of occasions that you did
4 that; is that fair to say?

5 A. Yeah -- in the beginning I did more than even approaching
6 1987. I think the last time I testified may have been in the
7 very beginning of 1987, but there were other members who were
8 doing more testimony than me, Balter and Witorsch were doing a
9 good bit of the testimony, primarily because they made very
10 good -- they're not only bright, but made very good
11 presentations.

12 Q. So, members of the IAPAG group provided legislative
13 testimony and testimony before government agencies for a time
14 period between 1985 and approximately the fall of 1987; is that
15 correct?

16 A. That seems to be correct, to again, the best of my
17 recollection. I don't think it went into 1988.

18 Q. That's fine, I'm just asking for your best recollection.
19 Now, as far as testimony that you and other members of IAPAG
20 gave to these legislative bodies, let me call your attention to
21 page 9 of your corrected testimony. Do you have your corrected
22 testimony there?

23 If I could call up on the screen page 9. Can you blow up
24 like the first half of the page.

25 You're asked questions, you see on that page, about

1 testimony, do you see that?

2 A. I do.

3 Q. And the first question was "So members of IAPAG were
4 flown around the United States at the behest and expense of the
5 Tobacco Institute," do you see that question?

6 A. I did.

7 Q. And then you gave an answer, and then the next question
8 was: "Was the purpose of these trips to respond to reports from
9 various governmental bodies about the risks associated with
10 secondhand smoke," correct? And you answered "yes". Do you see
11 that?

12 A. I do.

13 Q. And then the next question, "So the government said to
14 you so IAPAG members were flown around the country by the
15 tobacco industry to testify at various governmental hearings
16 that data relied upon by such organizations as the National
17 Academy of Sciences was weak and unsupported, correct" and the
18 proposed answer was "yes". You took that out and your answer
19 was "that's an inaccurate portrayal." Do you see that answer?

20 A. I do.

21 Q. Would you like you to tell us why that's an inaccurate
22 portrayal by the government?

23 A. Because our purpose -- we didn't -- we didn't testify at
24 hearings that the data relied upon by the Natural Academy was
25 weak and unsupported. The questions always were as to the

1 interpretation of the data. Nothing, nothing that was ever
2 provided by the Academy as an example was unsupported. It was a
3 matter of the interpretation of the data, and what is weak data
4 is already a different issue, because "weak" meaning limited
5 amount, does "weak" mean statistically weak, or does "weak" mean
6 bad work. So I wasn't willing to sign off on that
7 representation.

8 Q. Sir, did you believe during the time that you gave
9 testimony to legislative bodies or governmental bodies in
10 connection with doing consulting work for the Tobacco Institute,
11 did you always provide those bodies with your independent
12 honestly held scientific opinions?

13 A. I did.

14 Q. And so, we don't have to guess at what you said or why
15 you considered that an inaccurate portrayal. Let me show you
16 your testimony. I'm going to show you U.S. Exhibit 21252, which
17 is testimony that is a statement that you gave before the United
18 States Senate Subcommittee on Civil Service Post Office and
19 General Services October 2nd, 1985. Do you generally recall
20 appearing before that organization and providing this statement?

21 A. I recall appearing and providing a statement. I assume
22 that this is the statement.

23 Q. You have no reason to doubt it, do you?

24 A. No, of course not.

25 Q. Now, let's quickly go through this so the Court can see

1 exactly what you did do in your testimony that you believe was
2 inaccurately portrayed by the government. First of all, -- in
3 fact, maybe I should ask you before I go through this. During
4 the time that you testified and provided testimony to
5 legislative bodies and governmental bodies, did you essentially
6 communicate the same type of information each time you
7 testified?

8 A. It depended. It depends. We testified as to the
9 interpretation -- as to the findings, and the findings were
10 based on the interpretation of studies, and depends upon what
11 those studies were.

12 Q. Okay. Let's quickly go through your testimony. I take
13 it, if we go down to the second paragraph, if I could cull that
14 out. You basically explain your background and explain that
15 you're testifying at the request and expense of the Tobacco
16 Institute. Do you see that?

17 A. Yes, I do.

18 Q. And to the best of your recollection, whenever you gave
19 such testimony before any legislative body or governmental body,
20 did you always disclose the involvement, or the fact that it was
21 at the request and expense of the Tobacco Institute, to the best
22 of your knowledge?

23 A. To the best of my knowledge, yes.

24 Q. And were the other members of IAPAG also taught or told
25 to do the same thing?

1 A. Yes.

2 Q. You were the chairman of IAPAG; is that correct?

3 A. I was.

4 Q. That's what you expected everyone else to do also; is

5 that correct?

6 A. That's correct.

7 Q. Now, you then go on to explain here that you have

8 exhaustively reviewed the pertinent scientific literature

9 concerning exposure to environmental tobacco smoke, particularly

10 in the workplace and possible health effects. You go on to

11 explain that "individual members of our group have expertise in

12 the disciplines of toxicology, epidemiology, industrial hygiene,

13 and pulmonary medicine. Specifically, we were asked

14 independently to evaluate the primary data focusing on exposure

15 to environmental tobacco smoke and chronic health disturbances,

16 and to consider the place that environmental tobacco smoke has

17 in the entire problem of indoor air pollution."

18 I take it that statement was entirely true; is that

19 correct?

20 A. That's correct.

21 Q. That's exactly what you had done, isn't it?

22 A. That's true.

23 Q. Let's go to the next page. If I start at the top, it

24 says: "My purpose today is to present the essence of our

25 group's opinion on environmental tobacco smoke, which is

- 1 currently being prepared for publication in the scientific
2 literature." I take it that was an accurate statement?
- 3 A. Yes.
- 4 Q. And then you have there: "These are a few preliminary
5 points that deserve mention because they represent the
6 conditions for my appearance," and then you walk through some of
7 those preliminary points; is that correct, sir?
- 8 A. That's correct.
- 9 Q. And you go on and explain to this particular senate body
10 that the opinions that you are presenting here today are
11 presented as part of our study for the Tobacco Institute, but
12 they are our independently held opinions. Do you see that?
- 13 A. I do.
- 14 Q. Is there any doubt in your mind that that's a correct
15 statement, that the opinions that you rendered that day were
16 your independently held scientific views?
- 17 A. None at all.
- 18 Q. Now, you go on to explain, number 2, "that as such I'm
19 appearing here as a spokesman for the group of scientists with
20 whom I've been working." Is that referring to IAPAG?
- 21 A. It does.
- 22 Q. "And I'm not a spokesman for the Tobacco Institute," and
23 that was your view, was it not?
- 24 A. It was.
- 25 Q. Now, you go on to talk about: "I did not take issue with

1 the position that active smoking, per se, is associated with
2 significant health disturbances." You put right on the table
3 what your view of that issue is; is that correct?

4 A. Yes, sir.

5 Q. In fact, at the time that you went to work for the
6 Tobacco Institute as a consultant in mid-1984, you had already
7 published some literature in which you had publicly stated that
8 you believe active smoking causes disease; is that correct?

9 A. I had published that statement, and I had also published
10 some data having to do with what we thought were early studies
11 the effect of smoking on the immune system, yes.

12 Q. And you actually, in doing -- strike the question. I'll
13 come back to that in a minute.

14 In any event, you had told the Tobacco Institute, or
15 through Covington & Burling, that when you testified you were
16 going to make it very clear about your position on active
17 smoking; is that correct?

18 A. That was a condition, yes.

19 Q. And the Tobacco Institute said that was fine?

20 A. Eventually.

21 Q. And you gave your testimony, is that correct, that we see
22 on the screen?

23 A. That's correct.

24 Q. Now, you go on to explain: "Nothing that I say here
25 today about environmental tobacco smoke exposure is intended to

1 imply a similar opinion about active smoking. Indeed, I and my
2 colleagues, consider environmental tobacco smoke exposure and
3 active smoking to be toxicologically distinct phenomena;" is
4 that correct?

5 A. That's correct.

6 Q. And I take it that that clearly was the opinion of you
7 and your colleagues; is that correct?

8 A. That's correct.

9 Q. You go on to say in the next paragraph that you're not
10 taking a position on behalf of your group for or against the
11 legislation pending; is that correct?

12 A. That's correct.

13 Q. You go on to say, "I am, however, commenting on the
14 proposed finding in the bill that numerous studies have shown
15 environmental tobacco smoke to be a health hazard."

16 That's exactly what you were there to do; is that
17 correct?

18 A. That's correct.

19 Q. And you are go on to say, "I recognize that there are
20 people here -- laymen and scientists alike -- for whom
21 elimination of" -- we'll go to the next page -- "environmental
22 tobacco smoke represents a personal agenda. My testimony does
23 not address that position, except to caution against the
24 gerrymandering against scientific data to gain support for that
25 agenda." Is that how you honestly felt?

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Official Court Reporter

1 A. That's correct.

2 Q. And you go on to state in your testimony, number 6,
3 "finally, most important, our study was directed at the question
4 of demonstrable chronic health effects of environmental tobacco
5 smoke and not to question -- and not to the question of whether
6 tobacco smoke is or can be a nuisance or bothersome to some
7 people." Do you see that?

8 A. I do.

9 Q. You go on after that in your testimony for several pages
10 to explain your scientific opinions?

11 A. Correct.

12 Q. Do you go on to explain that in your testimony? And I
13 don't intend to go through each and every -- actually, if you
14 want to take a look at it to be sure, my question to you is, as
15 you look at the testimony you gave on that occasion, do you
16 believe that everything you said on that occasion was based on
17 your own scientific opinion regarding whether there was
18 sufficient data to establish a causal link between lung cancer
19 and environmental tobacco smoke?

20 A. A causal link between lung cancer and -- just lung
21 cancer?

22 Q. Yes.

23 A. Just so I don't misrepresent what my thoughts were, I
24 didn't doubt that environmental tobacco smoke was a carcinogen,
25 what I doubted was that it represented a carcinogenic threat in

1 the ordinary exposure.

2 Q. That's fine. Let me just ask a general question and I
3 can save some time. Why don't you just explain to the Court in
4 your own words what your scientific opinion was that you
5 communicated that day to this legislative body?

6 A. My scientific opinion with regard to environmental
7 tobacco smoke is exactly what I said, that there's --
8 environmental tobacco smoke is derived from mainstream smoke,
9 it's not chemically the same, but it clearly contains the
10 carcinogens that are in tobacco smoke, so that at some level
11 environmental tobacco smoke could be carcinogenic by its
12 chemical nature. My point was that that level had not been
13 reached in any of the -- based on any of the studies that had
14 been reported. That is, that the studies that claimed to have
15 observed an increase cancer incidence due to environmental
16 tobacco smoke were much too marginal to make such a conclusion.

17 Q. And did you express that opinion to this legislative body
18 that day?

19 A. I did.

20 Q. And did you continue to express that opinion as you
21 appeared before other governmental and legislative bodies over
22 time on behalf of the Tobacco Institute?

23 A. In some form or another, yes.

24 Q. Okay. Now, as I understand your testimony in reading
25 your deposition, in approximately May or June of 1997, you and

1 Nancy Balter of C-E-H-H-T, you had a meeting with John Rupp of
2 Covington & Burling, and explained to Mr. Rupp that the members
3 of IAPAG had come to the conclusion that their usefulness of
4 providing testimony had reached an end; is that correct?

5 A. To the best of my recollection, I think we were speaking
6 for all of IAPAG. I know we were speaking for ourselves, and I
7 believe we were speaking for all of IAPAG in June of '87. By
8 January of '88, it was all of IAPAG.

9 Q. Okay. And you told the Court this morning that at that
10 point in time, you had believed that the public relations arm of
11 the Tobacco Institute wanted you to become too much of an
12 advocate to participate in PR events; is that correct?

13 A. That's correct.

14 Q. And you made the decision you did not want to do that; is
15 that correct?

16 A. That's -- I made the decision that I didn't want to do
17 it. We didn't sign on for that nor would we have intended to
18 sign on for that.

19 Q. And you told Mr. Rupp that from that point forward, at
20 least you and you think the other members of IAPAG, would no
21 longer be providing testimony to bodies; is that correct?

22 A. At least for Dr. Balter and myself. I cannot be sure for
23 whether or not at that time I told them all of IAPAG.

24 Q. Well, did all of IAPAG stop providing testimony about
25 that time?

1 A. Like I said, about that a time, or somewhere around the
2 beginning of 1988.

3 Q. Okay. Now, as far as whatever concerns you had as a
4 consultant about the PR folks at the Tobacco Institute, whatever
5 your feelings were, they were not serious enough to cause you to
6 personally cease from continuing to provide consulting services
7 to the Tobacco Institute after you stopped testifying; is that
8 correct?

9 A. Um, no, I don't think that's correct, if you're talking
10 about to the Tobacco Institute, because my understanding from
11 John Rupp at the time is that after a January 1988 meeting in
12 which the PR people at TI were particularly annoyed with me, I
13 was told that, essentially, Balter and I were off their payroll.
14 In other words, they were not going to pay anymore consulting
15 fees for Balter and me, and eventually that was extended to
16 IAPAG.

17 Q. Well, sir, am I correct, looking at billings submitted by
18 CEHHT, did CEHHT, your organization, continue to provide
19 consulting services to the tobacco industry for years after
20 1987?

21 A. Wait a minute, we have to distinguish between tobacco
22 industry and Tobacco Institute. So, you said tobacco industry.

23 Q. Let me stick with my question. After the events happened
24 with your -- with the PR people at the Tobacco Institute, did
25 you personally, you personally continue to provide substantial

1 consulting services to the tobacco industry?

2 A. I provided services, consulting in services, to the
3 tobacco industry, whether it's substantial or not is to be
4 determined, but I was primarily working with Philip Morris at
5 that particular time, specifically Philip Morris in Neuchatel,
6 Switzerland, FTR.

7 Q. I'm going to come to that. Independent of the work you
8 were doing for Philip Morris, independent of that work, did you
9 continue to provide substantial consulting services to the
10 tobacco industry after you stopped giving active testimony
11 before legislative bodies, if you remember?

12 A. Are you talking about me or CEHHT?

13 Q. I'm talking about you personally.

14 A. My recollection is that the consulting services I
15 provided to the tobacco industry were through Covington to
16 Philip Morris after that, and it -- as far as I know -- it was
17 on mostly scientific issues, certainly not any testimony or
18 anything like that. So the answer to your question is yes, I
19 was providing consulting services to the industry. If -- after
20 that period.

21 Q. For a number of years after that period; is that correct,
22 Doctor?

23 A. I had a, myself personally, I think the last -- I think
24 the last of our grant to Georgetown from Philip Morris occurred
25 in '92. I'm not -- I'm not certain about what -- about after

1 '92. There may have been -- I know that my partner, Phill
2 Witorsch, was doing work with them, and his brother was doing
3 work with them, and I may have filled in on some things, but as
4 a direct consultant, I don't believe so, no.

5 Q. But you actually -- do you remember you, yourself,
6 personally providing consulting services up to the year 1992, is
7 that how I understand your testimony?

8 A. That's correct.

9 Q. So that's about five years after you stopped giving
10 active testimony?

11 A. That's correct.

12 Q. Okay. And if we look -- I've looked at some of the
13 billings, and if you need me to show you my billings I'll show
14 them to you, okay? Do you recall, for example, in August of
15 1987, after you stopped providing legislative testimony for TI,
16 that you begin to participate in and bill time in connection
17 with working with what was known as the Scientific Witness Team
18 Development?

19 A. Yes, that was -- that was a significant amount of effort
20 on our part after we stopped testifying. We agreed to help them
21 train people, if you will, for the Scientific Witness Team; that
22 is correct.

23 Q. And that was for the Tobacco Institute?

24 A. I believe it was for the Tobacco Institute -- yes, it was
25 for the Tobacco Institute.

1 Q. And that went on for some time after you stopped giving
2 active testimony; is that correct?

3 A. Myself personally it went on until January of 1988, at
4 which time I was told the Tobacco Institute was not going to --
5 we were no longer being paid consulting fees by the Tobacco
6 Institute.

7 Q. Well, for example, tell the Court what was the Scientific
8 Witness Team?

9 A. Um, when we decided in mid-1987 that we did not think it
10 productive -- a productive relationship could be maintained
11 between IAPAG and TI with regard to testifying, we did agree to
12 provide background and training to people who TI identified who
13 might be more amenable to being advocative.

14 Q. What involvement did you have with the scientific -- what
15 did you actually do?

16 A. We actually gave them -- we provided them with
17 literature, because at the time we maintained a literature --
18 ETS literature database, which was made available to whomever
19 Covington told us to distribute it. And so we provided them
20 with literature, but more importantly we provided them with
21 scientific instruction background. We had meetings in which we
22 discussed the science with them, and the like.

23 Q. I take it you thought that was an appropriate thing for
24 you to do to work with that team?

25 A. If I didn't think it was appropriate, I wouldn't have

- 1 done it. Yes, the answer is yes.
- 2 Q. That's fine. In fact, do you remember telling, when you
3 would train people on the Scientific Training Team you would
4 train them to testify as a scientist and not as an advocate; is
5 that correct?
- 6 A. That's correct.
- 7 Q. That's what you thought was an appropriate role for a
8 scientist; is that correct?
- 9 A. That's correct.
- 10 Q. Now, and you continued to do that up until when, did you
11 say?
- 12 A. Up until January of 1988 --
- 13 Q. Okay.
- 14 A. -- as far as my involvement in it.
- 15 Q. Could I have JD 53135, please. Let me show you an
16 invoice which is dated March 28th, 1988. I'll try to call it up
17 on the screen. This is a bill dated March 28th, 1988 on the
18 stationery of your consulting group; is that correct?
- 19 A. That's correct.
- 20 Q. And it's being sent to John Rupp at Covington & Burling;
21 is that correct?
- 22 A. That's correct.
- 23 Q. And it appears to -- is it referring to -- it appears to
24 be time for the month of February of 1988?
- 25 A. Correct.

- 1 Q. And you built 10 hours during February to -- do you see
2 that?
- 3 A. I do.
- 4 Q. And it looks like that's for Scientific Witness Teamwork;
5 is that correct? At least the top of it says --
- 6 A. I see it, yes.
- 7 Q. Okay. So you're at least doing work into February of
8 1988?
- 9 A. It would appear there, yes.
- 10 Q. Now, throughout 1988 did you personally continue to
11 provide consulting services to the tobacco industry in the area
12 of literature and data review?
- 13 A. CEHHT did, CEHHT, HHT had provided -- maintained the
14 literature database, and I did some of -- I did some literature
15 review, but I can't give you the exact timing of it and who it
16 was for, but I did do some literature review.
- 17 Q. Let me see if I can help refresh your memory. Can I have
18 JD 54140 handed to the witness, please? I think this is an
19 invoice dated August 15th, 1988. Do you have that in front of
20 you, sir?
- 21 A. I do.
- 22 Q. That appears to be, maybe, for the month -- billing for
23 the month of July; is that correct?
- 24 A. That's correct.
- 25 Q. And I'm just looking here, it says Dr. Sorell Schwartz,

1 literature and data review, you worked 11 hours in July of 1988
2 doing literature and data review personally?

3 A. That's correct.

4 Q. Can you just tell us, generally, what you would be doing
5 during those 11 hours, just generally? I don't expect you to
6 know exactly.

7 A. If it's for the database, literature review database
8 management. Dr. Balter oversaw the literature database, and she
9 would select -- she had a hierarchal system for selecting papers
10 to be -- that went into the database, whether they had full
11 reviews or partial reviews and the like, and then she would pass
12 them on for various -- various of us to do reviews and provide
13 them back to her. So I'm assuming that's what it was.

14 Q. So, at least at this point, you're still doing consulting
15 work -- this is for the Tobacco Institute; is that correct?

16 A. Well, I can only tell you that I was told by John Rupp
17 that after our meeting in January of 1988, which was on the
18 Martin Luther King -- I remember it was particularly on the
19 Martin Luther King Monday, the Martin Luther King holiday, that
20 TI wasn't going to pay anymore of my bills. Now, the question
21 is, who paid this, how this is distributed, because this bill
22 went to Covington, and how Covington billed it out I have no
23 idea. Whether TI paid those fees or whether Philip Morris paid
24 them, I have no idea.

25 Q. That's fine, but you at least, generally, were aware that

- 1 somebody in the tobacco industry would be paying those fees?
- 2 A. Absolutely.
- 3 Q. And you were still submitting bills doing consulting
- 4 work?
- 5 A. Yes, that's not at issue.
- 6 Q. Okay. And I'll just try to move through this quickly.
- 7 If we go into the year 1989, the next year in 1989, did you
- 8 continue to provide consulting services to the tobacco industry?
- 9 A. Yes.
- 10 Q. And did you continue to bill for it?
- 11 A. Yes.
- 12 Q. And do you remember in the year 1989 billing a
- 13 substantial amount of time in connection with something known as
- 14 the McGill Symposium?
- 15 A. I remember the -- I remember the McGill Symposium well.
- 16 Q. Let me show you -- could I have JD 54155, which I believe
- 17 you'll find to be an invoice dated December 22, 1989. That's JD
- 18 54155.
- 19 And this is in December of '89, and you billed 47 hours
- 20 for one month for the month of October; is that correct?
- 21 A. That's correct.
- 22 Q. So, you're doing quite a bit of consulting work for the
- 23 tobacco industry still, at least, at the end of 1989; is that
- 24 fair to say?
- 25 A. On the McGill Symposium, yes.

1 Q. Okay.

2 THE COURT: What does it mean on that document, if you
3 know, where it says in the right hand -- on the right-hand side:
4 "Do not pay"?

5 THE WITNESS: I assume that's -- that's a notation from
6 Covington or somebody else. I have no idea.

7 THE COURT: Were you paid?

8 THE WITNESS: I have no idea. I mean, I just can't
9 recall. I mean this is -- I only know what I read here.

10 BY MR. WEBB:

11 Q. Doctor, if the tobacco companies stopped paying you,
12 would you stop working for them?

13 A. Yes.

14 Q. Did you continue to work for them for several years?

15 A. Um, the only way, very frankly, outside of the grant that
16 we received at Georgetown, the only way that I can recall about
17 what work I was doing for the industry is this: One is I know
18 what I was told in 1988, January of 1988, and number 2, if you
19 have the invoices. I -- it was not, it was not my rosen and
20 dutro (sic), my professional reason for being. I was -- so
21 whatever invoices you see, I certainly will not argue with, but
22 I can't tell you exactly how many of these or what there were.
23 I can just tell you there were episodes of where we did -- I
24 personally did work for -- as a consultant to the tobacco
25 industry, and it's my understanding, after 19 -- January of

1 1988, that it was Philip Morris and not TI that paid for my
2 consulting fees.

3 Q. And I take it from what you just told me, you actually
4 don't know how that was handled between Covington and the
5 tobacco?

6 A. I haven't got the foggiest, it was, way, way, way above
7 my pay grade.

8 Q. All you know is you were continuing to do consulting work
9 for the tobacco industry and they were paying for it?

10 A. That's correct.

11 Q. And your organization, Center for Environmental Health
12 and Human Toxicology, if we just look at the total -- can with
13 we go to the total for this bill for that month? That's about
14 \$39,000?

15 A. That's correct.

16 Q. So, at least at this point, it appears your firm is still
17 doing a fairly substantial amount of work for the tobacco
18 industry?

19 A. That's correct.

20 Q. Let's go to the next year, if we go to the year 1990.
21 Just to help refresh your memory, when I look at your bills, it
22 appears your organization is doing a lot of consulting work on
23 something known as the EPA risk assessment. Do you know what
24 the EPA risk assessment is?

25 A. Was it the -- well, it was the -- the EPA -- I can't

1 think of what the term is, it is a risk assessment. It was
2 mostly an assessment of the EPA's document that it published
3 that was later reviewed by the Scientific Advisory Board.

4 Q. So you are familiar with what is known as the EPA risk
5 assessment?

6 A. Absolutely, yes.

7 Q. And do you recall, as you think about it now, that in the
8 year 1990, that you personally billed time to the tobacco
9 industry for consulting with the tobacco industry on the EPA
10 risk assessment matter?

11 A. Oh, yes. I can't say it was 1990, but I definitely did
12 work on a -- on evaluating the EPA document, yes.

13 Q. Well, let's just look at some of it. For example, could
14 I have JD 54157, which I think you'll see is an invoice dated
15 from your organization February 28, 1990. I put a copy up on
16 the screen. It appears to me that in 1990 -- well, actually,
17 you tell me, it says Environmental Tobacco Smoke Project,
18 January 1st to 31, 1990, it says: Causation risk document prep.
19 Is that in connection with the EPA risk assessment, if you
20 remember?

21 A. No, it wasn't.

22 Q. Go ahead and explain to me what that is.

23 A. I was preparing a paper for, I think, for Risk Analysis,
24 which is the journal for the Society of Risk Analysis on Causal
25 Assessment Methodology, essentially how one assigns causation.

1 It's an area of which I was specializing -- beginning a
2 specialization at that time, and actually specialize to this
3 day, and I was looking at the -- what's called the application
4 of Bayesian Methods to publishing a -- to publishing a paper.

5 Q. That's the mic in your way.

6 A. To publishing a paper on that. That's what that was
7 referred to. The word "document" is whoever wrote up the bill.
8 It really refers to a manuscript.

9 Q. Fine. By these projects that we're going through that
10 you say -- these projects where you're doing all this consulting
11 work, now into the 1990, these are for the tobacco industry in
12 general, is that correct?

13 A. Well, I don't know if that's correct. My understanding
14 is that my fees were being paid for by Philip Morris.

15 Q. Okay. But at least -- the projects don't appear to be
16 directed at Philip Morris projects, do they?

17 A. No, they don't.

18 Q. In fact, if we just stick with that year -- let me go to
19 the end of the year. Could I have JD 54167, which would be an
20 invoice dated December 19, 1990 in which it appears that by the
21 time we get to December of 1990, you're spending a large amount
22 of time on what is known as preparation for EPA/SAB hearing.

23 A. That's a -- well, that is actually a list of various --
24 the way the invoices were made up, those are -- each semi colon
25 separates a separate task, so those 62 hours don't represent the

1 EPA/SAB hearing. There were separate documents -- separate --
2 excuse me -- items. One was the --

3 THE COURT: Might those have been for separate clients as
4 well?

5 THE WITNESS: No, no, they were all -- well, they were all
6 submitted to Covington, so they were all for tobacco. And they
7 were -- one was preparation for EPA/SAB hearing which they wanted
8 me to attend. I wasn't making any presentations there or
9 anything, they wanted me to attend -- or John Rupp actually
10 wanted me to attend. Document manuscript preparation revision
11 review, that is what we were just talking about before.
12 Literature review and analysis we also spoke about. Tell
13 conferences, I have no idea. Work on the cardiovascular project
14 including AHA meeting at Dallas, I don't have the foggiest idea
15 what that is.

16 BY MR. WEBB:

17 Q. Is it fair to say you don't recall details, but you're
18 billing 62 hours of time in December of 1990 for doing work for
19 the tobacco industry; is that correct?

20 A. That's correct.

21 Q. So, it's fair to say, at least at that point, you're
22 still doing a substantial amount of consulting work for the
23 tobacco industry; is that correct?

24 A. Well, again, I can't -- I'd have to look at all the
25 invoices to say whether it's substantial. For that particular

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- 1 moment, for certain for November of 1990, that's substantial.
- 2 Q. That's all right. For November you consider it
- 3 substantial?
- 4 A. I would.
- 5 Q. In fact, if we look at that total bill for your
- 6 organization is billing the tobacco industry, the total, I
- 7 think, is \$58,000 for that month?
- 8 A. That, that also included people who were -- we ran -- who
- 9 ran their bills through us who we paid so that not all the money
- 10 was really -- well, technically they were company revenues, but
- 11 a lot of it is a wash through. But if you look at Phill
- 12 Witorsch, Balter and me, that represents real company revenue.
- 13 Q. It appears to you, at least at this point, you and other
- 14 people connected to your organization is still doing substantial
- 15 work for the tobacco industry, at least in that month?
- 16 A. Yes, that's correct.
- 17 Q. Now, if we go into 1991, do you recall in the next year
- 18 that you continued to do substantial consulting services for the
- 19 tobacco industry?
- 20 A. I don't recall. I don't deny it, I just don't recall it.
- 21 Q. Okay, then I'll try to go quickly, could I have JD 54170,
- 22 which is a March 14, 1991 invoice for work done in February. Do
- 23 you see that on the screen?
- 24 A. I do.
- 25 Q. And if we go down, it looks like you worked 66 hours in

- 1 the month of February of 1991; is that correct?
- 2 A. Yes, that's correct.
- 3 Q. Doing consulting work for the tobacco industry?
- 4 A. That's correct.
- 5 Q. And other people in your firm are even spending more
- 6 time, such as Dr. Witorsch; is that correct?
- 7 A. That's correct.
- 8 Q. He spent 116 hours that month; is that correct?
- 9 A. That's what it says. I can't attest to it, that's what
- 10 the bill says, yes.
- 11 Q. You're not doubting that he worked the hours are you?
- 12 A. No, I have no reason to doubt it.
- 13 Q. Now, let's go to the middle of the year, June. Could I
- 14 have JD 54713, June 21, 1991. I think if we find you,
- 15 Dr. Schwartz, you billed 61 and a half hours for that month
- 16 doing work on various tobacco industry matters; is that correct?
- 17 A. Yes, that's correct. I mean, that's what it says there.
- 18 I don't -- I have no reason to doubt it, but I can't attest to
- 19 it. I can just say that yes, I see it and I assume it's
- 20 correct.
- 21 Q. So, at least as we go through these -- is your memory
- 22 refreshed that you personally continued to provide consulting
- 23 services for the tobacco industry in a fairly substantial way
- 24 over a number of years after you stopped giving active
- 25 testimony?

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1 A. Yes, I don't believe that was -- if the issue is that
2 that is in dispute, I don't believe that that issue has ever
3 been in dispute.

4 Q. Okay. Now, in fact, if we go forward, am I right, even
5 going up into the years 1996 and 1997, as long as ten years
6 after you had stopped giving active testimony, we still see your
7 organization, CEHHT, billing the tobacco industry for work done;
8 is that correct?

9 A. The only thing that I recall, such billings were for the
10 literature project and that was that there was a point at which
11 TI said they don't want to pay for the literature -- doing the
12 literature work anymore and Philip Morris asked us to keep it
13 and we had someone assigned who managed and kept track and did
14 all that was asked, but the papers weren't, as far as I know,
15 weren't being sent out or anything like that. But I would --
16 if -- I would be surprised, though I can't deny it by
17 recollection, that if you found any billings for me during that
18 particular time.

19 Q. In fact, I agree -- I don't see billings from you. I'll
20 just show you one of the bills, and let's look at 1997. For
21 example, 1997, could I have JD 54229. I think you'll find that
22 it's dated July 3rd, 1997. At least your organization is still
23 sending bills to the tobacco industry?

24 A. That -- in order to maybe truncate this, the fact is that
25 we were asked by Philip Morris to maintain that database, and we

1 paid a person to -- who followed it, and it continued, I think,
2 until January of 2000 and after which Philip Morris told us we
3 could destroy the database. As long as I can sync this in, I --
4 we were about to destroy it when I got a subpoena for -- when I
5 was told, excuse me, by Mr. Goold about this case, and I was on
6 a witness list, so I decided not to destroy it, and I'm still
7 paying -- we're still paying \$50 a month for some organization
8 in Colorado to keep it for us. So if maybe somebody can tell me
9 that we can now destroy it, we can save \$50 a month.

10 Q. You'll probably have to talk to somebody higher than me
11 to answer that question. But my only point is, you see, if I
12 understand what you're saying, up to the year 2000, your
13 consulting company continued to bill the tobacco industry for
14 maintaining the database; is that correct.

15 A. Um, yes.

16 THE COURT: What does that term "monthly rate flat fee"
17 mean? Were you being paid a retainer of 17,500 a month.

18 THE WITNESS: Yes. Philip Morris paid a rate of 17,500 a
19 month. At that particular time, the database was out in
20 Colorado, in fact, is still out in Colorado. It was being -- we
21 hired a firm to manage it because Dr. Balter had moved -- retired
22 and moved to Colorado and she was overseeing it, and our
23 researcher, Kit Dorr (sic) in Washington, was working with her on
24 it, and is the -- that is the fee that was paid to pay
25 Dr. Balter's salary, Dr. -- Ms. Brewer's salary and the company

1 that was -- and also the copyright -- the copyright fees.

2 BY MR. WEBB:

3 Q. Okay, let me go to a little different topic. If I
4 understand your testimony that in addition to the work that you
5 did, generally, for the tobacco industry, in addition to that,
6 you also did some consulting work that was specific to Philip
7 Morris; is that correct?

8 A. Um, Philip Morris, I had a grant from Philip Morris to
9 develop the physiologically based pharmacogenetic model of
10 nicotine cotinine, and other nicotine metabolites, which -- and
11 that was working specifically with FTR in Neuchatel. We would
12 have scientific meetings in which -- and I think we had about
13 three of them, which they would pay our expenses and the like,
14 and they also provided a grant, grant to Georgetown, but the
15 services, if they are to be termed that, to Philip Morris all
16 related to the scientific issues of modeling, of pharmacogenetic
17 modeling and to causation and bayesian analysis issues.

18 Q. And that work you were doing specifically for Philip
19 Morris in connection with the grant; is that correct?

20 A. Part of it -- the physiologically based pharmacogenetic
21 modeling was a grant -- the meetings that we had, I don't know
22 whether they were under our grant or they paid for them
23 separately, I don't recall.

24 Q. But you had no problem continuing to work for Philip
25 Morris?

1 A. No. It was -- in fact, it was scientifically very
2 productive and scientifically it was very satisfying.

3 Q. In fact, I don't -- go ahead, I didn't mean to interrupt
4 you.

5 A. No, I'm finished.

6 Q. I don't intend to get into the real scientific details of
7 that pharmacogenetic nicotine model, but as I understand it, you
8 were working directly with Philip Morris scientists out of
9 Neuchatel Switzerland; is that correct?

10 A. That's correct.

11 Q. And the leader of that scientific team was Dr. Helmut
12 Gaisch?

13 A. That's correct.

14 Q. And, as I understand it, as you've told us right now, you
15 believe that was very worthwhile scientific research?

16 A. Absolutely.

17 Q. First rate?

18 A. First rate.

19 Q. Now, in fact, if you look back at the total of your
20 relationship to the tobacco industry over the years, am I right,
21 there's only two people that stand out in your mind that you had
22 any significant contact with, and they were John Rupp and Helmut
23 Gaisch; is that correct?

24 A. Well, you've, you've unfortunately -- or fortunately, in
25 your question you said over the years in my contact with the

1 tobacco industry, but I also was a grantee of the AMAERF, the
2 American Medical Association Committee for Research on Tobacco
3 and Health which received their money from the tobacco industry
4 in the early '70s. So, I assume you're really just talking
5 about the --

6 Q. That's a fair point, that's my mistake.

7 A. All right.

8 Q. I'll come to that later. You did some earlier research
9 way back in the '70s under a grant from the AMA that the tobacco
10 industry funded; is that correct?

11 A. That's correct.

12 Q. And I'll talk about that later.

13 A. Okay.

14 Q. But I'm talking about the work that you began doing in
15 mid-1984 that your direct examination is devoted to. If I
16 understand your deposition testimony, there are two people that
17 were your primary contacts, one was John Rupp and the other was
18 Helmut Gaisch?

19 A. As primary contacts, that's correct, yes.

20 Q. In fact, you testified that those are the only two that
21 you believed you had any professional meaningful dealings with?

22 A. To my recollection, I had some dealings with Chris
23 Proctor, who was at the time a scientific advisor to Covington
24 or something like that, but that's correct.

25 Q. Okay. In fact, am I correct that anyone else you may

1 have had contact with in the tobacco industry were just
2 acquaintances to just say hello to other than Mr. Rupp and
3 Dr. Gaisch?

4 A. Well, Gaisch, Gaisch had a whole crew of scientists in
5 Neuchatel that I knew very well. They were not my primary
6 contacts but I knew them very well, much more than to say hello,
7 we discussed a lot of science together.

8 Q. Do you have his deposition, if I could hand him his
9 deposition.

10 Sir, could I have tab 35, the DOJ deposition at page 77,
11 line 5 to 10. If you could go to page 77 of your deposition.

12 A. Can you -- I didn't bring my reading glasses and this --

13 MR. WEBB: Do you need magnifiers?

14 THE WITNESS: Okay, great.

15 BY MR. WEBB:

16 Q. And it's on the screen, too.

17 A. It is okay, I'm sorry. Very good.

18 Q. Do you recall giving that testimony, "and that was it,
19 except for my relationship with Helmut Gaisch in Neuchatel,
20 anyone else in the tobacco industry were just acquaintances of
21 hello, how are you. Rupp was really the only person that I had
22 any professional, meaningful dealings with other than Helmut
23 Gaisch," do you recall giving that testimony?

24 A. I don't recall giving it, but certainly it is a correct
25 representation. The qualification I gave was when I spoke about

- 1 Gaisch, I also had to associate the people around Gaisch who I
2 knew, that's all.
- 3 Q. That's fair. So the two people that you identify in your
4 deposition of you -- that you had the most meaningful contacts
5 with, let me take John Rupp to begin with.
- 6 A. Okay.
- 7 Q. John Rupp was an attorney at the law firm of Covington &
8 Burling; is that correct?
- 9 A. That's correct.
- 10 Q. And am I right, shortly after you agreed in 1984 to
11 become a consultant on ETS issues, after you had reviewed the
12 literature and done the work you wanted to do, John Rupp became
13 your primary contact; is that fair to say?
- 14 A. That's fair to say, yes.
- 15 Q. And when you consulted with TI, one of the things that
16 you were very concerned about, is you wanted to make sure that
17 you and your fellow scientists were always allowed to state and
18 testify to your own independent scientific opinions; is that
19 correct?
- 20 A. That's correct.
- 21 Q. And you were very grateful that John Rupp always was very
22 respectful of your desire to do that; is that correct?
- 23 A. With emphasis on the words "very." Yes.
- 24 Q. Am I correct, John Rupp never instructed you or put any
25 pressure on you to take any particular position on any

- 1 scientific issue?
- 2 A. That is absolutely correct.
- 3 Q. John Rupp never asked you to make any statement that was
- 4 inconsistent with your independently held scientific opinions;
- 5 is that correct?
- 6 A. That's correct.
- 7 Q. The same is true of Dr. Gaisch, the Philip Morris
- 8 scientist in Switzerland; is that correct?
- 9 A. Well, yes, but Gaisch never had anything to do with my
- 10 testifying and so forth, so he would not have had even occasion
- 11 to think about it.
- 12 Q. And he didn't?
- 13 A. Right. Well, he might have thought about it, he
- 14 certainly didn't tell me.
- 15 Q. And Dr. Gaisch never tried to influence the results of
- 16 any scientific research you were doing, did he?
- 17 A. No, of course not.
- 18 Q. And Dr. Gaisch treated you at all times as an academic
- 19 and a scientist; is that fair to say?
- 20 A. And I treated him in kind.
- 21 Q. And, in fact, you believed that your relationship with
- 22 Philip Morris and Dr. Gaisch and the people that worked with him
- 23 was a very fulfilling, professional relationship, is that fair
- 24 to say?
- 25 A. It is very fair to say.

1 Q. And whenever you met with Helmut Gaisch, you would always
2 talk about straight science; is that fair to say?

3 A. That's fair to say, yes, except for some of his
4 cockamamie theories on economics.

5 Q. Okay. On the issue -- by the way, the work that you did
6 for the Tobacco Institute, or the tobacco industry generally, as
7 far as the consulting work that you do, as a pharma -- a person
8 with your background, you frequently performed consulting works
9 for private clients and governmental clients that have nothing
10 to do with the tobacco industry; is that fair to say?

11 A. That's correct.

12 Q. In fact, I don't intend to go into it, but I looked at
13 your r@sum@, you have a distinguished list of federal government
14 agencies you've represented as a consultant including FDA, EPA,
15 OSHA, FTC, the Department of Justice, et cetera; is that fair to
16 say?

17 A. Well, "represented" is more of a term for your
18 profession. We consulted with them.

19 Q. I apologize, you acted as consultants for them?

20 A. Right.

21 Q. Now, --

22 THE COURT: I think maybe we ought to take a break now,
23 unless you're in the middle of a subject.

24 MR. WEBB: No, I'm not in the middle of anything.

25 THE COURT: And what do you anticipate in terms of your

1 final closing cross?

2 MR. WEBB: I've got more to go than I thought. I -- I
3 wonder if we could talk outside of the presence of the witness
4 for a second. I don't want to say anything --

5 THE COURT: Yes. You may step outside. Thank you.

6 (Witness left courtroom.)

7 MR. WEBB: Your Honor, I had estimated to the
8 government --

9 THE COURT: Wait just a minute, Mr. Webb.

10 MR. WEBB: I'm sorry.

11 THE COURT: Okay.

12 MR. WEBB: I had estimated to the government that I would
13 have two to three hours of cross-examination with this witness.
14 I'm just looking at where I am, I'm actually behind where I
15 thought I would be.

16 THE COURT: Well, he's certainly not evasive.

17 MR. WEBB: No, I'm not arguing about anyone.

18 THE COURT: I understand.

19 MR. WEBB: There's a lot of things in his testimony I need
20 to get into the record. Let me ask a question, is Mr. Cummings
21 still here? I don't know whether -- I don't -- it's going to
22 take more time to get through this than I thought. Is there any
23 chance I could -- we could interrupt with their other witness --
24 I don't care when Dr. --

25 THE COURT: Well, Mr. Cummings, why don't you come

1 forward.

2 MR. WEBB: I'm trying to move quickly, I'm not trying to
3 delay, but I can see that I'm going to be a while.

4 THE COURT: Do you have any idea of what Professor
5 Schwartz's schedule is other than his business?

6 MR. CUMMINGS: It's busy, he teaches classes on Tuesdays
7 and Thursdays in the afternoon. Other than that, I would have to
8 chat with him about what his schedule is like this week. When
9 were you proposing bringing him back?

10 MR. WEBB: I was thinking Wednesday. I'm just trying to
11 accommodate Mr. Bernick's witness, who I know the lady's from
12 Scotland and there's a huge issue, and that's all I know, and I
13 don't mind having my cross interrupted, is all I'm saying.

14 MS. EUBANKS: Well, Your Honor, we have another witness,
15 Mr. Rupp, who's also from overseas, who's supposed to follow --

16 THE COURT: Mr. Rupp is associated, to say the least, with
17 Covington & Burling. It's true we're taking him away from his
18 apartments in London and Paris, but he'll just have to put up
19 with D.C. for a few days. And plus, we can only juggle so many
20 people at one time.

21 MS. EUBANKS: I just raise it, Your Honor, because there
22 had been some communications with Mr. Rupp when we were talking
23 about getting him over here where he was a little bit reluctant
24 to stay long enough, so I just raised it so it's at least on the
25 record.

1 THE COURT: I would be reluctant to leave London and
2 Paris, too. Where is -- I'm going to blank.

3 MR. BERNICK: Dr. Blackie?

4 THE COURT: No, no, usually we have someone from Arnold
5 and Porter here. I'm embarrassed I can't remember his name.

6 MR. WEBB: Mr. Stern.

7 THE COURT: Thank you, Mr. Stern. Where is Mr. Stern?
8 You all can get the word back to Mr. Stern to make sure that he's
9 responsible for making sure Mr. Rupp stays here for the period we
10 need. Let's focus on the moment on the two people we're trying
11 to manage. Certainly from my perspective, completing his
12 testimony on Wednesday would not be overly disruptive, I just
13 read his direct and it's not much of a break. And we are trying
14 to deal with this witness from Scotland. Why, during the break,
15 don't you ask Professor Schwartz if he is available at all on
16 Wednesday to complete his testimony. In addition, though, let me
17 find out whether Dr. Blackie is actually here -- she's in the
18 courthouse?

19 MR. BERNICK: I don't know -- yes, she's here.

20 THE COURT: Oh, I see, I just didn't know how far away she
21 was.

22 MR. CUMMINGS: Is it your idea to interrupt Dr. --
23 Professor Schwartz's testimony at some point -- it's 3:30 now, at
24 some point this afternoon and have him come back on Wednesday?

25 THE COURT: If we all agreed on that, I would probably let

1 him go now because we have so much trouble getting the full
2 testimony of this next witness.

3 MR. CUMMINGS: Why don't we talk to him -- why don't we
4 resolve the issue now and I'll find out right now.

5 THE COURT: Are there any other ifs and/or buts we have to
6 look into first?

7 MR. BERNICK: Not from my witness's point of view, no.
8 Obviously, if Dr. Blackie were to finish mid-afternoon tomorrow,
9 we might have a little bit of time at the end of the day
10 tomorrow. It sounds like Dr. Schwartz has got a teaching --

11 MR. CUMMINGS: He teaches from 2:00 to 4:00 is the real
12 problem.

13 MR. WEBB: No, I understand.

14 THE COURT: I wouldn't break a commitment to him.

15 MS. EUBANKS: Well, Your Honor, I only say, I don't want
16 to promise, even if we start here today, that she can go
17 mid-afternoon tomorrow if we're not completed with the testimony.

18 THE COURT: I understand that.

19 MS. EUBANKS: All right.

20 THE COURT: I do. I'm not sure how you all think you're
21 going to finish her tomorrow, but that's a whole other issue.
22 Why don't you bring Professor Schwartz back in and ask him on the
23 way what we're concerned about.

24 MR. CUMMINGS: Your Honor, I apologize to the Court, he
25 teaches a class Wednesday afternoon, Thursday would be the best

1 day for him to come back.

2 (Discussion had off the record.)

3 I'm sorry, you didn't send him back out, did you.

4 THE COURT: Well, his availability is Wednesday, not

5 Thursday, right?

6 MR. WEBB: Thursday not Wednesday.

7 THE COURT: Thursday not Wednesday. I'm sorry, I'm sorry.

8 Pretty soon you all will drive me crazy.

9 MR. WEBB: The issue that Mr. Bernick raised that I don't

10 know --

11 MR. CUMMINGS: He teaches tomorrow afternoon.

12 MR. WEBB: -- the answer is no.

13 THE COURT: For tomorrow afternoon.

14 MR. CUMMINGS: He teaches tomorrow afternoon from 2:00 to

15 4:00, so it's going to take from Georgetown a half hour to get

16 down here.

17 THE COURT: That's terrible in the afternoon.

18 MR. CUMMINGS: Wednesday as well. So Thursday's the only

19 day.

20 MS. EUBANKS: Judge Kessler, we haven't even heard what

21 the reason is that Dr. Blackie can't stay, besides professional

22 commitments, which we all have. It seems to me that in terms of

23 efficiency, we have the professor here, if we could go ahead and

24 finish him we probably would get done with the witness a lot

25 quicker than if with we have to stop and start. It seems to me

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1 that he's here, and to have to have him start over again, it
2 takes additional time every time we do that with a break even
3 with the three days from Thursday back to Mondays.

4 MR. WEBB: I will do whatever Your Honor wants. I am not
5 going to take any additional time because of the break at all.
6 I'm just trying to accommodate what I understand to be an issue,
7 and it doesn't matter to me. I can continue now --

8 THE COURT: But you've got --

9 MR. WEBB: I have a long ways to go, longer than I
10 expected, and that's the truth.

11 MS. EUBANKS: Well, Your Honor, I'll note we haven't even
12 objected on grounds of leading here in order --

13 THE COURT: There's been nothing wrong with the
14 cross-examination. I'm not criticizing anybody in terms of how
15 long it's taking. There's a great deal of testimony.

16 Mr. Bernick, here's your time to make your
17 representations, if you can, if you want to, about what her
18 problems are. Is it just that she has professional commitments
19 she's going to have to break them.

20 MR. BERNICK: We can find out and make appropriate
21 representations to the Court. If it actually worked out that we
22 went through and we finished up, perhaps, Dr. Blackie but
23 starting right now --

24 THE COURT: I just cannot imagine that we will finish her
25 in that period of time.

1 MR. BERNICK: My other alternative also, I would urge the
2 Court, I think represents a simple solution, which is simply that
3 she would come back and finish up whatever, what I think will be
4 in any event a very modest portion of the ETS testimony, she'll
5 come back as part of our case. By that time you will have heard
6 from both sides. I just think that is the simplest solution
7 that's fairest total --

8 THE COURT: I know the government doesn't agree with that.

9 MS. EUBANKS: We really don't, but we're prepared to argue
10 that if you think necessary. I mean, we put her on our witness
11 list in our case in chief and we would like to be able to go
12 through the testimony and, even with some of the unique orders
13 of the case, be able to stand where we stand with respect to the
14 witness's testimony, what we expect to come in and build on.

15 MR. BERNICK: I do recall that there was a specific
16 accommodation for Dr. Harris's --

17 THE COURT: Would Dr. Blackie come forward, please?
18 Dr. Blackie, just come up to the podium, you don't need to take
19 the witness stand yet, it's right up here. Would you just state
20 your name, please?

21 DR. BLACKIE: Sharon Blackie.

22 THE COURT: And I know you're here from Scotland. We are
23 having some real problems accommodating a number of witnesses
24 because people take longer than it is expected and that just
25 happens. And I know you've come a long way. I'm not sure that

1 realistic representations were made to you, however. You
2 expected to leave tomorrow afternoon; is that right?

3 DR. BLACKIE: Yes, that's correct.

4 THE COURT: I'm not sure that's going to be able to
5 happen, quite frankly. What exactly are the commitments that you
6 have starting, I guess, Wednesday?

7 DR. BLACKIE: Okay. The main problem that I have is a
8 logistical one with my house and the fact that I live on a very
9 small farm that has animals and livestock, and whenever I go away
10 somebody has to house sit and my house sitter at the moment are
11 my parents. Unfortunately, my stepfather has a hospital
12 appointment on Thursday, which means that he has to leave on
13 Wednesday, so I can't just leave animals, you know, completely
14 uncared for. Also, I have an academic commitment on Wednesday
15 evening and at the moment by leaving, my leaving tomorrow evening
16 I would get back about two hours ahead of that academic
17 commitment.

18 THE COURT: And where are your academic commitments?

19 DR. BLACKIE: From home, but it's a tutorial for a
20 master's degree that I'm doing at 7:30 on Wednesday evening.

21 THE COURT: In which you're getting the Master's Degree or
22 giving it?

23 DR. BLACKIE: Getting it, but the most difficult thing, as
24 I say, there's nobody in my house to take care of my animals or
25 any of those things.

1 THE COURT: And there's no neighbor you can call?

2 DR. BLACKIE: No, because it involves -- it involves an
3 awful lot of work and most of my -- I work in a very remote place
4 and most of my neighbors have farms of their own, and also there
5 are -- there's a very, very small puppy. I know it sounds crazy,
6 but when you live in the middle of nowhere there are no kennels
7 in about 3 hours, and there's no way that my house and my animals
8 could be left abandoned at this stage.

9 THE COURT: How long were you told that you were going to
10 have to be here?

11 DR. BLACKIE: I was told that it had been arranged with
12 the government that I would testify on Monday and that that
13 really would be it. And originally I thought of leaving on
14 Monday night, but I did wonder whether that -- sometimes things
15 do drag on and so I managed to extend it until Tuesday.

16 THE COURT: All right. Why don't you wait outside,
17 please, and then we'll figure this out.

18 Well, I don't hear anybody coming up with any magic
19 answer. If you all think I'm going to have a whole bunch of
20 animals dying off in Scotland, I'm not going to do that, unless
21 you have a better answer.

22 MS. EUBANKS: I have a solution. Maybe I could propose a
23 solution.

24 THE COURT: Go ahead Ms. Eubanks.

25 MS. EUBANKS: The defendants have enormous resources.

1 Perhaps -- the defendants have enormous resources, perhaps they
2 could intervene in some way to get someone to come care for the
3 animals. What Dr. Blackie says that is she has -- her father has
4 a commitment in the hospital, and I don't know if that's like an
5 appointment with the doctor where he's coming back later, I don't
6 know what an appointment with the hospital is, if he'll be back
7 later. I don't know anything about that, but I do know the
8 significant resources that defendants have, and that they can
9 certainly make things happen, and if asked, perhaps they can make
10 arrangements for the care of the livestock and the puppy.

11 MR. BERNICK: Your Honor, that's -- I know it's kind of
12 a -- it's not really a light thing at the end of the day. We
13 specifically made arrangements for her to appear on a date
14 certain, which is today. And we made no promises that her
15 testimony would go as quickly or slowly. She, obviously, was
16 planning on that day, but spillover on this day and made these
17 commitments. So I think everybody's been operating on good faith
18 to make sure her spot is there. She does live in a very remote
19 location. No amount of resources is going to go create support
20 for her in the next 48 hours. To saying nothing of my client,
21 Brown & Williamson, I have a British affiliate, God knows what
22 can really be done, but that's farfetched.

23 Accommodations have been made for other witnesses, and I
24 think this is a more than fair accommodation that doesn't require
25 any impact on the schedule, she appears, goes through substantial

1 examination. I am still optimistic that we can finish her.

2 THE COURT: Does she have to leave the courthouse at 3:00
3 or be at an airport at 3:00?

4 MR. BERNICK: She has to leave the courthouse at 3:00.
5 She flies through Dulles. She travels, basically, 14 to 18 hours
6 just to get here and to get back. This is not an insignificant
7 undertaking, particularly when there was a very planned for
8 process in advance. So we're really talking about something -- I
9 see everybody lining up. I think I've said all that I can say,
10 Your Honor, I think that this is a very -- in a sense, something
11 that could be dealt with in a fairly easy fashion than to go
12 through all these lengths so that the government can not have a
13 little stub left over when she comes back all over again as a
14 part of our case.

15 THE COURT: No, I don't think that's a minor thing. I
16 suppose the error made was by me in putting Professor Schwartz on
17 today. I just felt that he had been, you know, inconvenienced
18 for a number of days on end.

19 If he can live with it, Mr. Cummings, I'm going to ask him
20 to be inconvenienced again. It's only a trip across town from
21 Georgetown. We're going to take a ten-minute break, and then
22 we're going to put her on. We will go until 5, maybe -- let me
23 make sure, Ms. Hightower, are you here today? Maybe a little bit
24 later, and then we'll start tomorrow morning and do the best we
25 can, take a shorter lunch hour if we need to, and if we don't

1 finish I'm not sure what we'll do, I really -- I have to
2 reconsider on that.

3 MR. BRODY: If I may, Your Honor, just one point in the
4 interest of accuracy and a complete record. We had never agreed
5 that Dr. Blackie's testimony would begin first thing Monday
6 morning and be completed on Monday. The arrangement that was
7 made, and the representation that was made to us by counsel for
8 Brown & Williamson weeks and weeks ago was that she would be
9 available all day Monday, all day Tuesday, that there might be
10 some things that would interfere with her ability to be in Court
11 all day on Wednesday, but that they would not interfere with her
12 continuing to be in Washington. And as recently as last week,
13 when they felt that they were going to have trouble getting in
14 the corrected written direct examination by noon on Friday,
15 counsel for Brown & Williamson suggested to us that we switch
16 Dr. Blackie and Dr. Rupp -- Mr. Rupp, I'm sorry, and have
17 Dr. Blackie's testimony start on Tuesday morning. So the
18 departure at 3:00 on Tuesday afternoon was something that was new
19 to us as of Thursday of last week.

20 THE COURT: I can see the interest of clarifying the
21 record. You can do that after we finish with Dr. Blackie.
22 10 minutes, everybody.

23 MR. CUMMINGS: I'm assuming --

24 THE COURT: Please give my apologies to Professor Schwartz
25 and tell him that at least as of this moment, we will expect him

1 on Thursday morning.

2 MR. CUMMINGS: Okay, Your Honor. If it looks like they're
3 not going to start with him first thing Thursday, could I ask
4 somebody to give me a call Wednesday?

5 THE COURT: Absolutely, the government will call you and
6 tell you where we stand.

7 MR. CUMMINGS: Thank you.

8 THE COURT: Or you can always call chambers and find out.

9 MR. CUMMINGS: I wouldn't want to do that, I'll call
10 Ms. Gray.

11 (Thereupon, a break was had from 3:41 p.m. until 3:53
12 p.m.)

13 THE COURT: All right. The government has its next
14 witness, right.

15 MS. EUBANKS: Yes, Your Honor. We call Dr. Sharon Boyse
16 Blackie.

17 (SHARON BOYSE BLACKIE, GOVERNMENT'S WITNESS, SWORN)

18 DIRECT EXAMINATION OF SHARON BOYSE BLACKIE

19 BY MS. EUBANKS:

20 Q. Good afternoon. We haven't met before. My name is
21 Sharon Eubanks and I represent the United States.

22 How do you prefer to be addressed?

23 A. My name is Sharon Blackie.

24 Q. Do you prefer Dr. Blackie?

25 A. Yes, please.

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1 Q. Can you, for the record, state your name, please.

2 A. It's Sharon Blackie.

3 Q. Did you receive a written direct examination of Sharon

4 Boyse, in parentheses, Blackie pursuant to order number 471A?

5 A. Yes, I did.

6 Q. All right. Did you -- did your counsel give that

7 document to you?

8 A. Yes.

9 Q. Upon receipt, did you review it and make changes?

10 A. Yes, I did.

11 MS. EUBANKS: May I approach the witness, Your Honor?

12 THE COURT: Yes, you may.

13 BY MS. EUBANKS:

14 Q. I just handed you a copy of your examination, but I would

15 like you to confirm that for me. Would you take a moment and

16 review the document.

17 Is this a modified version -- and I'll have to ask you to

18 give a verbal response so that the court reporter can take

19 everything down, but is this the document that you modified your

20 testimony for this case, U.S. v Philip Morris?

21 A. Yes, it is.

22 Q. And I ask that -- are you prepared to adopt this as your

23 testimony before this United States District Court under oath?

24 A. Yes, I am.

25 MS. EUBANKS: Your Honor, I would ask the Court to

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1 acknowledge the adoption and, if appropriate, to receive the
2 testimony as evidence in this case.

3 THE COURT: Yes, it will be received at this time.

4 MS. EUBANKS: Thank you, Your Honor.

5 BY MS. EUBANKS:

6 Q. Have you discussed your testimony to be given here with
7 anyone today?

8 A. No.

9 Q. Have you -- in terms of preparing the written direct, did
10 you work with anyone to prepare your answers or your changes?

11 A. Yes, I did.

12 Q. Tell -- with whom did you work?

13 A. With the lawyers representing my company.

14 Q. And who are the lawyers?

15 A. You mean the names of the lawyers?

16 Q. Yes, please.

17 A. Ken Bass and Dawn Marchant.

18 Q. And when did you work with them?

19 A. It would have been last Tuesday, Wednesday and Thursday.

20 Q. Have you spoken with anyone since Friday about it?

21 A. No.

22 Q. Now, besides the documents that are referred to in the
23 written direct examination which I handed you, did you review
24 any other documents in conjunction with the testimony that
25 you're prepared to give today?

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- 1 A. Yes, I did review some documents.
- 2 Q. And how did it come about that you reviewed those
3 documents?
- 4 A. They were sent to me by courier to my home address.
- 5 Q. And what documents were those additional documents that
6 were sent to you by courier?
- 7 A. They were documents that represented, I believe, your
8 exhibits for my testimony.
- 9 Q. All right, then. Perhaps I should be clear and back up a
10 little bit.
- 11 You reviewed, in addition to your written direct
12 examination, the exhibits that were cited or referenced in that
13 written direct examination at the same time that you reviewed
14 the testimony; is that fair to say?
- 15 A. It was a little bit after. And I reviewed them very
16 briefly because, unfortunately, they didn't arrive until
17 Thursday. But yes, in theory, that's what happened.
- 18 Q. All right. Besides the -- do you need to make any
19 changes in your testimony in light of those exhibits, do you
20 believe?
- 21 A. No.
- 22 Q. In terms of the exhibits, were there any other documents
23 that you reviewed that were not exhibits that were proposed by
24 the government alongside of the written direct testimony?
- 25 A. No, I don't believe so.

1 Q. All right. So your lawyers did not provide you with any
2 additional documents besides those that were cited by the United
3 States in the testimony?

4 A. That's correct.

5 Q. All right. Now, you're no longer an employee of Brown &
6 Williamson and you're no longer an employee of BATCo; isn't that
7 correct?

8 A. That's correct.

9 Q. How are you -- are you currently employed?

10 A. I'm self-employed. I'm a practicing psychologist.

11 Q. All right. And how long have you been self-employed?

12 A. For -- well, since July 2003.

13 Q. And when did you leave Brown & Williamson?

14 A. I left Brown & Williamson at the end of 2001,
15 December 2001.

16 Q. And when did you leave BATCo?

17 A. The end of June 2003.

18 Q. How are you being compensated for your time now in
19 conjunction with the testimony that you're giving and your work
20 on the written direct?

21 A. I have a consultancy agreement with Brown & Williamson;
22 not with BATCo, but with Brown & Williamson, which covers a
23 whole bunch of work, different types of work that they may want
24 to ask me about. And that is on an annual basis. It's agreed
25 from year to year and it's a flat fee.

- 1 Q. And what is that flat fee?
- 2 A. \$95,000.
- 3 Q. And what are the -- you mentioned a whole bunch of work.
- 4 Can you be more specific, please.
- 5 A. The contract doesn't specify, but the idea is that it's
- 6 not just litigation-related work, but it's work related to my
- 7 previous employment for them. So, for example, if they wanted
- 8 to ask me about research and development issues, they can also
- 9 do that because that was what I was mostly employed to do at the
- 10 time.
- 11 Q. Now, with respect to your consultancy agreement, how long
- 12 ago did you enter into that agreement?
- 13 A. I entered into it as soon as I left BATCo, so that would
- 14 have been in July 2003.
- 15 Q. How does the annual payment of \$95,000 work? And by that
- 16 I mean are there other types of work that you can do that would
- 17 lend to -- lead to an increase in the amount or is it just a
- 18 total flat fee for \$95,000 per year?
- 19 A. It's a total flat fee. It's based on up to 70 days work
- 20 per year, but that can be any kind of work.
- 21 Q. So if you exceeded 70 days work, would it be fair to say
- 22 that under your consultancy agreement, you could renegotiate and
- 23 get more than \$95,000 a year?
- 24 A. I would hope so, but it hasn't come to that yet.
- 25 Q. So if you work fewer than 70 days a year, then you still

1 get \$95,000?

2 A. Yes, I do.

3 Q. How many days have you worked under the current
4 agreement?

5 A. For the first year, which would have been July 2003 to
6 end of June 2004, I think there were something like 25 -- 20 to
7 25 days. This year, I'm already at about that level, so I
8 suspect it's going to be a lot more.

9 Q. So last year, for between 20 to 25 days work, you
10 received \$95,000 from Brown & Williamson?

11 A. That's correct.

12 Q. Did you receive any payment from any other tobacco entity
13 last year for your work?

14 A. No, I have no relationship with any other tobacco entity.

15 Q. Let's turn to your written direct testimony. And we'll
16 be referring to the document that I handed you, so from time to
17 time, what I will do is reference it in particular, in
18 particular places on the document, and ask you to look at it.
19 If you need a little extra time to look at it, just feel free to
20 say because --

21 Well, let me just ask: When is the last time you
22 reviewed the documents?

23 A. I think it would have been Friday of last week.

24 Q. Okay. Now, I'd like to direct your attention to page 8
25 of your written direct examination and I'm looking at the first

1 question on that page.

2 The question that was posed by the United States is:

3 "Additionally, by 1986, BATCo was concerned about the public's
4 perception as to whether ETS was harmful to health, correct?"

5 Now, the United States had proposed "Yes," but you had
6 shaded out "Yes," meaning that "Yes" was not an appropriate
7 answer, correct?

8 A. "Yes" wasn't -- that wouldn't have given the full story,
9 correct.

10 Q. And what was the answer that you gave in response to that
11 question?

12 A. That BATCo was concerned that the public was not getting
13 a balanced view of the science. That was really its major
14 concern.

15 MR. BERNICK: Just for the record, my copy at least does
16 not indicate that "Yes" has been shaded out. There is simply --

17 THE COURT: Nor does mine.

18 MS. EUBANKS: Let me make the record clear. Thank you,
19 Mr. Bernick.

20 BY MS. EUBANKS:

21 Q. You just testified, did you not, that "Yes" was not a
22 correct answer to that question. But I want to make sure that I
23 have your understanding, so let me give you a moment to look at
24 it.

25 If you mean "Yes" and to go ahead and add that statement,

1 then that's fine as well.

2 And while you're looking at it, would you look at the
3 next question as well because perhaps there's a similar
4 situation there and it's not shaded.

5 Let me know whether "Yes" is or is not part of your
6 answer with respect to the first two questions on page 8, if you
7 will, please.

8 A. It is part of the answer, which is why it's not shaded.

9 Q. All right. Thank you for that clarification.

10 So your statement here is that "BATCo was concerned that
11 the public wasn't getting a balanced view of the science" when
12 asked whether BATCo was concerned about the public's perception
13 as to whether ETS was harmful.

14 In terms of the -- is it your view that the United States
15 Surgeon General's -- that the United States Surgeon General was
16 not placed -- or one to give a balanced view of the science on
17 smoking and health issues?

18 A. It wasn't just the United States Surgeon General that was
19 providing public information.

20 Q. I'm not asking you that. I'm asking you in particular
21 about the United States Surgeon General in terms of how the
22 reports are put together.

23 Do you know how the United States Surgeon General Reports
24 are put together?

25 A. As a matter of principle? Do you mean all of them or the

1 one in particular on environmental tobacco smoke?

2 Q. Let's deal with the one from 1986. Are you familiar with
3 that one?

4 A. It's a while since I read it, but yes, I was at one
5 stage.

6 Q. Is it your view that the 1986 Surgeon General's Report --
7 U.S. Surgeon General's Report does not present a balanced view
8 of science? Yes or no, please.

9 A. I don't believe it is a fully balanced view of the ETS
10 science at that time.

11 Q. Now, you added a word --

12 A. If I may finish, it's the conclusions that I would
13 question, not necessarily the body of the report.

14 Q. Now, you've added a word to your answer that wasn't in
15 the answer to your written direct. You said that "The U.S.
16 Surgeon General's Report did not present a fully balanced view
17 of the science," so I want to make sure I understand your
18 testimony.

19 Is it your testimony that the U.S. Surgeon General's
20 Report from 1986 did not present a balanced view or that there
21 was something that was not in the U.S. Surgeon General's Report
22 from 1986 that should have been included? Which one is it?

23 MR. BERNICK: I'm a little confused at this point. It's
24 okay if she decouples the question from the prefatory statement,
25 but she says -- I believe counsel characterized the direct

1 examination as saying that she didn't think that the Surgeon
2 General's view was a balanced view.

3 At least in the questions that have been the subject of
4 examination so far, there's no reference to the Surgeon General.

5 MS. EUBANKS: I raised it, Your Honor, in my question. I
6 mean, it was a proper followup because there's an addition to the
7 question, so I really don't understand the objection because --

8 THE COURT: That question was asked.

9 MR. BERNICK: It says, "You have added a word to your
10 answer that wasn't the word in your written direct." And she
11 then went on to say: "You said that the U.S. Surgeon General's
12 Report did not present a fully balanced view."

13 She didn't add a word; the word "Yes" was there all the
14 time and there's no reference in the direct to the Surgeon
15 General's Report.

16 THE COURT: Mr. Bernick, a couple of paragraphs earlier,
17 the question from Ms. Eubanks is: "So your statement here is
18 that 'BATCo was concerned that the public wasn't getting a
19 balanced view of the science,' when asked whether BATCo was
20 concerned about the public's perception as to whether ETS was
21 harmful. In terms of the -- is it your view that the United
22 States Surgeon General's -- the United States Surgeon General was
23 not placed -- or one to give a balanced view of science on
24 smoking and health issues?"

25 So the question was asked.

1 MR. BERNICK: Okay. I have no problem with that, but in
2 her most recent question, she went back and characterized, and I
3 think, mischaracterized that the witness somehow had changed the
4 direct examination. She hadn't.

5 THE COURT: Well, she hadn't, no. She hadn't.
6 Go ahead, Ms. Eubanks.

7 MS. EUBANKS: Thank you, Your Honor.

8 BY MS. EUBANKS:

9 Q. Didn't you just state a few moments ago that you believed
10 that the United States Surgeon General's Report from 1986 did
11 not present a fully balanced view of the science? Yes or no,
12 please.

13 A. Well, I'm sorry. It's not a yes or no answer.

14 Q. Did you state it or did you not? And do you recollect
15 just a few moments ago stating that the United States Surgeon
16 General's Report did not present, for 1986, a fully balanced
17 view of the science?

18 A. What I said was that I didn't believe that the
19 conclusions to the report were balanced and I wasn't
20 particularly talking about the report itself.

21 But this question wasn't based on the Surgeon General's
22 Report so you've lost me a little bit. I'm not sure what you
23 are trying to ask me because the answer that was given in direct
24 examination was based on the much broader information that the
25 public was getting, over and above the Surgeon General's Report.

1 Q. Well, what would you add to the body of evidence in 1986
2 to the Surgeon General's Report that dealt with involuntary
3 smoking to complete the balanced view that you speak of in your
4 direct testimony?

5 A. There was a report from the International Agency For
6 Research on Cancer. I think there was a National Research
7 Council report from the U.S. I can't remember the exact date.

8 But this also talks about just reports that were in the
9 media. It's not intended to be restricted just to government
10 reports in the United States. There were other countries around
11 the world that were looking at it where BATCo operated. BATCo
12 did not operate in the United States.

13 Q. Dr. Blackie, in terms of -- I appreciate the length of
14 your answer, but I know that you have a schedule. If you will
15 work with me, I'm trying to direct your answers to my questions.
16 I think we'll get through this a lot quicker and I'll try to be
17 more precise in my questions.

18 A. Thank you.

19 Q. So are you aware whether the 1986 Surgeon General's
20 Report cited to any of these other IARC or the National Research
21 Council that you're referencing that would balance the report
22 out more? Or balance out the information more, I should say.

23 A. I'm sorry. I'm confused about your question. I don't
24 know because I haven't looked at it for a long time, but that
25 wasn't the basis of my answer.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 Q. Okay. Then let's move on. In -- also on that page, you
2 were asked the question of the -- the next question there,
3 beginning on line 5. The question that was posed was: "In
4 fact, this was a concern shared by members of the tobacco
5 industry. And by 'tobacco industry,'" it says, "I mean some
6 combination of Brown & Williamson, R.J. Reynolds, BATCo, Philip
7 Morris, Liggett and Lorillard."

8 Given the nature of your testimony, I think it's probably
9 important that we understand the terms in the frame of
10 reference. The response that you gave, isn't it, is that:
11 "Yes, but I don't agree with this definition of the 'tobacco
12 industry.'"

13 Do you see that?

14 A. Yes, I do.

15 Q. So first, would you include Brown & Williamson as part of
16 the tobacco industry in your definition of "tobacco industry"?

17 A. Yes.

18 Q. And would you include R.J. Reynolds in your definition of
19 the "tobacco industry"?

20 A. Yes.

21 Q. And would you include BATCo in your definition of the
22 "tobacco industry"?

23 A. Yes.

24 Q. And would you include Philip Morris in your definition of
25 the "tobacco industry"?

1 A. Yes.

2 Q. Would you include Liggett in your definition of the
3 "tobacco industry"?

4 A. Yes.

5 Q. Would you include Lorillard in your definition of the
6 "tobacco industry"?

7 A. Yes.

8 Q. Would you include Altria in your definition of the
9 "tobacco industry"?

10 A. I don't know that company, I'm afraid.

11 Q. All right. Now, will you give us your definition of
12 "tobacco industry."

13 A. It doesn't include a number of companies that I think
14 BATCo certainly operated with or met from time to time,
15 companies that were very important in markets where we operated,
16 like Rothmans International, Japan Tobacco.

17 Also, I don't -- I never met with Liggett. I don't know
18 Liggett at all so I would have had no basis for knowing what
19 their concerns were.

20 Q. But just so that we understand definitionally, when you
21 say "tobacco industry," if I understand your testimony here
22 today, what you're saying is that it's more expansive than the
23 companies that were identified in the question that we just
24 discussed and that, if I understand your testimony, that's the
25 reason that you would quarrel with the definition of "tobacco

- 1 industry," because it wasn't broad enough?
- 2 A. Because it wasn't broad enough and because you're asking
3 me a question about whether I understood the concerns shared by
4 members of the tobacco industry. My point is also that Liggett,
5 for example, I have no idea what their concerns were because I
6 never, ever met with representatives of Liggett.
- 7 Q. Well, you were aware as a person working for a tobacco
8 company that Liggett's concerns were tobacco company concerns,
9 were you not?
- 10 A. Well, I guess by definition they would be, but I don't
11 know what they were because I never spoke to them. Every
12 company had its own concerns; every company had its own approach
13 to these issues. I have no idea what Liggett's were.
- 14 Q. Did you ever speak to representatives of Lorillard?
- 15 A. Yes, from time to time.
- 16 Q. And you spoke with representatives of Philip Morris?
- 17 A. Yes.
- 18 Q. And you spoke with representatives, obviously, of BATCo?
- 19 A. Yes.
- 20 Q. And you spoke with representatives from R.J. Reynolds?
- 21 A. Yes.
- 22 Q. And you spoke with representatives from Brown &
23 Williamson, obviously, correct?
- 24 A. Correct.
- 25 Q. And you spoke with representatives from the Tobacco

1 Institute, correct?

2 A. No.

3 Q. Never? Ever?

4 A. I don't recall. I'd hate to say "never" because it could
5 just be my memory, but I don't recall dealing with the Tobacco
6 Institute. BATCo did not operate in the United States and so
7 when I worked for BATCo, there would have been no reason really
8 for me to meet with those people.

9 Q. Well, we'll come back to that a little bit later. What
10 about CIAR? Did you have any contact with members of CIAR?

11 A. Occasionally, yes.

12 Q. Yes. Okay. Now, let's move forward in your testimony to
13 page 11. And I want to direct your attention to line 3, the
14 answer that you give there, and make sure that I understand
15 this. The question that was posed was: "However, today, unlike
16 the 1980s, BATCo agrees that ETS is harmful to children,
17 correct?"

18 You answered "Yes," with an explanation. Do you see your
19 explanation there?

20 A. Yes, I do.

21 Q. Now, I have a few questions about that explanation.

22 THE COURT: Excuse me, Ms. Eubanks. I don't think that's
23 right. The "Yes" is shaded out on my copy.

24 MS. EUBANKS: Let me ask the witness because on my copy,
25 it's not.

1 THE WITNESS: It is shaded out. I'm sorry.

2 MS. EUBANKS: I stand corrected.

3 BY MS. EUBANKS:

4 Q. So you provide -- and I do see you begin with: "I do not
5 know the current position." And you state a little bit more.

6 Let me give you a moment to look at what you state and I
7 want to ask you a couple of questions about that.

8 Have you read it?

9 A. Yes, I have.

10 Q. What is the evidence on children that you reference
11 there?

12 A. The scientific studies that were published.

13 Q. Can you be more specific?

14 A. The scientific studies that were published in peer review
15 journals of the effects of environmental tobacco smoke exposures
16 in children.

17 Q. Can you give an example of at least two?

18 A. Gosh, not off the top of my head, no. I don't retain
19 that information.

20 Q. Then how -- strike that.

21 When did -- when, then, did it, as you say, start to come
22 in -- this scientific evidence that was in the peer review
23 journals that was evidence regarding harmful effects of ETS upon
24 children?

25 A. I would say that really from the late 1980s, it began to

1 mount up. And obviously, it just accumulates over the years.

2 Q. Now, also in that answer, you use the phrase -- well, let
3 me just read it: "In the early days, there was not enough
4 evidence to make a very strong judgment on the effects of ETS on
5 children."

6 And I want to highlight that "very strong judgment"
7 statement and ask you this: While you were at the companies
8 working on these issues, can you describe what constituted
9 sufficient evidence to make a very strong judgment?

10 A. It's difficult for me to do it that way. I can tell you
11 why I think there wasn't evidence to make a very strong
12 judgment.

13 Q. First tell me why you can't answer the question, please.

14 A. Because that's not the way that you normally look at
15 science. To me, it's a question of you evaluate the evidence
16 that there is and if there are questions about that evidence
17 that prevent you from making a very strong judgment, then the
18 inclination of most scientists is to wait until that evidence
19 becomes clear, which normally it does by multiplication. And
20 that's what happened in this situation.

21 Q. Now, let me ask you this question, then. As a science,
22 then, you have gradations of judgment: You have very strong
23 judgment; you have sufficient; you have not enough. I mean, can
24 you tell me what they are, because you use the phrase "a very
25 strong judgment" and I want to understand what these gradations

1 are that you as a scientist would apply.

2 And let's start with "sufficient." Sufficient evidence
3 or sufficient judgment with enough evidence -- is that a concept
4 that scientists would use insofar as evaluating the harmful
5 effect of ETS in children?

6 A. Well, it could be. It depends on the scientists. These
7 are not gradations that you learn in science school. These are
8 words that you use as an individual science -- scientist when
9 you're talking about your own judgment of the evidence.

10 So I'm not sure I understand you.

11 Q. Then as a policy matter, the company was waiting for a
12 very strong judgment from its scientists before it would move to
13 the statement that there was a harmful effect in children of
14 ETS?

15 That ETS had a harmful effect upon children -- before
16 BATCo would move to that judgment, it needed very strong
17 evidence; is that true?

18 A. It needed evidence --

19 MR. BERNICK: I'm sorry. I'm going to object to the form
20 of the question. I'm not sure, of all those different questions,
21 which one actually is being put to the witness.

22 MS. EUBANKS: I'll rephrase it, Your Honor.

23 BY MS. EUBANKS:

24 Q. What did it take for -- let's deal with BATCo first
25 because that's what this question deals with. When you were at

1 BATCo, how much evidence was enough to express a view that ETS
2 was harmful to children?

3 A. I think some suggestion that the confounding factors in
4 these studies could be accounted for in some other way. The
5 problem with the earlier studies was that there were a lot of
6 other confounding factors and it was very difficult to say
7 whether it was ETS exposure or these confounding factors that
8 were showing the effect.

9 I think that as the studies multiplied and people took
10 into account the confounding factors, the evidence became a lot
11 stronger; in my view, very much stronger.

12 But that's my words, not any written gradation that all
13 scientists would adopt.

14 Q. Now, let's just talk about a matter of policy and what
15 was done with respect to BATCo. As a matter of policy, when
16 BATCo was making a judgment about ETS and its harmful effects on
17 children, as a matter of policy, what -- how much evidence was
18 sufficient for the company to come forward with its views that
19 ETS had a harmful effect on children?

20 A. It's not a question of how much evidence; it's a question
21 of what the evidence that is there says. In the early studies,
22 they hadn't really taken into account these different
23 confounding factors. In the later studies, they had, so by the
24 time we got more studies and we got better designed studies, the
25 confounding factors had been taken into account and it just

1 really lost ETS.

2 Q. What was your position when you left BATCo?

3 A. At which time?

4 Q. This last time.

5 A. I was head of Strategic Research.

6 Q. And as head of Strategic Research, what were your duties?

7 A. I was responsible for the company's Research and

8 Development Department, for products -- for looking at novel

9 products that might hopefully be safer and for looking at all

10 kinds of product innovations, for evaluating the effects of

11 those product innovations in biological test systems.

12 I was not, in my later position in BATCo, at all

13 responsible for smoking and health positions. That was not my

14 job.

15 Q. But you were at one point responsible for smoking and

16 health positions, were you not?

17 A. That is correct, yes.

18 Q. And you were responsible for smoking and health positions

19 in the late 1980s, were you not?

20 A. Yes, I was.

21 Q. And you were familiar with the policy of BATCo at the

22 time, were you not?

23 A. Yes, I was.

24 Q. And so I'll ask the question again. And I'm not asking

25 about confounders and other scientific factors. I'm asking as a

1 matter of policy, how did BATCo make a determination or -- as a
2 matter of policy -- strike that. Let me start over.

3 As a matter of policy, how much evidence did BATCo
4 determine was enough before it would come forward and inform
5 people of the harmful effects of ETS on children?

6 A. But that's what I just --

7 MR. BERNICK: I'm sorry. That is now a different
8 question, but it was framed in a way to suggest by the prefatory
9 remark this is the same question all over again. And maybe it
10 is. But it's now: What does it take to inform people?

11 I think we have to be fair to the witness. If she's been
12 asked the question two different times before and it's now the
13 same question, let her answer it again. But if it's now going to
14 be shifted to a question of a public disclosure to consumers or
15 something like that, that's a different question.

16 So which one is it?

17 MS. EUBANKS: Your Honor, I think the question is clear
18 and if Mr. Bernick would have let the witness answer --

19 THE COURT: Well, the last question is the question that
20 stands. And I'm going to ask the court reporter to read it back.
21 It's about two questions back. And it begins with "So I'll ask
22 the question again."

23 COURT REPORTER: "So I'll ask the question again. And I'm
24 not asking about confounders and other scientific factors. I'm
25 asking as a matter of policy, how did BATCo make a determination

1 or -- as a matter of policy -- strike that. Let me start over.

2 "As a matter of policy, how much evidence did BATCo
3 determine was enough before it would come forward and inform
4 people of the harmful effects of ETS on children?"

5 THE WITNESS: Am I to answer that now?

6 THE COURT: Yes. That is the question.

7 THE WITNESS: Okay. First of all, it was not my job to
8 make the determination as to what BATCo should say to consumers.
9 That was really the BATCo board. My job at that time was to look
10 at the company's scientific position.

11 As I've explained to you, and I'll repeat my earlier
12 answer, it's not --

13 THE COURT: I'm sorry, ma'am --

14 MS. EUBANKS: That's all right, Your Honor. If she wasn't
15 in a position to give anything except what the board would do,
16 then I'm happy to move on.

17 THE COURT: All right.

18 BY MS. EUBANKS:

19 Q. Now, I'd like to direct your attention to page 12,
20 please, of your testimony.

21 And, Nikki, if you could pull up 34677, please.

22 I'm referring to line 17: "What is this document?"

23 And your answer that -- you added that it was draft
24 minutes from the August 1988 Scientific Research Group meeting.

25 Do you see that testimony that you've given?

- 1 A. Yes, I do.
- 2 Q. Now, the document that's coming up on the screen -- and
3 I'll have a copy handed to you as well; it might be easier to
4 look at it -- and I just want to confirm something.
- 5 Since you added the word "draft," would you take a
6 moment -- and I'm trying to ascertain with respect to this
7 document whether you maintain that the entire document is a
8 draft or, if you look at the third page into Exhibit 34677, I
9 see the word "draft" at the top of that page.
- 10 Do you see that?
- 11 A. Yes.
- 12 Q. And the page that follows, I see "draft"?
- 13 A. Yes.
- 14 Q. And the page that follows that, I see "draft"?
- 15 A. Yes.
- 16 Q. Do you see "draft" anywhere else on Exhibit 34677?
- 17 A. No.
- 18 Q. All right. Then, the entirety of 34677, just so I
19 understand your testimony, is not that the entire document is a
20 draft, correct?
- 21 A. I don't know whether it is or not, no, but I agree with
22 you that it's only those three pages that say that specifically.
- 23 Q. Well, typically, if a document was a draft, it would be
24 marked as such, wouldn't it?
- 25 A. Yes, it would.

- 1 Q. And those other pages we've ascertained were not marked.
2 Let's look at -- correct?
- 3 A. Correct.
- 4 Q. Let's look at the last page of 34677, please.
5 Do you have that in front of you?
- 6 A. Yes, I do.
- 7 Q. Now, I'd like you to note the statement -- this says
8 "Scientific Research Group." Briefly, what was the Scientific
9 Research Group, just to orient us?
- 10 A. It was a group that was formed by the scientists of the
11 BAT Group of companies, including BATCo and Brown & Williamson,
12 to fund scientific research in external academic institutions.
- 13 Q. Do you see the reasons that are identified? And there
14 are five triangles -- diamonds -- that come down under
15 "Reasons."
- 16 Do you see that on the document on that page?
- 17 A. Yes, I do.
- 18 Q. Would you read the last one in that series.
- 19 A. "Cigarette industry problems should mostly be tackled on
20 an industry and not company basis."
- 21 Q. Now, we talked earlier about your definition of
22 "cigarette industry," so can you tell me how, if it did, did the
23 Scientific Research Group ensure that individual companies did
24 not interfere with industry problems?
- 25 A. The Scientific Research Group had nothing to do with the

1 industry. It was a purely BAT Group company organization.

2 Q. But we're looking at the last page of the document and,
3 while it was particularly a BAT Group organization, this is a
4 document that identifies work associated with the Scientific
5 Research Group, does it not?

6 A. I don't know what it is, I'm afraid. This is a meeting I
7 didn't attend and I don't know -- I don't know who wrote this or
8 what was in their minds at the time.

9 Q. Dr. Blackie, I'm not asking you about what was in the
10 minds of the authors. You were a member of the SRG, weren't
11 you?

12 A. Not at that time, no.

13 Q. But to your knowledge, the work of the SRG wasn't --
14 never changed from one time to the other; it was all relatively
15 constant as you described it, correct?

16 A. More or less. But again, it had nothing to do with the
17 tobacco industry. It was a purely BAT Group; it never spoke to
18 other members of the tobacco industry, which is why I don't know
19 what this means. I don't know what it refers to.

20 Q. So in your position, are you testifying here under oath
21 that as a member of the SRG, that you never spoke with other
22 tobacco company members? I just want to be clear.

23 A. That's not at all what I said. What I said was the SRG
24 didn't speak as an organization to the tobacco industry.

25 Q. But when you were a member of the SRG, you did, from time

1 to time speak to other members of the tobacco industry, did you
2 not?

3 A. About non-SRG matters, yes, that's correct.

4 Q. But the SRG, as you stated here today and in your written
5 direct, was a group of individuals from around the BAT Group --
6 actually, from CAC companies, as they were formally known, which
7 was responsible for funding external research into smoking and
8 health-related issues, correct?

9 A. Yes, that's correct.

10 Q. And smoking and health-related issues were industry
11 concerns, were they not?

12 A. Arguably, all companies, of course, were concerned about
13 them, but that doesn't mean to say that the SRG spoke to them.

14 Q. I think my question was clear and I want to read it back
15 to you. And please, if you could focus on that question.

16 Smoking and health-related issues were industry concerns,
17 were they not?

18 A. As I answered, I'm sure that most companies had concerns
19 about smoking and health. I didn't work for the industry; I
20 worked for BATCo and Brown & Williamson.

21 Q. I'm not asking you that question. I'm asking you about
22 the work that was done and smoking and health concerns being
23 something that the industry, which you've already defined in
24 your testimony earlier today, would be concerned about.

25 Remember when we talked about who is the tobacco industry

1 and I got your definition of "industry"?

2 MR. BERNICK: We now have two different questions that are
3 pending.

4 MS. EUBANKS: No, it's just one, Your Honor.

5 MR. BERNICK: Excuse me. If I could just finish the
6 objection.

7 THE COUR: Go ahead, Mr. Bernick.

8 MR. BERNICK: She already responded to the first question
9 twice. If that question is not being posed again, that's fine;
10 we can shift on to a second question that was part of her
11 question.

12 I think we have to be fair to the witness. She answered
13 that question twice. If there is a new question, it ought to be
14 put to her plainly.

15 THE COURT: She did answer the question. Next question,
16 please.

17 BY MS. EUBANKS:

18 Q. I want you to focus again on the scientific Research
19 Group, and I want you to take time to read that document that
20 had the word "confidential" stamped at the top. Do you see -- I
21 want you to take a moment to look at it and to tell me if
22 there's anything that's inconsistent with that document,
23 notwithstanding whether you were at any meeting where it was
24 discussed or not, with your understanding of the work of the
25 Scientific Research Group when you were part of that group?

1 A. The problem, Ms. -- I'm sorry, may I answer now?

2 THE COURT: Yes, you may answer.

3 THE WITNESS: Okay. I don't know really what that first
4 part of the document is referring to. It looks to me like it's
5 just sort of setting the context for the Scientific Research
6 Group and saying this is the world in which the company operates
7 and the Scientific Research Group operates in this world, but
8 there's nothing in here that says to me that the SRG meets with
9 other industry members, and I know it doesn't. I'm kind of
10 losing track of what you're asking me. I do apologize.

11 BY MS. EUBANKS:

12 Q. I apologize to you because I want to be very clear. I'm
13 not asserting that the SRG met with other companies. What I am
14 asking and what I did ask you, I believe, was whether you were a
15 member of SRG, and you said yes, correct?

16 A. Correct.

17 Q. And in your work at BATCo from time to time,
18 notwithstanding whether it was a part of SRG or not, you met
19 with other industry members, correct?

20 A. Correct.

21 Q. And the information that you gathered during that time
22 was in no way prohibited from you using when you did individual
23 work on the SRG, correct?

24 A. It was irrelevant to the SRG work. The SRG work didn't
25 have any bearing on any of the meetings that I had with other

1 members of the industry. It was completely irrelevant.

2 Q. But wouldn't you agree that the SRG was focused upon
3 problems that confronted the industry as a whole which of course
4 would include BATCo?

5 A. No, not really. The SRG was focused on identifying and
6 funding academic research. To some extent the type of academic
7 research it funded was dependent upon what particular issues
8 were out there in the world, but it didn't interface with any
9 other organization in that way.

10 Q. All right. You've identified one thing that the SRG was
11 focused on: Identifying and funding academic research.

12 And in terms of the identification and the funding of
13 academic research, is it your testimony that any academic
14 research that was funded through the SRG was never shared with
15 any other industry members?

16 A. No, it wasn't.

17 Q. It was never shared?

18 A. Gosh, I can't say never for sure because I wasn't a
19 member of it throughout all its existence, but what I'm saying
20 is I don't recall an instance where it was. It was just BATCo
21 funded research.

22 Q. So, through the SRG BATCo funded research, now we've
23 identified one thing that the SRG did, and I'm just dealing with
24 the time that you were a member. And just for purposes of the
25 record, when was that, exactly?

1 A. I was a member from 1986 to 1994, and again from --
2 throughout the time that I was employed by BATCo, so that would
3 also be from 2002 to June 2003.

4 Q. During the time you left in '94 to the time you came back
5 in 2002, if I'm to understand your testimony, you continued to
6 work in 2002 on the Scientific Research Group for BATCo,
7 correct?

8 A. Correct, but I hadn't been a member from '96 to 2002.

9 Q. All right. Now, when you came back in 2002, was there
10 anything changed or different about the work of the Scientific
11 Research Group? And by different, I mean different from what
12 was accomplished during the '86 to '94 time frame?

13 A. A little bit different. Its primary focus was still
14 funding research, but in the meantime it had taken on another
15 role of looking at how the company would evaluate potentially
16 safer cigarettes, which it didn't really do in the early days.

17 Q. All right. Then, what were the other functions of the
18 Scientific Research Group? You named two now: The focus on
19 safer cigarettes and the focus on identifying and funding
20 academic research. Anything else?

21 A. It was also responsible, I guess as an entity, for
22 advising the company -- the company for advising, I suppose, the
23 BAT Industries' board at that stage about the state of the
24 scientific art, about what was happening on smoking and health
25 in the scientific literature.

1 Q. Did the advice to the board take any particular form?

2 A. The chairman of the SRG did a presentation to the board,
3 I think on an annual basis, to the best of my recollection.

4 MR. BERNICK: Your Honor, at this point I'll just
5 interpose I guess an objection. Counsel's time is the
6 government's to use, but all these questions are almost discovery
7 types of questions and are not really implicated by any of the
8 corrections that have been made to the testimony. I mean, we're
9 only at page whatever, 11.

10 THE COURT: Page 12.

11 MS. EUBANKS: Well, Your Honor, in fact, I wasn't planning
12 to go straight through the testimony, this is prefatory to a
13 large number of questions that I have about the Scientific
14 Research Group, and to orient the Court and the witness as to
15 where we're going with this I think it's entirely appropriate
16 that we have an understanding of what it means. There are
17 certain limitations --

18 THE COURT: You can proceed. It's your time, everybody.
19 That's why I put a time limit on for you all to use in whatever
20 way you thought was going to help your case.

21 BY MS. EUBANKS:

22 Q. Are there any other duties of the SRG besides the three
23 that you've listed so far?

24 A. Those were the major ones. I can't recall off the top of
25 my head any other major duties.

1 Q. Now, let's go to page 20, and I'd like you to look at
2 your testimony given on lines 17 and 18 or at least the question
3 from 14 that goes through 18. Would you take a moment and look
4 at that?

5 It's fair to say that you've testified that external
6 scientists do not want to deal with the industry, correct?

7 A. Some of them don't; some of them had no problem. Some of
8 them don't, that's correct.

9 Q. Then, it's true, though, isn't it, that your or BAT's
10 occasion use of law firms to pay external scientists allowed
11 BATCo to conceal its involvement with the project or research
12 that was underway?

13 A. Never. It was never -- the involvement was never
14 concealed. Every scientist that we ever worked with knew
15 exactly where the money was coming from.

16 Q. Well, let me phrase the question differently. If the
17 money was coming from a law firm, then the scientists would not
18 necessarily know, would it, that the law firm was being paid by
19 BATCo?

20 A. Yes, they would, it was a matter of policy. All of the
21 scientists, it was made perfectly clear to them that it was
22 funding from BATCo. It was simply that a number of them stated,
23 and a number of the memos that you have as exhibits say this,
24 that some scientists just did not want to deal directly with
25 industry members for whatever reasons they had.

1 Q. That policy was never written, was it?

2 A. Um, it was never written, but I think it's clear in the
3 documents, in all of the documents that I've reviewed and all
4 the documents that I wrote it's very, very clear that there's
5 never an attempt to conceal from the scientists. It was
6 obvious, for one thing, it would be obvious to any scientist if
7 they're being asked to look at environmental tobacco smoke that
8 there was probably a tobacco industry involvement, but it wasn't
9 that. Covington & Burling -- excuse me -- Covington & Burling,
10 who we worked with, were asked specifically to make it very
11 clear to the scientists who was funding the project.

12 Q. But you never wrote down that policy for Covington &
13 Burling to follow in any document, did you?

14 A. It wasn't necessary to write it down, it was obvious. It
15 was part of all of the discussions that we had. I think it's
16 implicit in most of the documents if you read them.

17 Q. But -- well, believe me we'll get to that, but in terms
18 of whether law firms or other organizations were used to
19 organize or arrange the work and payment for that effort, BATCo
20 didn't -- wasn't required by any internal written guidance to
21 reveal that it was involved either directly or indirectly with
22 the project, though; isn't that correct?

23 A. The policy doesn't have to be written, it can be
24 understood. It was BATCo policy that we never funded research
25 where the scientists didn't understand where the money came

- 1 from. That was very, very clear and that was throughout my
2 whole time with BATCo and with Brown & Williamson.
- 3 Q. Let's look at exhibit -- U.S. Exhibit 79190, please.
4 You're being handed a copy. I'll ask you to take a look at it.
5 It also appears on the screen, but it might be easier to look at
6 it because the document is about five, six pages long.
- 7 Now, you attended the meeting that's described in
8 Exhibit 79190, didn't you?
- 9 A. Yes, I did.
- 10 Q. And what was the date of that meeting?
- 11 A. February the 17th, I think it's 1988.
- 12 Q. You wrote U.S. Exhibit 79190, didn't you?
- 13 A. Yes, I did.
- 14 Q. And this document is addressed in your written direct
15 testimony and was one of the documents that was given you,
16 wasn't it?
- 17 A. Yes, that's correct.
- 18 Q. Now, I'd like you to focus on the paragraph numbered 15,
19 which is on Bates page ending on 334, and the Bates number is on
20 the right-hand side of the document.
- 21 A. 15. I'm sorry, I think -- Is that 335?
- 22 Q. I'm sorry, it's -- you're correct. And if we can have
23 that -- it's difficult to read. Can you read that, Dr. Blackie?
- 24 A. Just --
- 25 Q. Would you read it into the record because it's not a very

1 clear copy, please.

2 A. "Although the industry is in great need of concerted
3 effort and --" something, I can't read that word, something in
4 the ETS area "-- action in the ETS area, the detailed strategy
5 of Philip Morris leaves something to be desired. The excessive
6 involvement of external lawyers at this very basic scientific
7 level is questionable and in Europe, at least, is likely to
8 frighten off a number of scientists who might otherwise be
9 prepared to talk to the industry.

10 Also, the rather oblique initial approach may appear to
11 be somewhat less than honest to many scientists. In the past
12 the industry, at least in the U.K., has had no difficulty
13 approaching scientists directly. The idea of setting up a
14 special group of consultants coordinated by one national
15 coordinating scientist is also rather likely to frighten away
16 many scientists who would justifiably not wish to be associated
17 with industry in this rather structured way, or who would not
18 wish to be part of what will inevitably be seen to be a pro-
19 industry group, but who would be prepared to carry out exactly
20 the same activities as an individual and therefore less
21 compromising basis."

22 Q. And you authored that paragraph, didn't you?

23 A. Yes, I did.

24 Q. And so you were concerned, isn't it fair to say, with the
25 heavy use of external lawyers in the process that you described,

1 were you not?

2 A. At that point, yes. I had never heard of this happening
3 before, and I was concerned about how it would be perceived by
4 scientists.

5 Q. You said at that time. That was in 1988, correct?

6 A. That's correct.

7 Q. It's fair to say that you later embraced the use of
8 industry lawyers in this manner, didn't you?

9 A. Yes, that's correct, in a different -- never in Europe,
10 we did not participate in that program, but in other parts of
11 the world it seemed that scientists were not in general willing
12 to talk directly to the industry, which I was not aware of, and
13 that they were more comfortable dealing with external
14 organizations.

15 Q. Now, you were concerned, as set forth in U.S.
16 Exhibit 79190, weren't you, that the PM proposal may appear to
17 be somewhat less than honest to many scientists, right?

18 A. The way that they were describing it at the time, that's
19 how it appeared to me, yes. That was not necessarily the
20 approach that we subsequently used that I was then comfortable
21 with.

22 Q. But you did write about the fact that the Philip Morris
23 proposal seemed to you a little bit less than honest to the
24 scientists?

25 A. At that time that was my feeling.

1 Q. And at that time, the reason that you felt that it was
2 not -- a little bit less than honest was that it didn't identify
3 the tobacco companies as being involved?

4 A. What it did, to the best of my recollection, is at the
5 first meeting it didn't, but subsequently if it was decided to
6 adopt a particular scientist as a consultant, then it was made
7 very clear that the funding came from Philip Morris. So my
8 question, I suppose, was just about the first meeting, the
9 initial contact that was made.

10 Q. Now, initially at least, as set forth in this exhibit,
11 you really didn't care much for the proposal to set up a special
12 group of consultants that was coordinated by a national
13 coordinating scientist either, now did you?

14 A. Not in Europe in that particular way with those
15 particular scientists, no.

16 Q. But that's not what the document says, it doesn't really
17 limit it to that, does it?

18 A. It doesn't, but I wrote the document so that was my
19 intent at the time. That's what I intended by it.

20 Q. So, you have a clear recollection of a document that you
21 wrote in February 1988 sitting here today?

22 A. I do of this particular meeting. I've been questioned on
23 it so often that pretty much every memory I had that has been
24 lurking in the back of my mind has come to the forefront by now.

25 Q. Is your memory pretty good?

1 A. Not on all things, no, not on things that I haven't seen
2 for a long time, it's actually pretty bad, but as I say, I've
3 been questioned on this document a number of times.

4 Q. And you believe that your testimony about this document
5 over time has been entirely consistent with the testimony that
6 you're giving today?

7 A. Yes, I believe so.

8 Q. Okay. Now, let's look at paragraph 16 of that document,
9 please. And again, because it's not particularly clear, if you
10 could, would you read that into the record, please?

11 MR. BERNICK: Again, Your Honor, I think that there is
12 only two questions relating to this entire document that were the
13 subject of corrections, and they really related to a question of
14 the company's name.

15 This document was quoted from extensively in the direct
16 examination, but those quotes do not include either paragraph 15,
17 which was just the subject of examination, or paragraph 16. So
18 we're really covering ground that's not really implicated by any
19 of the corrections; indeed, none of the quotations.

20 MS. EUBANKS: Your Honor, in all fairness, these written
21 directs are written. It's unfair to put certain words in a
22 witness's mouth besides quoting the document. What the witness
23 did do was go along with those quotes, so certainly it's fair
24 notice that there might be some particularized follow-up that if
25 we had put all of that in here we probably would have encountered

1 numerous objections and a lengthy process. So, in terms of these
2 questions, the document certainly was before the witness, and
3 this paragraph here is very material. It references "keeping the
4 ETS controversy alive," which is something --

5 THE COURT: Go ahead with your question.

6 BY MS. EUBANKS:

7 Q. Would you read that paragraph into the record, please.

8 A. "It must be appreciated that Philip Morris are putting
9 vast amounts of funding into these projects, not only in
10 directly funding large numbers of research projects all over the
11 world, but in attempting to coordinate and pay so many
12 scientists on an international basis to keep the ETS controversy
13 alive.

14 It is generally felt that this kind of activity is
15 already giving them a marketing and public affairs advantage,
16 especially in countries in which until recently they have played
17 a rather low profile."

18 Q. Now, you were looking at this closely because of the
19 marketing and public affairs advantage that PM was -- Philip
20 Morris was gaining with its approach in this matter, weren't
21 you?

22 A. I'm sorry, looking at what closely?

23 Q. Well, the activities of PM with the external scientists,
24 those matters discussed in Exhibit 79190.

25 A. We were always interested in what competitors were doing

1 that might give them any kind of an advantage, yes.

2 THE COURT: And you wrote this document when you were with
3 BATCo; isn't that right?

4 THE WITNESS: Yes, that's correct.

5 BY MS. EUBANKS:

6 Q. Now, your testimony here says that BATCo declined Philip
7 Morris's invitation to join some of these activities that were
8 discussed in Exhibit 79190 at the time, correct?

9 A. BATCo never joined the European Consultancy Program that
10 Philip Morris -- that's talked about here; we never ever joined
11 the European program.

12 Q. But you did join in the program -- did BATCo join into
13 any other program with Philip Morris with respect to --

14 A. Yes.

15 Q. Can you tell us what that is?

16 A. We joined in a program in the Far East and we joined in a
17 program in Latin America.

18 Q. And you joined into those programs because they were in
19 your company's interest in that -- correct?

20 A. They were in markets where we had an interest, yes,
21 that's correct.

22 Q. And so you did it -- you joined in those programs to gain
23 a marketing advantage, just as PM had displayed as set forth in
24 Exhibit 79190?

25 A. No, I can't imagine how we could have gotten a marketing

1 advantage out of those programs that we joined in.

2 Q. But you believe at the time that you joined in those
3 programs that it would lead to a marketing advantage, didn't
4 you?

5 A. Not a marketing advantage, no. I can't see how it would.

6 Q. But it led to an advantage for the company, did it not?

7 A. No, not really. The only advantage to the company was
8 trying to get a more balanced view of the environmental tobacco
9 smoke science in those countries.

10 Q. And, in fact, what it did, those programs led to was an
11 ability to keep the ETS controversy alive as referenced in
12 Exhibit 79190, correct?

13 A. No, because there already was a controversy, we didn't
14 need to keep it alive. What we were trying to do was point out
15 there were two sides to this debate and that in the media, at
16 least, it was very one-sided. It was only the bad news, if you
17 like, that was being talked about, and all of the evidence that
18 didn't support the idea that ETS was a cause of diseases was not
19 getting a hearing.

20 Q. So, there wasn't that much evidence in the Far East at
21 the time about ETS or not -- let me strike that. There were not
22 that many scientists who had written in peer reviewed
23 publications in the Far East at the time that BATCo joined into
24 that program, correct?

25 A. There were a couple, there were a couple of studies in

1 Japan and a couple of studies in China, but beyond that there
2 wasn't very much.

3 Q. So you went to those markets to develop research in order
4 to use that to inform the public about ETS, correct?

5 A. We carried out research to try and identify what the
6 major indoor air quality issues were in those particular
7 countries.

8 Q. And in carrying out the research and in that undertaking,
9 you were able to maintain the controversy that you've discussed
10 already existed, correct?

11 A. Well, the aim wasn't to maintain the controversy; the aim
12 was to produce science that shed light on the controversy.

13 Q. I understand that that was the aim, but let's just say
14 that this was a side effect, that it did have a side effect, did
15 it not, whether it was intended or not, of maintaining the
16 controversy?

17 A. Well, I wouldn't put it like that because in a lot of
18 those countries there wasn't data local to the countries in the
19 first place, and what we were doing was trying to create new
20 data in those countries because most of the data that there was
21 was in countries like the U.S. and Europe which weren't relative
22 to indoor air qualities in, you know, downtown Kuala Lumpur in
23 Malaysia.

24 Q. I understand that that's your testimony, but let's look
25 at Exhibit 79165. Do you have that in front of you? It's just

1 one page. Is this a document that you authored and signed?
2 A. Yes, it is.
3 Q. And what's the date on it, please?
4 A. The 22nd of June, 1989.
5 Q. And you sent this document to Mr. Parrish at Philip
6 Morris, correct?
7 A. Correct.
8 Q. And you sent it to other representatives of Philip Morris
9 and -- correct?
10 A. Correct.
11 Q. And you sent it to R.J. Reynolds in Winston-Salem?
12 A. Yes.
13 Q. And to R.J. Reynolds in London?
14 A. Yes.
15 Q. All right. And in terms of the other Philip Morris
16 representatives, you sent them to at least one Philip Morris
17 representative in Neuchatel, correct?
18 A. Correct.
19 Q. Now, Exhibit Number 71 -- 79165 is dated June 22nd, 1989,
20 correct?
21 A. Correct.
22 Q. And I notice here that the -- you're inviting in this
23 document, are you not, R.J. Reynolds and Philip Morris to a
24 meeting to address among other things how ETS might best be
25 approached in what you refer to as the public arena, correct?

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1 A. Yes, but as it says earlier in that sentence, it's
2 looking predominantly at scientific research and having a review
3 of where such research is headed.

4 Q. I'm not interested in that so much as the fact that this
5 is 16 months following the prior document that we looked at, and
6 now we're, if I read this correctly, you're reaching out to
7 Philip Morris and R.J. Reynolds and inviting them to a meeting
8 to discuss how ETS might best be approached in the public arena,
9 yes or no, please?

10 A. And scientific research. It's both of those things. If
11 you look at the document, they follow one from each other.

12 Q. Well, I want to focus more on the -- the public arena. I
13 understand your testimony about the scientific research. So,
14 it's fair to say, then, that you had, based upon the document
15 that you authored here, Exhibit 79165, you had basically changed
16 your tune on the role of lawyers and their effectiveness in
17 terms of working on ETS issues, correct?

18 MR. BERNICK: Objection to the form of the question.

19 THE WITNESS: I'm sorry?

20 THE COURT: Well, put it in a better phrase than "changed
21 your tune", but -- you can insert a more polite phrase. Why
22 don't you answer the question.

23 THE WITNESS: This is a completely different kind of
24 meeting, so it's a different situation.

25 BY MS. EUBANKS:

1 Q. Well, let me ask you the question again. In terms of the
2 practice that -- or the matters that were discussed in the
3 previous exhibit that we looked at, 79190, isn't it fair to say
4 that you took a dim view of the involvement of industry lawyers
5 with the ETS issues that were described in that exhibit,
6 correct?

7 A. I wasn't comfortable with external lawyers acting on
8 behalf of the industry talking to external scientists at that
9 time, and yes, I did subsequently change my mind on that, but
10 this is a different -- this is a completely different scenario
11 where we're talking about lawyers who represent the companies.
12 And, of course, lawyers who represent the companies are of
13 course going to be interested in any of these issues, that's
14 their job, so I never had an issue with that, I never had a
15 problem with that.

16 Q. I see that you sent Exhibit 79165 to Mr. J. Goold. Who
17 is that?

18 A. I believe he was a lawyer for R.J. Reynolds at the time.

19 Q. At the time. Now, you state in this document that, in
20 the middle of the page, and you can tell me if I read this
21 correctly, "We would therefore suggest that the best format for
22 the meeting would be to have representation from the scientific,
23 legal, and public affairs department of Each company. Do you
24 see that in the middle of your one-page memo?

25 A. Yes, I do.

1 Q. And so the purpose of this meeting was to gather people
2 from the scientific community, the legal community, and public
3 affairs departments to address what the best approach might be
4 to ETS issues in the public arena, correct?

5 A. To the best of my recollection, it was to look at ETS as
6 an issue, and that covered obviously public issues and
7 litigation and legal issues and scientific issues, and I read
8 this as that meeting looking at all of those.

9 Q. You weren't -- this doesn't reference litigation, does
10 it?

11 A. Only in the sense that lawyers are present.

12 Q. But lawyers did a lot of things for the companies that
13 didn't involve litigation, correct?

14 A. That's true, it could have been regulation. They were
15 very heavily involved in regulation. I'm sorry, I didn't mean
16 to limit it just to litigation. I meant any of the things that
17 internal company lawyers do for the company on any of these
18 issues.

19 Q. In fact, there isn't anything in Exhibit 79165 that
20 suggests that litigation was an issue that was to be addressed
21 at the meeting that you were suggesting, correct?

22 A. No. I didn't mean to give that impression. I was just
23 giving it as an example as you correctly point out.

24 Q. And in fact, in Exhibit Number 79165 you actually were
25 inviting Philip Morris and the others to come forward with

1 specific suggestions for what could be discussed at the meeting
2 that you were trying to convene, correct?

3 A. Correct.

4 Q. Wasn't it important in 1988, say mid-1988 to BATCo that
5 it not take any position regarding the secondhand smoke issue
6 that might be seen to indict active smoking?

7 A. Um, not necessarily, only in the sense that the company
8 at that stage held the position that active smoking hadn't been
9 established to be a cause of disease, and so, you know, in that
10 sense it believed that.

11 Q. You said "not necessarily". I just want to make sure
12 that I understand your answer when you say not necessarily,
13 because in 1988, isn't it true, that if BATCo had taken a
14 position on secondhand smoke, that that position, any position
15 that it took on secondhand smoke might have an effect on its
16 litigation posture in cases involving direct smoking?

17 MR. BERNICK: I'm sorry. To the extent that really calls
18 for the witness to speculate what the litigation impact might be,
19 I don't think it's a really fair question. I think she can be
20 fairly asked what impact from the scientific point of view one is
21 to another, but to ask her to speculate about litigation impacts
22 I don't think is appropriate for this witness.

23 MS. EUBANKS: Well, Your Honor, this witness herself
24 invited --

25 THE COURT: This is a very sophisticated witness. The

1 objection's overruled.

2 THE WITNESS: I'm sorry, I lost track of the question now.

3 MS. EUBANKS: So I have, may I ask if Mr. Wallace can read
4 it back, please.

5 THE COURT REPORTER: You said "not necessarily". I just
6 want to make sure that I understand your answer when you say not
7 necessarily, because in 1988, isn't it true, that if BATCo had
8 taken a position on secondhand smoke, that that position, any
9 position that it took on secondhand smoke might have an effect on
10 its litigation posture in cases involving direct smoking?

11 THE WITNESS: Okay. At that time I really was very naive
12 about litigation and I didn't get involved with litigation until
13 about ten years later. So, at that time litigation was not where
14 I was thinking; BATCo didn't have litigation, it was only in the
15 U.S. Yes, of course, if a company had believed that
16 environmental tobacco smoke was a cause of disease, it would be
17 very difficult to do that without believing that active smoking
18 caused disease. I mean, the fact is that the company's position
19 was based on the science and it had nothing to do with
20 litigation.

21 MS. EUBANKS: Your Honor, I see it's about 5:00, and I
22 know there are other obligations.

23 THE COURT: All right. The witness may be excused, and
24 then I want to talk to counsel for just a moment, please.

25 (Witness left the courtroom.)

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1 THE COURT: Well, now, of course I know a lot more about
2 the arrangements with this witness. She's essentially on
3 retainer for approximately 70 days a year at a very handsome
4 salary, and so this is my ruling, everybody, and defendants can
5 figure it out. This is a witness, she's in front of me now, she
6 has to complete her testimony. She has to complete her testimony
7 in the government's case. So you have a couple of options, none
8 are particularly desirable. You talk to her tonight and you find
9 out whether there isn't some way -- you can sit down, Ms.
10 Eubanks -- with adequate financial arrangements that some distant
11 neighbor can't be paid rather handsomely to come in and take care
12 of her situation -- that's one option -- and she stays and
13 finishes her testimony, or another option -- and she'll still be
14 within her 70 days -- I don't want to get that wrong, let me
15 check my notes. Right, 70 days, she'll still within her 70 days.
16 Your second option is she goes home, she takes care of her
17 personal issues, and she comes back and finishes her testimony in
18 the government's case. Not perfect, but --

19 MR. BERNICK: That's fine, we'll proceed accordingly.

20 THE COURT: So you'll figure it out overnight?

21 MR. BERNICK: We'll figure it out.

22 THE COURT: Okay, everybody. Who am I going to see at
23 9:30 tomorrow morning? I guess I'll see Dr. Blackie, and we'll
24 certainly get done what we can get done tomorrow. I think the
25 government's not really tonight in a position to tell Professor

1 Schwartz's lawyer anything definitive, but at least he's here in
2 D.C. and will be a little bit less discommoded than the rest of
3 the world. See you all at 9:30 tomorrow.

4 (Proceedings adjourned at 5:00 p.m.)

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10 C E R T I F I C A T E

11 I, Scott L. Wallace, RDR-CRR, certify that the
12 foregoing is a correct transcript from the record of proceedings
13 in the above-entitled matter.

14 -----
15 Scott L. Wallace, RDR, CRR
16 Official Court Reporter
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1 I N D E X

2

3 Examinations Page

4

5 CROSS-EXAMINATION OF SORELL SCHWARTZ 3592
6 BY MR. WEBB

7 DIRECT EXAMINATION OF SHARON BOYSE BLACKIE 3656
8 BY MS. EUBANKS

8 E X H I B I T S

9 Description Page

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