

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                            |   |                       |
|----------------------------|---|-----------------------|
| UNITED STATES OF AMERICA,  | . |                       |
|                            | . |                       |
| Plaintiff,                 | . | Docket No. CA99-02496 |
|                            | . |                       |
| v.                         | . |                       |
|                            | . |                       |
| PHILIP MORRIS USA, et al., | . | Washington, D.C.      |
|                            | . | March 31, 2005        |
|                            | . |                       |
| Defendants.                | . |                       |
| . . . . .                  | . |                       |

VOLUME 85  
MORNING SESSION  
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS  
BEFORE THE HONORABLE GLADYS KESSLER,  
UNITED STATES DISTRICT JUDGE

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1 MORNING SESSION, MARCH 31, 2005

2 THE COURT: Good morning, everybody.

3 ALL PARTIES PRESENT: Good morning, Your Honor.

4 THE COURT: This is United States versus Philip Morris, CA  
5 99-2496, and I gather the parties now have a schedule with the  
6 Special Master?

7 MS. EUBANKS: Yes, Your Honor. Last night I spoke with  
8 Judge Levy, and the United States has scheduled a meeting with  
9 him for this coming Sunday. We tried to get in on Friday, but he  
10 had a commitment on Friday, so we've scheduled a meeting with him  
11 on Sunday. We've agreed to send him some documents responsive to  
12 some of the documents -- or the document that he's going to get  
13 from defendants today.

14 THE COURT: And I don't know if defendants have a  
15 follow-up meeting scheduled or they need to wait.

16 MR. REDGRAVE: Your Honor, Jonathan Redgrave for the  
17 record.

18 THE COURT: What is that hazard?

19 MR. REDGRAVE: It's a moat.

20 MR. McDERMOTT: These are exhibits that my colleagues have  
21 put down to trip me up, and they may succeed.

22 MR. REDGRAVE: I think Mr. McDermott is trying to injure  
23 me. That's it. We did not know about the meeting scheduled for  
24 the plaintiff. Obviously, that's a separate session. We have  
25 not been contacted yet or hadn't had contact with the Special

1 Master yet with respect to our session. We are finishing our  
2 submission, which I won't even talk about. As far as that,  
3 they'll go over to the Special Master today.

4 THE COURT: All right. Thank you. We are ready to  
5 proceed with our witness, and you are still under oath this  
6 morning.

7 MR. SEALLS: Good morning, Your Honor. Kenneth Sealls  
8 again on behalf of the United States.

9 CONTINUED CROSS EXAMINATION OF LYNN J. BEASLEY  
10 BY MR. SEALLS:

11 Q. Good morning, Ms. Beasley.

12 A. Good morning.

13 Q. I'll direct your attention again to United States Exhibit  
14 93,235. For your reference, it's on the screen. You read this  
15 exhibit over yesterday to yourself on the witness stand, didn't  
16 you?

17 A. No, I did not read the whole thing. I just skimmed it.

18 Q. I direct your attention to page 3, the second full  
19 paragraph. Do you see how in the second sentence of the second  
20 full paragraph your name appears twice? Mr. Jackson, it's down  
21 below, next paragraph.

22 Would you like me to read it to you?

23 A. I was just reading through the paragraph where you said  
24 my name appeared twice.

25 Q. Have you finished reading it?

1 A. Yes.

2 Q. Why is your name in this document twice?

3 MR. McDERMOTT: Objection, Your Honor, no foundation.

4 This is improper questioning.

5 THE COURT: Sustained. How would she know that?

6 MR. SEALLS: Your Honor, she should know in that it --

7 THE COURT: That won't do, Mr. Sealls. This witness,

8 maybe I'm tired this morning, but this witness has not indicated

9 any familiarity or knowledge -- familiarity with or knowledge

10 about this document; isn't that correct?

11 MR. SEALLS: That's correct, Your Honor, but the topic of

12 the document is one that is consistent with other things she has

13 testified to --

14 THE COURT: Why don't you ask her just straightforwardly

15 whether she had this conversation with the parties who allegedly

16 wrote this document and then follow up that way?

17 MR. SEALLS: Yes, Your Honor, I do have other questions.

18 THE COURT: All right. Go ahead. But the objection's

19 sustained.

20 BY MR. SEALLS:

21 Q. Ms. Beasley, did you give some materials to persons in

22 connection with this document?

23 A. No, not -- no.

24 Q. At the end of paragraph -- you did give some documents to

25 Ms. Kacir and Jones Day lawyers?

1 A. I don't know what -- no, I don't know what you're  
2 referring to. I don't have any recollection of that.

3 MR. SEALLS: Your Honor, at this point, it presents quite  
4 a quandary in that this document is 13 years old. If this  
5 witness and other witnesses are able to say I don't remember or I  
6 don't recall and the document contains matters that were within  
7 that witness's scope of responsibilities while that witness was  
8 there, it sets an incredibly high standard for the United States  
9 to get in documents over the course of 50 years. I do think  
10 there is a foundation to the extent the document talks about a  
11 topic that Ms. Beasley was involved with.

12 THE COURT: Do you have a copy of the document?

13 MR. SEALLS: Yes, Your Honor.

14 THE COURT: All right. This is a document dated December  
15 7th 1992, for the record, U.S. Exhibit 93235.

16 Ms. Beasley, you're going to have to refresh my  
17 recollection. Did you say that you are or are not familiar with  
18 this document?

19 THE WITNESS: I haven't been asked, but I am not familiar  
20 with this document. I had never seen it before.

21 THE COURT: All right. December of 1992, what were your  
22 responsibilities?

23 THE WITNESS: I believe in December '92 I was probably  
24 head of the Winston brand in marketing.

25 THE COURT: Mr. Seal, again, I think you can ask certain



1 follow-up questions based upon very specific references to Ms.  
2 Beasley in this document in this paragraph.

3 MR. SEALLS: I will, Your Honor, I will.

4 THE COURT: You asked one; she said she didn't remember.

5 MR. SEALLS: I do have specific questions to ask her, Your  
6 Honor.

7 THE COURT: But again, there may be legitimate objections  
8 to be raised depending upon what your questions are. Do you need  
9 this document back? I may need it.

10 MR. SEALLS: Yes, Your Honor.

11 THE COURT: All right. Well, okay.

12 MR. SEALLS: Thank you, Your Honor. Court's indulgence.

13 BY MR. SEALLS:

14 Q. Ms. Beasley, do you recall giving any documents to the  
15 Jones Day lawyers in connection with Ms. Kacir?

16 A. No, I don't recall that.

17 Q. Do you recall being involved in any litigation concerning  
18 youth smoking in 1992, December of 1992?

19 A. Well, certainly there was some litigation with regard  
20 to -- well, litigation. 1992 there would have been a Federal  
21 Trade Commission investigation with regard to the Joe Camel  
22 campaign. I guess that really wasn't litigation because it was  
23 just a FTC investigation, so I guess you wouldn't call it --

24 THE COURT: We won't worry about the definition. Go  
25 ahead, please.

1 BY MR. SEALLS:  
2 Q. Did you interact with Ms. Kacir in 1992 with respect to  
3 any Joe Camel litigation?  
4 A. Not that I recall.  
5 Q. Did you interact with the attorneys from Jones Day in  
6 1992 regarding FTC Joe Camel litigation?  
7 A. No, I don't think it was Jones Day that was involved; I  
8 think it was Collier Shannon.  
9 Q. Do you recall giving any documents to the Jones Day  
10 lawyers at any time regarding the Joe Camel campaign?  
11 A. Giving Jones Day's lawyers documents regarding the Joe  
12 Camel campaign, is that your question?  
13 Q. Correct.  
14 A. No, I don't remember giving them documents.  
15 Q. Were you at any time informed of Kevin Verner's comments  
16 with regard to the Joe Camel FTC litigation?  
17 A. No, I don't -- no.  
18 Q. What was your role regarding the Joe Camel litigation in  
19 1992?  
20 A. In 1992, during the FTC investigation, I was involved  
21 with the Federal Trade Commission. I actually met with the  
22 commissioners. I was involved with the team working on it for  
23 us, and putting -- meeting with them and talking about our side  
24 of the case.  
25 Q. Did you, in your involvement with the team, discard any

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1 ads that you believed were not appropriate to younger people?

2 A. Well, not with that legal team, no. When we developed  
3 the Joe Camel campaign with adult smokers in focus groups -- I  
4 think that's what you're talking about -- we rejected ads that  
5 adult smokers felt were for people younger than their age. That  
6 doesn't have to do with the FTC investigation. That's about  
7 when we developed the Joe Camel campaign.

8 Q. Did you do that as a routine practice?

9 A. Did we do what as a routine practice?

10 Q. Did you weed out advertisements that were inappropriate  
11 to younger people as a routine practice in preparing for the Joe  
12 Camel litigation?

13 A. No, again, it wasn't preparing for the Joe Camel  
14 litigation. You're confusing the things. When we -- when I was  
15 involved with developing the Joe Camel campaign in 1987-88, I  
16 was involved, and we did focus groups among adult smokers, and  
17 when we did those focus groups among adult smokers we would ask  
18 questions like do you feel this advertising is for people your  
19 age, people younger than you. And if they said the ad was for  
20 people younger than them, then we rejected the ad and I have  
21 several examples of that, but this is unrelated to the FTC  
22 investigation. It is simply how we approached developing the  
23 campaign in 1987 and '88 when I was on the brand.

24 Q. Based on your review of U.S. Exhibit 93,235, can you tell  
25 the Court whether you are familiar with most of the events

1 described within it?

2 A. Again, are you referring --

3 MR. McDERMOTT: Objection, no foundation. The witness has  
4 already testified she didn't review the whole document and she's  
5 asking a general question about familiarity with events she  
6 hasn't even read about, let alone --

7 THE COURT: And that's a fairly long document, is it not,  
8 Mr. Sealls? I don't remember how many pages, but to me, 15 or  
9 20, maybe more.

10 MR. SEALLS: Your Honor, it's 22 pages, but I've asked her  
11 based on her review, whether she is familiar with --

12 THE COURT: She hasn't had a chance to review it. She  
13 said she's not familiar with it on the stand. She had an  
14 opportunity to review particular paragraphs to which you called  
15 her attention, but she hasn't reviewed the entire document. If  
16 you want, during the mid-morning break, to give her time to  
17 review the document then we can come back to this issue, but it  
18 is a pretty substantial document. When I flipped through it I  
19 didn't have an opportunity to look at it at all carefully and I  
20 read pretty quickly.

21 MR. SEALLS: Your Honor, I'll ask her specific questions  
22 and about specific parts of the document.

23 THE COURT: All right. Again -- okay, we'll see.

24 BY MR. SEALLS:

25 Q. Ms. Beasley, on page 2 of the document, do you see the

1 caption "policies on surveys at RJR", that's about the middle of  
2 the page?

3 A. I see the document says that.

4 THE COURT: And let me be clear. Do you know who the  
5 "Kevin" is who is being referred to fairly often in this  
6 document?

7 THE WITNESS: Yes, I did know Kevin Verner.

8 THE COURT: And what was his position at the company, or  
9 did he work for the company?

10 THE WITNESS: He did work for the company, and I think at  
11 this point in time he was in charge of the youth -- he was in  
12 external relations in charge of youth nonsmoking programs. I  
13 think that's what he was working on at that point in time. I'm  
14 not positive of that. That's kind of my best recollection.

15 THE COURT: All right. Now, Mr. Sealls, please, your  
16 question.

17 MR. SEALLS: Yes, ma'am.

18 BY MR. SEALLS:

19 Q. Now, Ms. Beasley, you were familiar with the tracking  
20 that was done in 1992 of youth by Reynolds, aren't you?

21 A. No, I don't know what you're referring to, tracking youth  
22 in 1992. I don't know what you're referring to.

23 Q. I'm referring to the tracking of the smokers aged 18  
24 through 34. You are familiar with the method of research, the  
25 tracking of youth as young as 18 through 34 youth smokers,

- 1   aren't you?
- 2   A.     I am familiar with our market tracking of adult smokers
- 3   18 to 34.
- 4   Q.     And you were familiar with it in December of 1992,
- 5   weren't you?
- 6   A.     Again, yes. During the period of -- yes, I'm familiar
- 7   with adult smoking tracking.
- 8   Q.     And you were coordinating with the attorneys in 1992 on
- 9   issues concerning Joe Camel litigation, correct?
- 10  A.     I don't know what you mean by "coordinating with
- 11  attorneys." I was involved with the FTC investigation and I met
- 12  with FTC commissioners to talk about the campaign.
- 13  Q.     Turning to the final page of the document, Ms. Beasley,
- 14  there's a reference in the middle of it to two JAMA articles on
- 15  Joe Camel. Do you see that, middle of page 22?
- 16  A.     I see it in the document.
- 17  Q.     Are you familiar with JAMA?
- 18  A.     Yes.
- 19  Q.     Are you familiar with articles in JAMA concerning Joe
- 20  Camel?
- 21  A.     Yes.
- 22  Q.     You were familiar with them in 1992, weren't you?
- 23  A.     I don't remember exactly what year they came out, but it
- 24  was probably around then.
- 25  Q.     Did you ever discuss any of those JAMA articles with

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1 Kevin Verner?

2 A. No, not that I recall.

3 Q. Did you ever discuss those JAMA articles with anyone in  
4 preparation of the Joe Camel litigation?

5 A. Well, with regard to the Federal Trade Commission  
6 investigation, yes.

7 MR. SEALLS: Your Honor, once again, our position is  
8 that --

9 THE COURT: What is your question, Mr. Sealls? Right now  
10 you asked the witness a question, she gave an answer. What's  
11 your next question?

12 BY MR. SEALLS:

13 Q. My question is, Ms. Beasley, you did coordinate at R.J.  
14 Reynolds with others on youth nonsmoking problems, didn't you,  
15 in 1992?

16 A. No, I don't know what you're referring to.

17 Q. I'm referring to underage smoking, more specifically,  
18 underage smoking allegations against the company in 1992?

19 A. Again, as I told you, what I was involved with in 1992  
20 was the Federal Trade Commission investigation of the Joe Camel  
21 campaign.

22 Q. Ms. Beasley, yesterday I had asked you whether Reynolds  
23 extrapolates data on nonsmokers -- or I should say smokers below  
24 the age of 18, by looking at studies of smokers 18 through 34.  
25 Do you recall that?

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- 1 A. Yes, I recall that.
- 2 Q. And you answered that Reynolds does not, didn't you?
- 3 A. Yes, I said that -- again, I had been in marketing, I've  
4 done marketing research among adult smokers and never in my  
5 experience have we tried to extrapolate those results to  
6 underage.
- 7 Q. So when a reference is made in this document on page 3  
8 that you were discarding ads which were seen as appealing to  
9 people younger than some unspecified age, you would have been  
10 discarding ads of persons who were underage and should not have  
11 been tracked, wouldn't you?
- 12 A. You know, I didn't follow your question. I don't know  
13 what you asked.
- 14 Q. I'll refer you again to what's on the screen on page 3,  
15 second full paragraph, second sentence. Do you see the sentence  
16 that reads "we then explored with him the material that Lynn  
17 Beasley had given us about discarding ads which were seen as  
18 appealing to people younger than you and the built-in, if you  
19 will, slop-over factor that you get if that same test is  
20 administered at 21 and over and that you wouldn't know what you  
21 are weren't doing, but that it might have that kind of impact.  
22 Kevin agrees that age is an issue; that is focused on an in ad  
23 evaluation and, I think strongly corroborates Beasley's view  
24 that this is a routine practice."
- 25 Do you have any idea what is meant by "Beasley's view



1   that this is a routine practice"?

2   A.     I think I already described that, which is, when we do  
3   developmental research among adult smokers on campaigns, we will  
4   ask questions like do you think this advertising is for people  
5   your age, do you think it's for you? And if they say "no, I  
6   think this is for people younger than me", then we eliminate  
7   those ads. I think I've described that.

8   Q.     Were there others who had a different view of what to do  
9   with such ads?

10  A.     No, not that I'm aware of.

11  Q.     Do you know what's meant by a "slop-over factor" in the  
12  sentence that I read a couple minutes ago?

13  A.     It's probably talking about possible spillover appeal,  
14  I'm guessing. I'm not really sure.

15           MR. SEALLS: Court's indulgence.

16  BY MR. SEALLS:

17  Q.     So, Ms. Beasley, your testimony is that -- I'll refer you  
18  again back to page 2 of the document, Ms. Beasley, at the very  
19  bottom, the bottom paragraph, the second sentence. You see  
20  where the writer says he "is of the impression that the tracking  
21  was never done by reference in the Salem marketing document, in  
22  parentheses, which I didn't show him, but described to him, was  
23  not from actual tracking but from extrapolation from studies  
24  based on those 18 and over," you see that part?

25  A.     I see the document says that.

1 Q. And you see that it continues, "he said in his experience  
2 that was a not uncommon practice and that it was possible to  
3 make assumptions about the under-age market based on what you  
4 knew about the legal market", you saw that?

5 A. I see the document says that.

6 Q. Is it your testimony then, that the author of this  
7 document was wrong in writing that?

8 MR. McDERMOTT: Objection, no foundation, improper  
9 impeachment.

10 THE COURT: Objection is sustained, although the question  
11 may be asked in terms of whether the witness, based on her  
12 knowledge, and, of course, experience of the company, agrees or  
13 disagrees with what counsel just read.

14 Ms. Beasley, can you answer that question for the record,  
15 please?

16 THE WITNESS: Certainly. I would disagree with that  
17 statement.

18 BY MR. SEALLS:

19 Q. Thank you, Ms. Beasley. Ms. Beasley, Reynolds has been  
20 publicly saying it doesn't market to youth the entire time  
21 you've been with the company, hasn't it?

22 A. That's been the company's policy the entire time I have  
23 been with the company.

24 Q. And it's been publicly saying all the while you've been  
25 with the company that it doesn't want youth to smoke, correct?

1 A. The company -- the policy, since I've been at the  
2 company, is that we do not want youth to smoke.

3 Q. I direct your attention to U.S. Exhibit 76,544. Do you  
4 see the 1984 advertisement in the Chicago Tribune where Reynolds  
5 asserts "we don't advertise to children"?

6 A. I cannot read that copy from here, and you can't read it  
7 on this. I don't know if you want me to --

8 Q. Can you see it on the screen?

9 THE COURT: Perhaps the government can enlarge that text,  
10 although it is -- that's better, certainly, although -- can you  
11 read it Ms. Beasley?

12 THE WITNESS: I've read it.

13 BY MR. SEALLS:

14 Q. And that was the company's position in 1984, correct?

15 A. You know, I don't remember this ad. Again, my  
16 recollection of this -- this is 1984. My recollection of the  
17 company's position in 1984 is that we don't market, we only  
18 market to adult smokers, we don't want youth to smoke and we do  
19 not market to those under the age to legally smoke.

20 Q. I direct your attention to U.S. Exhibit 76,633.

21 A. Yes.

22 Q. Do you have it in front of you?

23 A. Do you mean this (indicating)?

24 Q. No, not that, it's what's on the screen. Ms. Beasley, I  
25 have a question that's referenced in the third paragraph. Do

- 1 you see the third paragraph which begins "R.J. Reynolds Tobacco  
2 is not interested in"?
- 3 A. Yes, I see the third paragraph.
- 4 Q. And you see that it says that "Reynolds tobacco is not  
5 interested in and has nothing aimed at trying to persuade any  
6 nonsmokers to begin smoking". Do you see that?
- 7 A. I do.
- 8 Q. This is from the company Website, correct?
- 9 A. It looks like it was, yes, in 2003.
- 10 Q. I want to turn your attention to Camel marketing. Camel  
11 is one of the companies two top brands in terms of market  
12 potential, isn't it?
- 13 A. Yes.
- 14 Q. Kool is the other brand, right?
- 15 A. Well, those are the two brands that we have selected to  
16 devote -- allocate more of our marketing dollars to to try to  
17 grow for the future.
- 18 Q. You were the Assistant Brand Manager for Camel  
19 October 1984 to August 1985, correct?
- 20 A. I think that's roughly right.
- 21 Q. While you were Assistant Brand Manager for Camel, you  
22 reported to Rick Caufield, didn't you?
- 23 A. Yes, I did.
- 24 Q. He was the Senior Brand Manager for Camel while you were  
25 Assistant Brand Manager for Camel, correct?

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- 1 A. That's correct.
- 2 Q. While you were Assistant Brand Manager for Camel,  
3 Reynolds held Camel younger adult focus groups, correct?
- 4 A. Again, I have seen that in the course of litigation. As  
5 Assistant Brand Manager of the Camel brand in 1984 and '85, I  
6 worked on promotions. I think you're talking about advertising  
7 focus groups. I have seen that in the course of litigation.
- 8 Q. Is it your testimony that you didn't review, prior to  
9 litigation, any marketing research report concerning Camel young  
10 adult smoker focus groups?
- 11 A. Again, there could have been younger adult focus groups  
12 on promotion. At the time, I was not involved in the  
13 advertising development. My specific accountability was  
14 promotion.
- 15 Q. And when you say "promotion", are you referring to any  
16 placement of ads --
- 17 A. Any placement of ads?
- 18 Q. -- in magazines, correct?
- 19 A. Well, you could run a promotion in a magazine. I mean,  
20 that could include a promotion in a magazine, certainly.
- 21 Q. Certain promotions that Reynolds had concerning Camel in  
22 1985 were the Go With It campaign, correct?
- 23 A. I'm sorry, the what?
- 24 Q. Strike that. The French Camel campaign had certain  
25 promotions in 1985 that you would have been involved with,

- 1 correct?
- 2 A. There wasn't a French Camel campaign, it was the French  
3 Camel poster. It was just a poster; it was not a campaign.
- 4 Q. Were there promotions done in connection with the French  
5 Camel poster?
- 6 A. Poster, yes.
- 7 Q. Were there promotions done with regard to the Welcome to  
8 the Oasis campaign?
- 9 A. I can't remember.
- 10 Q. I show you, Ms. Beasley, U.S. Exhibit 71,050. This is a  
11 marketing research report dated February 1, 1985, is it not?
- 12 A. Yes.
- 13 Q. And that is at the time that you were the Assistant Brand  
14 Manager for Camel, correct?
- 15 A. Again, as I described my accountabilities on Camel at the  
16 time.
- 17 Q. It was while you were an Assistant Brand Manager; is that  
18 correct, for Camel?
- 19 A. I was an Assistant Brand Manager in February of 1985 on  
20 Camel.
- 21 Q. And you worked -- did you work with an L.W. Hall as an  
22 Assistant Brand Manager?
- 23 A. No, I believe at that time Mr. Hall was head of all of  
24 marketing research.
- 25 Q. Did you work with A.R. Cox as Assistant Brand Manager for

1 Camel?

2 A. I think the next two, Alan Cox and Dan Murphy, I think  
3 they were directors in marketing research at the time, so I  
4 would not have been working directly with them, no.

5 Q. You worked under Mr. Winebrenner, didn't you? Wasn't he  
6 someone you reported to?

7 A. No, at this time I did not report to him. I think at  
8 this time John Winebrenner was head of all of marketing. Rick  
9 Caufield, my boss, would have reported to, probably, John  
10 Winebrenner.

11 Q. You did report all the way up the chain since Hall was  
12 the head of all marketing research, didn't you?

13 A. No, I didn't report in through marketing research. I  
14 reported in through marketing. I was not part of marketing  
15 research.

16 Q. But did you report to Mr. Caufield, correct?

17 A. Correct.

18 Q. Do you see on page 2 of this document, ma'am, starting at  
19 the first paragraph, language that begins with, "due to the  
20 importance of younger adult smokers, Camel has developed a new  
21 advertising campaign which is directed solely towards this  
22 group". Do you see that?

23 A. You're asking me if I see that?

24 Q. Yes.

25 A. Yes, I see it.

1 Q. And the next thing it says, "although the new campaign  
2 appears different from the current campaign, it was developed to  
3 supplement but not to replace the Camel world campaign", that's  
4 what it says, right?

5 A. Yes, it says that.

6 Q. And then it says that "management requested that the  
7 younger adult campaign be taken to focus groups in order to  
8 obtain consumer reaction to the new ads." That's what it says,  
9 correct?

10 A. Yes, I see that.

11 Q. Would you go to the bottom of the page, the last complete  
12 sentence, it reads, "certain ads did convey the message that  
13 Camel was an acceptable choice for young adult smokers. As  
14 evidence focus group members placed some of the adds in young  
15 adult publications, such as National Lampoon and Rolling Stone."  
16 Do you see that?

17 A. I see that.

18 THE COURT: How did Reynolds define the term age wise, the  
19 term "younger adult"?

20 THE WITNESS: Younger adult. Generally that would be 18  
21 to 24 adult smokers. I'm not sure, it's probably defined in this  
22 document. At some points in time it was 18 to 20. At some  
23 points in time it was 21 to 24, but generally, I would say 18 to  
24 24.

25 BY MR. SEALLS:



- 1 Q. Isn't it true, Ms. Beasley, that today Camel is the third  
2 most commonly smoked brand among 12 to 17-year-olds?
- 3 A. No, I don't believe that's true. We don't track that  
4 research, but based on government studies I'm aware of, I don't  
5 believe that's true.
- 6 Q. Are you familiar with the Department of Health and Human  
7 Services results from the 2003 national survey on drug use and  
8 health, national findings?
- 9 A. I don't think I -- I haven't reviewed that.
- 10 Q. Mr. Jackson, would you put that on the screen, please?  
11 I'm showing you the document at pages 39 through 40. And it's  
12 JD Exhibit 067884. These are the DHHS results from the 2003  
13 national survey on drug use and health national findings, aren't  
14 they, Ms. Beasley?
- 15 A. That's what it looks like, yes.
- 16 Q. Directing your attention to what's on the screen and on  
17 your page at pages 39 through 40, you see that under the caption  
18 "usual brand of cigarettes smoked" the first bullet says, "among  
19 past month cigarette smokers age 12 or older the most commonly  
20 smoked brands were Marlboro, 41.3 percent, Newport,  
21 10.8 percent, and Camel 7.0 percent. These brands also were the  
22 most commonly reported in 2002." Do you see that?
- 23 A. I do.
- 24 Q. Do you see also -- let's skip to the third bullet, that  
25 would be the first one on page 40, and it reads, "the same three

1 brands accounted for most of youth cigarette smoking in 2003.  
2 Among current smokers 12 to 17 years of age, 49.2 percent  
3 reported Marlboro, 23.4 percent reported Newport, and  
4 9.7 percent reported Camel. No other individual cigarette brand  
5 was reported by more than 3 percent of youth. These three  
6 brands were also most commonly reported by youths in 2002." Do  
7 you see that, Ms. Beasley?  
8 A. I do. You know, maybe I misunderstood your question.  
9 I'm sorry.  
10 Q. I don't have another question for you right now.  
11 A. I thought you asked me if Camel was the most popular  
12 brand in government studies among 12 to 17. I thought you said  
13 "most popular". If you said one of the top three, then based on  
14 these government studies I was aware of that. Did I  
15 misunderstand your question?  
16 Q. I don't know, Ms. Beasley.  
17 A. Okay.  
18 Q. I direct your attention to U.S. Exhibit 76,783. You see  
19 this is an ad on Camel's 75th birthday campaign appearing in Car  
20 Craft magazine in 1978, do you see that?  
21 A. Yes, I do.  
22 Q. Let me ask you a question about the 75th birthday  
23 campaign. It's true that it achieved continuous share of smoker  
24 gains among younger adult smokers; isn't that true?  
25 A. Yes, Camel grew among younger adult smokers.

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1 Q. And what's on the screen, U.S. Exhibit 76,783, that is  
2 Joe Camel featured in the ad, correct?

3 A. Yes.

4 Q. The next exhibit I want to direct your attention to is  
5 U.S. Exhibit 76,784?

6 THE COURT: Well, excuse me a minute, I want to go back to  
7 the last one. What was the date, if there was any, on the last  
8 exhibit that was put on the screen?

9 MR. SEALLS: Your Honor, this is dated some time in --  
10 according to the front page, 1988. There's a notation on that  
11 page referencing --

12 THE COURT: Okay.

13 MR. SEALLS: -- that period in '88.

14 BY MR. SEALLS:

15 Q. Ms. Beasley, are you looking, now, at U.S.  
16 Exhibit 76,784?

17 A. Is that the one up there? No.

18 Q. Yes, it is, ma'am. That's Joe Camel and in a 1988 Sports  
19 Illustrated ad, correct?

20 A. I don't know if that ran in 1988.

21 Q. Mr. Jackson, would you highlight on the screen the date  
22 of the magazine? Thank you.

23 Do you see highlighted, Ms. Beasley, November 21, 1988?

24 A. Is that the cover of the magazine? Yes. I see that. I  
25 was just wondering, because it looks like there are two

1 different ads in here, and the one that comes after this one is  
2 dated 1988. I'm not sure that this one ran in 1988. I just  
3 don't recall. Maybe it ran in the latter part of 1988, but are  
4 you suggesting that these all ran together, this was one ad?

5 Q. I'm asking you that question, ma'am.

6 A. Well, I don't have the magazine. I just have these  
7 Xeroxed copies you put together, and it looks like two different  
8 Camel ads.

9 Q. It looks like two different Camel ads?

10 MR. McDERMOTT: Excuse me, if the government has a full  
11 copy of the magazine that might make things a little easier for  
12 the witness and for all of us.

13 THE COURT: If you have it, yes.

14 MR. SEALLS: We do not, Your Honor.

15 THE COURT: Well, can you represent whether these are two  
16 successive pages that you put together or were they one long  
17 foldout, as one sees occasionally in magazines?

18 MR. SEALLS: Yes, I can represent, Your Honor. These are  
19 consecutive pages. Unfortunately, when it was made an exhibit  
20 the pages did not run consecutively, so the number on the right  
21 column, the AVD number, is not running consecutive, but this is  
22 one magazine that a representative of the United States --

23 THE COURT: But they were consecutive pages in this  
24 magazine?

25 MR. SEALLS: Yes, ma'am, yes.

1           THE COURT: All right. Now, let's have the question for  
2 Ms. Beasley, please.  
3 BY MR. SEALLS:  
4 Q.       The next exhibit, Ms. Beasley, is U.S. Exhibit 76,785.  
5 This is the Camel Smooth Moves campaign appearing in a 1989 Car  
6 Craft magazine, correct?  
7 A.       I don't remember if this appeared in 1989 or not. Maybe  
8 you can -- is it '89? I'm not -- I guess it could have been.  
9 Let me see if there's a date on this. It could have been 1989,  
10 I just don't recall.  
11 Q.       And then, Ms. Beasley, let me show you what's United  
12 States Exhibit 76,786. That's a Joe Camel ad appearing in a  
13 1993 Sports Illustrated, swimsuit edition, correct?  
14 A.       Again, I'll just have to take your word for it that it  
15 was 1993. I can't recall what year these ads ran.  
16 Q.       Do you see on the front page it says swim suits '93 in  
17 the lower left-hand corner?  
18 A.       Yes, I see that.  
19 Q.       U.S. Exhibit 76,788, we'll show you. That's Joe Camel  
20 again?  
21 A.       Yes.  
22 Q.       And this is the ad asking, "wanna see a show, go ahead,  
23 it's on me"?  
24 A.       That's what it says.  
25 Q.       This ad ran in Glamour magazine in 1996, didn't it?

1 A. I would have no way of recalling that.

2 Q. Let's look at U.S. Exhibit 76,786.

3 THE COURT: The magazine to which you were just referring,  
4 because that's not Glamour, it's -- I think it's called  
5 Gentlemen's Quarterly, I think.

6 MR. SEALLS: We went past Glamour, Your Honor.

7 THE COURT: Oh, I'm sorry.

8 BY MR. SEALLS:

9 Q. Are you familiar with the ad --

10 MR. SEALLS: Court's indulgence. We'll go for a moment,  
11 Your Honor, to some questions I have concerning Ms. Beasley's  
12 experience with the company.

13 BY MR. SEALLS:

14 Q. Ms. Beasley, in 2001 you were the Executive Vice  
15 President in charge of all of Reynolds marketing, correct?

16 A. That's correct.

17 Q. I would like to show you U.S. Exhibit 76816. I may have  
18 questions concerning this later, Ms. Beasley, but I want to not  
19 show you this at the moment.

20 A. Don't look at this?

21 Q. No, I'll have a question for you and perhaps come back to  
22 this.

23 MR. McDERMOTT: Objection. Is the witness supposed to  
24 look at the exhibit or not?

25 MR. SEALLS: Your Honor, I have no questions on it. I'm

1 withdrawing it for now.

2 THE COURT: So, therefore, she doesn't have to look at it.

3 BY MR. SEALLS:

4 Q. I'd like to put up U.S. Exhibit 76,795. This is a Camel  
5 Mighty Tasty ad, isn't it, Ms. Beasley?

6 A. Yes, it is.

7 Q. And it's appearing in a 1999 Rolling Stone Magazine,  
8 correct?

9 A. I can't see the date. I mean, I can take your word for  
10 it.

11 Q. Didn't you testify in your written direct that in  
12 March 2001 Reynolds removed Rolling Stone, Allure and ESPN from  
13 its approved list of magazines for advertising?

14 A. It -- let's see, 1999. I don't think it was '99, no. It  
15 would have been -- I can refer to the direct, if you'd like, but  
16 I think that it was 2001.

17 Q. Yes, March 2001, according to your written direct  
18 testimony.

19 A. Oh, I thought you said '99. I guess I misunderstood.

20 Q. If I did, I misspoke. So it was March 2001 that Reynolds  
21 removed Rolling Stone, Allure and ESPN from its approved list of  
22 magazines advertising?

23 A. I think that's right. I can refer to my direct to be  
24 sure of that, but I -- that's my best recollection. I'd be  
25 happy to look at the direct to confirm that.

1 Q. Please, take your time, look at it.

2 THE COURT: Well, do you want to just stand on what's in

3 your direct?

4 THE WITNESS: Yes, that's easier.

5 THE COURT: It is.

6 BY MR. SEALLS:

7 Q. And it was also in your direct that these three magazines

8 were taken off the list because they did not meet the adult

9 readership requirement based on either Simmons or MRI?

10 A. That's right. As I recall, in March 2001 we put in a new

11 advertising print placement policy and new approval policy and

12 when we put that policy in, there were -- well, I'm just trying

13 to remember which ones fell off when. Can I just refer to my

14 direct to be sure?

15 Q. So, Ms. Beasley, you don't recall what's in your written

16 direct on this point?

17 A. I just don't recall the specific magazines on which date.

18 I just need to refer back to it, please.

19 MR. McDERMOTT: Can I direct the witness to the correct

20 page, if that would save a little time?

21 THE COURT: Please, thank you.

22 MR. McDERMOTT: 58.

23 THE WITNESS: Okay, I'm there, thank you. I appreciate

24 the time.

25 BY MR. SEALLS:



- 1 Q. Did you write this part of your written direct that you  
2 just reviewed?
- 3 A. Yes.
- 4 Q. I'd like to draw your attention to U.S. Exhibit 93,245.  
5 This is a Rolling Stone Magazine dated March 10, 2005, correct?
- 6 A. Yes, it is.
- 7 Q. That is a Camel ad in the centerfold, isn't it?
- 8 A. Yes. I mean, I can explain that if you would like.
- 9 Q. I have other questions about it for you. The ad has a  
10 drawing -- it's in the centerfold, isn't it?
- 11 A. I don't know. Do you want me to -- is it in a magazine  
12 here? Oh, no. I don't know if it is or not.
- 13 Q. But you see the woman in there. Is that a drawing of a  
14 woman smoking the Camel cigarette?
- 15 A. I believe that's, again, a photograph. Back then the  
16 artist, you know, refines --
- 17 Q. She's a fairly attractive young woman?
- 18 A. Yes, I think she's attractive.
- 19 Q. She's dressed in a one-piece bathing suit?
- 20 A. Yes, she is.
- 21 Q. Wearing purple stiletto heels?
- 22 A. Probably blue, but --
- 23 Q. Stiletto?
- 24 A. High heels, um-hmm.
- 25 Q. I next refer you to U.S. Exhibit 93,239. This is a

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1 Rolling Stone Magazine dated April 7, 2005, isn't it?

2 A. Yes, it is.

3 Q. And you see the cover article is The Children of Rock?

4 A. Yes, I do.

5 Q. Would you please turn to page 58. Would you like a hard

6 copy of the magazine, ma'am?

7 MR. SEALLS: May I approach the witness, Your Honor?

8 THE COURT: Yes.

9 THE WITNESS: Sure. It doesn't look like I have a page

10 58.

11 BY MR. SEALLS:

12 Q. Ms. Beasley, I've tabbed page 59 for you. Do you see

13 page 58 next to the tab page?

14 A. I do.

15 Q. That's a Camel ad, isn't it?

16 A. Yes, it is.

17 Q. And it has a picture of a young woman smoking a Camel

18 cigarette, doesn't it?

19 A. Yes, it does.

20 Q. And you see that her left eyebrow is pierced, don't you?

21 A. Yes. Again, you know, this is an adult smoker,

22 obviously, and her left ear --

23 Q. Not her ear, her eyebrow?

24 A. Oh, eyebrow.

25 Q. You see that her left eyebrow is pierced?

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- 1 A. I do.
- 2 Q. And you see there's a ring in the left eyebrow?
- 3 A. Yes.
- 4 Q. Next I'd like to draw your attention to U.S.
- 5 Exhibit 93,238. This is a Rolling Stone Magazine dated March
- 6 24, 2005, correct?
- 7 A. Yes, it is.
- 8 Q. And if you turn to the rear of it, what is the back cover
- 9 of it, you'll see a Camel ad, won't you?
- 10 A. You mean in this color copy section?
- 11 Q. Yes, ma'am, if you turn to the last page of it.
- 12 A. I assume that's the back cover.
- 13 Q. Yes, you see a Camel ad, don't you?
- 14 A. Yes.
- 15 Q. And you see there's a picture of a young man with a
- 16 slicked back popular hair style, correct?
- 17 A. Popular a long time ago.
- 18 Q. The Fonzie look, correct?
- 19 THE COURT: I think Ms. Beasley is giving away her age. I
- 20 won't comment on that.
- 21 BY MR. SEALLS:
- 22 Q. And you see that he's lighting up a Camel, don't you?
- 23 A. Yes.
- 24 Q. Do you see the tattoo on his neck?
- 25 A. Yes, I do.

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1 Q. Do you see on his right biceps he has a cap of Camel  
2 underneath his T-shirt?

3 A. Yes, I see that.

4 Q. And he's wearing a white T-shirt, right?

5 A. Yes.

6 Q. Next exhibit, Ms. Beasley, is U.S. Exhibit 93,246. This  
7 is from a Rolling Stone Magazine dated February 24th, 2005. Do  
8 you see that? Would you enlarge that, Mr. Jackson?

9 Can you see on the copy that you have, Ms. Beasley, 2005  
10 in the upper right corner, February 24, 2005?

11 A. Yes, I see it.

12 Q. And you see that there's a Camel Pleasure to Burn ad on  
13 the rear of the magazine, isn't there?

14 A. I don't actually have the magazine, but I see the Xerox  
15 copy here.

16 Q. I'll represent to you that that's a copy of the magazine.

17 A. All right.

18 Q. There's a picture of a young man smoking a cigarette,  
19 isn't there?

20 A. Again, it's an adult smoker.

21 Q. He looks like he hasn't had a haircut in a long time,  
22 doesn't he?

23 A. He does.

24 Q. I want to ask you a few questions, Ms. Beasley, about  
25 Reynolds' marketing programs. Since the July 2004 merger,

- 1 Reynolds has lowered from age 21 to 18 the age of those who may  
2 participate in its marketing programs, hasn't it?
- 3 A. With regard to, yes, specific programs we have. We still  
4 do development research among 21 plus adult smokers, but in  
5 terms of, for example, our direct marketing programs or our  
6 event programs and sampling programs conducted in age restricted  
7 facilities, they are now legal age adult smokers. We believe we  
8 have the procedures in place to ensure that it is to legal age  
9 adult smokers, and very strong controls in place.
- 10 Q. So, some of those marketing programs would include direct  
11 mail programs, right?
- 12 A. Yes, I believe I just -- I covered that.
- 13 Q. And promotional programs?
- 14 A. Again, like, for example, sampling and age restricted  
15 venues. And again, we have very strong controls in place to  
16 limit any youth exposure.
- 17 Q. I have a few questions I would like to turn your  
18 direction to concerning the Master Settlement Agreement. In the  
19 Master Settlement Agreement Reynolds doesn't agree to limit the  
20 amounts it may spend on advertising, does it?
- 21 A. No, that is not part of the Master Settlement Agreement.
- 22 Q. Nor does Reynolds agree to limit the amounts it may spend  
23 on promotions, does it?
- 24 A. No, spending limits are not part of the Master Settlement  
25 Agreement.

- 1 Q. And Reynolds doesn't agree to limit the amounts it may  
2 spend on retail value added, does it?
- 3 A. No.
- 4 Q. It doesn't agree to limit the value of coupons that it  
5 issues, does it?
- 6 A. The value of coupons?
- 7 Q. "It" being Reynolds, the value of coupons that Reynolds  
8 issues.
- 9 A. No.
- 10 Q. Nor does Reynolds agree to limit the amount it spends on  
11 direct mailings, does it?
- 12 A. No. Again, the MSA does not contain spending limits on  
13 your marketing programs.
- 14 Q. Reynolds doesn't agree, under the MSA, to limit the  
15 number of magazine ad placements either, does it?
- 16 A. Well, there are restrictions. We do have an agreement  
17 with the Attorney Generals in terms of our print placement  
18 policy.
- 19 Q. But the MSA itself does not limit the number of magazine  
20 ad placements for Reynolds, does it?
- 21 A. The MSA itself didn't. We now -- it was part of an MSA  
22 action, we now have an agreement with the Attorney Generals in  
23 terms of a print placement policy that was part of the MSA  
24 dispute resolution.
- 25 Q. Reynolds didn't give up anything when it agreed not to

1 license third parties to use any of its trademarks on any item  
2 that is intended for children, did it?

3 A. Could you repeat that question? It sounded like a double  
4 negative. If you could just repeat it, please?

5 Q. Yes, I will. Reynolds did not give up anything when it  
6 agreed to not authorize or license to a third party the use of  
7 any of its trademarks on any item intended for children?

8 A. No, certainly as a policy that just codified our company  
9 policy, which is, we don't authorize the use of our trademarks  
10 for children's items.

11 Q. The agreement under -- the agreement with the Attorney  
12 Generals does not limit the number of magazine placements RJR  
13 can make, did it?

14 A. Again, the original MSA agreement did not have a print  
15 placement policy in it. However, as part of the Master  
16 Settlement Dispute Resolution, we have now agreed with the  
17 Attorney Generals on specific print placement criteria.

18 Q. Did you say prep placement?

19 A. Print placement criteria.

20 Q. My question was about the number of magazine placements.  
21 Is it your testimony that the agreement with the Attorney  
22 Generals does limit the number of Reynolds' magazine placements?

23 A. Well, it covers gross rating points and gross  
24 impressions, so, like for example, on gross rating points I  
25 believe the standard is -- and gross rating points are like

1 reach time frequency, approximately that calculation, that the  
2 number of -- that your gross rating points against 12 to 17  
3 can -- cannot be any more than 70 percent of what it is among  
4 adult smokers. And then similarly with gross impressions, it  
5 has to be a higher index among the adult smoker target than  
6 among the youth target, and it has to be less than a hundred  
7 index. So in terms of the agreement, it's very specific in  
8 terms of the agreement. In addition to 85 percent adult  
9 readership for magazines that have 12 to 17 data it needs to be  
10 85 percent adult readership. So I mean there's -- it's a pretty  
11 specific agreement on print placement.

12 Q. Ms. Beasley, but there is not a limit on the number of  
13 ads, is there?

14 A. Well, again, the number of ads you run, depending on the  
15 magazines you select, has to fit this criteria now, and so it  
16 could change the mix of what you can run, this new criteria.

17 Q. Are you able to answer my question yes or no?

18 A. Okay. Please try again.

19 Q. That was a question. Are you able to answer the question  
20 I asked more than once with a yes or a no answer?

21 A. I don't know. Could you ask that question again? I  
22 mean, I'll try.

23 Q. Yes. The agreements with the Attorney Generals do not  
24 limit the number of ads that Reynolds places, does it?

25 A. I'm having trouble with just a yes or no, because I would



1 say no, not the number of ads, but yes, in terms of the number  
2 of ads, because this calculation on gross impressions, you have  
3 to look at the gross impressions you have among the adult target  
4 audience and the underage audience, and you would have to change  
5 the mix of the number of ads you have to achieve that gross  
6 impression goal.

7 Q. Ms. Beasley, let's talk about Reynolds' compliance or  
8 lack thereof with the MSA. The only reason that Reynolds  
9 entered into the agreements with the Attorney Generals is  
10 because the Attorney Generals had alleged that Reynolds had  
11 violated the terms of the MSA, correct?

12 A. I was not involved in the negotiation of the Master  
13 Settlement Agreement. I realize that the Master Settlement  
14 Agreement was to resolve litigation brought by the states  
15 against our company and other companies, but in terms of the  
16 specifics of it, I don't know.

17 Q. I'm not asking you specifics of the MSA, I'm asking  
18 you -- let me strike that. You are the Chief Operating Officer  
19 of Reynolds, aren't you?

20 A. Yes, I am.

21 Q. And you are made aware, if not aware, of allegations of  
22 MSA violations, aren't you?

23 A. I would say generally, with regard to inquiries from the  
24 Attorney Generals, that I would not be made aware of every one.  
25 Some of them are, obviously, just information requests or

1 routine things that can be handled, but I would say with regard  
2 to significant issues, I am apprised of when the Attorney  
3 Generals have inquiries about our practices.

4 Q. But you know the only reason they have inquiries about  
5 your practices is when they allege that you, meaning Reynolds,  
6 have violated the MSA, you know that, don't you?

7 A. No, that's not correct. The inquiries we get from the  
8 Attorney Generals range from information requests, just wanting  
9 to know what the plans are, what the schedule is for the  
10 upcoming year. There are also inquiries about third party  
11 activity. You know, for example with regard to movie studios,  
12 the Attorney Generals have asked us, even though we take  
13 absolutely no part in paying for placement of product in our  
14 movies, we do not do it. Despite that, movie studios have put  
15 our products in movies. The Attorney Generals requested that we  
16 write letters to all of the movie studios and request that they  
17 not put our product in the movies. So, there are requests like  
18 that that really deal with third party issues. There's been  
19 retailers, Websites, movie companies, and then also there are  
20 inquiries about our business practices. So, there's a range of  
21 inquiries that come from the Attorney Generals.

22 Q. Ms. Beasley, the only reason for Reynolds' change in  
23 magazine ad policy was to address allegations of MSA violations;  
24 isn't that right?

25 A. I would say that we changed -- we thought we had a policy

1 that complied with the MSA. You know, it's not concrete in the  
2 MSA, there's not a concrete thing like 14 square feet. There is  
3 no concrete, here's the guideline for print placement policy.  
4 We felt like ours was in compliance, but Attorney Generals  
5 disagreed and we entered into dispute resolution over it, and  
6 ultimately settled with the Attorney General on how we would  
7 proceed.

8 Q. So, it was at least one of the reasons for Reynolds'  
9 change in magazine ad policy, correct?

10 A. Certainly the Attorney General -- Attorneys General's  
11 discussion about our print placement policy was one of the  
12 reasons we changed it.

13 Q. I draw your attention to your written direct testimony,  
14 page 48 lines 3 to 10. Do you see where the question is, "how  
15 many disputes with the A.G.s have actually resulted in  
16 litigation?"

17 A. I see that.

18 Q. And you see the answer is, "the A.G.s have filed  
19 complaints over four issues: The length of time we could  
20 display signage at our former Winston Cup series sponsored  
21 events." That's the first issue, ma'am?

22 A. Yes.

23 Q. Continuing, "sampling and consumer product testing in  
24 California and Arizona", is that the second issue?

25 A. Yes.

1 Q. Continuing. "Our advertising on matchbooks and whether  
2 matchbooks constituted merchandise under MSA", is that the third  
3 issue, ma'am?

4 A. Yes.

5 Q. And "Reynolds' magazine advertisement placement  
6 policies", is that the fourth issue?

7 A. Yes.

8 Q. I would like to go through these issues with you, ma'am,  
9 briefly. The first issue, length of time signage displayed.  
10 Reynolds had refused to remove its outdoor advertising signs at  
11 a California race track, hadn't it?

12 A. No, that's not correct. This was signage for the event,  
13 the Winston cup series sponsorship, and we were sponsoring the  
14 entire series, not an individual race, and there was guidelines  
15 within the Master Settlement Agreement about signage at the race  
16 track could stay up -- I forget the exact timeframe here, but so  
17 much time before the start of the first event and so long after  
18 the finish of the last event. Because we were sponsoring the  
19 entire series, we interpreted that as the first event of the  
20 series and the last event of the series. I believe that the  
21 A.G.'s interpretation was it's the first event at a specific  
22 race track and the last event after a race track. And clearly  
23 you could interpret it -- it was gray. It was not clear what  
24 the correct interpretation was. And in fact, it was litigated,  
25 the issue was presented in four Courts. We won in one Court,

1 lost in two Courts and settled in the fourth and then moved on.

2 So, I think that demonstrates, it's a very complex, difficult  
3 agreement that is not always clear in its language.

4 Q. I didn't have another question pending, ma'am.

5 A. Sorry.

6 MR. McDERMOTT: Your Honor, I think the witness was in the  
7 middle of an answer.

8 THE COURT: I think she answered the question. Next  
9 question please.

10 BY MR. SEALLS:

11 Q. Returning, Ms. Beasley, to the consumer and product  
12 testing in California, the second issue?

13 A. Yes.

14 Q. California sued Reynolds to stop it from sending hundreds  
15 of thousands of free cigarettes through the mails, didn't it?

16 A. With regard to the consumer testing, consumer testing  
17 product consumer testing is allowed through the mail under the  
18 Master Settlement Agreement. The Attorney General had some  
19 questions about it. We ultimately did not have a big issue. We  
20 agreed with some modifications in terms of making sure -- I  
21 believe it was a smoker was notified 180 days in advance that  
22 they certified that they wanted to participate, and then we  
23 agreed to the kind -- the numbers, absolute numbers in terms of  
24 how much we would do. So, I mean, it was -- we were able to  
25 agree to interpretation and that satisfied both parties.

- 1 Q. Ms. Beasley, but my question is, California sued Reynolds  
2 to stop it from sending those hundreds of thousands of free  
3 cigarettes through the mails, yes or no?
- 4 A. They did bring action. We were able to resolve it  
5 with --
- 6 Q. I didn't have another question pending.
- 7 A. Okay.
- 8 Q. Some of those mailings went to persons who Reynolds  
9 hadn't gotten certificates of being 18 or older, didn't they?
- 10 A. Well, you're talking about -- there were two different  
11 issues. You're talking about the sampling issue. The sampling  
12 issue related to, we had a supplier who conducted sampling for  
13 us, and --
- 14 Q. Did it go to persons 18 or older who didn't certify being  
15 18 or older? That's all I'm asking.
- 16 A. Well, we had certification cards that said they were 18  
17 or older, but as it turned out, the supplier had falsified the  
18 cards, and so once we found that out, of course, we took  
19 corrective action against the supplier. We also put in a new  
20 procedure --
- 21 Q. I didn't have a question concerning that, ma'am. I just  
22 wanted to know that.
- 23 And regarding the issue of the free cigarettes going  
24 through the mail, Reynolds settled that, didn't it?
- 25 A. It's not a -- we negotiated a mutually agreeable place to

1 be. We still do product consumer testing, we supply the A.G.  
2 with the amount we're doing, and it's --  
3 Q. I only have a specific question -- I'm sorry, to  
4 interrupt you, but Reynolds settled, didn't it?  
5 A. We agreed, we came to agreement.  
6 Q. I want to --  
7 MR. McDERMOTT: Your Honor, it seems to me the government  
8 is cutting off the witness.  
9 THE COURT: Well, first of all, a lot of this is in the  
10 direct testimony. Second of all, you can certainly explore it on  
11 redirect. So far it's been all right. Go ahead, please.  
12 BY MR. SEALLS:  
13 Q. Directing your attention to the matchbooks, isn't it true  
14 that the highest Court in Ohio stopped Reynolds from using  
15 matchbooks with Reynolds' brand names in them?  
16 A. It is true. I believe it was --  
17 Q. And the Court ruled -- I'm sorry, I did cutoff what you  
18 were saying.  
19 A. I believe -- I do believe it was the Ohio Supreme Court  
20 disagreed and found that the matchbooks were interpretation of  
21 branded merchandise rather than an advertising vehicle.  
22 Q. And the final issue, Reynolds' magazine advertising  
23 placement policies, Ms. Beasley, is a way of targeting youth,  
24 isn't it?  
25 A. I don't know what you mean. I have no idea how you

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1 connect those.

2 Q. Didn't the California Courts rule that Reynolds targeted  
3 youth in print ads?

4 A. Well -- say that again.

5 Q. Isn't it a fact that concerning this fourth issue that  
6 you put in your written direct testimony and deemed placement  
7 policies, that the Courts sued -- pardon me -- that the Courts  
8 ruled that Reynolds targeted youth in print ads?

9 A. I believe that the lower Court -- this is my  
10 recollection, that the lower Court did not say that we had any  
11 intent to target kids, but that because the spillover of the --  
12 the potential spillover of the advertising was enough to say  
13 that it did, and so that we should have a policy in place to  
14 ensure that there was no disproportionate spillovers.

15 Q. And it was after the Courts ruled against Reynolds that  
16 Reynolds settled this issue, correct?

17 A. Yes.

18 MR. SEALLS: I have no further questions of this witness  
19 at this time, Your Honor.

20 THE COURT: Mr. McDermott, how long will your redirect be?

21 MR. McDERMOTT: I certainly expect it to finish before the  
22 lunch break, an hour plus or minus.

23 THE COURT: Do you want to take a morning recess now while  
24 you get everything rearranged?

25 MR. McDERMOTT: This is probably a good time, Your Honor.



1 THE COURT: All right. Let's take 15 minutes, everybody.

2 (Thereupon, a Break was taken from 10:52 a.m. until  
3 11:10 a.m.)

4 THE COURT: Redirect, please.

5 MR. McDERMOTT: For the record, Bob McDermott.

6 REDIRECT EXAMINATION OF LYNN J. BEASLEY

7 BY MR. McDERMOTT:

8 Q. Good morning, Ms. Beasley. I want to start with  
9 something that you were asked about this morning just to make  
10 sure the record is absolutely clear.

11 I'm not on. I was going to ask you to speak into the  
12 microphone. I better heal myself before I administer  
13 prescriptions.

14 You were talking with counsel for the government this  
15 morning about the process of reviewing ads in a focus group, but  
16 I want to make sure the record is clear and the context is clear  
17 because this is an important issue. Will you describe how  
18 advertising copy is developed, using focus group feedback.

19 THE WITNESS: Certainly. Focus groups really create a  
20 dynamic sort of process where you --

21 THE COURT: Mr. Bernick, you can't hear?

22 MR. BERNICK: No.

23 THE COURT: Ms. Beasley, you're going to have to talk up,  
24 please.

25 THE WITNESS: That's better?

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1 BY MR. McDERMOTT:  
2 Q. Much better.  
3 A. A focus group process is a developmental process. It's  
4 where you create a lot of ideas and it's a dynamic process,  
5 where you go back and forth, like one person might say something  
6 and the other people in the group react to it and you're  
7 building ideas. You change things while you're doing it. It's  
8 a creative, dynamic input. It has the whole group talking about  
9 it, and you're able to get feedback and change things real-time  
10 as you're developing ideas and see what the reaction of the  
11 adult smokers are.  
12 Q. And you engage in this process before you run the --  
13 MR. SEALLS: Objection, Your Honor, leading.  
14 THE COURT: Sustained.  
15 BY MR. McDERMOTT:  
16 Q. The focus groups for developing ads take place before or  
17 after the ads are run in magazines and so forth?  
18 A. It's before. It's part of the development process.  
19 We're developing ads. And the focus groups are to help us  
20 develop them before we decide on what we're going to do.  
21 Q. All right. Now, you mentioned in your testimony earlier  
22 today that the question would be asked in appropriate  
23 circumstances: Is this ad for you or for somebody older than  
24 you or for somebody younger than you? Do you recall that  
25 testimony?

- 1 A. Yes, I do.
- 2 Q. This is in a focus group context, you were describing?
- 3 A. Yes.
- 4 Q. All right. What happens to an advertisement or a  
5 proposed advertisement if the focus group says "It looks too  
6 young; it's for somebody younger than me"?
- 7 A. We eliminate it.
- 8 Q. And when you say you "eliminate it," what does that mean?
- 9 A. It means we don't run it; we don't pursue further work on  
10 it; we don't use it.
- 11 Q. You stop developing the concept -- the execution?
- 12 A. That execution we stop.
- 13 Q. And you don't run it in magazines and put it on  
14 billboards and the like, correct?
- 15 A. That's correct.
- 16 Q. It has nothing to do with litigation; is that correct?
- 17 MR. SEALLS: Objection again, Your Honor, leading.
- 18 THE COURT: You can ask it differently, Mr. McDermott.
- 19 BY MR. McDERMOTT:
- 20 Q. Does that process have anything to do with litigation,  
21 the focus group process of determining the appropriateness of  
22 advertising?
- 23 A. No.
- 24 Q. And when you reject ads as a result of focus group  
25 feedback, is litigation even a consideration?

1 A. No.

2 Q. It has nothing -- and none of the process you described  
3 had anything to do with the FTC inquiry, correct?

4 A. No, it did not. This is -- it's a standard way in which  
5 we develop marketing.

6 Q. It's a way of screening ads?

7 A. It's a way of developing and screening ads and getting to  
8 what we finally run.

9 Q. You were asked at the end of your examination this  
10 morning about some litigation that the company has engaged in  
11 post-MSA and you were taken through a number of issues. I would  
12 like to return to one of them right now relating to sampling, a  
13 case brought by California.

14 You pointed out in your testimony that there was  
15 contractor misconduct. I would like you to explain what the  
16 case was about, what Reynolds found out and what Reynolds did  
17 about it during the course of this inquiry and dispute.

18 A. All right. We had hired this third-party contractor to  
19 do sampling for us among adult smokers and they were required to  
20 age-certify these smokers and have them sign that they are an  
21 adult smoker, they want to receive a sample from us. And we  
22 found out that an employee of the supplier had falsified -- had  
23 made these up. And so we reprimanded the supplier, the  
24 employees involved, and we put a new process in place to ensure  
25 it couldn't happen again.

1           We created -- we identified technologies. We worked with  
2 another supplier, identified technology where anyone doing  
3 sampling for us among adult smokers uses a digital camera and so  
4 when the adult smoker presents their I.D. to prove that they are  
5 an adult of legal age, then the agent has to take a picture of  
6 that government-issued I.D. and then we keep that on record so  
7 that we have proof that, in fact, it is an age-verified smoker  
8 who we are sampling.

9       Q.       So the Attorney General of California --

10           MR. SEALLS: Objection, Your Honor. Leading question.

11           THE COURT: Well, let me hear the question, although it  
12 sounds that way.

13       BY MR. McDERMOTT:

14       Q.       The Attorney General of California pointed out a problem  
15 with the sampling --

16       A.       That's correct.

17       Q.       -- and called your attention to this contractor. What  
18 was the name of the contractor?

19       A.       KBA.

20       Q.       All right. Reynolds investigated?

21       A.       Yes.

22       Q.       And the problem turned out to be an employee who was  
23 falsifying documents, unbeknownst to Reynolds and, obviously,  
24 unbeknownst to the Attorney General?

25           MR. SEALLS: Same objection, Your Honor. Continuing

1 leading questions.

2 THE COURT: I'm going to sustain it. Number one, it is  
3 leading and number two, that's what she just testified to.

4 MR. McDERMOTT: I'll move on, Your Honor.

5 BY MR. McDERMOTT:

6 Q. But as a result of this issue, Reynolds tightened up its  
7 safeguards and has new procedures?

8 A. Yes. We have new procedures in place and we also  
9 reprimanded the supplier and required that they reimburse us.

10 Q. Let me ask you about the litigation with Ohio involving  
11 matchbooks. Would you explain the nature of the underlying  
12 dispute that arose.

13 A. Yes. We had a historical practice of buying advertising  
14 space on matchbooks from a third party. You buy the advertising  
15 space and then you put it on the matchbooks and then the  
16 matchbooks are typically distributed in stores when a smoker  
17 buys cigarettes. And we had always bought this as advertising  
18 space.

19 And the Attorney General felt like it was not buying  
20 advertising space, that it was in fact branded merchandise, that  
21 in fact we were putting the brand logo on merchandise instead of  
22 buying advertising space. And we took the issue to -- it was in  
23 Ohio and we won at the lower court level, but then we lost at  
24 the higher court level and so we discontinued the practice.

25 Q. So this dispute basically involved an interpretation --

1           MR. SEALLS:  Objection, Your Honor.

2   BY MR. McDERMOTT:

3   Q.       -- of merchandise versus advertising?

4   A.       That's correct.

5           MR. SEALLS:  It's been asked and answered and --

6           THE COURT:  Mr. McDermott, please, just ask it in a

7   different form.

8           MR. McDERMOTT:  I'll move on, Your Honor.

9   BY MR. McDERMOTT:

10  Q.       Let me turn to the print placement dispute, Ms. Beasley,

11  and let me ask you at the outset, as far as you understood it,

12  prior to the institution of this case, did the MSA have any

13  provision that specifically addressed print placement policies

14  for Reynolds or any other member of the tobacco industry?

15  A.       No, it did not.

16  Q.       Okay.  What was Reynolds' print placement policy at the

17  time the Attorney General of California brought the lawsuit?

18  A.       It was -- the print placement policy we had was 75 -- we

19  wouldn't advertise in any magazine that didn't have at least

20  75 percent adult readership.  If there were MRI or Simmons data

21  available on the 12 to 17 portion, if that data was available,

22  then we looked at it and we only advertised in magazines that

23  had at least 75 percent adult readership, in addition to looking

24  at other criteria.

25  Q.       Did Reynolds have any guidance that it looked to in

1 adopting the 75 percent adult readership standard?

2 A. Yes, we did. We had -- in fact, when we were looking for  
3 what would be a reasonable standard for an age-restricted  
4 product, we looked at the Federal Trade Commission's report to  
5 Congress on alcohol practices, alcohol industry practices. And  
6 in fact in that report, they had said that a best practice for  
7 this age-restricted product, alcohol, was 60 to 70 percent adult  
8 readership in magazines.

9 And so we looked at that and said this is an  
10 age-restricted product, alcohol; the Federal Trade Commission  
11 considers a best practice in the alcohol industry 60 to  
12 70 percent adult readership and we went to 75 percent adult  
13 readership.

14 Q. Let me hand you Exhibit JD 066833.

15 And for the record it's a report from the FTC entitled  
16 "Self-Regulation in the Alcohol Industry: A Review of Industry  
17 Efforts to Avoid Promoting Alcohol to Underage Consumers,"  
18 issued by the Federal Trade Commission in September 1999.

19 Is this the document that you were referring to,  
20 Ms. Beasley?

21 A. Yes, it is.

22 MR. SEALLS: Your Honor, I'm going to object to this. The  
23 witness has already testified to it in her written direct. She's  
24 testified to it on cross-examination. At this point, it becomes  
25 merely cumulative.



1           THE COURT: I don't know that. Certainly her counsel has  
2 an opportunity to, let's say, correct anything on redirect that  
3 is appropriate.

4 BY MR. McDERMOTT:

5 Q.       Let me ask you to turn, Ms. Beasley, to the page Bates  
6 numbered 524721785 headed "Best Practices."

7 A.       Yes.

8 Q.       Okay. I'll read the highlighted sections into the  
9 record. I have a question about that for you.

10           "Best Practices. The special reports filed with the  
11 Commission indicate that some individual beverage alcohol  
12 companies have adopted ad placement policies that go beyond the  
13 minimum code requirements in order to minimize underage exposure  
14 to their ads. First, several companies have raised the standard  
15 for ad placement. Instead of adhering to the 50 percent  
16 requirement, these companies require a 60 to 70 percent  
17 legal-age audience for print media, a 55 to 60 percent legal-age  
18 audience for radio and a 70 to 75 percent legal-age audience for  
19 television placements. This practice has two benefits: It  
20 provides a margin to compensate for limitations in audience  
21 composition data; and it minimizes the number of underage  
22 consumers reached by alcohol advertising without unduly  
23 interfering with the advertiser's ability to reach a legal-age  
24 audience."

25           Ms. Beasley, in adopting the 75 percent standard, did

1 Reynolds believe that it had struck a reasonable balance between  
2 minimizing the number of underage consumers and still preserving  
3 its right to reach a legal-age audience?

4 A. Yes, we did.

5 Q. During the print placement lawsuit, did the Attorney  
6 General ever assert that Reynolds was advertising --

7 MR. SEALLS: Objection, Your Honor. It's a leading  
8 question.

9 THE COURT: Overruled.

10 BY MR. McDERMOTT:

11 Q. Did the Attorney General of California ever assert that  
12 Reynolds was advertising in magazines that were primarily  
13 directed to youth?

14 A. No.

15 Q. Did the Attorney General assert that Reynolds was  
16 intentionally targeting youth with its magazine placement?

17 A. No.

18 Q. Did the trial court find that Reynolds intentionally  
19 targeted youth?

20 A. No.

21 Q. You indicated that this lawsuit has been resolved,  
22 correct?

23 A. That's correct.

24 Q. And Reynolds now has an 85 percent adult readership  
25 standard?

- 1 A. That's correct.
- 2 Q. Along with a number of other --
- 3 A. Along with a number of other criteria that we have agreed
- 4 to.
- 5 Q. And Reynolds is abiding by that standard?
- 6 A. Yes.
- 7 Q. Let me move to another area. This was a question raised
- 8 yesterday. You were shown U.S. Exhibit 89392, a Camel
- 9 perception tracking document. Do you have that before you?
- 10 Can we call that up, Jamey? 89392.
- 11 A. Yes, I think I have that. Yes, I have it.
- 12 Q. In connection with this document, you were asked whether
- 13 Reynolds could extrapolate from the data selected here for adult
- 14 smokers age 18 to 34 to underage persons and you answered "No."
- 15 Do you recall that?
- 16 A. I do.
- 17 Q. Can you explain to the Court why you can't extrapolate in
- 18 the manner suggested by the question?
- 19 A. Certainly. First of all, with regard to doing marketing
- 20 research among adult smokers, you do it at different -- among
- 21 different age groups because different age groups react
- 22 differently; you get different answers. And that's why you
- 23 break up age groups. And so that's been my experience for the
- 24 last 23 years, is that you cannot extrapolate because you get
- 25 different answers among different age groups.

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1           Beyond that, I think it would be unlikely to be able to  
2     extrapolate because kids are experimenting with smoking  
3     underage -- experimentation with smoking. They are not smoking  
4     daily and making a brand choice daily the way adult smokers do.  
5     They -- if you look at the government studies on  
6     experimentation, it's often a measurement of one cigarette in  
7     30 days. That's not like an adult who smokes every day and  
8     makes a brand choice every day.

9           Also, kids experimenting with smoking, again, from  
10    government studies, the majority do not even buy their own  
11    cigarettes in stores because, of course, it's illegal for them  
12    to. So it's the same thing as an adult smoker going into a  
13    store and making a choice.

14           So not only can you not extrapolate age groups because  
15    they respond differently, but clearly, the behavior around  
16    smoking with regards to illegal underage experimentation is  
17    different than adult smokers.

18    Q.     All right. During the Joe Camel campaign, Ms. Beasley,  
19    did the Marketing Department try to track the performance of the  
20    Camel brand among underage smokers?

21    A.     No.

22    Q.     Let me ask you to turn a few pages into the document to  
23    the page Bates numbered 517032150. You see it's headed  
24    "Proposition Communication"?

25    A.     Yes, I see that.

1 Q. I want to direct your attention to the highlighted  
2 language there. I'll read it into the record. "The increased  
3 appeal of Camel advertising among 18 to 34 smokers during the  
4 September-January '96 period was driven by 25 to 34 competitive  
5 smokers." Do you see that?

6 A. I do.

7 Q. Is this consistent or inconsistent with your testimony  
8 that you were tracking adult smokers, not underage smokers?

9 A. It is consistent with my testimony. This is adult  
10 smokers.

11 Q. Ms. Beasley, you were asked a number of questions about  
12 Camel, specific Camel advertisements. And let me ask you some  
13 questions about the Camel campaign before we get to some of the  
14 advertisements.

15 First, can you tell me, as a general proposition, what  
16 role promotional programs played in the development of the Joe  
17 Camel campaign or the Camel campaign in the mid '80s and after?

18 A. Sure. Our promotional programs are a key part of what  
19 motivates brand switching. You want to give a competitive  
20 smoker a reason to try the brand again, to engage with the  
21 brand. So whether it's a buy one, get one free promotion in  
22 stores so that they'll walk in the store that day and switch to  
23 Camel, promotion is key to getting the change in behavior that  
24 you're looking for.

25 Q. Based on your personal involvement in the campaign and

1 the Camel brand in the mid to late '80s, can you tell us whether  
2 Camel adopted a new promotional campaign some time before or  
3 after the Joe Camel campaign went into print?

4 A. Could you ask -- I'm not sure I understand the question.

5 Q. I might have gotten myself confused.

6 Did the Camel brand adopt a new promotional approach or  
7 strategy prior to the Joe Camel campaign itself being developed?

8 MR. SEALLS: Objection, Your Honor, just as to timeframe.

9 THE COURT: Well, he identified the timeframe.

10 BY MR. McDERMOTT:

11 Q. Mid '80s, mid to late '80s.

12 A. In the mid to late '80s -- I'm not positive what you're  
13 asking here, but in the 1987-'88 time period, we developed --  
14 that is when we developed the Joe Camel campaign.

15 Q. All right. Let me short-circuit this. Let me show you  
16 JD 61202.

17 A. Okay.

18 Q. For the record, this is a memorandum dated January 6th,  
19 1989 from S.L. Snyder to Mr. G.C. Pennell, subject: "Camel  
20 Younger Adult SOS Analysis."

21 Can you tell us who Mr. Pennell is?

22 A. Um-hmm. Cliff Pennell. He was in charge of the Camel  
23 brand at this period of time.

24 Q. All right. Let me direct your attention to the  
25 highlighted language and ask you to read that.

1 A. Certainly.

2 Q. And then after reading it, can you explain --

3 Well, let's read it into the record. "Growth slacked off  
4 somewhat during early '88 until promotion programs could be put  
5 in place to support the new Birthday and Heroic Camel  
6 advertising, which has targeted younger adult male appeal. Once  
7 the new advertising and pack-oriented promotions took effect,  
8 Camel ex-regulars' share of younger adult male smokers resumed  
9 strong and significant rate of growth."

10 Do you see that?

11 A. Yes, I do.

12 Q. Can you explain what was going on with the brand during  
13 this time period.

14 A. Yes. During this time period, we were putting -- the  
15 pack promotions I was talking about earlier when I referenced  
16 buy one, get one free promotions in store -- it's those kinds of  
17 pack promotions. Of course, we also had premium items then.

18 But again, to motivate the behavior, to get an adult  
19 smoker to switch, promotion is important because it's what  
20 actually changes their behavior. You can run the advertising  
21 and it communicates information that creates a positive image  
22 for the brand, but then if they're used to coming in the store  
23 and asking for Marlboro every time, you've got to do something  
24 like to jar that behavior to get them to change their choice.

25 And what this is saying is that we had to put those kinds

1 of pack promotions in place in order to motivate that change in  
2 behavior.

3 Q. Let me ask you to turn two pages into the document. It's  
4 called "Attachment 1," Bates number 506- -- 506862146.

5 A. Um-hmm. Yes.

6 Q. Can you explain this chart to the Court, please, what  
7 this reflects.

8 A. Yes. "SOS" means Share of Smoker, and that's your share  
9 among adult smokers, 18 to 24, males. And what it shows is  
10 that -- it's going down during the Bob Beck advertising  
11 campaign. That was the advertising campaign that preceded the  
12 Joe Camel campaign.

13 And it says "Volume-Oriented Promotion Strategy,"  
14 which -- "value-oriented" often means like carton promotions,  
15 you know, like just doing discounting. And then you see this  
16 change in between -- where the line is drawn in between '87 and  
17 '88 and it says "More retail pack promotions, coupled with  
18 execution of Pack Action Outlet Program."

19 And then you see where the campaign is introduced, the  
20 75th birthday campaign, and then the Heroic advertising campaign  
21 and more pack-oriented promotion programs. And so you can see  
22 the real change and growth in share of smoker with the inclusion  
23 of increased level of pack promotions.

24 Q. All right. Let me, then, ask you about some of the  
25 particular Joe Camel advertisements. Let me show you U.S.



1 76785. The government showed you this this morning. And this  
2 is -- if you look through that, that's part of the Smooth Moves  
3 advertisement series, is it not?

4 A. Yes, that's correct.

5 Q. Okay. Ms. Beasley, can you explain to the Court what the  
6 thinking was behind the Smooth Moves, what the basic concept  
7 was, from your perspective?

8 A. The basic concept was, because we were using the  
9 advertising line "smooth character," to have funny lines that  
10 went with it around the Smooth Moves, what would be entertaining  
11 smooth moves that go with the smooth character.

12 Q. Did any of the ads that ran as a part of that campaign  
13 receive criticism?

14 A. Yes. This particular ad did.

15 Q. This particular ad?

16 A. Um-hmm.

17 Q. What did Reynolds do to address the criticism?

18 THE COURT: When you say "this particular ad," did you  
19 mean the one that was on the screen?

20 THE WITNESS: It's attached in this thing.

21 MR. McDERMOTT: Yes, Your Honor. It's --

22 THE COURT: It's awfully hard to see. Does anybody have  
23 an original or a better copy?

24 MR. SEALLS: No, Your Honor. We only had that in black  
25 and white.

1 THE COURT: Okay.

2 BY MR. McDERMOTT:

3 Q. Ms. Beasley, why don't you explain to the Court -- since  
4 that isn't a very clear copy, describe briefly what the ad shows  
5 and the nature of the criticisms that were leveled against it.

6 A. Okay. This front -- this was a picture of a woman and it  
7 says "Bored, lonely, restless. What you need is" -- and this is  
8 a -- I can't tell exactly what was on that page, but it says  
9 "Smooth Moves" and it had a Camel logo here and then it gets to  
10 this -- and they had numbers associated with them, like they  
11 would say "Smooth Move number 325." And that's what this is.  
12 And again, these were supposed to be entertaining and funny.

13 This one was clearly a mistake. I'm trying to see --

14 THE COURT: "This was a mistake"? You don't mean that the  
15 actual execution of the ad was a mistake, but rather that it was  
16 a mistake to run it; is that right?

17 THE WITNESS: Yes. I'm sorry. That's what I meant.

18 MR. McDERMOTT: And we'll get to that point --

19 THE WITNESS: I'm sorry.

20 BY MR. McDERMOTT:

21 Q. I'm sorry. Had you completed your explanation?

22 A. So anyhow, then it lists Smooth Move kind of things  
23 underneath the ad.

24 Q. All right. Let me show you now JE 024271.

25 And for the record, that is a letter dated June 16, 1989

1 from the CEO, James W. Johnston, the CEO of R.J. Reynolds  
2 Tobacco Company, addressed to The Honorable Gerry Sikorski, a  
3 member of Congress. Let me direct your attention to the second  
4 paragraph, Ms. Beasley.

5 A. Yes.

6 Q. Can you read that into the record, please.

7 A. "I have carefully reviewed the situation and have  
8 concluded that this ad should never have run. I can also say  
9 that it would not have run had I been at Reynolds when it was  
10 proposed. I apologize to you and others who were offended by it  
11 and can assure you that it will never run again."

12 Q. Let me ask you to turn to the second page, Ms. Beasley,  
13 and direct your attention to the last paragraph. Can you read  
14 that into the record and then let me ask you a question.

15 A. "I have taken immediate steps to reinforce current  
16 advertising policies and to strengthen our internal advertising  
17 review procedures to ensure that there is no repetition of this  
18 unfortunate incident."

19 Q. First question: Do you agree that this was an  
20 unfortunate incident?

21 A. Yes, I do. It was --

22 THE COURT: I still haven't been able to read what's on  
23 this ad that everybody else, obviously, has read a hundred times.  
24 Could someone pass it up, please.

25 But you can go ahead with your questioning.

1 BY MR. McDERMOTT:

2 Q. Ms. Beasley, explain to the Court what steps were put in  
3 place pursuant to Mr. Johnston's commitment.

4 A. Pursuant to his commitment, we put an internal ad review  
5 panel in place. And this panel included nonmarketing employees  
6 who were representative of different groups like, let's say,  
7 parents, African-Americans, men, women, so that it was  
8 nonmarketing people, kind of representative, from employees  
9 across the company.

10 And you would develop all of the advertising and as you  
11 got to a finished point on the advertising, you would take it to  
12 this internal review panel to see if they -- they then would see  
13 these kinds of issues.

14 Of course, in addition, before it ever got there,  
15 external relations and legal and marketing people reviewed it,  
16 but this was an effort because we said, "Gee, this should have  
17 been caught." I mean, it should not have run. It should have  
18 been clear that it was offensive to women. It was. And so we  
19 said, "Okay, sometimes marketing people evidently miss that, so  
20 we're putting this internal review panel in place to have a  
21 double-check so that they don't miss these kinds of things."

22 Q. All right. Let me ask you about another ad that the  
23 government showed you. It's U.S. 76788. Can you tell the Court  
24 a little bit about this advertisement.

25 A. Yes. This was a promotional ad. It was "Save \$25 on

1 TicketMaster tickets with Camel Cash." And Camel Cash were  
2 little coupons inserted in the pack that you could collect and  
3 then use for valuable things. And so this was one of the things  
4 that you could use your Camel Cash for.

5 Q. Okay. Let me see if we can blow up, just on the very  
6 lower right-hand corner -- can you read what that says, please.

7 Can you blow that up or highlight it, Jamey?

8 Can you read that, Ms. Beasley?

9 A. Yes. It says: "Offer restricted to smokers 21 years of  
10 age or older."

11 Q. Who was the Camel Cash program directed to back at the  
12 time this ran?

13 A. It was directed to the adult smokers that Camel was  
14 targeting at this time. It would have been younger adult  
15 smokers 18 to 24 as well as 25 to 34, and then Camel franchise  
16 smokers.

17 Q. And did that restriction on 21 plus extend to this  
18 TicketMaster offer that's mentioned in the ad?

19 A. Yes, it did.

20 Q. Okay. Let me ask you whether Reynolds gave some  
21 consideration to whether TicketMaster was an appropriate --

22 MR. SEALLS: Objection, Your Honor --

23 BY MR. McDERMOTT:

24 Q. -- promotional --

25 MR. SEALLS: -- leading.

1           THE COURT: "Whether Reynolds gave consideration"?  
2           No. Overruled.  
3   BY MR. McDERMOTT:  
4   Q.       -- to whether TicketMaster was an appropriate promotional  
5   vehicle before it --  
6   A.       We --  
7   Q.       -- signed up with them?  
8   A.       We did, in fact. We talked with TicketMaster and we  
9   actually got data from them on who uses TicketMaster. And I  
10   don't remember the exact percent, but it was like over  
11   90 percent adult.  
12   Q.       Let me help you out here.  
13           Can we give Ms. Beasley JD 066736.  
14           MR. SEALLS: Your Honor, I'm going to object to this as  
15   being beyond the scope of the cross.  
16           THE COURT: Well, while there was no discussion in the  
17   cross on this particular -- of TicketMaster, certainly there was  
18   a great deal of cross-examination about whether Reynolds was  
19   either targeting youth or -- actually there was more  
20   cross-examination on whether Reynolds' promotions and ads were  
21   spilling over into a youth audience. And obviously, this  
22   document is relevant to that.  
23           So the objection's overruled.  
24           MR. McDERMOTT: Okay.  
25   BY MR. McDERMOTT:

1 Q. Let me read this into the record. It's dated March 7,  
2 1996 from Richard Williams to Larry Soulters, "Re: TicketMaster  
3 Statement": "Overwhelmingly, our clientele is adult and when  
4 RJR approached us, we didn't blink. They market an adult  
5 product and we saw it as a good match, considering the fact that  
6 90 percent of our clientele is 21 years of age or above."

7 And at the bottom: "Furthermore, the vast majority of  
8 our clientele fall in the income category of 35- to \$70,000."

9 Ms. Beasley, is that consistent with your recollection of  
10 the information you were provided by TicketMaster before  
11 deciding it was an appropriate vehicle for your promotions?

12 MR. SEALLS: Your Honor, I have an objection to this.  
13 There has been no foundation laid with respect to this witness  
14 and this document.

15 THE COURT: The question was: Is it consistent with?

16 You can have her identify the document if you want.

17 BY MR. McDERMOTT:

18 Q. Can you identify this document, Ms. Beasley?

19 A. Yes. I didn't actually see -- I wasn't over -- I don't  
20 remember seeing this at the time, but I've seen it in the course  
21 of litigation.

22 MR. SEALLS: Same objection, Your Honor.

23 THE WITNESS: But I do remember the -- it is consistent  
24 with my recollection of the issue.

25 BY MR. McDERMOTT:

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1 Q. And the information Reynolds was supplied by  
2 TicketMaster?  
3 A. Absolutely. I do remember receiving this information.  
4 Q. Okay.  
5 MR. SEALLS: Your Honor, I make the same objection. The  
6 witness --  
7 THE COURT: No, the objection is overruled. The document  
8 itself is not being used for its substantive value; it's simply  
9 being used for the witness to indicate whether she agrees with it  
10 or not and, in part, to refresh her recollection.  
11 Go ahead, please.  
12 BY MR. McDERMOTT:  
13 Q. Ms. Beasley, are you aware of any evidence that youth  
14 improperly participated in this promotion that was described?  
15 A. No.  
16 MR. McDERMOTT: May I have a moment, Your Honor?  
17 BY MR. McDERMOTT:  
18 Q. Ms. Beasley, you were shown some magazines yesterday  
19 afternoon, a couple of magazines. Do you recall that?  
20 A. Yes, I do.  
21 Q. And let me ask you about one of them right now. Smooth.  
22 Government's Exhibit 93236. Do you remember this magazine?  
23 A. I do.  
24 THE COURT: Mr. McDermott, I think you're going to have to  
25 keep your voice up. I'm not sure if --

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1           MR. McDERMOTT: I turned my microphone off. I'm sorry,  
2 Your Honor. I probably need to do both. Belt with suspenders.  
3 BY MR. McDERMOTT:  
4 Q.       You recall seeing this magazine yesterday -- being shown  
5 this magazine?  
6 A.       Yes.  
7           MR. McDERMOTT: All right. Jamey, can you put on the  
8 screen the last advertisement that appears on the inside back  
9 cover? Do you have that? The exhibit number is 93236.  
10          Okay. Let me just put it on the ELMO.  
11 BY MR. McDERMOTT:  
12 Q.       Ms. Beasley, do you see where it says "2004, B & W  
13 Tobacco Company"?  
14 A.       I do.  
15 Q.       All right. Excuse me. "B & W T Co."  
16 A.       Um-hmm.  
17 Q.       Ms. Beasley, does Reynolds have a practice when it places  
18 advertisements in magazines as to whether it copyrights them or  
19 not?  
20 A.       Yes, we do.  
21 Q.       And when it runs an ad in a magazine --  
22           MR. SEALLS: Objection, your Honor, this is beyond the  
23 scope of the cross.  
24           MR. McDERMOTT: I'm asking questions about an ad that the  
25 government utilized and put in contextual information to give the

1 Court some very helpful background in understanding whether this  
2 ad was --

3 THE COURT: Well, certainly there's no question the ad was  
4 utilized in cross. I'll allow you some leeway to see where  
5 you're going.

6 BY MR. McDERMOTT:

7 Q. All right. Let me show you JD 068024. And for the  
8 record, it's a document titled "Smooth Demographics" with some  
9 demographic information on the readership.

10 MR. SEALLS: Objection. Your Honor, no foundation so far.

11 THE COURT: So far there's no question, so why don't you  
12 go ahead, please.

13 BY MR. McDERMOTT:

14 Q. Ms. Beasley, do you see before you demographic  
15 information regarding this magazine?

16 A. Yes.

17 Q. What is the average age of readership indicated in this  
18 demographic profile?

19 MR. SEALLS: Same objection, Your Honor, foundation.

20 THE COURT: Sustained at this point.

21 MR. McDERMOTT: Your Honor, let me -- we're in a very  
22 difficult position. It's complicated, but --

23 THE COURT: Why don't you ask her what this document is.

24 BY MR. McDERMOTT:

25 Q. Ms. Beasley, do you know what this document is?

1 A. It looks like a document that reflects the demographics  
2 of this magazine. We routinely ask for magazines to provide  
3 their demographic information to us in the evaluation of the  
4 magazine.

5 Q. And so, even if you haven't seen this particular document  
6 before, this is consistent with information with the type you  
7 get all the time, correct?

8 MR. SEALLS: Same objection, Your Honor, the witness  
9 hasn't seen this, it's hearsay.

10 THE COURT: Are you going to seek to admit this?

11 MR. McDERMOTT: Your Honor, maybe we ought to have Ms.  
12 Beasley leave the room for just a second. I'll explain a bit of  
13 a problem we have. We have a bit of an evidentiary problem  
14 because the government has thrown us a slight curve ball.

15 THE COURT: Let's come back to this issue, please, and  
16 move on. And we'll see if we can get all the rest of the  
17 redirect done before lunch and then if there's still time we can  
18 ask Ms. Beasley to step out.

19 BY MR. McDERMOTT:

20 Q. All right. Ms. Beasley, let me ask you about the other  
21 magazine, then, you were shown yesterday, Stuff, Exhibit Number  
22 93237. Let me ask you in the first place, what kind of  
23 information does Reynolds evaluate before deciding to place an  
24 ad in any magazine, Stuff or any other magazine?

25 A. The kinds of things that we evaluate are the percent

1 adult readership that the magazine has. We also look at  
2 editorial content and other advertisers and how the magazine is  
3 distributed, and of course, business issues like, is it a stable  
4 magazine and things like that.

5 Q. These are not evaluations that you personally perform; is  
6 that correct, but others on the Reynolds --

7 A. I'm sorry, that's the process inside of Reynolds. I do  
8 not do that personally.

9 Q. Okay. Who is in charge of that process right now at  
10 Reynolds?

11 A. JoAnne Williard.

12 Q. Let me show you JD 066832. For the record, it's  
13 entitled, "R.J. Reynolds Tobacco Company New Publication  
14 Analysis, May 1st, 1998, Publication: Stuff." Ms. Beasley,  
15 what is this?

16 A. When publications start in existence, obviously, they  
17 don't have measured data yet because they haven't actually  
18 started the magazine, so we ask them for, you know, what's their  
19 editorial focus, what's their target that they are trying to  
20 sell this magazine to, you know, information from the magazine  
21 itself.

22 Q. Okay.

23 MR. SEALLS: Objection, Your Honor. Foundation. There's  
24 no testimony that the witness is involved in this process  
25 personally or has seen this document before.

1 THE COURT: Have you seen this document before?

2 THE WITNESS: No.

3 THE COURT: Can you elicit any other information?

4 BY MR. McDERMOTT:

5 Q. Is this the kind of document that Reynolds generates when  
6 it considers whether or not to place an ad in a new magazine?

7 A. Yes, it is.

8 Q. Taking a look at the document, including at the bottom,  
9 the Bates number, can you tell whether or not this was a  
10 business record kept and maintained at Reynolds?

11 MR. SEALLS: Same objection, Your Honor.

12 THE COURT: Overruled. She may certainly answer this  
13 question.

14 THE WITNESS: It appears so.

15 BY MR. McDERMOTT:

16 Q. Ms. Beasley, what is the editorial focus indicated in the  
17 highlighted language?

18 A. Stuff is a buying guide targeted at men 25 to 34.

19 Q. Okay. Now, Ms. Beasley, yesterday in questioning the  
20 government suggested that this magazine, Stuff, was not measured  
21 by MRI. Do you recall that?

22 A. I do.

23 Q. Let me show you JD 08022. For the record, it's an e-mail  
24 from JoAnne Williard to Pat Hoots, Subject MRI, Study 12. Is  
25 this JoAnne Williard the person at Reynolds who was in charge

1 of --

2 THE COURT: Counsel?

3 MR. SEALLS: Your Honor, I have a question and then an  
4 objection.

5 THE COURT: Introductory questions are allowed to see if a  
6 foundation can be laid.

7 MR. SEALLS: It's not that, Your Honor.

8 THE COURT: The objection is foundation. You keep making  
9 those objections too soon.

10 MR. SEALLS: It's not that objection.

11 THE COURT: What is your objection?

12 MR. SEALLS: This is a document that we don't think was  
13 produced to us in discovery.

14 THE COURT: Oh, I don't think it was --

15 MR. SEALLS: And I would ask Mr. McDermott --

16 THE COURT: Excuse me. I don't think it was produced, it  
17 was just written two days ago. But go ahead, what's your  
18 response?

19 MR. McDERMOTT: Your Honor, this is fair response to an  
20 issue raised by the government. That magazine wasn't produced to  
21 us in discovery because it's issued in April 2005, and this is  
22 the MRI data that pertains to the time period when the placement  
23 was made. How can I produce information which doesn't exist with  
24 respect to a challenge that hasn't been raised?

25 THE COURT: I must say, I didn't focus yesterday. That

1 was April 2005. I think I was trying to see as little of that  
2 magazine as I could get away with.

3 MR. McDERMOTT: I understand, Your Honor.

4 THE COURT: Go ahead.

5 MR. SEALLS: In response, Your Honor, the data is  
6 December 1st, '04, the data was available then.

7 THE COURT: What do you mean "then"?

8 MR. SEALLS: Whenever the data was created. I see it says  
9 2004 MRI 12 Plus Study, December 1, '04.

10 THE COURT: The issue is, I believe, you could not have  
11 produced the April 2005 edition of that magazine by 2000 -- by  
12 December 2004, right?

13 MR. SEALLS: That's correct, Your Honor, but this is still  
14 information that could have been generated and produced to us.

15 THE COURT: No, the objection's overruled. Go ahead,  
16 please.

17 BY MR. McDERMOTT:

18 Q. Ms. Beasley, let me, then, direct your attention to the  
19 next page, and you see the column MRI 12 Plus Study, 12-1-04 and  
20 then it has information on the 12 to 17 audience. Do you see  
21 that?

22 A. Yes, I do.

23 Q. And you see a series of publications listed on the  
24 left-hand column with information regarding readership and  
25 percentage of total readership in the 12 to 17 audience?

- 1 A. Yes.
- 2 Q. Okay. Let me ask you to look to the next page and find
- 3 Stuff. What does it indicate the percentage of 12 to 17
- 4 readership is?
- 5 A. 10.81 percent.
- 6 Q. Ms. Beasley, is that percent underage readership, which
- 7 suggests an 89.19 percent adult readership, consistent with
- 8 Reynolds' ad placement policies?
- 9 A. Yes, it is.
- 10 Q. Is it consistent with the Attorney General of
- 11 California's ad placement policies as negotiated with Reynolds?
- 12 A. Yes, it is.
- 13 Q. Is it consistent with the readership, proposed readership
- 14 standard under the so-called FDA rule?
- 15 A. With regard to 85 percent readership, yes.
- 16 Q. All right. While we have that, the government showed you
- 17 a number of ads, recent ads relating to Rolling Stone today. Do
- 18 you recall that?
- 19 A. Yes.
- 20 Q. Okay. Look at the top of the second page. What is the
- 21 percentage readership for 12 to 17-year-old readers?
- 22 A. 14.30 percent.
- 23 Q. Which means that the adult readership is 85.7 percent?
- 24 A. That's correct.
- 25 Q. And that's consistent with Reynolds' policy?

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- 1 A. Yes, it is.
- 2 Q. And that's consistent with the policy negotiated with the  
3 Attorney Generals?
- 4 A. Yes, it is.
- 5 Q. The government also showed you some Sports Illustrated.  
6 What is the percentage of the 12 to 17-year-old market  
7 reflected -- 12 to 17-year-old readership reflected in this  
8 report?
- 9 A. 13.78 percent.
- 10 Q. All right. Let me turn back to the magazine itself. Do  
11 you have a copy of the magazine before you? If you don't, I can  
12 hand you up my copy. Would you like my copy?
- 13 A. Yes. I don't see it.
- 14 Q. You can -- can you display, Jamey, JD 068023?
- 15 MR. McDERMOTT: Your Honor, let me explain to the Court,  
16 this is the cover of that magazine, and in addition, two other  
17 ads in the magazine that I'm going to ask Ms. Beasley about now.
- 18 BY MR. McDERMOTT:
- 19 Q. But Ms. Beasley, let me ask you to turn to the second  
20 page. You see it is an ad for the Army National Guard?
- 21 A. Yes, I see that.
- 22 Q. Okay. Now, let me ask you to turn to page 53 of the  
23 actual magazine itself, and can you confirm that -- just back,  
24 Jamey.
- 25 A. Yes.

1 Q. Can you confirm that page 53 is the copy of the ad we  
2 have here?

3 A. Yes.

4 Q. At 93237? All right. Let me ask you to turn to the next  
5 page. Can you flip back? There you go. Can you see that's an  
6 ad for the Army Reserve?

7 A. I see that.

8 Q. And Jamey, can you blowup a little bit in the left-hand  
9 corner, lower left-hand corner "paid for by the United States  
10 Army," and can you blowup the star there, "U.S. Army". Do you  
11 see that?

12 A. I do.

13 Q. Is -- and can you confirm this is the back cover of the  
14 magazine?

15 A. It's the inside back cover.

16 Q. All right. And do you know whether the inside back cover  
17 is considered a premium location for advertisement placement?

18 A. It is.

19 Q. Ms. Beasley, is the United States Army part of the United  
20 States government?

21 A. Yes.

22 MR. McDERMOTT: Your Honor, but for that other magazine, I  
23 think my examination would be concluded, and if we can ask the  
24 witness to step out for just a moment.

25 THE COURT: All right.

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1 MR. McDERMOTT: I will explain our dilemma.

2 THE COURT: Ms. Beasley, please.

3 (Witness left the courtroom.)

4 Okay.

5 MR. McDERMOTT: The magazine that we were handed  
6 yesterday, obviously, was not something that we had known about  
7 in advance. We have done some investigation, and we are --

8 THE COURT: Now, which magazine are you referring to?

9 MR. McDERMOTT: The Smooth magazine, the -- this one  
10 (indicating) that had the B & W advertisement. We have done the  
11 following things: We have checked with the magazine itself to  
12 find out what the demographics are and got the profile, which I  
13 showed you, but it's not a business record because we just got  
14 it. We checked with the people inside Reynolds. They did not  
15 authorize placement of this advertisement. We have an e-mail --  
16 can you throw that up on the screen? JD -- I can hand up a copy  
17 to the Court. Actually I can put it on the ELMO.

18 This ad was run without the company's permission, as far  
19 as we can tell. This magazine is not on our approved list.

20 THE COURT: How would they have even gotten the ad  
21 content?

22 MR. McDERMOTT: I believe it might have been approved by  
23 B & W in 2004. Reynolds has a business practice of putting the  
24 year it runs the ads in the ad. That's 2004. As far as we  
25 can -- I don't want to misrepresent to the Court and I don't want

1 to drive beyond headlights, but as far as we can tell, they had  
2 that ad, didn't -- I mean, after the merger, it was not  
3 authorized to be run, they ran it anyway. We don't know why,  
4 whether it was a mistake, whether -- we don't have the full  
5 story. But right now, the Court is left with a misimpression,  
6 and we don't have a very satisfactory way of completing the  
7 evidentiary record.

8 Ms. Beasley, in one sense, is not a competent witness  
9 because she is -- she hadn't seen the stuff, she doesn't know the  
10 stuff, she can't talk to her subordinates, but the record and the  
11 impression left is grotesquely misleading and inaccurate, and we  
12 need a way to respond.

13 THE COURT: I think -- ask I'll certainly hear from the  
14 government in a minute. Think there's an evidentiary difference  
15 between that one page piece of paper labeled "demographics" and  
16 an internal e-mail from, I gather, a Ms. Carol Sterling to -- I'm  
17 not sure who. Someone at Jones Day.

18 MR. McDERMOTT: Let me explain. Mullen/Long Haymes Carr,  
19 Mullen/LHC, is the contractor that Reynolds uses to actually make  
20 the media buys. Reynolds doesn't do it itself, it uses somebody.  
21 JoAnne Williard is the Reynolds official. We were scrambling  
22 around saying what's the story, and Ms. Sterling, over at  
23 Mullen/LHC, got the information directly to us and to Reynolds at  
24 directly the same time. This is all the story we know, but the  
25 record's going to close in a few days. We can't add anybody to

1 the list.

2 THE COURT: A few days?

3 MR. McDERMOTT: I think the defense is going to rest next  
4 week, Your Honor. We don't have anybody on our list left that we  
5 can use to respond to this, you know --

6 THE COURT: What do you plan to --

7 MR. McDERMOTT: Charges which were dropped on our table  
8 yesterday afternoon.

9 THE COURT: What do you plan to ask her, or how do you  
10 plan to use these documents, one or the other?

11 MR. McDERMOTT: Your Honor, I was making this up as we go  
12 along. Part of the problem is she hasn't seen this stuff, she  
13 doesn't know the facts. We need an opportunity to expand the  
14 record in some way to get this in so the Court isn't mislead and  
15 the record isn't inaccurate, because right now, it is an  
16 incomplete and an unfair and a misleading picture, which we could  
17 not have anticipated.

18 THE COURT: Well, let me hear from the government. I'm  
19 not sure -- certainly they can't tell you how to make your  
20 record. Let me hear from the government.

21 MR. SEALLS: Yes, Your Honor.

22 THE COURT: And by the way, it's Mr. Sealls, right?

23 MR. SEALLS: Right.

24 THE COURT: I think I was mispronouncing your name. I'm  
25 sorry, the court reporter corrected me. Go ahead.

1           MR. SEALLS: No problem, Your Honor. Your Honor, the  
2 situation we find ourselves in is because they do not have the  
3 correct witness to rehabilitate Ms. Beasley and they're trying to  
4 do it instead by -- and a page which has no authentication to it,  
5 which is hearsay, then they have people within the organization  
6 sending e-mails who are not here to testify. Your Honor, they  
7 raised certain issues, which we then addressed in our  
8 cross-examination.

9           THE COURT: There's no question about the propriety of the  
10 cross.

11          MR. SEALLS: Yes, and at this point they find themselves  
12 in a position where we don't feel we have any obligation, of  
13 course, to lend them assistance, but we would like the same rules  
14 applied equally of foundation and of having live witnesses. I  
15 would also add one thing, Your Honor, just to make sure the  
16 context of the copyright on the Kool, in the Smooth magazine,  
17 it's understood, I represented that this is a magazine that the  
18 government got off the newsstand within the last two weeks.

19          MR. McDERMOTT: That's exactly the problem, Your Honor,  
20 and it also, seems to me, at least, and it used to be the case  
21 that the government was interested in a search for the truth, and  
22 right now I don't think that counsel can represent that the  
23 impressions left by the record as it stands, the official record,  
24 is accurate or fair, and there's no way we could have anticipated  
25 this and there's no way we can respond to this unless we're given

1 leave to expand the record and submit additional evidence and we  
2 can't button it up in an evidentiary sense between 5:00 at night  
3 and 9:30 in the morning, that's just impossible. We didn't know  
4 what the facts were and it looks like somebody was off the  
5 reservation. How could we know about that?

6 THE COURT: If you are given authority to do it, is there  
7 any reason that you can't bring in for extremely brief testimony  
8 Ms. Sterling to -- wait a minute. She may be pure hearsay. I  
9 think you have to bring in someone from the publication to  
10 testify that they had no authorization to run the ad; isn't that  
11 correct?

12 MR. McDERMOTT: That is the most direct way. I think --  
13 if you'll give us leave to noodle on the problem and make a  
14 recommendation to the Court and the government, that may well be  
15 the best thing to do, but if you give us leave to come back to  
16 the Court with a proposed solution, we would be satisfied.

17 THE COURT: Well, I think, basically, what you're asking  
18 for is to -- I was going to say leave this witness's testimony  
19 open, but I don't really think this witness can help you one way  
20 or the other. She obviously has no -- I think, based on what you  
21 said, she has no personal knowledge about what Ms. Sterling is  
22 e-mailing about. Ms. Sterling's e-mail is pure hearsay because,  
23 certainly, you would want it for the truth of it, so it's not  
24 going to do you any good to bring in Ms. Sterling. I believe --  
25 I'm just talking this through now -- that we can close

1 Ms. Beasley's testimony, and all you're asking for at this point  
2 is the opportunity to, at least, make a specific proposal to the  
3 Court about providing some extremely limited focussed additional  
4 testimony to rebut only this issue. Is that a correct statement?

5 MR. McDERMOTT: Yes, Your Honor, that's correct.

6 THE COURT: That's all that's being asked right now,  
7 Mr. Sealls.

8 MR. SEALLS: We don't have any problem with that, Your  
9 Honor.

10 THE COURT: You'll have to see where you go from there,  
11 but you're done, as I understand it, right now with Ms. Beasley.

12 MR. McDERMOTT: That's correct, Your Honor.

13 THE COURT: All right. Well, she may be excused.

14 MR. McDERMOTT: Thank you.

15 THE COURT: I need to rule on her objections or the  
16 objections to her testimony, and I believe there are only five  
17 and there are two about which I need to hear further from  
18 counsel. The government's objections as to the following  
19 portions of the written direct are overruled. The first  
20 objection was to page 76 line 15 to 77 line 1, page 81 line 5 to  
21 81 line 7, and page 129, line 1 to 130 line 5. Those are  
22 overruled.

23 There are three others, however. Two of them are very  
24 close to each other in the direct, and they are both, I'm quite  
25 sure, charts. One is on page 10 and the objection is to lines 6



1 on page 10 to 16 on line 11, and all of that testimony refers to  
2 JDEM 0606112 on page 10.

3 The second objection, which is certainly very similar and  
4 related, refers to figure 2 on page 12 of the direct, JDEM  
5 060614. The objection is to page 11, line 17 through page 13,  
6 line 9, and I believe, that also encompasses figure number 3,  
7 yes, which refers to JDEM 060613. I hope all counsel are  
8 following me, and new counsel better identify yourself for the  
9 record, please.

10 MS. MOORE: Tashena, T-A-S-H-E-N-A, Middleton Moore, from  
11 Jones Day on behalf of joint defendants.

12 THE COURT: Let me hear. I know what the government  
13 wrote, of course, but I want to hear very specifically what the  
14 government's objections are.

15 MR. SEALLS: Yes, Your Honor. The first objection is, and  
16 this is JDEM 060612. Ms. Beasley really doesn't have the  
17 expertise to talk about industry-wide price increases after the  
18 MSA. She's got to look at other documents and make such  
19 testimony based on hearsay. She would know within her own  
20 organization through business records and information generated  
21 there how that's affected Reynolds, but she cannot know how it  
22 affects the others. And for her to testify, she's now testifying  
23 from lack of personal knowledge and is, in effect, becoming an  
24 expert.

25 THE COURT: And were there other objections to these two

1 groups of objections?

2 MR. SEALLS: No --

3 THE COURT: I don't mean that -- yes, these two groups of  
4 objections.

5 MR. SEALLS: No, Your Honor, that's the essence of them.

6 THE COURT: Let me hear from defense counsel.

7 MS. MOORE: Your Honor, first we would like to say that it  
8 is our position that the government is mischaracterizing  
9 Ms. Beasley's testimony. It is not expert opinion, but factual-  
10 based opinion, it's data. In particular, we're talking about  
11 JDEM 060612, is data, as the source indicates, from Exhibit T of  
12 the MSA, RJRT estimates, and also if you look at JDEM 060613, 614  
13 and 617, the source indicates MSAI shipment data. That is data  
14 from Management Science Associates, Incorporated. That is a  
15 company that Reynolds uses to gain data, obtain data regarding  
16 tobacco industry in general.

17 The data that the government objects to is data that  
18 Ms. Beasley sees on a regular basis as Chief Operating Officer of  
19 Reynolds. Part of her position, as president and CEO of  
20 Reynolds, is to know the competitive landscape, to know  
21 Reynolds's position relative to PM, relative to Lorillard,  
22 relative her competition.

23 Just to give some background, as you already know from the  
24 record, Ms. Beasley has been President and CEO for the last three  
25 years. Before that she was, in 1997 to 2001, she was the

1 Executive Vice President in charge of all of marketing for  
2 Reynolds. The government concedes the marketing background for  
3 Ms. Beasley in its papers during the course of its  
4 cross-examination. The government cannot suggest that  
5 Ms. Beasley does not have the personal knowledge of other company  
6 records, such as market share, industrywide market share price  
7 increases, when this is, in fact, part of her job. As President  
8 and CEO of Reynolds, she is charged and is responsible for  
9 planning and implementing Reynolds' business strategies, business  
10 objectives. Part of her every day course of employment is  
11 looking at this data. This data does not come to Ms. Beasley  
12 just Reynolds data, this is industry-wide data that she is  
13 personally familiar with and intimately familiar with, and if the  
14 government wanted to question Ms. Beasley regarding her personal  
15 knowledge she could have told them that she does review this data  
16 on her day-to-day, this is integral to her business, this is  
17 vital tobacco-wide industry data that she reviewed on a regular  
18 basis to make business decisions regarding pricing, regarding  
19 market share.

20 And I also would like to point out, Your Honor, that this  
21 is the same type of information regarding market share that the  
22 government asked of Mr. Schindler in its proposed written direct.  
23 It specifically asked Mr. Schindler regarding Marlboro's market  
24 share.

25 THE COURT: All right. Let me hear from the government,

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1 please, a response.

2 MR. SEALLS: Yes, Your Honor, briefly. It's not the  
3 government's responsibility to ask Ms. Beasley whether she's  
4 familiar, has reviewed, what those duties encompass, if she's  
5 seen those. It wasn't in the written direct, from the best of  
6 our estimation.

7 THE COURT: The government's objections are sustained. I  
8 went over this material very carefully because, obviously, the  
9 figures were very clear, they certainly were helpful. Defense  
10 counsel is correct that this is not expert testimony and I'm not  
11 judging it as expert testimony. The government's objection was  
12 that there was no adequate foundation for the testimony regarding  
13 these particular figures. It is certainly true that Ms. Beasley,  
14 in her very high and very well compensated position, is required  
15 to have a great deal of general broad definition, but she never  
16 testified how she put these graphs together. They are indeed  
17 significant, I don't deny that, which is why the minute I read  
18 them I said, how did she do this? Where did she get this  
19 information? How did she make certain judgments that were  
20 clearly called for in putting the grafts together. So the  
21 objections are sustained.

22 There's one more that I want to at least hear from  
23 everybody on. Page 15, line 10 through page 16, lines 7, and  
24 that testimony describes figures 4 and 5, JDEM, 060615 and 060616  
25 on page 14, and figure 6, which is JDEM 060617 on page 16. Let

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1 me hear from the government first, please.

2 MR. SEALLS: Your Honor, again, the United States'  
3 position is that Ms. Beasley does not give any details of her  
4 having personal knowledge of the sum product of what's in these  
5 charts. There is a little bit of testimony that she assisted in  
6 the preparation, but, Your Honor, the balance of it is really --  
7 I don't know what amount she assisted in from reading this, her  
8 testimony, and these do not appear to be documents that she is  
9 giving any testimony about having contributed to to any degree  
10 other than she assisted in preparing the chart, and I think that  
11 that testimony, which is from her own words, leaves the  
12 defendants short.

13 THE COURT: Counsel.

14 MS. MOORE: I believe, again, Your Honor, Ms. Beasley's  
15 testimony, she was asked about shipping data, and as I said, the  
16 source here is from Management Science Associates, Inc., and what  
17 they do is they gather data from shipment to distributors to gain  
18 information industry-wide regarding shipments and that's where  
19 these figures come from. That's where all of these figures come  
20 from and the JDEMs that we previously discussed, and again, this  
21 is internal Reynolds' tracking data that Reynolds obtains from  
22 third party, tracking data that they obtain in the ordinary  
23 course of business that Ms. Beasley reviews in her duties in the  
24 course of her employment.

25 THE COURT: None of which I knew reading the direct, which

1 is the vantage point from which these objections must be judged.  
2 None of which I knew until counsel ably provided the information,  
3 and which is certainly part of your job, but it is not the  
4 information that is provided by Ms. Beasley in her direct  
5 examination to establish an adequate foundation for the  
6 presentation of that evidence.

7 So, those objections are sustained, the others as I've  
8 indicated, are overruled. I think that covers all the matters  
9 relating to Ms. Beasley. Counsel should certainly look over  
10 exhibits and see, based on all of the rulings, counsel can come  
11 to agreements on those.

12 MS. MOORE: Thank you, Your Honor.

13 THE COURT: This may be excused now. Let me get my long  
14 list, everybody, and see if we can't take care of perhaps one or  
15 maybe two witnesses before lunch. I do have a 1:00 conference  
16 call, everybody, so I will want to break at about quarter of or  
17 ten of. I believe that Mr. Welch's testimony -- that there's a  
18 motion to strike, and that needs to be decided by me, and that  
19 there's nothing else regarding Mr. Welch testimony. Am I right  
20 about that?

21 MR. SPIEGEL: Good afternoon, Your Honor, Brett Spiegel  
22 for the United States. There actually, I believe, are two  
23 documents.

24 MR. FREDERICK: Three, actually.

25 MR. SPIEGEL: We're going to --

1 MR. FREDERICK: Withdraw one.

2 MR. SPIEGEL: -- withdraw one. So there is actually two  
3 documents remaining, aside from those in the motion for  
4 reconsideration which needs to be discussed.

5 THE COURT: Well, let's deal with those documents then, of  
6 course, I have to find the file.

7 MR. FREDERICK: And, Your Honor, while you're doing that  
8 I'm going to get my file. I'll be right back.

9 THE COURT: Actually it's the file on the very bottom,  
10 everybody. Okay. All right, who is to begin?

11 MR. FREDERICK: Your Honor, Tom Frederick for Philip  
12 Morris. Your Honor, the government has advised me they've  
13 withdrawn one of the documents to which you had an objection, so  
14 the only two as to which we maintain objections that are being  
15 offered by the government are U.S. Exhibit 89397 and U.S.  
16 Exhibit 89398, and the objection is hearsay. They are both  
17 transcripts of interviews that Mr. Welch gave to the media.

18 THE COURT: All right. Just one minute, now. Let me --  
19 Just tell me what page this is at on your objections,  
20 please.

21 MR. FREDERICK: One second, Your Honor. I have to  
22 apologize because I don't have that with me, but it would be in  
23 the chart of objections to exhibits. You'd find it under those  
24 exhibit numbers, 89397 and 89398.

25 THE COURT: Well, I have your objection to the written

1 direct examination, and you say there's also a chart on --

2 MR. FREDERICK: There should be -- it's either on Exhibit  
3 B or Exhibit C that there should be a chart, and if not we'll  
4 come back with it after lunch.

5 THE COURT: B is the written direct; C, you're correct.  
6 Okay. All right. What are the exhibits now?

7 MR. FREDERICK: 89397 --

8 THE COURT: I have the numbers, but what were they?

9 MR. FREDERICK: They are transcripts of interviews.  
10 They're media interviews, transcripts of the media interviews.  
11 The objection is simply hearsay. They're Mr. Welch giving an  
12 interview to the media.

13 THE COURT: And you're moving to admit those?

14 MR. SPIEGEL: Yes, Your Honor, under Federal Rules of  
15 Civil Procedure 801(d)(1) "a prior consistent that is consistent  
16 with the declarant's testimony and is offered to rebut an express  
17 or implied charge against the declarant of recent fabrication or  
18 improper influence of motive is not hearsay." Virtually, the  
19 entirety of the cross-examination was geared to precisely those  
20 matters, trying to say is that Mr. Welch had some way had  
21 fabricated his story after the fact at the behest of the United  
22 States. Both of these documents are interviews given by  
23 Mr. Welch before the United States had ever, frankly, ever known  
24 who Mr. Welch was, and so this shows -- this does precisely what  
25 it is supposed to be allowed under Federal Rule of Procedure



1 Rule 801(d)(1).

2 THE COURT: When did he give those interviews?

3 MR. SPIEGEL: They are --

4 THE COURT: After he left employment, naturally?

5 MR. FREDERICK: Yes, Your Honor.

6 MR. SPIEGEL: Yes.

7 MR. FREDERICK: And I'll just give you the dates, one is  
8 July 2003, and the other -- they're in July of 2003.

9 THE COURT: And what's the defendants' response?

10 MR. FREDERICK: The Rule, the exception to the Rule cited  
11 for the admission of prior consistent statements doesn't apply.  
12 He had the same motive at the time he gave these interviews at  
13 the time that he testified. I mean, if he would have said this  
14 back in 1992 when he's employed, then that would be a prior  
15 consistent statement that could be used to rehabilitate the  
16 witness. He had the same motive at the time that he gave these  
17 interviews that he had sitting in the Court here today -- I mean  
18 on the witness stand here in Court.

19 THE COURT: What do you deem his motive to be or what are  
20 you arguing his motive was?

21 MR. FREDERICK: His motive was to -- I'm not going to  
22 guess at what his motive was, I'm just saying there was  
23 nothing -- there was no change in his position. He was somebody  
24 who had decided to give statements to the media, he made those  
25 same statements in Court. Our contention isn't that he made

1 different statements in Court than he gave to the media. Our  
2 contention is that he made different -- he never said what he  
3 said if Court or said to the media back at the time of his  
4 employment, and that's the relevant period for a prior consistent  
5 statement that would have rehabilitated him, if he had said that  
6 the statements that he made to the media and in Court back at  
7 that time, that would be a rehabilitative statement. These are  
8 not rehabilitative statements.

9 THE COURT: He never said anything to the contrary either  
10 back at the time that he was employed, did he?

11 MR. FREDERICK: He never said anything at all.

12 THE COURT: Right, correct.

13 MR. SPIEGEL: With all due respect, Your Honor, I believe  
14 that the arguments that were made during Mr. Welch's testimony  
15 were not simply that you made up this testimony today because you  
16 wanted attention or anything else, it was specifically that the  
17 United States government had put words in the mouth of the  
18 witness, and the specific language of 801(d)(1) is an expressed  
19 or implied charge of recent fabrication. What they were alleging  
20 during the course of his cross-examination was recent  
21 fabrication.

22 MR. FREDERICK: And Your Honor, that's, just real quickly,  
23 that's way too general. There were specific questions and  
24 answers that I -- questions that I asked Mr. Welch and answers he  
25 gave where I asked him, you know, who put -- whose language was

1     that, was that yours or was it Mr. Spiegel's, and he answered on  
2     several occasions Mr. Spiegel's. Those questions don't tie into  
3     the Q and A's in these interviews. Those are different questions  
4     and answers. You've got to look -- and to rehabilitate him by  
5     means of these statements they have to have something to do with  
6     the questions and answers that he gave in Court.

7             MR. SPIEGEL: First of all, I don't accept Mr. Frederick's  
8     characterization of the questions and answers that were given  
9     there. There were some questions that were to specific matters  
10    and those specific matters are in many situations covered by  
11    these previous interviews. Second, there were also questions  
12    that were general as to whether or not there's been changes made  
13    broadly at the behest of the United States government.

14            THE COURT: I don't think that those interviews fall  
15    within the exception, and the defendants' objections will be  
16    sustained on those two -- as to those two objections. And then  
17    there are two matters remaining for me, correct, everybody?

18            MR. FREDERICK: With respect to Mr. Welch?

19            THE COURT: Yes.

20            MR. FREDERICK: I believe there's only the motion to  
21    strike the testimony.

22            THE COURT: One.

23            MR. SPIEGEL: The motion for reconsideration.

24            THE COURT: I think there are two.

25            MR. FREDERICK: I'm sorry, I apologize.

1 THE COURT: A motion to strike and a motion to reconsider.

2 And I'll try to get to them soon. All right.

3 I'm going to try to get through one more.

4 MR. SPIEGEL: I'm not certain about this, but I believe  
5 the motion to strike was resolved orally by Your Honor prior to  
6 Mr. Welch's testimony, but I could be incorrect on that.

7 THE COURT: Well, I'll look on my, quote, table, unquote.  
8 As to Dr. Townsend, I believe that everybody asked for a little  
9 more time. I don't know if we're at the point where you've  
10 gotten your little more time or not.

11 MR. SCHWARTZ: Good morning, Your Honor, Joel Schwartz for  
12 the United States, we're ready to go.

13 THE COURT: All right. Let me find his testimony. Well,  
14 for some reason I don't see Dr. Townsend's file. Let me just  
15 make sure of that. No, I'm sorry, everybody, we'll do that this  
16 afternoon, though, definitely.

17 MR. SCHWARTZ: Okay.

18 THE COURT: I knew we hadn't finished with that. Now, I  
19 do have the Dixon file, which, of course, I'll have to find  
20 again. Are counsel ready on that? Let me find it again. I  
21 believe there are three issues outstanding.

22 MR. PFEFFER: I think, for the record, Philip Pfeffer from  
23 Chadbourne and Park representing BATCo. We agreed in an order on  
24 the exhibits, Your Honor, so the only thing outstanding is the  
25 application of Your Honor's ruling with regard to two portions of

1 Dr. Dixon's testimony, so --

2 THE COURT: All right. Well, tell me where to find that.

3 MR. WILLIAMS: Your Honor, if I may, Robert Williams for  
4 the United States. We have reached agreement on the exhibits.  
5 There is one issue I would like to note, just to bring the  
6 Court's attention. There were some subsequently identified trial  
7 exhibits that were associated with Dr. Dixon's testimony. We're  
8 not objecting to those exhibits, but as far as I'm aware, they  
9 were not separately identified as subsequently identified  
10 exhibits, and that we would just ask that defendants be  
11 instructed. That's the practice that I'm under the impression  
12 that the parties have been following, is to separately provide  
13 opposing counsel with a list of just those exhibits so that we're  
14 not in the position of having to go through the entire exhibit  
15 list and determine for ourselves which are subsequently  
16 identified.

17 THE COURT: All right. But there are two pieces of  
18 testimony; is that right?

19 MR. PFEFFER: Yes, Your Honor.

20 THE COURT: And that will be in the United States'  
21 objections; is that correct?

22 MR. PFEFFER: That's correct, Your Honor.

23 THE COURT: And it will be fastest if you can --

24 MR. PFEFFER: Point you to those portions?

25 THE COURT: Please.

1           MR. PFEFFER: Very well, Your Honor. The first one  
2 relates to the testimony that Your Honor excluded with regard to  
3 the butt studies, Dr. Dixon's testimony on the butt analysis.  
4 The government has objected to --

5           THE COURT: What pages?

6           MR. PFEFFER: Pages 47 line 3 to page 52 line 18. And  
7 that is at page 4 of the United States' objection, there's a  
8 chart there. And we understand the Court's ruling with regard to  
9 excluding Dr. Dixon's testimony on the butt studies, but we think  
10 that the governments' page and line designation really casts too  
11 wide a net. We believe that the only testimony that should be  
12 excluded under Your Honor's ruling would be lines 47 -- I'm  
13 sorry, page 47 line 24 to page 52, line 10, so really there are  
14 two snippets --

15          THE COURT: Wait one second. Let me get all this down.  
16 You want the exclusion limited to 47 line what?

17          MR. PFEFFER: 24.

18          THE COURT: To?

19          MR. PFEFFER: 52, line 10.

20          THE COURT: Let me start on page 47 right now, 47 line 3.  
21 What's the government's argument as to the first lines on page  
22 47? It seems to be very general, introductory questioning on  
23 that line.

24          MR. WILLIAMS: Your Honor, first of all, I would like to  
25 refer the Court to our first legal issues motion which is on the

1 filter analysis, and those are specifically the page and line  
2 designations that we submitted to the Court and the Court  
3 sustained that objection. The objection was to discussion of  
4 this new filter analysis, which the defendants concede was not in  
5 the expert report. Their response was that it was covered in the  
6 deposition, and you know, we have the Eriksen rule so that's not  
7 sufficient under Rule 26. So, Dr. Dixon was proffered only as an  
8 expert witness, not to give fact testimony, so it's our position  
9 that any testimony about this new filter analysis method is out.

10 MR. PFEFFER: If I may respond to that, Your Honor. To  
11 the contrary, I think as Your Honor noticed, that testimony it is  
12 introductory and notes that there were previous butt analyses and  
13 previous methodologies that were going to be changed because  
14 there were limitations to them. And specifically on that issue,  
15 if I may bring to Your Honor's attention, U.S. Exhibit 46683,  
16 which the government used in cross-examining Dr. Dixon. And  
17 specifically, this was an e-mail from Dr. Dixon to Hugh Honeycutt  
18 where he discusses expressly that there were limitations to the  
19 old butt analysis, that they were going to be doing further butt  
20 analysis and that they are going to be using it for other  
21 purposes.

22 Now, the government injected that issue into the case and  
23 to now come and say that somehow the notion that there were  
24 previous butt analyses and that that was something that they  
25 objected to and that it had no place in Dr. Dixon's testimony,

1 well, to the extent they took that position in their papers they  
2 certainly waived it by putting this exhibit and putting it to  
3 Dr. Dixon, and I believe Ms. Eubanks actually read certain  
4 portions that expressly related to the butt analysis and the  
5 record will reflect that.

6 THE COURT: Government?

7 MR. WILLIAMS: Your Honor, we would disagree with that.  
8 That was not the purpose for which we used this e-mail. The  
9 e-mail was used for the assertion that Mr. Dixon -- Dr. Dixon was  
10 a full-time litigation witness, nothing more than Mr. Honeycutt's  
11 assertion on that.

12 MR. PFEFFER: I can assure you, Your Honor, that  
13 Ms. Eubanks read portions that related to the butt analysis. I  
14 went back and looked at the transcript.

15 THE COURT: She may have read it, but it was used for a  
16 different purpose. I've had a chance to look over this. The  
17 entire 47, 3 through 52, 18, which is the subject of the  
18 objection, is sustained.

19 What's the second one, please?

20 MR. PFEFFER: The second issue relates to the government's  
21 objection, the last box on that page 4 in their chart, line 67, 9  
22 through 67, 10. Plaintiff objected to those lines because they  
23 cited in Exhibit JD 031677, which was Dr. Dixon's publication in  
24 2002 on acetaldehyde. The government said that article was not  
25 listed as reliance material, it should be out. They objected to



1 two specific lines of the testimony, and Your Honor excluded it.

2 We respect that. We don't reargue that.

3 Now -- and then what the government did after they got  
4 that ruling, was Ms. Eubanks then said to the Court, "Your Honor,  
5 with respect to the opinions that are offered on the acetaldehyde  
6 issue, to the extent that they are set forth in the written  
7 direct, we should file a notice or something with the Court  
8 making it clear, given that the ruling on failure to disclose,  
9 that certain portions of the testimony correspond to that should  
10 be stricken as well and we'll supply that with the Court."  
11 Frankly, day late, dollar short. The government took the view  
12 that they objected to those two lines, now they've come to me and  
13 said, well, we want you to agree to exclude three pages of  
14 testimony relating to a whole host of issues, the majority of  
15 which are not based on that article.

16 THE COURT: Well, what I've got in front of me is the  
17 government's objections that cover two or three lines, I'm not  
18 sure which. Is the government now asking for more?

19 MR. PFEFFER: Absolutely.

20 THE COURT: Excuse me, let me ask the government, they can  
21 speak for themselves.

22 MR. WILLIAMS: Your Honor, I would completely disagree  
23 with counsel's characterization. This issue was argued  
24 extensively before Dr. Dixon took the stand, and if you would  
25 like I can refer you to the record. The issue of Dr. Dixon's

1 opinion on acetaldehyde was litigated not once, but twice. At  
2 the first break Mr. Bernick got up and re argued the issue and I  
3 can show Your Honor the transcript.

4 THE COURT: Just tell me, to begin with, the answer to my  
5 question which is what are you seeking to exclude?

6 MR. WILLIAMS: We are seeking to exclude his new  
7 previously undisclosed opinions on acetaldehyde. The word  
8 "acetaldehyde" does not appear anywhere in his expert report.  
9 Defendants concede that, they conceded it on the record when he  
10 testified that it was something that we had brought up in our  
11 case, they weren't expecting it and they wanted to offer  
12 Dr. Dixon to rebut that.

13 THE COURT: And so what pages are you seeking to exclude  
14 or what lines?

15 MR. WILLIAMS: Your Honor, if I may hand up a proposed  
16 order that I sent to opposing counsel pursuant to Ms. Eubanks'  
17 statement in Court. So we are seeking to exclude pages 65 line  
18 13 to page 68 line 21, and if Your Honor looks at that testimony,  
19 it's all about acetaldehyde and it's all about the document. He  
20 explains in detail that document which the Court excluded.

21 MR. PFEFFER: That is just wrong, Your Honor. That  
22 testimony, the majority of those three pages of testimony to  
23 which the government did not specifically object, relates to  
24 Dr. Dixon's presentation to the Department of Health in 1999, two  
25 years or three years before the publication, it relates to his

1 comments about Dr. DeNoble's earlier research, which Dr. DeNoble  
2 spoke about extensively in this case, and also Dr. Wigand also  
3 spoke about in this case. The testimony relates to other issues,  
4 I agree, they relate to acetaldehyde, but the government never  
5 made that objection and, frankly, for them to come in now and say  
6 we want to exclude three more pages of testimony is just -- is  
7 beyond the pale, it is not covered by Your Honor's prior rulings  
8 and would be contrary to Order 471.

9 THE COURT: Excuse me, why didn't the government object to  
10 begin with?

11 MR. WILLIAMS: Your Honor, we did object. Here's the  
12 transcript.

13 THE COURT: No, no, you didn't include those pages in your  
14 United States' objections, did you?

15 MR. WILLIAMS: We objected to the exhibit as an  
16 undisclosed exhibit and then we expanded on that before Dr. Dixon  
17 took the stand.

18 THE COURT: But you didn't object to those pages, did you?

19 MR. WILLIAMS: Well, we objected to the basis -- this is a  
20 document that Dr. Dixon relied upon for his opinions on  
21 acetaldehyde.

22 THE COURT: The document's not the issue. The procedure  
23 we've all followed, to attempt to keep some order to this  
24 process, is that people sort of fly or stumble on the basis of  
25 the written objections and then, of course, on the basis of the

1 written responses. The government didn't seek to exclude these  
2 additional pages in its written objections and I think you're  
3 bound by that at this time.

4 MR. WILLIAMS: Your Honor, if I may, there is more  
5 testimony on this document that was stricken besides the two  
6 lines that defendants say is stricken. So it would be completely  
7 eviscerate the Court's ruling to --

8 THE COURT: Are you saying it was stricken in the record  
9 during the testimony?

10 MR. WILLIAMS: Yes, you excluded the Document, it's 2003  
11 acetaldehyde article that Dr. Dixon himself prepared and  
12 authored, it was not in the expert report, not disclosed to the  
13 United States, and Your Honor, I think the record is clear that  
14 from the discussion in Court, if I may --

15 THE COURT: Well, no, let me do it this way, because his  
16 testimony was a while ago. I would want to refresh myself on it.  
17 By tomorrow at 5, each of you can file a two-page statement  
18 explaining your position and, above all, attaching thereto the  
19 portions of the transcript that you think support your position  
20 about what has been excluded or what has not been excluded. And  
21 that way your portions of the transcript are not limited to two  
22 pages, if you think you need more than that, but your actual  
23 argument should be no more than two pages, everybody.

24 MR. PFEFFER: Your Honor, if I may say just one more  
25 thing. I appreciate that, and we will submit that to the Court.

1 I just think Order 471 makes expressly clear that no disputes may  
2 be submitted for the first time either the night before or the  
3 day when the dispute in question must be resolved, and that's  
4 precisely what the government did. And to now give them a chance  
5 to reargue and take a second bite at the apple.

6 THE COURT: He's not rearguing at all. The statement that  
7 has been made to me this morning is that during the course of the  
8 testimony I actually struck certain testimony. Isn't that your  
9 argument?

10 MR. WILLIAMS: Not during the course, but prior to him  
11 taking the stand.

12 THE COURT: All right, immediately prior to. If, in fact,  
13 I did that, well, then, of course, I'm going to enter an order --  
14 a written order that incorporates that. There's not going to be  
15 a substantive re argument of the underlying issue. Either the  
16 transcript shows what the government says or it does not. If I  
17 struck it, so be it. That's the end of the matter.

18 MR. PFEFFER: Thank you, Your Honor.

19 THE COURT: Okay. Everybody we're going to take a lunch  
20 recess until 2:00, please.

21 (Thereupon, a luncheon recess was had.)  
22  
23  
24  
25

## 1 C E R T I F I C A T E

2 I, Scott L. Wallace, RDR-CRR, certify that the  
3 foregoing is a correct transcript from the record of proceedings  
4 in the above-entitled matter.

5 -----  
6 Scott L. Wallace, RDR, CRR  
7 Official Court Reporter  
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Scott L. Wallace, RDR, CRR  
Official Court Reporter

1 I N D E X

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3 Examinations Page

4

5 CONTINUED CROSS EXAMINATION OF LYNN J. BEASLEY 17339  
BY MR. SEALLS

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7 REDIRECT EXAMINATION OF LYNN J. BEASLEY 17382  
BY MR. McDERMOTT

8 E X H I B I T S

9 Description Page

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                            |   |                     |
|----------------------------|---|---------------------|
| UNITED STATES OF AMERICA,  | : | CA No. 99-2496 (GK) |
|                            | : | March 31, 2005      |
| Plaintiff,                 | : |                     |
|                            | : | 2:04 p.m.           |
|                            | : |                     |
| v.                         | : | Washington, D.C.    |
|                            | : |                     |
| PHILIP MORRIS USA, et al., | : |                     |
|                            | : |                     |
| Defendants.                | : |                     |
| . . . . .                  | : |                     |

VOLUME 85  
AFTERNOON SESSION  
TRANSCRIPT OF TRIAL RECORD  
BEFORE THE HONORABLE GLADYS KESSLER  
UNITED STATES DISTRICT JUDGE

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21

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

24

25

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

2 THE COURT: All right, counsel, we are ready to begin.  
3 I think we are ready on Dr. Townsend; is that right? I think  
4 most counsel are here on that.

5 And my notes are that as of last week, at least,  
6 counsel hadn't really begun to work things out, so tell me where  
7 you stand at this point.

8 MR. SCHWARTZ: Your Honor, we have narrowed the  
9 issues -- good morning -- or good afternoon, rather. Joel  
10 Schwartz for the government.

11 THE COURT: Mr. Schwartz, it's been a long morning.

12 MR. SCHWARTZ: How do you do?

13 We have eliminated some of the exhibits. There's an  
14 issue that counsel and I disagree on with regard to our  
15 objections to the testimony in light of the voir dire and the  
16 court's rulings after the voir dire of Dr. Townsend.

17 I think, if the court will permit me, I'd like to  
18 address the testimony issue first because that will affect how  
19 much we need to talk about with regard to the exhibits.

20 THE COURT: That's fine.

21 MR. SCHWARTZ: Thank you, Your Honor.

22 Did you want to say something first?

23 Your Honor, prior to Dr. Townsend's appearance we moved  
24 to eliminate -- or strike testimony in six areas of his written  
25 direct examination. Subsequently, we have withdrawn one of

1       them, and that's an objection we had to his testimony about  
2       metals and radioisotopes. We were incorrect about the objection  
3       and so we have withdrawn it.

4               Your Honor did, at the beginning of the day on  
5       March 7th, note that you read over our objections and issued a  
6       ruling about the testimonial objections. And I would just point  
7       Your Honor to -- it's page 14402.

8               And you said that you -- it just starts at line 8, Your  
9       Honor. If that's clear. However, in light of the voir dire, I  
10      need to address the court and ask for specific remedy about the  
11      rulings that the court made.

12              Some of the areas we objected to in our written direct  
13      included the testimony that Dr. Townsend gave in his written  
14      direct about consumer acceptability, the testimony he gave about  
15      the effect or potential effect or impact of FDA or FTC activity,  
16      and about compensation.

17              And we did not file anything in writing in our  
18      objections about compensation. We adduced -- because I didn't  
19      think that we had adduced sufficient testimony. So we adduced  
20      sufficient testimony in voir dire from -- which I thought we had  
21      safe ground to make a motion with regard to his testimony about  
22      voir dire, and Your Honor ruled --

23              THE COURT: About compensation.

24              MR. SCHWARTZ: About compensation, about the FDA/FTC  
25      issue, and about consumer acceptability, at page 14616 at the

1 transcript, and found that he was not an expert.

2 That testimony remains in his written direct, and if  
3 Your Honor wants to leave it there, of course, that's the  
4 court's -- has the power to do so.

5 What I would suggest, Your Honor, respectfully -- and I  
6 think compensation is the best example is -- that what you have,  
7 if it's not expert testimony, what you have is opinions based on  
8 hearsay. And I'm happy to show the court some of that testimony  
9 on the Elmo if that would assist the court. But it doesn't come  
10 in even though, despite our objections, the court has found that  
11 Dr. Townsend was both a fact witness and an expert witness.

12 Hearsay that's not relevant and opinions that -- for  
13 which he cannot be an expert should not be in his direct  
14 examination testimony.

15 THE COURT: It came in as a fact witness, right?

16 MR. SCHWARTZ: He came in -- Your Honor did it --  
17 overruled my objection with regard to him being a fact witness  
18 and we asked to strike all the testimony because we felt that it  
19 couldn't be unfolded and separated. Your Honor made a ruling  
20 about that and we are not here to reargue that.

21 What I'm here to say is when you have testimony about  
22 compensation -- and I'm happy to show the court some -- it only  
23 speaks to things that are either his opinion or his opinions  
24 based on hearsay that someone else told him that we can't  
25 cross-examine. That has no place in the record.

1           And by way of example, I'm just going to put up, with  
2           the court's permission, page 154 of his written direct  
3           examination.

4           The first two lines they ask him if he's familiar with  
5           Dr. Michael Dixon and is he an expert?

6           Judge, it's irrelevant to expert testimony, completely,  
7           and it's even less relevant to fact testimony.

8           The next set of testimony, Your Honor, is, Have  
9           Reynolds scientist conducted research on the issue of  
10          compensation? And he says, yes, they have, and they show --  
11          you're shown two exhibits and he's asked about that.

12          And they say, For what advice did these scientist who  
13          did the research give you, and then he gives a page or two of  
14          testimony about based on the advice they gave me, compensation  
15          is not complete, low-tar cigarettes still have a positive  
16          effect, and on and on and on.

17          Your Honor ruled that he cannot give expert opinions  
18          about that. Therefore, what these other people in his  
19          company -- and then he's later asked, What is your understanding  
20          of the public health community's view? And he offers again an  
21          opinion that, at page 157, that -- I'm sorry, 156 -- he says,  
22          The studies show that compensation is complete. And he  
23          questions that. And he says, Our scientists say it's not  
24          complete.

25          All that testimony, if he's not an expert, is based on

1 something somebody else told him. And we asked Dr. Townsend  
2 very clearly, The person at your company who knows all about  
3 this stuff and who can give firsthand testimony about it is  
4 Dr. John Robinson.

5 Dr. Robinson was on the defendants' witness list. He's  
6 now off the defendants' witness list. If they've taken  
7 Dr. Robinson off the witness list, they have taken this issue  
8 off the table.

9 And if Dr. Townsend is strictly an expert -- or  
10 strictly a fact witness with regard to compensation, that  
11 testimony doesn't come in.

12 The same thing goes with regard to his comments about  
13 FDA and FTC. The same thing goes about consumer acceptability.  
14 It's all based on what somebody else told him.

15 And when we talked about consumer acceptability, Your  
16 Honor, we weren't talking about what the sales levels for  
17 products -- clearly that was something he needed to know to form  
18 opinions that were admissible -- but why something only reached  
19 a certain sales level or why a product failed according to RJR  
20 is not within his bailiwick.

21 A fourth area which we objected to in our written  
22 objection, which the court did not expressly rule on after voir  
23 dire, was marketing and the issue of marketing. And he gives  
24 two pieces of opinions -- or two opinions in his written direct  
25 about whether health claims would have a positive effect, or

1       what effect it would on sales or consumer acceptability.

2               Again, Dr. Townsend was very willing to admit, or he at  
3       least admitted at some point that he didn't know about this  
4       marketing stuff and he shouldn't talk about it. For the same  
5       reason that testimony shouldn't come in.

6               And those are four of the six -- I guess there are --  
7       four of the six areas, and then we have just two more to address  
8       in the testimony that don't relate to whether he's an expert or  
9       not.

10              And I don't know if the court wants me to go on or if  
11       the court wants to address this or let counsel address those  
12       areas that pertain to what we think he's not an expert about and  
13       what we think the court has ruled he's not an expert about.

14              THE COURT: Let me hear from the defense counsel at  
15       this time, and you should please identify yours.

16              MS. HERRIGAN: Karen Herrigan with Jones, Day on behalf  
17       of joint defendant.

18              Even though Mr. Schwartz says that he's not here to  
19       reargue the issues, I think in fact he is.

20              As he put up on the Elmo before your court actually did  
21       rule on these objections the legal issue memoranda at the start  
22       of trial on March 7th, and that's what Mr. Schwartz just had on  
23       the Elmo earlier.

24              And as far as the court's later rulings after voir  
25       dire, I think it's pretty clear. Dr. Townsend said he wasn't an



1 expert in those areas, and his testimony was coming in for what  
2 he understood FDA and FTC regulation to be, and compensation to  
3 be and consumer acceptance to be. And I think Your Honor will  
4 take it for what you take it for, and it is what it is.

5 And in terms of compensation specifically. If, as the  
6 government suggests, that it should be somehow eliminated and  
7 all his testimony stricken now -- I can't remember when  
8 Dr. Townsend got off the stand, but I think it was about 23 days  
9 ago -- this is just a bad precedent to start, Your Honor, where  
10 you have the witness gone and then, you know, we can't address  
11 these concerns here.

12 These hearsay objections are new. The foundation  
13 objections are new. They should have been raised on the  
14 pleadings on February 23rd. They can't be raised now on  
15 March 31st.

16 And in terms of compensation alone, assuming that in  
17 fact some of it should come out, on March 8th Mr. Schwartz said  
18 to Dr. Townsend, Okay, and compensation, generally, the idea is  
19 what, sir? Can you encapsulate the notion of compensation?

20 So I think if the door was ever closed he opened it  
21 right open on March 8th.

22 THE COURT: The basic point is that the decisions were  
23 made. They've been made already. This is a motion for  
24 reconsideration, pure and simple. It's reargument.

25 What is more, it is reargument that really doesn't take

1       into account the lengthy opinion I read into the record on  
2       Monday.

3               I remember Dr. Townsend's testimony quite well and, in  
4       particular, what I remember is -- I don't want to say in  
5       particular -- but certainly what I clearly remember is reading  
6       it in light of the government's objections.

7               The opinion I gave on Monday was the result of thinking  
8       a whole lot about, and struggling with, a lot of objections  
9       raised by the government -- and, in particular, it's come up in  
10      defense testimony -- to testimony given by defense fact  
11      witnesses.

12              As we both know, all of us know, the government relied  
13      primarily on experts, and so there are a whole series of  
14      objections as to them, and then the defendants are relying  
15      certainly to a clear extent on their own fact witnesses, many of  
16      whom are either scientific experts in their own particular areas  
17      or high-level executives like Ms. Ivey and our witness this  
18      morning, Ms. Beasley, who are extremely knowledgeable about what  
19      is going on at the company.

20              All of which is to say that when I ruled on  
21      Dr. Townsend's testimony I certainly had in mind the lines I was  
22      trying to draw and did draw in the oral ruling I gave on Monday.

23              I don't believe that any of the rulings that I made at  
24      the time of Dr. Townsend's testimony are inconsistent with the  
25      principles that I tried to lay down on Monday.

1           In addition -- and I do again remember the objections  
2       very clearly -- some of the testimony that Dr. Townsend gave --  
3       and I do not mean this critically of Dr. Townsend at all -- but  
4       some of the testimony he gave on some of these, I will say,  
5       ancillary areas to his testimony, I mean the testimony was  
6       either clearly introductory or so obvious -- I mean, I don't  
7       think you have to be a marketing expert, everybody, to conclude  
8       that consumers will react affirmatively if health claims are  
9       made for cigarettes.

10           So that some of the testimony objected to -- again, I'm  
11       not saying this in any way to be demeaning of Dr. Townsend --  
12       but some of it was just -- what should I say -- obvious is the  
13       only way I can put it and almost not worth objecting to.

14           But the ruling stands. Now if there are issues I  
15       didn't rule on, let me hear about them, Mr. Schwartz.

16           MR. SCHWARTZ: Your Honor, I believe there still may be  
17       two issues of testimony and I think there are three exhibits  
18       remaining to address.

19           The two issues of testimony that I don't think the  
20       court has ruled on, in light of what Her Honor said at the  
21       beginning of March 7th, was the testimony -- that we believe is  
22       prohibited by Order 476 and the affirmative defense's summary  
23       judgment ruling the court entered, we have --

24           THE COURT: About the FTC?

25           MR. SCHWARTZ: No, Your Honor, not about the FTC.

1 About government activity. And I can specifically...

2 There were six -- six areas of testimony. It was the  
3 government's failure to set criteria for safe cigarettes, the  
4 fact that the government in the witness's opinion trashed or  
5 condemned Premier --

6 THE COURT: Wait. What legal issue are you on?

7 MR. SCHWARTZ: It's about order -- legal issue number  
8 5, Your Honor, related to barred affirmative defenses.

9 THE COURT: Go ahead.

10 MR. SCHWARTZ: The FTC was issue number 3. This is  
11 legal issue number 5.

12 There were six areas of testimony we asked the court to  
13 strike because we believed that Order 476, the court's ruling  
14 with regard to our summary judgment motion, prevents that  
15 testimony from being introduced into evidence.

16 THE COURT: Go ahead, briefly.

17 MS. HERRIGAN: Your Honor, I'm just going to put up  
18 that what Mr. Schwartz had up there earlier and it's not  
19 legible, but it says:

20 You've read the legal objections. I don't need to hear  
21 argument about them. I've read them. I read his testimony.  
22 The objections are overruled. You've already ruled on legal  
23 issue memo five.

24 THE COURT: Why are we doing this again?

25 MR. SCHWARTZ: Your Honor, you talked about what was

1 expertise --

2 Could you secure that for one second?

3 You said, On a couple of the issues regarding his  
4 expertise. If that's -- if the court -- I'm asking the court,  
5 Has the court ruled on issue number 5 even though this not about  
6 a whether he's an expert or not?

7 The objection we have under legal number 5, it's not  
8 about expertise, it's about Order 476 and whether the defense  
9 can introduce evidence of government activity as an affirmative  
10 defense to its own, what we believe, to be fraudulent active.  
11 If the court has ruled on that and that's what the court is  
12 saying, then I have no further argument.

13 THE COURT: Well, let me make it very clear.

14 I mean, I have to go back and look at the context of  
15 that particular page or two of the transcript. But in Order 476  
16 I ruled that those affirmative defenses could not stand.

17 I did not draw lines about precluding large areas of  
18 testimony which are clearly relevant to many issues raised in  
19 this case. I think that's the defendants' argument this  
20 afternoon.

21 MS. HORRIGAN: That is our argument, Your Honor.

22 THE COURT: The objection is overruled, if it wasn't  
23 overruled earlier.

24 Tell me your last objection.

25 MR. SCHWARTZ: The last testimonial objection, Your

1 Honor, pertains to testimony that Dr. Townsend gave about a dual  
2 ledger system.

3 According to the testimony of Dr. Townsend, the  
4 government has alleged that RJR is destroying or losing or  
5 erasing certain research reports.

6 Dr. Townsend says, Couldn't happen because we have this  
7 dual ledger system, and that dual ledger system, everything has  
8 to be written down by one person and written down by another  
9 person, and then I went and personally checked that and I'm  
10 telling you, there's nothing wrong with that.

11 That's a violation, in our opinion, of Rule 1002. He's  
12 going to talk about what's in the document. And it's the  
13 original document rule. If he's trying to prove the content of  
14 a document he's got to bring in this document.

15 I addressed numerous times about Dr. Townsend, his  
16 ability to give testimony about things that he wouldn't bring  
17 the documentation in for. This, more than any of them,  
18 specifically is spoken to by Rule 1002.

19 He could prove evidence or talk about that in another  
20 way, but he chose to talk about this dual ledger, about somebody  
21 makes an entry, somebody didn't make an entry, and then he chose  
22 to talk about the fact that he went and checked it and he did  
23 all these comparisons and it's neat and clean and everything is  
24 fine.

25 And, Your Honor, the rule says, or the commentary to

1 the rule says, Application of the rule requires a resolution of  
2 the question of whether contents are sought to be proved. It  
3 says, Thus, an event may be proved by nondocumentary evidence  
4 even though a written record of it was made. If, however, the  
5 event is sought to be proved by the written record, the rule  
6 applies.

7 Counsel adduced written testimony that sought to prove  
8 the content of that dual ledger and the existence of that dual  
9 ledger by talking about the dual ledger system. That's got to  
10 come into evidence. It hasn't.

11 Again, as he did a number times, he did not show us and  
12 he denied us the opportunity to cross-examine him on it. That's  
13 why Rule 1002 exists and we believe it applies to this portion  
14 of the testimony.

15 MS. HERRIGAN: Your Honor, this is legal issue number  
16 6. I direct your attention to the transcript up there. You've  
17 already ruled on it.

18 And what Dr. Townsend testified about is a dual ledger  
19 system. It's not this big, gigantic ledger that's been in  
20 existence for years and years and years. It's a system of how  
21 Reynolds keeps track of its research efforts.

22 And so it's not so much that he's testifying about the  
23 document, he's testifying about what he's done with respect to  
24 the dual ledger system. So I don't think the best evidence rule  
25 applies here to his testimony.

1           MR. SCHWARTZ: Your Honor, if it will assist the court,  
2 here is the testimony.

3           THE COURT: Didn't I rule on it already?

4           MR. SCHWARTZ: I asked the court if that -- if the  
5 ruling that was -- that Ms. Horrigan has put up here has said  
6 you ruled on it, that's fine. I didn't think it was clear you  
7 ruled on that. I thought you were talking about the expert  
8 testimony issues. If court has already ruled on it, I'll speak  
9 no further to it.

10          THE COURT: Let me put it this way. My own notes show  
11 that I overruled the objection because the testimony was not for  
12 the purpose of showing that every entry in the original ledger  
13 was accurate and truthful, but was rather for the purpose of  
14 showing that the company had this particular process and  
15 procedure, and this witness had taken certain steps that he  
16 thought satisfied himself that the procedure had been complied  
17 with.

18          Whether I come to that conclusion or not is a different  
19 question. Whether he was able to respond adequately and  
20 fulsomely to the government's cross is a different question.

21          But he may testify that, as he did, that he went back  
22 to his lab, that he checked this ledger, and that the -- what I  
23 gather is relatively standard operating procedure in scientific  
24 labs was followed.

25          He didn't give expert testimony that this was standard



1 operating procedure. Those are my words, not his. But I did  
2 overrule that objection.

3 Now, there are objections as to certain exhibits?

4 MR. SCHWARTZ: Yes, Your Honor.

5 The remaining objection or objections to exhibits, the  
6 first one remaining is joint defense 675. That is one article  
7 that --

8 THE COURT: 675?

9 MR. SCHWARTZ: 675. 000675.

10 THE COURT: You're objecting on authenticity grounds?

11 MR. SCHWARTZ: Yes, Your Honor.

12 And I spoke to Ms. Horrigan, or we had an e-mail  
13 conversation about it. In light of the court's subsequent  
14 ruling with regard to his not being an expert on compensation,  
15 we believe that there's no place for articles written by someone  
16 else in this company being stuck into the record when it can't  
17 be the basis for his expert opinion any more.

18 And I also suggested to Ms. Horrigan that there was a  
19 second article, Exhibit 391, that we did not object to in the  
20 written objections because the court had not ruled on the  
21 compensation issue, that also was covered by that. If the court  
22 doesn't want to entertain that objection, it's understood.

23 But at least with regard to 675 --

24 THE COURT: You didn't object to it to begin with?

25 MR. SCHWARTZ: No, because we had not adduced the

1 record, because this was not a situation where there was a  
2 Daubert hearing in this case.

3 Your Honor said that you were going to consider -- the  
4 court was going to consider Daubert issues as part of the  
5 examination. I could not adduce the testimony sufficient to  
6 make a record to make a good faith argument about compensation  
7 before I could do the voir dire. That's why I had to wait.

8 I alerted Ms. Horrigan to this at least a week and a  
9 half ago and she told me that she was going to stand on her  
10 objection. And, of course, she's entitled to. But it's my  
11 responsibility to say that this -- there's another reason that  
12 subsequently evolved that justifies striking this exhibit.

13 THE COURT: But certainly your original objection was  
14 only that it didn't contain Bates numbers; right?

15 MR. SCHWARTZ: That's completely correct, Your Honor.

16 But the court set up a process where there was not a  
17 separate Daubert hearing where I could adduce testimony and then  
18 make motions from that about what he could testify to at trial.

19 Instead, the court has implemented a process where the  
20 Daubert hearing essentially became part of the voir dire that  
21 occurred during cross-examination.

22 There's no way I can predict how well or poorly I'm  
23 going to do about showing that Dr. Townsend was not a  
24 compensation expert. Apparently, we did well enough to show  
25 that he wasn't. We couldn't do that until we got him up on the

1 stand.

2 If there were a separate set of procedures where there  
3 was an earlier Daubert hearing, then I would have made the  
4 motion then and I would have made it in writing.

5 The court is absolutely right I did not write anything  
6 about authentication there, and if the court wants to rule on  
7 just that issue, that's fine, but I believe, because of the  
8 process that the court has implemented in folding Daubert into  
9 cross-examination, the only time to make it is as soon as it's  
10 legitimately available and I have a good-faith basis to make it.  
11 That's why I'm doing it now.

12 THE COURT: Well, I understand your position.

13 Let me hear from the defense. I'll certainly hear from  
14 you about both articles. Was the exhibit JD 675, at least,  
15 referred to in his testimony?

16 MS. HERRIGAN: Yes, it was.

17 MR. SCHWARTZ: 675 and 391 are asked about at page 154  
18 of the written direct examination.

19 The question was, Do you have colleagues who have  
20 written about compensation? And he said Yes. Thank you.

21 And he says, Here's two articles. Are these those  
22 kinds of articles? And that's --

23 THE COURT: Why should I admit those?

24 MS. HERRIGAN: Why should you, Your Honor? Well,  
25 because they go to allegations in this case where the government

1 suggests the defendants knew something more about compensation  
2 and the phenomenon of compensation than the general scientific  
3 public.

4 And these are articles published by Reynolds'  
5 scientists in 1994 and 1997 describing the FTC method and its  
6 measurement of nicotine uptake in smokers and nicotine  
7 absorption in smokers.

8 MR. SCHWARTZ: If I may add, Your Honor. Respectfully,  
9 Ms. Horrigan is good enough to bring the exhibits.

10 Both of these articles have as coauthors a Dr. Robinson  
11 and a Dr. deBethizy, d-e-B-e-t-h-i-z-y. Each of these gentlemen  
12 were live defense witnesses. For whatever reason the defense  
13 pulled them off the witness list -- if they want to put their  
14 knowledge into evidence and subjected to cross-examination, they  
15 had created the opportunity to do so.

16 Instead of doing that, they yanked him off the witness  
17 list and they are trying to stick it in through Dr. Townsend.  
18 That's not permissible.

19 THE COURT: Am I correct that the only time he refers  
20 to these two exhibits are -- or is -- I'm sorry -- is at line 20  
21 on page 154? Is that right?

22 MS. HERRIGAN: That's correct.

23 THE COURT: It has nothing to do with his testimony.

24 MS. HERRIGAN: Well, they are also cited in the  
25 findings of fact, Your Honor.

1           THE COURT: I'll assume -- correct me if I'm wrong --  
2     that in your findings of fact citation you cite them to show  
3     that Reynolds didn't know anything that the public health  
4     community didn't know. Is that right?

5           MS. HERRIGAN: That Reynolds is making available its  
6     research on the FTC method and the phenomenon of compensation.

7           THE COURT: There's no nexus between that and his  
8     testimony. He doesn't say a word about those articles, nor  
9     could he, really, because he's not an expert on compensation and  
10    he wasn't offered for that reason.

11          MS. HERRIGAN: If you look on the next page of his  
12    testimony he goes into a little bit further about compensation,  
13    what other scientists at Reynolds have told him about  
14    compensation, what his understanding of compensation is.

15          THE COURT: Well, that may be, but -- I mean, that's  
16    true, but there's no reference back to these articles. I don't  
17    see why they should go into the record.

18          If they were admitted, they would be being admitted for  
19    the truth of the articles, just as so many other articles have  
20    come in.

21          When the witness has either relied on those articles in  
22    reaching his or her own expert opinions or in the process of  
23    giving their testimony, the articles support their positions or  
24    explain or corroborate their positions.

25          But this is simply a mention, Let me show you 675 and

1 391. Please identify them. He does in one sentence, and that's  
2 it. No, I'm going to sustain that objection.

3 I do understand -- let me say it this way. I've been  
4 very rigorous, as you all know, about not allowing objections  
5 that weren't presented in the procedure that was laid out where  
6 everybody had to file their written objections the week before.

7 I do understand the dilemma that the government found  
8 itself in, at least in this particular instance. I'm not saying  
9 that necessarily applies any place else.

10 But I think that Mr. Schwartz was being very careful  
11 about not making an objection to which he did not have an  
12 evidentiary basis at the time that he had to file his  
13 objections. That's the reason I'm considering this objection  
14 which was not made.

15 MS. HERRIGAN: If I could speak to that, Your Honor.

16 What makes it difficult is because we have these  
17 procedures set up in Order 471, and so it informs our judgment  
18 in terms of what exhibits to submit with future witnesses based  
19 on the objections that are still pending and exhibits that we've  
20 submitted with earlier witnesses.

21 THE COURT: But you did know --

22 MS. HERRIGAN: Of one authenticity objection to JD  
23 000675, which is a self-authenticating document. So if it was  
24 an authenticity objection, that would be easily overcome.

25 THE COURT: It would be --

1 MS. HERRIGAN: That he has now, you know, after  
2 Dr. Townsend has left the stand, stated these objections, it  
3 makes it difficult then to get these exhibits into evidence.  
4 And that's our dilemma because the procedures in Order 471  
5 wouldn't be followed.

6 THE COURT: You have other witnesses coming, plus my  
7 recollection -- well, I'll let that go.

8 Anyway, anything else on Dr. Townsend?

9 MR. SCHWARTZ: That's all, Your Honor.

10 THE COURT: All right. I will expect an order shortly.

11 Dr. Dixon. I'm not sure if anybody is ready on  
12 Dr. Dixon.

13 MR. PFEFFER: We addressed this before the lunch break.

14 THE COURT: We did. Sorry, everybody.

15 Dr. Langenfeld.

16 MR. BRODY: Your Honor, we had requested on Tuesday  
17 that we not address Dr. Langenfeld this week because  
18 Mr. Goldfarb is unavailable. He will be available next week if  
19 there is a time to address those objections.

20 THE COURT: All right. Bradley.

21 Well, it's almost always the bottom file, no matter how  
22 I rearrange the files, and it was.

23 Okay. This was Dr. Bradley, the biostatistician. I  
24 remember his testimony well. Actually, I found his testimony  
25 quite fascinating on general principles. I'm not saying any

1 more than that since I never took a course in biostatistics.

2 All right.

3 MR. BRODY: Your Honor, in terms of the United States'  
4 objections to exhibits that are being offered by defendants --

5 THE COURT: Do you have your mike on?

6 MR. BRODY: I have it on but not turned on. Sorry.

7 We have objections to 36 demonstrative exhibits. It's  
8 the same issue relating to each of the 36 demonstratives and  
9 these were identified in the testimony as, you know, J-DEM with  
10 a number and submitted by defendants simply with a J-DEM number.

11 Now, we had initially objected to a number of these  
12 what we thought were demonstrative exhibits because there was no  
13 other indication based on disclosure issues that Your Honor  
14 resolved.

15 In the course of conferring with Mr. Cassetta about  
16 what we had left outstanding where we needed to go, Mr. Cassetta  
17 indicated that joint defendants seek to have these documents  
18 admitted as summary exhibits under Rule 1006. That is something  
19 that was not previously indicated in the papers filed by  
20 defendants and they simply have not complied with the  
21 requirements of the rule.

22 There are a number of these exhibits that simply do not  
23 provide summaries of voluminous data. They do not provide  
24 summaries of the kinds of things that could not be offered into  
25 evidence in and of themselves.



1           And Mr. Cassetta has not been able to tell me whether  
2       or not we have even been provided with each and every one of the  
3       exhibits that apparently underlie -- or the documents that  
4       apparently underlie what we are now being told are summary  
5       exhibits.

6           And so the request that these 36 exhibits, which we  
7       initially thought were demonstratives, being admitted as Rule  
8       1006 summaries is something that we object to. They did not  
9       follow the rules.

10          THE COURT: First of all, I don't see them with my  
11       direct, but I guess they are interspersed.

12          MR. CASSETTA: They are in the direct, Your Honor. And  
13       whenever Mr. Brody is done, I'll be ready to address this.

14          MR. BRODY: I just had a couple of examples, Your  
15       Honor.

16          Here is one of them. We are talking here about total  
17       of 18 studies that are represented in what we had originally  
18       thought was a demonstrative, but we're now told is a summary  
19       exhibit that defendants want the court to admit under Rule 1006.

20          Others of them look a little more like what you might  
21       think was an actual summary exhibit. But again, the problem on  
22       these is we haven't been provided any assurance that we received  
23       the underlying data.

24          The rule clearly states that the originals or  
25       duplicates shall be made available for examination or copying or

1 both by other parties at reasonable time and place.

2 That never happened. So we were never on notice that  
3 these could even be considered to be summary exhibits, and we  
4 were not on notice that the defendants sought to admit these  
5 under Rule 1006. As far as we knew, they were simply  
6 demonstrative exhibits that were being offered.

7 THE COURT: Not offered. You don't mean offered  
8 though. Used.

9 MR. BRODY: Well, used and presumably now offered.

10 There's a third category and that's some of  
11 Dr. Bradley's charts. And again, I believe on this one, that  
12 this is just a couple of statistics taken out of two -- a total  
13 of two articles and clearly not the kind of thing that comes  
14 under Rule 1006.

15 If they were offering it simply as a demonstrative,  
16 demonstrative aid, that would be one thing, but to offer it as,  
17 you know, substantive evidence of the content of the underlying  
18 documents, which are not identified here, is something that is  
19 completely different.

20 THE COURT: Are you objecting to every one of the  
21 tables listed? All -- I don't want to say all of them -- many  
22 of the tables listed in Dr. Bradley's testimony are  
23 demonstratives. It may be that all of them are. I'm not sure  
24 of that. But many, many are.

25 MR. BRODY: We received a list from counsel for

1 defendants that indicated that 36 of the exhibits labeled as  
2 demonstratives were actually going to be offered under Rule 1006  
3 as summaries, and that's what we have an objection to on the  
4 ground that they are not properly offered as summary exhibits  
5 under Rule 1006.

6 And even if the court were to find that some of them  
7 were properly offered as summaries, defendants did not comply  
8 with either this court's rules or the Federal Rules of Evidence.  
9 They did not identify them as summary exhibits at the time that  
10 they were provided with Dr. Bradley's testimony and they did  
11 not -- and have not to this time -- been able to tell us that we  
12 were ever provided with all of the underlying materials from  
13 which they created these.

14 And certainly there was never a point in time where  
15 they said, This is a summary exhibit and, you know, here are all  
16 of the materials -- duplicates of the materials for you to look  
17 at so that you can satisfy yourself that it's a proper summary.

18 THE COURT: When were you told they were going to be  
19 used as summary exhibits?

20 MR. BRODY: This week.

21 THE COURT: Let me hear from the defendants.

22 MR. CASSETTA: Your Honor, they were told when we filed  
23 our written direct examination that these were summary exhibits.

24 We complied with Order Number 471 and Rule 1006 which  
25 required us to provide them copies of the exhibits, to make the

1 exhibits available and to list them on our exhibit list.

2 If we look at an example of one of the exhibits and  
3 Mr. Bradley's testimony, I think it will be clear that they were  
4 summary exhibits.

5 First of all, Your Honor, these exhibits that we're  
6 talking about are contained within Mr. Bradley's written direct  
7 examination.

8 And if you look up on the board, he's asked, Did you  
9 prepare an exhibit summarizing your findings after applying  
10 three biostatistical factors for each study?

11 Yes. J-DEM 020117, which is attached below.

12 And it's a chart that sets forth, in which Dr. Bradley  
13 has summarized numerous studies and indicated what the relative  
14 risk is, who the gender was of the study population.

15 Rule 1006 requires that we make the underlying  
16 documents available to them. We have produced the underlying  
17 documents as to all domestic studies and all foreign studies  
18 that form the basis of these summary exhibits that we've  
19 identified.

20 The government --

21 THE COURT: Where do you show that you informed the  
22 government on the day of filing that these were to be summary  
23 rather than joint demonstrative exhibits?

24 MR. CASSETTA: Your Honor, it is contained within the  
25 written direct examination. It indicates right in here that

1       this is exhibit summarizes studies that the doctor has looked  
2       at.

3               What Mr. Brody seems to be objecting to is the fact  
4       that we used a J-DEM designator. There were only two  
5       designators that we used. There's nothing in the court order  
6       that says we have to use a certain letter designation for an  
7       exhibit.

8               If Your Honor will indulge me, I'll read Order Number  
9       471 which sets forth the requirement for summary exhibits and  
10      demonstrative exhibits, and nowhere in there does it say that we  
11      have to use a particular designator.

12              I mean, I find it difficult to believe that anybody who  
13      received this exhibit -- a list from us stating that under 471,  
14      that we were offering this exhibit, the written direct  
15      examination of Dr. Bradley would not understand that this is  
16      being offered as a summary exhibit.

17              And the government did not object to it. They had an  
18      opportunity. They had the written direct examination. They had  
19      copies of all this. All of the underlying documents were made  
20      available to them and they simply did not object to it.

21              And Mr. Brody, you know, has come back now weeks after  
22      the fact and tried to introduce these new objections. And he  
23      just -- the first time he asked me whether these were being  
24      offered as 1006 summaries was last night at about midnight.

25              I thought it was very clear from this that, you know,

1 in the written direct and in the exhibit. Order Number 471 --  
2 and I can put the relevant portions up on the board.

3 Parties shall identify and produce all summary exhibits  
4 that they intend to use at trial no later than 5 PM of the  
5 Monday preceding the week of trial in which the exhibit will be  
6 offered. At the time the summary exhibit is identified and  
7 produced, the party offering it shall indicate to opposing  
8 counsel the underlying documents or materials upon which the  
9 summary exhibit is based, unless the documents have been  
10 previously made available.

11 All of these exhibits, all of these studies that  
12 underlie these documents were either reliance material or  
13 exhibits and have been produced to the government. Any  
14 objections to such summary exhibit shall be filed pursuant to  
15 the rules set forth in section 12.

16 So the question is, there's nothing in there that says  
17 that we -- it says we have to identify the exhibits. We did.  
18 We have to produce the exhibits to the government. We did.

19 And I guess the question is between, you know,  
20 Dr. Bradley's testimony and copies of the exhibits, how could  
21 the government not know that these were being offered as  
22 summaries?

23 And from our perspective, they should have objected if  
24 they had any objection on that Wednesday, and they did not. And  
25 you know, if there's a disagreement, then I suppose we have to

1 go through each of the 36 demonstratives, because we -- I was  
2 not on notice until very recently that they had any problems  
3 with this, other than the objections made to 15 that were  
4 overruled by the court based upon the testimonial objections.

5 THE COURT: Mr. Brody.

6 MR. BRODY: Your Honor, I guess that it sounds as if  
7 defendants' argument comes down to saying that, despite the fact  
8 that Order 471 separately sets out a requirement that  
9 demonstrative exhibits be identified and summary exhibits be  
10 identified, we're supposed to look at every exhibit that says  
11 J-DEM and figure out for ourselves whether something like this  
12 is simply included for demonstrative purposes -- again, this is  
13 the one that's based on a total of two articles -- or whether  
14 they seek to admit it under Rule 1006 as a summary exhibit.

15 THE COURT: Why are you objecting to you now?

16 MR. BRODY: Because we have never received an  
17 indication that the defendants sought the admission of these  
18 materials under Rule 1006.

19 THE COURT: They were part and parcel of the direct  
20 testimony.

21 I will tell you when I read the direct testimony my eye  
22 does automatically go to the right-hand corner, if it's there,  
23 to see whether an exhibit I'm looking at -- particularly, if I  
24 find it a helpful exhibit -- is merely a demonstrative or is a  
25 regular exhibit that's coming into the record and upon which I

1 can rely as evidence.

2 MR. BRODY: Right. And that's the issue that comes up,  
3 because they are saying that this should come into the record,  
4 and you should rely on this as evidence despite the fact that,  
5 you know, this is something that is marked J-DEM -- I think it's  
6 clear the only assumption that can be made -- and what we are  
7 hearing from counsel for defendants is we are required to figure  
8 it out without an explicit statement that something is going to  
9 come into the record, you know, as evidence under 1006 as  
10 opposed to being offered for demonstrative purposes. And that's  
11 where the problem is.

12 This, to our view, is clearly simply a demonstrative  
13 exhibit. And that's why no objection was raised because we did  
14 not receive an indication from defendants until this week as we  
15 were trying to figure out the exact scope of where disagreements  
16 lie with respect to Dr. Bradley's exhibits, that they would seek  
17 to have the court accept things like this, and there are a total  
18 of 36 of them, into evidence pursuant to Rule 1006. And that's  
19 why we raised the objection.

20 If they were merely offering them for demonstrative  
21 purposes and the court found them helpful, there would be no  
22 dispute here, but because of what we learned this week for the  
23 first time, and it took three or four e-mails to even get that  
24 far trying to clarify exactly for what purpose they were  
25 offering them, that's where our objection lies, and that's why



1 we raise the objection. If they wish to offer them for  
2 demonstrative purposes only, that's fine.

3 When you have something like this, and there are two  
4 studies that something is based on -- and they are even offering  
5 the two studies as exhibits into evidence which thwarts the  
6 entire purpose of the rule, and the rule is -- is quite simply  
7 that, you know, where -- that the contents of voluminous  
8 writings, recordings, or photographs which cannot conveniently  
9 be examined in court may be presented in the form of a chart,  
10 summary, or calculation. And --

11 THE COURT: Do you have all the materials upon which  
12 each of these 36 charts is based?

13 MR. BRODY: We're trying to verify that. Mr. Cassetta  
14 was not able to verify that for me last night.

15 But again, we come down to the situation where if the  
16 underlying documents are being offered by defendants, and for a  
17 number of these what they are now calling summary exhibits, they  
18 are, then the summaries should not come in under Rule 1006.  
19 Because the advisory committee notes quite clearly state that  
20 the admission of summaries of voluminous books, records or  
21 documents offers the only practicable means of making their  
22 contents available to judge and jury.

23 The rule is not satisfied here where they are turning  
24 around and saying, you know, let's bring the two studies that  
25 this is based on into the record or let's bring the -- another

1       one I showed you, 18 studies that this is based on into the  
2       record.

3               So what it comes down to is these are simply  
4       demonstratives. They were never identified as summary exhibits  
5       specifically as required by Order 471 until this week.

6               They were not identified as such at the time it would  
7       have been required, and we would have some significant issues  
8       with them at that time.

9               And so that's why -- you know, as I said, if defendants  
10      wish to bring these in simply as demonstrative exhibits because  
11      they think they will be helpful to the court, that's fine, but  
12      if we're talking about rule 1006, there are significant issues  
13      that exist here.

14              MR. CASSETTA: Your Honor, just briefly.

15              We completely complied with the rules. We identified  
16      the exhibits.

17              THE COURT: Mr. Cassetta, I don't think you did. I  
18      have no desire to keep these exhibits out of the record. They  
19      were indeed helpful. I studied them carefully.

20              But Rule 471 clearly differentiated, and indeed it has  
21      been the practice throughout this trial for all parties to  
22      differentiate between demonstrative exhibits and just plain old  
23      exhibits.

24              Rule 471 differentiated between demonstrative and  
25      summary exhibits. There was a reason for that. Obviously,

1       there are different issues with plain exhibits, demonstrative  
2       exhibits, and summary exhibits.

3               I don't think you complied with 471 which, as I say,  
4       clearly differentiates. I don't think the government was on  
5       notice. And yes, I think the government did have to go through  
6       and figure out how these were being used.

7               I admit when I read them I wondered about it, but  
8       again, you know, you all have to flesh out certain issues and I  
9       was trying to understand very complicated testimony. And yes,  
10      indeed, I found -- I want to call them demonstratives or  
11      summaries very helpful. But I don't think the government was on  
12      notice about what you were doing.

13              And it could have been so easily corrected. I'm not  
14      sure if we've had other summary exhibits -- I'd have to go back  
15      and think about that -- and how they were denoted, if we had  
16      them. Certainly we haven't had any disputes about them.

17              If they've come in, they've been clearly summary  
18      exhibits, and I believe there's never been a problem with  
19      compliance with Rule 1006.

20              But I'm very disturbed and concerned about this  
21      situation with this witness's testimony and about the record  
22      with his testimony.

23              MR. CASSETTA: Your Honor, the first time I heard from  
24      Mr. Brody that there was any issue about What are you offering  
25      them for, was this week. We thought there was -- the government

1       made one objection to it.

2               THE COURT:  Because you labeled them demonstratives,  
3       and by definition, demonstratives don't come into evidence, so  
4       why would they object to something that doesn't get admitted  
5       into evidence?  I would have gotten mad at them for wasting my  
6       time.

7               MR. CASSETTA:  But we've listed them.  Your Honor, when  
8       we list exhibits on a list, whether they are J-DEM --

9               THE COURT:  Where's your exhibit list?

10              MR. CASSETTA:  I'll put it up, Your Honor.

11              Order 471 requires us to list all of the exhibits that  
12       we intend to offer into evidence, which is what we did.  This is  
13       the list of all the exhibits, whether they are summaries,  
14       whether they are regular exhibits, whatever they are, that we  
15       intend to offer into evidence.  Okay?  And all of these J-DEMs  
16       are listed as exhibits that we intend to offer into the record.

17              Dr. Bradley, in his testimony that was filed the very  
18       same day, states that these are summaries of studies, of  
19       voluminous studies that I've looked at.

20              We want them in the record so we can talk about how  
21       many studies have relative risks below 2.

22              THE COURT:  I understand why you want them in the  
23       record.

24              MR. CASSETTA:  And, Your Honor, I believe that we did  
25       everything that we were required to, respectfully.  Under the

1 rules, 471 says list everything you have. It doesn't say that  
2 you have to have a certain designation for summaries and a  
3 certain designation for demonstratives.

4 The convention we used, if it's a company document or  
5 an article, it gets a JD number because we -- the witness or we  
6 haven't created it. With the demonstratives, we just -- we used  
7 the J-DEM numbers because they were created. They were not --  
8 you know, they are summarizing something.

9 And, you know, I just think it's unfair to exclude  
10 this, and I think it will confuse the record because  
11 Dr. Bradley's testimony talks about all these things and refers  
12 to all these things.

13 How will the court, when it comes back to render  
14 findings and he's talking about, you know, all of these studies  
15 that he's looked at and how many and have relative risks below  
16 2, where is the concise place that the court can look to, to  
17 find that information?

18 THE COURT: What prejudice did you suffer, Mr. Brody,  
19 if any?

20 MR. BRODY: Well, Your Honor, we will suffer prejudice  
21 if these are admitted under 1006 because we weren't on notice  
22 and we didn't have time, and we didn't have the opportunity --  
23 I'm sorry -- because we weren't on notice to go through and  
24 examine -- I mean, to the degree that would be required  
25 whether -- and this is a good example -- the Thun study is one

1 of the studies.

2 THE COURT: Mr. Cassetta does have a point that the  
3 exhibits were listed on their exhibit list.

4 MR. BRODY: But, Your Honor, his point is undermined by  
5 the text of Order 471, which states that the party has to list  
6 exhibits that the party plans to either submit or refer to as  
7 part of the direct testimony of that witness.

8 And there was no differentiation on the exhibit list  
9 that we got, and there hasn't been a differentiation. The order  
10 requires -- even if you're simply referring to an exhibit, as  
11 you would refer to a demonstrative, that it be listed. And  
12 there have been a number of occasions where there have been  
13 demonstrative exhibits listed on the list that defendants have  
14 submitted with witnesses that are not being offered into  
15 evidence. The same thing on the United States' side.

16 And it's --

17 THE COURT: Certainly there have been many  
18 demonstratives that haven't been admitted.

19 MR. BRODY: Exactly, and that's the point is that --

20 THE COURT: But people can always withdraw. They can  
21 have a very fulsome exhibit list just to put you on notice and  
22 then when everything is done with that witness, they can decide  
23 they don't need half those exhibits.

24 MR. BRODY: The prejudice also, Your Honor, is that it  
25 doesn't comply with the rule. It doesn't comply with the

1 purposes of the rule.

2 And if they are offering the underlying materials, then  
3 they are not properly admitted as summary exhibits under Rule  
4 1006.

5 As we said, if they are simply being offered as  
6 demonstratives, which is what we thought based on their  
7 submission and what the court has determined we properly  
8 thought, we shouldn't be in a position where we have to guess as  
9 to what's what and for what purpose something is being offered.

10 I mean, under Mr. Cassetta's argument, Well, they were  
11 on the list of exhibits that was appended to or filed with  
12 Dr. Bradley's testimony, we would be required to treat every  
13 single exhibit on that list with a J-DEM notation as if it were  
14 a summary exhibit being offered under Rule 1006 or risk having  
15 waived something, even if there was no way to figure out, as in  
16 this case there was not, which was which.

17 And I don't think we can be put in the position where  
18 every time we get a list -- because Order 471 requires that  
19 documents that are simply going to be referred to be listed, it  
20 does not say every document on the list is one for which you  
21 seek admission, then we're going to have a situation where every  
22 single document with a J-DEM prefix is going to have to be  
23 treated as if it's a summary exhibit, analyzed extensively,  
24 analyzed to see whether the underlying materials are too  
25 voluminous to be admitted into the court record, which is what

1 the rules are for. It's where it's the only way to put the  
2 information in front of a Judge or jury is to do it in summary  
3 fashion. That's not the case here.

4 THE COURT: You don't really know yet, from the way I'm  
5 hearing things, because you haven't gotten all the information  
6 from the defendants, you don't really know yet whether you would  
7 be challenging these as summary exhibits, do you?

8 MR. BRODY: I know that we would be challenging -- I  
9 know we would challenging a number of them.

10 I also know that if they intended to offer them as  
11 summary exhibits, not only would they have had to comply with  
12 Order 471 but they would have had to comply with Order 1006.

13 And the representation that I got last night from  
14 Mr. Cassetta was that he was not going to go through and figure  
15 out whether defendants had, in fact, provided us with all the  
16 underlying materials or when or where.

17 It's not as if we got, you know, 10 boxes or 5 boxes or  
18 2 boxes, whatever it would be, of documents at the time we  
19 received what we thought were demonstratives saying, Here are  
20 all of the underlying materials that are too voluminous to admit  
21 into the record.

22 THE COURT: What's your position on compliance?

23 MR. CASSETTA: My position on compliance with the rule,  
24 Your Honor, is we have -- I told Mr. Brody this morning, he  
25 first asked me that -- you know --



1 THE COURT: Mr. Cassetta.

2 MR. CASSETTA: I'm sorry, Your Honor. I'm sorry.

3 But, you know, I hoped it wouldn't devolve into a  
4 he-said-she-said. The first time Mr. Brody asked me if they had  
5 gotten all the exhibits was at midnight last night.

6 He was working. I was working. My staff was gone. I  
7 sent him another e-mail this morning and I told him that with  
8 respect to all of the exhibits that summarized these studies,  
9 that we have provided them to the government either via them  
10 being exhibits or them being reliance materials.

11 And, you know, Your Honor, at a minimum -- I mean,  
12 there's been no prejudice to the government and there certainly  
13 would be no prejudice, you know, if there -- if the court feels  
14 there was ambiguity in the rules, if we have some time to try to  
15 sort this out and decide it on the merits whether something is  
16 appropriately a summary or not. I think that they are. They  
17 are discussed in the testimony.

18 I think -- I don't see how you could read the testimony  
19 or look at these exhibits and not know that they were summary  
20 exhibits. I just don't understand that. In any event --

21 THE COURT: I don't agree with that point because the  
22 definition of a demonstrative is it's not being offered for  
23 evidentiary purposes. And I didn't read them that way.

24 However, having said that, as I've also said, they were  
25 extremely helpful, they were extremely descriptive, and to

1       exclude them would eviscerate his testimony.

2               I think that counsel have to do more work to figure out  
3       whether there was really any prejudice to the government. You  
4       do have to provide the materials upon which each of your offered  
5       demonstratives were based and then you have to figure out  
6       whether you really were prejudiced by it, and if you think you  
7       were, you will have to set that forth.

8               It may be -- I don't know how you all want to handle  
9       it. It may be that this witness might have to be brought back  
10      to clarify certain things. If that's the route you think will  
11      help you in terms of cross-examination -- for the record, I'm  
12      talking to Mr. Brody -- but because it will be with this witness  
13      a very Draconian sanction as opposed to lots of other exhibits I  
14      rule on, where the world really will not fall apart whether a  
15      document comes in or out, I think more work has to be done on  
16      this.

17              Mr. Cassetta, there's a difference between  
18      demonstrative exhibits and exhibits that aren't labeled  
19      demonstrative. There isn't any doubt about that.

20              MR. CASSETTA: I understand there's a difference, Your  
21      Honor, and --

22              THE COURT: Sometimes I feel like I'm picking up  
23      people's pieces in this case. I don't know whether that's  
24      because of the length and exhaustion level or not.

25              I know that what I'm trying to get is a reliable

1 record, and reliability measured in large part by the Federal  
2 Rules of Evidence and the case law as I read it, and a  
3 comprehensive record, and a record that comports with all the  
4 principles of due process.

5 Those are my underlying goals, everybody, in case you  
6 all hadn't figured that out yet.

7 You're going to have to come back to me on this one.  
8 It has too much import.

9 MR. CASSETTA: We will, Your Honor.

10 THE COURT: All right.

11 MR. BRODY: Defendants, I believe, have objections to  
12 three or four of the exhibits the United States seeks to admit  
13 that were used in the cross-examination.

14 THE COURT: Of this witness?

15 MR. BRODY: Of Dr. Bradley.

16 MR. CASSETTA: Your Honor, first, this relates to an  
17 issue that the court has addressed before. Learned treatises,  
18 we can knock out two or three exhibits at once.

19 The rule clearly states -- and my recollection is the  
20 court has already ruled that with learned treatises the whole  
21 exhibit doesn't come in independently under that, only the  
22 portion that's read into the record. And if that's the case --

23 MR. BRODY: If I could ask which exhibit you're  
24 referring to?

25 THE COURT: And sometimes there's a reference to a

1 chapter, sometimes. Usually it's a particular section.

2 MR. BRODY: I thought we had agreed --

3 MR. CASSETTA: That's the Journal of Medicine --

4 MR. BRODY: I'm sorry. We are not offering the first  
5 exhibit Mr. Cassetta was referring to, but the second one we are  
6 offering.

7 THE COURT: All right. Let me hear the second one  
8 again.

9 MR. CASSETTA: The second one, it's an article, Your  
10 Honor, and it's a learned treatise.

11 You know, the only part that would come in was any  
12 examination that was read into the record or anything -- part of  
13 the document that was read into the record on cross-examination  
14 of the witness.

15 Mr. Brody certainly has not articulated a reason to me  
16 why this would overcome the hearsay rule.

17 MR. BRODY: Your Honor, this document should come into  
18 the record, not for the truth of the findings of the authors  
19 contained in the article, but for the fact that this is a study  
20 in the New England Journal of Medicine.

21 It's a short study. I'm not quite sure that I would  
22 agree that this would be called a learned treatise. It's merely  
23 an article from the New England Journal of Medicine.

24 And so we're not arguing that it's an exception. I  
25 mean, the argument we are offering is not that it's an exception

1 to the hearsay rule.

2 THE COURT: What's your argument?

3 MR. BRODY: The argument is this is a document that was  
4 specifically used on cross-examination with Dr. Bradley. It is  
5 a meta-analysis of existing studies on heart disease, elevated  
6 heart disease risk as a result of exposure to environmental  
7 tobacco smoke.

8 Dr. Bradley clearly offered a number of opinions about  
9 the studies on ETS and heart disease. He had done his own  
10 meta-analysis which he was offering as the correct result or  
11 his -- in his opinion, the correct result of doing a meta-  
12 analysis.

13 THE COURT: I remember the testimony. That article may  
14 be admitted. Anything else?

15 MR. CASSETTA: Yes, Your Honor. I'm sure the court  
16 will recall this testimony.

17 Just for the record, that previous exhibit that we were  
18 just talking about was U.S. 931 -- I'm sorry, JD 002895.

19 Your Honor --

20 THE COURT: JD?

21 MR. CASSETTA: JD.

22 THE COURT: Not J-DEM?

23 MR. CASSETTA: Correct, Your Honor, it's not a J-DEM.

24 The court will recall proceedings in Switzerland about  
25 a Dr. Rylander. The court allowed, over Mr. Minton's objection,

1       questioning about this, but I don't see why this document itself  
2       comes in.

3               THE COURT: Government has one sentence to argue or  
4       two.

5               MR. BRODY: It's not being offered for the truth of the  
6       findings by the criminal court in Switzerland, it's being  
7       offered for the fact that a court has found one of the sources  
8       relied on by the expert witness proffered by defendants to have  
9       participated in an unprecedented scientific fraud.

10              And the fact that this witness on cross-examination  
11       stated that something he didn't bother to look into. There was  
12       a lot of testimony elicited from Dr. Bradley showing that he was  
13       not familiar with either the backgrounds or history of the  
14       sources that he had relied on. And the fact that a criminal  
15       court found whether -- you know, whether its findings would be  
16       upheld or not.

17              THE COURT: Don't you have other testimony much, much  
18       earlier in this trial that establishes that fact?

19              MR. BRODY: I do not think we have testimony earlier in  
20       this trial related to the criminal court's findings with respect  
21       to Dr. Rylander. I do not think there is testimony specifically  
22       related to U.S. Exhibit 88632.

23              MR. CASSETTA: Your Honor, just so we are clear on one  
24       point.

25              The findings in this document had nothing whatsoever to

1 do with the article that was on Dr. Bradley's reliance that  
2 Dr. Rylander was one of six coauthors.

3 THE COURT: I know that. The purpose was to  
4 demonstrate that Dr. Bradley hadn't checked out the background  
5 of somebody upon whom he relied. I know that.

6 I assume that that criminal case has some kind of  
7 formal citation in the French system, doesn't it?

8 MR. BRODY: I'm sure it does, Your Honor, and we would  
9 be happy to provide the citation so that the court can take  
10 notice of the opinion by the citation.

11 THE COURT: That's the principle I've been following.

12 MR. BRODY: That's fine, Your Honor.

13 MR. CASSETTA: Are you then going to withdraw this  
14 other?

15 MR. BRODY: We are not offering that one.

16 MR. CASSETTA: So this exhibit we've just been  
17 discussing, Dr. Rylander, U.S. 88632, the government has  
18 withdrawn.

19 MR. BRODY: Well, we will provide a citation to the  
20 court opinion, Your Honor.

21 THE COURT: All right. That's fine.

22 MR. CASSETTA: The next document, Your Honor -- we are  
23 almost done.

24 MR. BRODY: Actually, this is the last one, I think.

25 MR. CASSETTA: This is a letter to an attorney at

1 Shook, Hardy & Bacon. It's hearsay. Really doesn't have any  
2 relevance to Dr. Bradley's testimony.

3 Mr. Brody has not articulated a reason to me, at least  
4 that I recall, why it comes in -- why it overcome the hearsay  
5 objection.

6 MR. BRODY: Your Honor, U.S. Exhibit 93170 is a letter  
7 from one of the authors that was relied on somewhat extensively  
8 by Dr. Bradley in his written direct examination.

9 He testified that he personally worked with  
10 Mr. O'Neill -- this was in the cross-examination -- and that  
11 Mr. O'Neill worked with him to prepare him for his testimony in  
12 the Broin trial.

13 Given -- given the fact that it is a letter to  
14 Mr. O'Neill at Shook, Hardy & Bacon, given the fact that  
15 defendants I don't think would deny that they have for a number  
16 of years retained Dr. Tweedie as a consultant as well as  
17 Dr. Mengerson, who is also referenced here, the Australian  
18 statistician, there is sufficient reliability here that this  
19 should come in under 807.

20 It's a letter to counsel for defendants at Shook, Hardy  
21 & Bacon who the witness, Dr. Bradley, who was on the stand,  
22 testified he personally worked with in preparing to offer  
23 testimony on ETS issues, and for that reason we think it should  
24 come in.

25 THE COURT: But he didn't write this letter, of course.



1           MR. BRODY: He did not write this letter, no. But we  
2 think, given the facts surrounding it and the facts elicited  
3 from the witness, the further fact that it's written to an  
4 attorney who was acting as an agent for defendants, that it  
5 should come in under 807 for the truth of the matter asserted in  
6 the letter; that is, that Dr. Tweedie was under contract with  
7 and providing work to Shook, Hardy.

8           THE COURT: Let me look at 807 again.

9           The objection -- let's see. Whose objection is it now?  
10 The objection is sustained.

11          MR. CASSETTA: Thank you, Your Honor. Thank you very  
12 much, Your Honor.

13          THE COURT: All right. Are counsel ready on Wecker?

14          MR. BRODY: No, Your Honor. Counsel have not had the  
15 opportunity to finalize things on Dr. Wecker.

16          I think the only witness remaining that we are ready to  
17 address today is Dr. McAllister.

18          THE COURT: You are ready on Dr. McAllister?

19          MR. BRODY: Yes, and Ms. Moltzen will be addressing  
20 that for the United States. I believe there is just one  
21 document at issue out of the 600 and some that are being offered  
22 by either side.

23          MS. MOLTZEN: Your Honor, there's only -- Mr. Bernick  
24 and I talked before lunch, and there's only one document still  
25 in dispute.

1 THE COURT: Wait a minute, everybody.

2 MS. MOLTZEN: JD 090054. And this is the testimony --  
3 you sustained our objection to the testimony surrounding this  
4 exhibit.

5 THE COURT: And somebody wants to get in Dr. Little's  
6 obituary? Oh, Mr. Bernick. Why?

7 MR. BERNICK: Because -- I guess it's relatively  
8 straightforward. There's no question but that it's relevant.  
9 The obituary is not simply an obituary that says that Dr. Little  
10 passed away.

11 THE COURT: No. It says what a great man he was.

12 MR. BERNICK: It was published in a peer review journal  
13 by the individual who is identified here who is Dr. Heston at  
14 the National Cancer Institute in 1972, which is after all of the  
15 events, after it's become well known what function the TIRC is,  
16 after the government says that this organization was well  
17 recognized as not being relevant, after Dr. Koten resigned from  
18 CTR.

19 So there has been controversy surrounding Dr. Little.  
20 You have an individual of unimpeachable integrity who stands by  
21 Dr. Little. The obituary is about Dr. Little's integrity and  
22 his contribution. It is clearly relevant because they've  
23 placed --

24 THE COURT: Sheer hearsay.

25 MR. BERNICK: What? It's an ancient document. This is

1 1972, Your Honor. It's not hearsay. It's absolutely a clear  
2 exception to the hearsay rule. It's an ancient document. It  
3 was not only that, but it has indicia reliability. It comes  
4 from a third party, has no connection to us, and it's published  
5 in Cancer Research Magazine.

6 If you want contemporaneous facts not subject to the  
7 hearsay rule that speaks squarely to the very issue that the  
8 government's raised, what better can you do than an individual  
9 associated with the National Cancer Institute who actually  
10 focuses on Dr. Little's career and his life after he's passed  
11 away?

12 It's clearly hearsay, but within the exception to the  
13 rule, and it's highly probative. And it's in our findings of  
14 fact, so it's presumptively admissible.

15 MS. MOLTZEN: No, it's not.

16 MR. BERNICK: I had thought that it was. If I'm  
17 mistaken, I'm mistaken.

18 THE COURT: Let me hear from the government, please.

19 MS. MOLTZEN: No, it's not in the findings of fact,  
20 Your Honor, and it's for the same exact reasons that you  
21 sustained this testimony; that there's no foundation for it with  
22 Dr. McAllister and that there's no personal knowledge from  
23 Dr. McAllister.

24 MR. BERNICK: It doesn't -- Dr. McAllister -- we've  
25 already been through the 602 issues.

1           Dr. McAllister can be familiar with this as part of his  
2 review of the history of CTR. His whole testimony talked about  
3 the history of CTR.

4           They have confronted him with all kinds of documents.  
5 They confronted all our witnesses with all kinds of documents  
6 that bear upon historical matters that are not squarely within  
7 the competence of the witness.

8           Under Your Honor's determination under 602 he, within  
9 the course of his duties, could look back over the history. He  
10 testified -- and I don't think it's disputed -- that this was  
11 germane to his history, and it's of central importance to the  
12 case.

13           How else do we establish that Dr. Little was recognized  
14 by people within his field as a man of integrity and of high  
15 scientific stature in opposition to what the government says if  
16 we can't introduce documents exactly like this?

17           We can't bring in somebody to go testify about it  
18 because they are not alive any more. That's the whole reason  
19 why you have an ancient documents exception to the hearsay rule.

20           THE COURT: Mr. Bernick, you have to slow down.

21           MR. BERNICK: I'm sorry.

22           I recognize, Your Honor, that you did rule on this  
23 before, but I remember that ruling and it came quickly, and I  
24 believe that this -- the only reason I'm raising it. It's the  
25 only document -- and I have to give credit to the government

1 here. Ms. Moltzen has been extremely diligent. There are 690-  
2 odd exhibits to the McAllister testimony, and we've managed to  
3 resolve all of them. And on the break before I came in, I  
4 withdrew our proffer as to two because I agreed with her. She  
5 said she was prepared to show that I was dead wrong and I  
6 agreed, so we withdrew them.

7 But the reason we are standing on this one is that it's  
8 so incredibly highly relevant. Dr. Hamell's assessment --  
9 Dr. Hamell was with the SGAC in 1962 and he's the one that  
10 visited Dr. Little -- is exactly of the same ilk. It is an  
11 ancient document. It comes in as an exception to the hearsay  
12 rule. It's an assessment by a highly credible third party as to  
13 the integrity of Dr. Little. This is absolutely no different.

14 MS. MOLTZEN: Your Honor, I don't think it's relevant.

15 Under rule 401, relevant evidence means evidence having  
16 any tendency to make the existence of any fact that is of  
17 consequence to the determination of the action more probable or  
18 less probable.

19 These three questions at the end of this obituary by  
20 Dr. Heston are not relevant. They do not make it any more or  
21 less probable that what Dr. Little accomplished.

22 THE COURT: Well, I haven't read the obituary, but I  
23 will assume, I think pretty safely, that the obituary goes to  
24 the issue of whether Dr. Little was respected within the  
25 profession, was a man of integrity and a scientist of an

1 accomplishment. Isn't that fair to say?

2 MR. BERNICK: This is exactly what we committed to do  
3 in the Frank Statement, is bring in somebody, people of  
4 unquestioned stature, distinguished men of science. And the  
5 issue has been raised about whether Dr. Little was that. And  
6 again, this is written in 1972 after he has become  
7 controversial.

8 It says Dr. Little lived far ahead of his time and thus  
9 a period was controversial. Remember, he was focused on  
10 microbiology as being the central feature of what CTR was doing.  
11 But even those who disagreed with him admired his commitment to  
12 what saw as truth. That's the whole deal.

13 THE COURT: I think it's an ancient document is what it  
14 comes in for.

15 MR. BERNICK: Your Honor, I had one other matter that's  
16 not directly relevant to Dr. McAllister, but I would like to  
17 take up after the break if it's more appropriate.

18 It relates just to the learned treatises issue we just  
19 discussed and it also does relate to the two exhibits where we  
20 eliminated the objection. We said, fine.

21 I'm happy to do it now, but I'm also happy --  
22 there's -- it doesn't really directly to Dr. McAllister in a  
23 fundamental way. I'm happy to raise it after the break if it's  
24 more appropriate.

25 THE COURT: I was hoping we could complete our work

1 before a break so we could all get on to other things.

2 I want to simply go back over the list just to make  
3 sure everybody is vaguely on the same page as to witnesses who  
4 still have outstanding issues.

5 Mr. Welch, those are before me.

6 Dr. Langenfeld, next week I think when Mr. Goldfarb  
7 comes back.

8 I forget for the minute whether it's Dr. or Mr. Wecker.

9 Mr. Read, Dr. Albino, Dr. Deitz. I think that's my  
10 list.

11 MR. BRODY: I think that's correct, Your Honor.

12 If it would make sense, and I don't know what  
13 defendants' view is on this, but they've indicated that they are  
14 going to be switching the order at the start of next week.

15 THE COURT: I did get a memo to that effect from my law  
16 clerk.

17 MR. BRODY: Right. Calling Mr. LeBow before they  
18 called Dr. Semenik. And if it would make sense, I think that  
19 Mr. LeBow's testimony would probably take about a half a day.

20 I know joint defendants initially are going to have  
21 some questions for him about his written direct as offered by  
22 Liggett and then, of course, we will have cross after that and  
23 any redirect.

24 But it might make sense to resolve the remaining  
25 exhibits in the afternoon. We can complete Dr. Semenik's

1 testimony on Tuesday. And I know that Dr. Viscusi can only come  
2 on Wednesday, but given our estimates we will be able to  
3 complete his testimony on Wednesday.

4 MR. BERNICK: That would be fine, Your Honor, except  
5 that we have to begin Dr. Semenik's testimony and get it done  
6 with as soon as we can.

7 That's not just a function of Dr. Semenik's schedule,  
8 I'll tell the court, it's also a function of my schedule. I'll  
9 be putting Dr. Semenik on. I have to be in Pittsburgh at 2:00  
10 o'clock on Tuesday for a status conference in a \$2 billion  
11 matter that I can't miss.

12 So, on the representation from the government that the  
13 cross-examination of Mr. LeBow would take about 2 hours, I think  
14 is what it was, and anticipating a half an hour, we agreed to  
15 the switch so that Dr. Semenik would go second, but then we  
16 would want to start him immediately, and then if you would like  
17 to schedule, and if the government -- if it's convenient with  
18 the government to schedule document issues for Tuesday afternoon  
19 as opposed to Monday afternoon, that way I can at least satisfy  
20 some of my other obligations. And I apologize to the court for  
21 the inconvenience.

22 MR. BRODY: That's fine, Your Honor. And I just --  
23 assuming no issues arise in the course of the cross-examination  
24 of Dr. Semenik that are unanticipated, we should be able to  
25 finish his testimony certainly by midmorning or the lunch break



1 on Tuesday.

2 MR. BERNICK: There were two other matters --

3 THE COURT: And Dr. Viscusi on Wednesday.

4 Let me check with our court reporter and whether he  
5 needs a break or not or can we go perhaps 15 minutes or so.

6 THE REPORTER: That's fine.

7 MR. BERNICK: Should we proceed, Your Honor?

8 THE COURT: Yes.

9 MR. BERNICK: With respect to learned treatises. I  
10 know that this has been an item that we've -- it's kind of been  
11 a little bit under the radar throughout the case and folks have  
12 probably adopt somewhat different practices, and I'm going to  
13 read the rule and make a suggestion. I don't think it has any  
14 strategic significance at all. It's purely a question of what  
15 the record looks like and what the rule provides.

16 It says to the extent called to the attention of an  
17 expert witness on cross-examination --

18 THE COURT: Where are you? 803.

19 MR. BERNICK: 803, 18. Or relied upon.

20 I can put it up on the screen.

21 Reliable authority by the testimony or admission of the  
22 witness, et cetera, et cetera. If admitted, the statements may  
23 be read into evidence but may not be received as exhibits.

24 If you read that together with Rule 703, I think that  
25 what it sets out as a scenario is this. That an expert can rely

1 on learned treatises even if they don't come into evidence.  
2 That's what 703 permits. An expert can rely on things that are  
3 not otherwise admissible. However, you have the option if  
4 the -- either on cross-examination or direct to read from a  
5 learned treatise into the record, so that that quote from the  
6 learned treatise comes into the record.

7           However, it's not apparent that the rule permits --  
8 indeed, it seems it does not, and the advisory notes would tend  
9 to confirm this -- that the learned treatise itself would come  
10 into evidence -- that is, the hard copy of the document would be  
11 received into evidence -- unless there's an alternative basis  
12 for the admission of the learned treatise, which is for the fact  
13 of its having been published.

14           For example, if you have a learned treatise that is  
15 introduced for the purpose, not of supporting expert testimony,  
16 but putting a company on notice, or where the company's belief  
17 was predicated upon it, that would be a very, very different  
18 proposition, because then you would be talking about the fact of  
19 what the treatise said rather than admitting it for the truth  
20 thereof.

21           But if the treatise is submitted in support of expert  
22 testimony, it would come in for the truth of the matter  
23 asserted, supporting the expert's statement to the same effect,  
24 which is for the truth of the matter asserted, but the hard copy  
25 itself would not.

1           Now, I have to acknowledge that in my experience, by  
2           and large when you don't have historical articles that are  
3           submitted for the purpose of establishing notice or the fact of  
4           publication, that most often the treatise doesn't come in at  
5           all. I mean, it's read from and that's it.

6           I've also, in fact before Judge Weinstein -- and I cite  
7           him only because he has some authority in the field of  
8           evidence -- I've had him, even in a jury case, require that the  
9           parties go back and create a hard copy exhibit simply to cover  
10          the article and then the quote from the article that was read to  
11          the jury so the jury has verbatim what was already read into the  
12          record.

13          But it seems to me that we ought to have a consistent  
14          practice here. If the practice of the court is going to be that  
15          the document comes in, the hard exhibit comes in, I think we  
16          have to really focus on creating a hard exhibit that only has  
17          got the portion read.

18          If the hard exhibit is not coming in we are simply  
19          going to rely upon the portion that appears in the transcript,  
20          that's all right, too. But I think it would be very helpful one  
21          way or another to have a convention that we can apply on a  
22          consistent basis.

23          We've had a lot of learned treatises that we put on our  
24          lists, and then when it comes up, I say, well, we are not really  
25          offering the thing into evidence in the sense that we are not

1 offering the whole document into evidence. I don't know that  
2 the other companies have done exactly the same, and I'm not sure  
3 that the government has followed the same rule in all cases,  
4 although I'm assuming that they probably have.

5 But I thought I'd point this out to the court as  
6 something that we should probably examine and resolve before we  
7 are faced with the task of compiling the formal record.

8 THE COURT: If Judge Posner was on our Court of Appeals  
9 we would certainly want all the treatises in the record,  
10 everybody.

11 MS. EUBANKS: I'll speak to that, briefly, Your Honor.

12 First off, I think Mr. Bernick is wrong about if the,  
13 with respect to 803 18 and learned treatises. The last sentence  
14 of 18 says that if admitted, the statement may be read into  
15 evidence but may not be received as exhibits. That is, if it is  
16 admitted. But in any instance where it's not admitted, then  
17 that certainly raises a question.

18 Let's say that we go through the testimony of the  
19 witness and the witness is talking about a document, a learned  
20 treatise, and then the court makes the determination that 803 18  
21 isn't applicable and that that evidence doesn't come in. It  
22 doesn't get to come in through the back door because, expressly  
23 because of 703.

24 The last sentence of 703 makes it clear that an expert  
25 may rely on hearsay, that's perfectly permissible, but that it

1 does not make that evidence admissible.

2 The last sentence of 703 says that facts or data that  
3 are otherwise inadmissible shall not be disclosed to the jury by  
4 the proponent of the evidence or inference unless the court  
5 determines that their probative value in assisting the jury to  
6 evaluate the experts' opinion substantially outweighs their  
7 prejudicial effect.

8 So that takes us back, then, to the question of whether  
9 in the first instance it meets the exception as a learned  
10 treatise before we can publish it otherwise.

11 It doesn't make it admissible just because the expert  
12 relies on it and it doesn't make it improper for an expert to  
13 rely upon hearsay to reach its -- to his or her conclusions to  
14 testify about those in court.

15 I can represent to the court that there has been at  
16 least one argument here about whether something was a learned  
17 treatise or not, maybe more than one, but I remember one in  
18 particular, and that this is something that has come up.

19 I think that the rules and the way that the court has  
20 been applying them as we go forward, there hasn't been an issue  
21 of whether something is permissible or not, and with the  
22 testimonial objections and the discussions on those, it seems  
23 that all of this doesn't require yet another procedure to deal  
24 with it.

25 It seems to me that the rules themselves really contain

1 a way to address it as we go forward and that we don't need  
2 right in the middle of now defendants' case, with the liability  
3 case of the government having been closed, to now have a  
4 procedure for dealing with the learned treatise exception. I  
5 think it should take care of itself with the proffer of each  
6 document.

7 THE COURT: I don't think we need a fancy procedure.

8 I can say one thing for sure, and that is as a general  
9 matter, the treatise itself is certainly not going to come into  
10 evidence.

11 MR. BERNICK: That's correct.

12 THE COURT: And once it is established that the volume  
13 in question meets the 803 exception, then the witness reads from  
14 the particular portion that's being shown to them or, as I say,  
15 sometimes it might even be a whole chapter, and depending upon  
16 the context, either the witness's reading of the quotation is  
17 sufficient and comes into evidence as part of that witness's  
18 testimony, or if it is appropriate for the entire chapter to  
19 come in -- and that would very much depend on the context of the  
20 witness's testimony -- then on an occasional basis a chapter  
21 might be admitted. That would not be my preference, but again,  
22 it would all depend on how the witness testified.

23 I don't want, Mr. Bernick, in answer I think more  
24 directly to your question, I don't want to have yet additional  
25 exhibits in the record when we've got a witness and a

1 transcript -- let me put it differently -- where we have a  
2 transcript in which the witness is either read a statement from  
3 a treatise or reads the statement from the treatise and says,  
4 you know, this is what it is.

5 MR. BERNICK: That's fine.

6 And my only reason for raising it is it's not a  
7 question of whether I want to get inadmissible things in through  
8 the back door, is with respect to those matters where the court  
9 already has allowed the treatise to be read, do we then say that  
10 the exhibit has been admitted because it has now been read, is  
11 the exhibit now admitted for purposes of our record? Not the  
12 entire document, but in a sense what is the record reflecting?

13 THE COURT: It doesn't reflect an exhibit per se, but  
14 it clearly has the witness's testimony --

15 MR. BERNICK: Well --

16 THE COURT: -- which is, as far as I'm concerned,  
17 something upon which I can rely.

18 MR. BERNICK: The last matter, Your Honor -- I'm sorry  
19 to raise another one.

20 I did try to notify the court that this was coming up,  
21 and I also spoke about it with counsel earlier today, and that  
22 is the subpoenas with respect to Mr. Myers.

23 As you recall, this is one of the items that was not  
24 put before the Special Master and we had a discussion about our  
25 efforts to obtain document discovery from the government itself.

1 Your Honor did rule upon that. I'm not revisiting that at all.

2 What I am here to raise, and I'd like to tender to the  
3 court the two documents that relate to it are a proposed  
4 subpoena -- proposed subpoenas to Mr. Myers and to his  
5 organization. They are JD 013259 and 60. They were sent to the  
6 government last night at about 8:00 o'clock.

7 And I spoke with Mr. Brody who referred me to  
8 Ms. Eubanks. I spoke to Ms. Eubanks, said I wanted to raise it  
9 before the end of the day.

10 What we've now done is to craft subpoenas directly to  
11 the witness. Remember, the government's concern was that if the  
12 government had to respond, that there be a work product issue.  
13 That essentially we would be asking for their thought process.

14 This no longer does this. This is directly served on  
15 Mr. Myers and his organization. We tried to simplify the  
16 requests. I'm happy to go through it. We believe that the  
17 requests are clearly exactly the kind of discovery that we would  
18 be entitled to.

19 Ordinarily, if a new witness had been identified --  
20 this is also a witness who is a third party witness, but  
21 obviously is not under subpoena by the government, apparently is  
22 volunteering to appear on his own, and to that extent if there  
23 is burden here, it's an appropriate burden. He's not being  
24 picked on as a stranger to the case.

25 THE COURT: Does he have counsel, do you know?



1           MR. BERNICK: I'm assuming that his organization has  
2       counsel. I don't know whether he personally has counsel.

3           My understanding was that counsel for the Department of  
4       Justice had contact with his counsel, and we would like to get  
5       the subpoena approved. If his counsel wants to come in and move  
6       to quash it, that's fine. We will obviously provide them with  
7       it.

8           But basically it's very straightforward. All documents  
9       that relate to his anticipated testimony, documents that relate  
10      to the efficacy of youth smoking and cessation programs, because  
11      apparently, although we don't know, apparently he's going to  
12      address that. Others are addressing it. We want  
13      communications. Items 3 and 4 really bear upon his bias, that  
14      is to what extent he has already been in communication with the  
15      government or with others about steps to take against the  
16      tobacco industry. And then the question of who finances him and  
17      his organization.

18          We want to be able to serve these right away. As Your  
19      Honor also will recall, we originally were going to schedule his  
20      deposition for the 9th, but that was before we ran into some of  
21      these problems with document production.

22          After the discussion we had last week with respect to  
23      the request of the government, we indicated our flexibility to  
24      move the deposition back. I think Your Honor said, well, we can  
25      have it until, I think the 20th of April. We are still very

1       amenable to that. We think that's the way it should go. And  
2       that would provide both the government and Mr. Myers more time  
3       to deal with these documents.

4               But as it stands now, my understanding that the  
5       government has not expressed flexibility and they still want  
6       Mr. Myers' deposition to take place next Saturday. I don't  
7       think that that can happen, frankly. But because of the time  
8       urgency that at least is implicit in that position, we wanted to  
9       get this before the court this afternoon.

10              One last thing. I'll only remind Your Honor that  
11       Mr. Myers never identified as a witness before. We only have  
12       one indication of what he's going to speak to as concerns  
13       remedies, and this is it right here. This is the disclosure  
14       that they made.

15              Will offer fact testimony concerning defendants'  
16       behavior and specifically related to conduct identified in the  
17       Master Settlement Agreement. I suppose I can understand  
18       something of that. And then, but on remedies, remedies aimed at  
19       preventing and restraining defendants from marketing to people  
20       under 21 and preventing and restraining fraudulent marketing  
21       activities.

22              Well, that's just about the entire remedies case. So,  
23       we really don't know what precisely he wants to address. If we  
24       got a real specification that says, you know, Mr. Myers is going  
25       to talk about X specifically, some set of facts or some

1 particular remedy, you know, we are more than happy then to go  
2 back to the document request and tailor that.

3 But right now, again as I indicated yesterday, we are  
4 very anxious that we make sure that we are timely making  
5 proposals for the discovery we think we need, and this is our  
6 proposal today for the discovery to take from Mr. Myers and his  
7 organization.

8 THE COURT: Does the government have anything to say  
9 about these subpoenas?

10 MS. EUBANKS: Quite a bit, Your Honor. If you would  
11 like to take the break before we address it.

12 THE COURT: All right. Take a 10-minute break,  
13 everybody.

14 (Recess began at 3:39 p.m.)

15 (Recess ended at 3:52 p.m.)

16 THE COURT: Ms. Eubanks, please.

17 MS. EUBANKS: Thank you, Your Honor.

18 First off, let me be clear. The United States does  
19 oppose the issuance of these subpoenas.

20 What I think will be helpful for the court in this  
21 presentation is to take the court through the court's prior  
22 rulings dealing with Matt Myers and the discovery issues and  
23 also to take the court through some related orders in the case,  
24 law of the case, and how the rules have been applied here.

25 Let me start out with the session of March 24th, '05

1       when the issue regarding discovery with respect to Matt Myers,  
2       one of the new witnesses listed on the United States' witness  
3       list for purposes of remedies occurred.

4               The court at line 4 of page 16,971 states:

5               "Secondly, an identification and production of those  
6       documents in the possession, custody or control of the United  
7       States or Mr. Myers" -- I'm sorry, this is the request, Your  
8       Honor. This is counsel's words in terms of discussing what it  
9       is that they want. This is how the issue first came up, their  
10      formulation of what they were seeking from Matt Myers.

11              "Secondly, an identification and production of those  
12      documents in the possession, custody or control of the United  
13      States or Mr. Myers or the Campaign for Tobacco Free Kids, which  
14      is where he's at right now, he's president and CEO, I believe,  
15      that are relevant to Mr. Myers' anticipated testimony which the  
16      government knows what it is and we don't.

17              "And then the deposition, and we have that deposition  
18      scheduled, so that's what's going to come up."

19              You will recall that Mr. Redgrave put up on the screen  
20      for the court to see a particular request and then that gave  
21      rise to the United States' objections.

22              While I'm always happy when joint defendants can agree  
23      with something that the United States has said, it's a little  
24      bit late for counsel to now suggest that the government's  
25      arguments regarding privilege should somehow be resurrected here

1 to address their now position regarding these subpoenas.

2 If you look at the subpoenas that were handed up, the  
3 materials that are requested, one goes to Matt Myers, the other  
4 goes to the Campaign for Tobacco Free Kids, and they are  
5 documents that are within the custody and control of the  
6 campaign and Matt Myers, and they are related to his anticipated  
7 testimony.

8 In terms of what it is that the court was considering,  
9 this is what defendants said was the issue and what they wanted  
10 from the United States before they could take the deposition of  
11 Mr. Myers before they could have Mr. Myers testify at trial.

12 Eventually, at page 16979 of that same day's  
13 transcript, beginning at line 12, the court stated:

14 "I'm going to rule as follows. Of course you get your  
15 deposition.

16 "In terms of the way you have formulated item number 2,  
17 identification and production of those documents, et cetera,  
18 that are relevant to Mr. Myers' anticipated testimony, it is  
19 perfectly clear that the government would -- by making that  
20 determination as to what was relevant to Mr. Myers' anticipated  
21 testimony, that the government would have to be giving away work  
22 product and it's -- what's the word I want -- essentially  
23 forecasting the testimony. And even more than that, it would be  
24 up to the government to figure out everything that could  
25 possibly be relevant to Mr. Myers' anticipated testimony. It

1       either casts too wide a net or casts too narrow a net. I'm not  
2       sure which."

3               The discussion continued after that. The court spent a  
4       great deal of time and even commented on the fact that the court  
5       was letting each party get out their position and wanted to hear  
6       it thoroughly.

7               At page 16,980, the court continues with the statement,  
8       "The purpose of the deposition is to find out what his testimony  
9       is going to be."

10              So the court took into account the request for a  
11       deposition and the request for documents that were associated  
12       with the witness's testimony and arrived at a particular result  
13       saying, You're going to get the deposition of the witness.

14              At some point in the argument, the United States raised  
15       the question that there is a deposition as a matter of right  
16       with respect to expert witnesses but not so with fact witnesses,  
17       but that's within the sound discretion of the trial court who  
18       made it very clear that the court was balancing a number of  
19       interests, a number of orders had occurred before, and needed to  
20       take all of that into consideration and flexibility was  
21       required.

22              The court -- Mr. Bernick at that hearing stated that,  
23       "We would have had document production of this witness, just  
24       like any other witness, and without the documents that you need  
25       for cross-examination." He raised the question of the need for

1 documents. That was fully explored.

2 Then the court says, at page 16981, asked the question  
3 of when is his deposition, and Mr. Bernick replies that it was  
4 April 9th.

5 I will represent to the court that that is one issue  
6 that in all of the transcripts that I've reviewed of the  
7 proceedings dealing with Mr. Myers that we have taken the  
8 position that the 9th is a firm date, but the court has not  
9 resolved that question of the timing for Matt Myers' deposition.  
10 That's something that has been discussed, but there's been no  
11 express ruling by the court on that issue.

12 We still take the position that Saturday, the 9th is a  
13 good day for that deposition, and Mr. Myers has -- in fact,  
14 defendants agreed to that date early on.

15 Moving forward in the transcript on that same date, we  
16 come to page 16984. And interestingly at line 24, I made the  
17 statement, "If what has passed is prologue, we can certainly  
18 count on that," referring to production -- voluminous -- request  
19 for production voluminous documents and state, "I can foresee a  
20 request for production of documents that is very broad, then  
21 whatever documents the United States --"

22 And the court interrupted me at that point, on page  
23 16985, line 2, and said, "No, there's not going to be a request  
24 for production of documents."

25 Obviously, these subpoenas have attached to them

1 requests for production of documents.

2 The court went on further at line 7 to state, "Rather  
3 than requiring the government to produce the documents which  
4 will be used in the direct one week prior to submitting the  
5 direct, I'm going to have to move that date back substantially  
6 in order to make sure that the documents are produced at least a  
7 few days in advance of actual deposition."

8 You can see that the court was considering what each  
9 side was saying about the burden, about what was needed, taking  
10 it into consideration and engaging the parties in a discussion.

11 Later in the same transcript, at page 16987, line 19,  
12 Mr. Bernick states, "But I need to get guidance from the court  
13 that says that we are going to get the documents that relate to  
14 the subject matter of his testimony and we are going to get  
15 them, say four days in advance of his deposition." And this is  
16 key, "That's all that we really need."

17 Now, in response to that statement, what the court does  
18 at page 16989, line 8, is states, "Three days before the  
19 deposition the government is to produce those documents which it  
20 has good faith reason to believe it will be using in the direct  
21 testimony of Mr. Myers."

22 There's a discussion where, once again, I tried to  
23 convince the court that the work product exemption should apply,  
24 but the court is well aware that that is a qualified assertion  
25 of privilege, and the court overruled what it was that the



1 United States was suggesting, even recognizing that it was work  
2 product but that this was something that was going to overcome  
3 that. And under the Hickman standard, even though we didn't go  
4 into that, it was very clear where the court was coming from  
5 because the court recognized it was work product but ordered  
6 that we come forward with those documents.

7 On page 16990 at line 2, the court gives a further  
8 clarification of the order if there were any doubt.

9 "You are not required to use those documents. I said  
10 documents that you have a good faith belief that you're going to  
11 use in your direct testimony.

12 "What is more, I have, I believe, substantially  
13 narrowed the language that Mr. Redgrave presented in item number  
14 2, which was too broad and demanded too much from you.

15 "But I believe that I have set much narrower parameters  
16 so that what you would be providing are documents that you  
17 are -- I don't know if I want to use the word virtually -- but  
18 virtually sure you're going to use in the direct testimony. You  
19 have to have some idea of what that man is going to be  
20 testifying about."

21 Then the court says, on that same page at line 24 -- I  
22 once again tried to convince the court, but that was too  
23 broad -- the court states, "There has to be some flexibility. I  
24 have to enter orders that I think accords fairness to both  
25 sides. That the my ruling on this issue."

1           But once was not enough because the issue was reraised.  
2       And on March 29th the court, at page 17173, announces at line 17  
3       after defendants reraised the issue, that the issue of Matt  
4       Myers was definitely ruled upon.

5           "That person as a witness was taken off the table in  
6       terms of the unresolved discovery issues."

7           In recognition of that fact, at page 17218 of the  
8       March 29th transcript, it was stated -- raised that -- and let  
9       me tell Your Honor who was speaking at this point -- by  
10      Mr. Bernick, that I believe the government still wants his  
11      deposition to proceed on the 9th, and at that point he raised  
12      that we should have until the 20th.

13          Again, in fairness, the court did not rule on the date  
14      of the deposition, but it's very clear that with respect to  
15      requests for production of documents surrounding the Campaign  
16      for Tobacco Free Kids and Matt Myers, that the court heard the  
17      arguments thoroughly of the parties and then entered a ruling on  
18      the record.

19          Now, Mr. Bernick has said that the lack of formality  
20      with which we proceeded with was an issue. He said that was  
21      informal. But this is a trial. We have been together now for  
22      six months.

23          It's every day that the court enters a ruling based  
24      upon representations and arguments of the parties. We had a  
25      very thorough ruling, evidentiary ruling on Monday that the

1 court read into the record. We do not view when the court  
2 speaks from the bench anything informal about instructions to  
3 undertake particular orders or requirements, and I don't think,  
4 in fairness to defendants, that they do either.

5 So we don't think that there's any level of  
6 informality. And if counsel is simply making the record that  
7 this is the subpoena that they would serve -- would serve should  
8 the court authorize it, that's one thing, but we don't believe  
9 that this is properly before the court.

10 As recently as last Friday, the court entered an order  
11 that is directly on point. Order Number 903 dealt with a  
12 request by Altria and Philip Morris to reconsider Order Number  
13 600. In that memorandum opinion that accompanied that order,  
14 the court recognized two important things.

15 At page 2 the court sets forth the standard for motions  
16 for reconsideration stating that they should be granted only if  
17 there is an intervening change in controlling law, the  
18 availability of new evidence, or the need to correct a clear  
19 error or present manifest injustice.

20 The court quoted to -- cited to a number of decisions.  
21 Motions for reconsideration have been filed in the case and the  
22 court from time to time has entertained them favorably and at  
23 other times has not. This was not such a time.

24 What the court did, at page 3 of the memorandum opinion  
25 accompanying Order 903 is state, and its apropos to the present

1 situation, "The court has already rejected the memorandum  
2 opinion accompanying Order Number 600, the basic factual and  
3 legal arguments that defendants are presenting in this motion to  
4 reconsider. There is no point at this busy time during trial to  
5 again discuss the reasons for rejecting those arguments."

6 Quite frankly, the law of this case is fairly clear,  
7 and the order that was entered, Order Number 903, was certainly  
8 not the first time that the court has been posed with questions  
9 dealing with timing, had to balance the interests of the parties  
10 and enter an order.

11 THE COURT: Ms. Eubanks, I have let you go for  
12 15 minutes now.

13 Are you basically saying that I covered the issue when  
14 I ruled on what discovery defendants should have regarding  
15 Mr. Bernick -- I'm sorry -- not Mr. Bernick, but regarding Matt  
16 Myers?

17 MS. EUBANKS: That is what we are saying, but if the  
18 court is entertaining as a request, as counsel has handed up,  
19 authorization to serve subpoenas upon Matt Myers and the  
20 Campaign for Tobacco Free Kids, I need to address the merits of  
21 that.

22 THE COURT: I thought that's what you were going to  
23 address.

24 Quite frankly, we did not discuss, at least it is my  
25 clear recollection, we didn't discuss third party subpoenas last

1 Thursday, although it may have been mentioned.

2 MS. EUBANKS: Yes, we did.

3 THE COURT: Excuse me. It was not fully fleshed out.  
4 I don't -- you can correct me on this if I'm wrong -- but I  
5 don't think I ruled directly on such an issue.

6 MS. EUBANKS: Yes, Your Honor. In fact, that was the  
7 issue, and it was -- I can't do a word search right now on the  
8 transcript, but I'm happy to do that.

9 But I know that the issue of third party subpoenas was  
10 raised, because both Mr. Brody and I spoke to what had happened  
11 to the United States with respect to Order Number 110 way back  
12 then when the court raised the question of third party  
13 subpoenas.

14 There was an extensive discussion in the record where  
15 Mr. Brody talked about what happened with the United States when  
16 it sought them. We compared that situation to Mr. Myers, and we  
17 talked about what was fair and appropriate given the court's  
18 handling of other third party subpoenas from other third  
19 parties.

20 THE COURT: I didn't have rule directly on a request.  
21 I don't think Mr. Bernick made a direct request. I'd like to  
22 hear you on the merits of the request, please.

23 MS. EUBANKS: Well, Your Honor, insofar as the merits  
24 of the request are concerned, I do think it is a key component  
25 of our argument that when the court considered the question of

1       discovery, and in some of those provisions that I read, you  
2       expressly stated discovery from the government and from Matt  
3       Myers, and Matt Myers at the time you recognized, you knew it  
4       was clear, was not a part of the government.

5               Now, when the court considered Order Number -- in fact,  
6       Your Honor, I'm advised by Mr. Brody that Mr. Redgrave made the  
7       direct request for subpoenas, and we can find this in the  
8       transcript for you.

9               But a subpoena certainly wouldn't -- or made the direct  
10       request for documents from Matt Myers and the Campaign for  
11       Tobacco Free Kids, and I can find this in the transcript and  
12       produce it later this evening to Your Honor and give you those  
13       page numbers so you can see how this issue was fleshed out and  
14       that's what all of the discussion was largely about.

15              And that is -- and furthermore, with respect to the  
16       merits of the issue of the propriety of a Rule 45 subpoena,  
17       Mr. Bernick misinforms the court when he says that Mr. Myers is  
18       volunteering to appear and that that somehow suggests that he  
19       should have -- there should be a lesser standard afforded to  
20       protecting him or his organization from discovery.

21              Indeed, Rule 45 says just the opposite. You cannot --  
22       what Rule 45 says, and the case law more importantly  
23       interpreting Rule 45 says about third party subpoenas, is that a  
24       nonparty required to produce documents or materials is protected  
25       against significant expense resulting from involuntary

1 assistance to the court.

2 What Mr. Matt Myers is providing here, Your Honor, is  
3 assistance to the court. And to the extent that defendants are  
4 serving him with these requests for production, that assistance  
5 is essentially involuntary.

6 If the United States is to pay him any fee for,  
7 statutory witness fee, for his time we have to serve him by our  
8 own regulations with a subpoena to come forward and testify, but  
9 he has not stated that that is a requirement. It's some nominal  
10 40 or \$50 a day witness fee that accompanies that.

11 Looking at the requests themselves -- and again they go  
12 to the Campaign -- and if you look at the description, it's  
13 about Matt Myers' testimony, it's not about -- he happens to be  
14 with the Campaign for Tobacco Free Kids.

15 But look at the documents that are specifically  
16 requested from Matt Myers and the burden that accompanies it and  
17 how this expands what it was that when this issue was first  
18 placed on the table, when Mr. Redgrave got up and said, This is  
19 what we want produced. Now it's grown, just as I have  
20 predicted, to documents to be produced.

21 All documents related to the anticipated trial  
22 testimony of Matt Myers, including documents related to any  
23 proposed alleged or contemplated remedies and documents  
24 concerning any work performed by Matt Myers or the Campaign for  
25 Tobacco Free Kids, or any of its predecessor organizations

1 related to the lawsuit.

2 I can leave to the court to read the other number 3 --  
3 number 2, 3, and 4, but essentially they fill almost a full  
4 page, single spaced. And Your Honor specifically stated, We are  
5 not going to have requests for production of documents.

6 In fact, the United States had argued that the way the  
7 request was being presented was improper because it was work  
8 product. We lost on that. And when we lost, we said, "Your  
9 Honor, there's no challenge to that ruling. We are going to  
10 present the documents 3 days in advance as you have ordered."  
11 And we worked over last weekend to try to get these things  
12 together so that we could do it on the schedule that we had on  
13 the 9th.

14 Defendants then marched into court on Monday and said,  
15 "Guess what. There's a change. This is a motion for  
16 reconsideration." I will provide the court with further  
17 specific citations to the record that make it very clear that  
18 that's the case.

19 But the request for production of documents from Matt  
20 Myers and from the Campaign for Tobacco Free Kids both have been  
21 thoroughly argued and discussed by the court.

22 What we heard from Mr. Bernick some time earlier this  
23 week was that he wanted to make sure that the court was aware of  
24 their position and that it was documented.

25 Well, if the position is documented in the scope of



1       these particular orders, what's important here, Your Honor, is  
2       what has been ruled again in the past.

3               I'll remind the court of a published order that was  
4       entered on February 3, 2004, in this case. It's 219 FRD 203.  
5       And I'm sure the Special Master very well remembers, and Your  
6       Honor no doubt as well, the request that the United States made  
7       for documents from the law firms of defendants' law firms. I  
8       think there were six briefs filed in the case, lots of  
9       sur-replies and so forth. And the court's ruling consistently  
10      in this case has been the timing is very important.

11             In this situation, 21 months before the scheduled trial  
12      date the United States moved to compel the production of certain  
13      records at defendants' law firms.

14             We were chastised heavily in a 54 page, I think it was,  
15      Report and Recommendation from the Special Master which the  
16      court cites with approval in this order, and further states that  
17      the court is well aware that the government considers this issue  
18      to be of compelling importance for the full and adequate  
19      presentation of its case.

20             That may or may not be true. If it is not true, the  
21      government suffers no prejudice from the adoption of Report and  
22      Recommendation Number 132. If it is a true, for all of the  
23      reasons spelled out in great detail by the Special Master, the  
24      responsibility lies with the government for its tactical  
25      decision to delay filing this motion for two and a half years.

1           Taking the court back to prior orders in this case.  
2       Before either party had -- in Order Number 110, before either  
3       party knew what the final witness list was six months before,  
4       this court cut off the third party discovery that was required.  
5       And at that point, you know, all of the documents had not been  
6       produced in the case. That was not what had been fully  
7       accomplished.

8           But what the court did there is -- I'll just put this  
9       up, Your Honor -- is it states here that Order Number 51 does  
10      not apply to parties and it requires parties to propound written  
11      discovery requests by a date certain.

12           Neither Order Number 51 nor any other order in the  
13      court in this litigation can be read to exclude third party  
14      subpoenas from the category of written discovery.

15           The provisions of Order 51 make it abundantly clear  
16      that written discovery propounded by a party bound by Order  
17      Number 51 is to be completed by December 1, 2001 regardless of  
18      whether the recipient of such discovery is a party or nonparty  
19      in this litigation.

20           Our understanding of what the court did when the court  
21      considered this matter was balance the interests here. The  
22      court entered a new order permitting the United States the  
23      ability to bring forward new witnesses for its remedies phase of  
24      the case. And in doing that, the court then balanced the  
25      interests that the defendants had of completing discovery.

1           You heard our argument at that time which we put  
2 forward that they knew about this particular existence of this  
3 witness, this organization. They know about their work. And  
4 you said, I have to balance this. Then you took into  
5 consideration the documents that were requested and you provided  
6 that.

7           What's interesting here, Your Honor, is when you look  
8 at that and then you look at Order Number 65, what you see is  
9 that by that particular date, well after the notification, or  
10 the ability to even discover from a third party, the court's  
11 order says, "By June 1, 02, the parties shall exchange final  
12 lists of fact witnesses. If the final list varies from the  
13 initial list by more than 10 percent, plus or minus, such  
14 variation will be considered prime fascia evidence that the  
15 initial list was not submitted in good faith for purposes of  
16 considering the imposition of sanctions."

17           My point here is that this is something that the court  
18 has already done to accommodate the defendants.

19           And finally, Your Honor, with respect to Order Number  
20 110, again considering -- and that was on a motion for time  
21 extension by the United States seeking more time to complete  
22 third party discovery, because we had misread a particular  
23 order.

24           The order here is particularly critical of the United  
25 States conduct with respect to filing that motion and it also

1 states that, "Moreover, plaintiff is still free to seek  
2 voluntary compliance with its request for documents and is free  
3 to depose representatives of various third parties. Such  
4 efforts at voluntary compliance and depositions must be  
5 accomplished, however, without the assistance of subpoenas duces  
6 tecum."

7 The United States early on was cut off, if you will,  
8 with respect to evidence that it could produce. Here in a sense  
9 with respect to third parts, then when we went forward with  
10 respect to law firms, then that was cut off as well.

11 What we learned during trial, which we did not know,  
12 was the significance of the involvement of the law firms and we  
13 learned that during the presentation in particular of the ETS  
14 part of our case, but we were not able to get at those documents  
15 and certainly were harmed by that. But these were the orders  
16 that were in place, and the reasoning of the court is set forth  
17 thoroughly in these orders.

18 But the point here is that the final -- final witness  
19 lists were not even due until several months, five or six months  
20 after the order was entered of the court.

21 The fact that we simply have identified a witness, we  
22 are certainly willing to -- and have worked with Mr. Myers -- to  
23 obtain from him documents to comply with the court's order that  
24 we are going to use -- or may use, in fact, in the written  
25 direct. That does not mean for these purposes -- and I want to

1       make this very clear and state it on the record -- this does not  
2       mean that the United States can control the presentation of the  
3       written direct by simply leaving out things.

4               If we want Matt Myers to talk about something and to  
5       cite to it, then we need to make sure that those documents come  
6       forward.

7               I also have discussed with him that, given the unique  
8       nature of this order, you need compare to our other orders, but  
9       I don't mean to suggest that what the court did was in any way  
10      unusual or unique, but different from our other orders and  
11      explaining to him why, that he should be prepared at that  
12      deposition to discuss what it is that he intends to testify  
13      about.

14              Now, you may recall from our discussions regarding  
15      Dr. Healton that -- and looking at some of the attachments to  
16      documents that were forwarded up -- that that was not the case  
17      when Dr. Healton offered her testimony.

18              That Dr. Healton said that she would answer questions  
19      and she understood, based upon a description of the testimony,  
20      what it is that she was going to testify about.

21              But in our discussions with Mr. Myers I have told him  
22      that I think that it is necessary for him to give testimony that  
23      will advise the defendants of what it is that he anticipates  
24      testifying about at the trial and that that will constitute full  
25      compliance with the court's orders, certainly its intent, even

1       though it wasn't expressed that way.

2               So, Your Honor, the point is that there's no value to  
3       be gained from papering to death the third party organization.  
4       I sent to Mr. Myers -- we got this request sometime around 9:00  
5       o'clock last night. He's out on the West Coast. I forwarded to  
6       him an e-mail with these attachments.

7               And he said that the -- and remember, I told you that  
8       his lawyer was ill and that he had not yet determined whether he  
9       was representing himself or whether someone else would be  
10      representing him. But what he did represent to me that I should  
11      pass on to the court, that the Campaign was not in a position to  
12      bear the burden or expense of the production requests. And I  
13      forwarded him copies of those documents that were handed up to  
14      you.

15              Thank you, Your Honor.

16              THE COURT: Mr. Bernick.

17              MR. BERNICK: Your Honor, I know the hour is late and  
18      I'm not going to respond to much of the recitation because I  
19      don't really believe it's at all germane.

20              I think that this comes back down to what is an  
21      unbelievably straightforward proposition, almost a proposition  
22      that is by now in the routine because it is so experienced so  
23      ordinarily in the course of regular litigation, and no amount of  
24      argument about what happened with respect to discovery earlier  
25      on in this case with respect to the law firms changes the basic

1 facts that drive this need. It almost need not be argued.

2 We have new remedies that have been brought into this  
3 case. There's no question about that. There's no question  
4 about that they are substantial new remedies.

5 There's no question but that if you had a case that was  
6 a case that had a new request for \$130 billion that, as counsel  
7 said the other day, you could spend years doing the discovery  
8 and no one could complain that somehow it's not warranted.

9 Your Honor has recognized repeatedly, and we appreciate  
10 this recognition because we need to -- maybe we need to be  
11 assured too frequently. Your Honor is very sensitive to the due  
12 process requirements, and those due process requirements have  
13 not been abridged by your prior orders. They cannot be abridged  
14 by orders in connection with this new remedies phase.

15 The same rules of evidence and procedure apply here  
16 with respect to these new remedies as they would apply to the  
17 beginning of the case to any other claim for relief. That's  
18 just the fact.

19 Now, obviously, if Mr. Myers had been deposed or  
20 subjected to discovery at some earlier point in the case, if he  
21 had been listed at any point as a witness, then arguments about  
22 what happened during the prior discovery period would be  
23 germane, because even though we have new remedies it may be that  
24 at least a portion of the discovery that was relevant to those  
25 remedies already had been conducted and we shouldn't be able to

1 repeat it, and we wouldn't seek to repeat it.

2 But that's not the situation here. He was not ever  
3 identified. He was never deposed. The government never said  
4 that they would ever call him.

5 He is the example par excellence of a new piece of  
6 evidence, a new source of evidence that's directly tied to the  
7 fact that they have new remedies.

8 So you have new remedies by the government's own  
9 admission, but for those new remedies this man would never have  
10 testified.

11 So we should be able to approach discovery of this  
12 individual without impairment to any of our rights because we've  
13 not had an opportunity to execute on any of our rights. And  
14 those rights cannot be abridged.

15 Now, Your Honor set out a pretrial schedule that  
16 obviously we spent a lot of time talking about. It was  
17 sequenced in a way that we had asked for, and we appreciate that  
18 from Your Honor, and it was very orderly.

19 And when we came in saying we want discovery here, we  
20 did so on an informal basis in hopes of avoiding formal  
21 requests, formal motion practice. And we represented to Your  
22 Honor that we would not seek to change the schedule. In fact,  
23 the whole schedule that we had proposed was designed to make  
24 sure that there would not be a gap in this case.

25 So, we recognize that we could have done -- asked for



1 more. We could have made this into an opportunity to create  
2 problems for the court, and we've deliberately sought  
3 acidulously to do none of that to try to resolve this  
4 informally, to try to get, not what we want, but what it is that  
5 we need and to do so promptly. That is purely and exclusively  
6 our only agenda.

7 Now, Your Honor gave us in that order some things that  
8 should have served to expedite this process. For example, we  
9 asked for, and Your Honor directed in that order, that there be  
10 detailed written statements of what each one of these witnesses  
11 were going to say.

12 With those detailed written statements we could have  
13 alleviated the need for things like, you know, interrogatories  
14 and the like because it would save us lots of time to know what  
15 a witness was going to say.

16 They didn't give those details statements. And Your  
17 Honor has seen, particularly with respect to Mr. Myers, the  
18 remedies are totally unspecified. Mr. Myers worked on  
19 antitobacco matters for 20 years. Who knows what part of that  
20 they are going to argue is germane now to remedies?

21 So, even the provisions of Your Honor's order governing  
22 remedies, the remedies' phase, have not been followed. So where  
23 are we with respect to Mr. Myers?

24 We don't know what he's going to say. We know who he  
25 is. We know he can say a lot of things. We don't know what

1       he's going to say. We don't have any interrogatories that he is  
2       required to answer. We don't have time for interrogatories in  
3       this case.

4               And they now say, "Well, in his deposition he will tell  
5       you what he's going to testify to." Now, that may have been  
6       possible under certain state court rules. For example, in New  
7       York they still have rules that read out that way. You really  
8       can't take expert depositions as an example. You learn what the  
9       expert is going to say at trial. But that's not how the Federal  
10      Rules work.

11             The Federal Rules, there's not a question of  
12      depositions being discretionary. I mean, for the government to  
13      represent that the Federal Rules make -- discretionary of  
14      witnesses who are going to testify is shameful.

15             The Federal Rules contemplate depositions. Your Honor  
16      has recognized that we are going to get the deposition. The  
17      question is whether it's going to be a meaningful one.

18             We shouldn't have to learn at the deposition what the  
19      subject matter of testimony is. We can then go figure out how  
20      to cross-examine him when he appears, based not on his  
21      deposition, but based upon what we've pieced together after the  
22      fact. The deposition has to be a meaningful one.

23             We should learn in advance of the deposition. This is  
24      what Your Honor's order contemplated. We should learn in  
25      advance what he's going to say and then get the documents that

1 we need, not simply to find out what he's going to say, but to  
2 cross-examine him. That's one of the huge purposes of  
3 depositions.

4 So we included on the list -- Mr. Redgrave got up and  
5 took a good shot at trying to say something that -- we just said  
6 give us everything that relates to the subject matter. Give us  
7 all that Mr. Myers says.

8 We didn't say that. We said let's use the testimony as  
9 a benchmark, and then the government objected that that would  
10 reveal their work product. Now I frankly don't really think  
11 that that was an argument that was very well taken, but I can  
12 understand it, and Your Honor adopted that, recognized, at least  
13 in part, that there was a work product protection and sought to  
14 protect the government on that score.

15 So what is it they now have to produce? They have to  
16 produce what they believe in good faith they are going to use in  
17 connection with the examination, and that's all.

18 So we now roll forward with a material witness, one of  
19 nine witnesses in a \$130 billion plus case, and we go forward to  
20 take his deposition and all that we're going to have is what the  
21 government has handpicked that serves their case, even though  
22 there may be documents by the boatload in the possession of this  
23 witness that are completely contrary to his testimony, and we  
24 will never find out about it.

25 That is trial by ambush. That is not a trial that has

1       due process by any stretch of the imagination. Your Honor has  
2       very carefully protected their work product, but Your Honor has  
3       not sought to protect the witness from cross-examination, and  
4       that is exactly what the government now seeks.

5               No interrogatories. No advanced document production  
6       from the witness. No advanced indication of what he's going to  
7       say. You show up, find out what he's going to say, and say,  
8       "Okay, now we've got to go figure out how to prepare for trial."

9               That's got nothing to do with any case that I think  
10       that any other individual in this entire courtroom or Your Honor  
11       has ever, ever seen, much less a \$130 billion case.

12              Your Honor ruled, and then clarified earlier this week,  
13       that all that the court was addressing was what the government  
14       had to do in advance. The government should comply with that.  
15       They indicated that they will.

16              The deposition will take place. It cannot take place  
17       on the 9th. That's ridiculous. It's impossible for it to take  
18       place on the 9th. We now come in and say, "Okay, we have a  
19       witness." And the question then becomes the merits of what's  
20       been asked of this witness.

21              This witness enjoys no work product protection. This  
22       witness enjoys no protection as an involuntary participant in  
23       this process. He is a volunteer. The government is not  
24       subpoenaing him. He's coming in.

25              In fact, we want to show that the reason that he's

1 coming in is in part that he's been acting in cooperation with  
2 the government all along to assist them in their case.

3 We want to establish that it's part of his agenda to  
4 use litigation to go after the tobacco industry. All of these  
5 matters bear upon his bias. He is a volunteer.

6 Now he does enjoy some protection. No witness can be  
7 overburdened. And we have given the pathway to protecting him  
8 from burden. All we have said is --

9 THE COURT: I'm sure he will appreciate that.

10 MR. BERNICK: I don't think he does.

11 But I don't think that frankly, Your Honor, that his  
12 agenda really -- I don't think that our interests are very much  
13 part of his agenda and I think Your Honor can well understand  
14 that.

15 So, he now comes in, and we've provided the path to  
16 narrow the request saying that, "Tell us what it is that you're  
17 going to testify about and then we can work with you."

18 That overture was made before. It's been made  
19 repeatedly. Nobody has taken us up on it. So we now come to  
20 the request itself.

21 Now you say all documents relating to the anticipated  
22 testimony. That's number 1. So the question is, Well, why  
23 isn't that enough? That's where you were before. Why do you  
24 have 2, 3 and 4?

25 The answer is that we don't want to get hung up on this

1       issue of anticipated testimony anymore. We don't want that to  
2       be used as a shield to protect the individual from full  
3       discovery on a substance of what he's going to say.

4               And they haven't told us what the anticipated testimony  
5       is so we have no way of gauging whether their compliance is  
6       adequate.

7               So we then go on to say -- we tried in number 2 to  
8       describe the areas that we know that he was involved in  
9       historically that appeared to overlap with remedy. We have just  
10      taken a guess at it. That's number two.

11              All documents concerning the efficacy or effect of  
12      youth smoking prevention cessation programs and the MSA. We  
13      could have asked him a gagillion other things that he's been  
14      involved in. He's talking about youth -- prevalence of youth  
15      smoking. He's talked about the nature of our advertising. He's  
16      talked about our conduct. He's talked about a dozen different  
17      things.

18              But because this is the remedies case we felt that he  
19      was going to talk about remedies. So we looked at what the  
20      remedies were the government was asking for and we built them  
21      into the request.

22              And then the next one, correspondence and  
23      communications regarding. The reason that's there is that we  
24      believe that he's totally plugged into the litigation  
25      enterprise.

1           We're going to be able to establish that and we don't  
2       want to have worry about that. We want to get the  
3       documentation. That goes straight to bias. Number 4 is bias  
4       again.

5           Now, I'm happy to work on narrowing requests. We are  
6       not seeking to delay this trial. I state that and I represent  
7       that to, Your Honor. I've tried cases all over the country for  
8       many years, and I've seen defendants do that. That is not what  
9       we are about here.

10          We are trying to get what it is that we need to be  
11       effective in going after their remedies, and to do it in a way  
12       that comports with Your Honor's schedule and our own schedule so  
13       we can get done with this trial.

14          But we cannot get that done if every step of the way we  
15       don't know what it is that the government really is seeking to  
16       elicit and we can't get at the documents ourselves. So that's  
17       why we are here, Your Honor.

18          The rules -- there's no way that the rules in some  
19       fashion serve to support the government's arguments to Your  
20       Honor, and there's no way that Your Honor's prior rulings or  
21       prior rules can be read fairly and consistently with due process  
22       to produce a result that constrains our rights under the Federal  
23       Rules to get the discovery that we want with respect to a very  
24       new and very broad theory of remedies.

25          So we stand by our requests and ask that Your Honor

1 authorize the issuance of third party discovery. If Mr. Myers  
2 wants to come in with his lawyer, or just pick up the phone and  
3 call us and sit down and talk about this, we are more than happy  
4 to do it, but we got to get this process going, Your Honor.  
5 Thank you.

6 THE COURT: Well, we're not going to get the process  
7 decided this afternoon.

8 I listened at great length to everyone, obviously. And  
9 any delay that is occasioned by my ruling on the request, if the  
10 request is granted -- if -- I will take that delay into account,  
11 certainly, in terms of setting subsequent deadlines.

12 Obviously, I'm not going to delay any extended period  
13 of time, but it might be Monday or Tuesday before I decide.

14 I consider, quite frankly, the next seven or eight days  
15 very crucial, not particularly in terms of my ruling on  
16 Mr. Myers, that's only a piece of what has to go on, but perhaps  
17 much more importantly what, if any, agreements the parties can  
18 come to in terms of their work with the Special Master on all  
19 other discovery issues relating to the government's remedies  
20 witnesses.

21 I think it's a very significant period of time. And I  
22 think that if the parties continue in the -- I'll use a word  
23 that, quote, the kids use -- in the hyper mode that they've been  
24 in for the last eight or 10 days, then I'm not terribly  
25 optimistic.



1 I've alluded to what the ramifications may be and I  
2 think they are pretty clear to everybody. If we have to really  
3 go through a litigated phase of discovery, I think it would be  
4 very unfortunate. It's also going to be very uncomfortable for  
5 everybody. And it will probably impact the optimistic date,  
6 probably doable date, that people had estimated this trial could  
7 finish on.

8 I would really urge all counsel to rethink the  
9 attitudes with which they are going into that set of  
10 negotiations. That's a separate issue, I fully realize that.

11 I won't forget to rule, everybody. I'm going to leave  
12 it at that. I will see you all Monday at 9:30. I know we're  
13 going to begin with Mr. LeBow and finish with him that day and  
14 get to our second witness that day as well. So I'll see you all  
15 at 9:30 on Monday.

16 (Proceedings concluded at 4:36 p.m.)

17 CERTIFICATE

18 I, EDWARD N. HAWKINS, Official Court Reporter, certify  
19 that the foregoing pages are a correct transcript from the  
20 record of proceedings in the above-entitled matter.

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23 Edward N. Hawkins, RMR

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