

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	February 9, 2005
Plaintiff,	:	
	:	9:34 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 62
MORNING SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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

2 THE COURT: Good morning, everybody.

3 This is United States of America versus Philip Morris.
4 CA 99-2496.

5 Dr. Levy, you're still under oath this morning.

6 And, Mr. Webb, please.

7 MR. WEBB: I'm going to get hooked up here, Your Honor.
8 I forgot to put my microphone on.

9 THE COURT: All right.

10 CAROLYN LEVY, Government's witness, SWORN

11 CROSS-EXAMINATION (Cont'd.)

12 BY MR. WEBB:

13 Q. Good morning, Dr. Levy. I'm going to try to pick up right
14 where we left off with our recess yesterday.

15 And Jamie, could I call back up on the screen, JD
16 43359, tab 4? And I think I was on page 4.

17 We were talking about the strategies. Do you recall
18 that Dr. Levy? We were talking to the court about the four
19 major strategies that Philip Morris used to implement what is
20 stated there to be a comprehensive approach that integrates the
21 following four strategies to help reduce youth smoking.

22 So I want to walk through those four strategies with
23 the court in a little detail so the court understands the Youth
24 Smoking Prevention Programs that Philip Morris implemented over
25 time.

1 So let's start with communications. I called out some
2 highlighted language there which if, you can read on the screen,
3 Dr. Levy, says: "Communications directed at youth are designed
4 to change youth perceptions about smoking and to convince them
5 that smoking is not cool, and they should not and do not need to
6 smoke to define themselves."

7 Let me start with, Doctor, why was that the way Philip
8 Morris decided to design its communications strategy?

9 A. I think the first piece comes -- well, when I think about
10 the first pieces, not necessarily what's on this page -- comes
11 from the Surgeon General's Report looking at age of trial of
12 cigarette smoking. And our goal was to help prevent youth
13 smoking. And about two-thirds of kids who smoke at all, ever
14 tried cigarettes, two-thirds of them try that from age 14 and
15 under.

16 So it's like, okay, we're trying to prevent trial. The
17 bulk of trial happens among kids 14 and under, and so what's
18 going on in their lives. And peers are very important. The
19 Surgeon General had highlighted the importance of peers. We
20 also knew from other literature that the perception that smoking
21 was more prevalent than in reality it was, was important.

22 So -- and we had the sense, from some of the reading
23 also about this cool thing, some kids had this mistaken
24 impression that smoking was cool.

25 So what this sentence tries to do in a very short

1 concise way is say, okay, we're trying to change the perception.
2 That is, we want to show them that most kids don't smoke.

3 We want to convince them that it's not cool, in fact,
4 they look silly smoking. And that in order to define who you
5 are, there are plenty of ways to do that that don't involve
6 smoking.

7 Q. Now, as far as when you started your communications
8 strategy, did Philip Morris select one particular mass media
9 outlet or vehicle to focus on at the beginning?

10 A. We chose television as the first medium.

11 Q. Why?

12 A. It has the best reach.

13 Q. By reach, you mean what?

14 A. It's going to reach the most kids.

15 Q. And when you designed the first group of TV commercials to
16 communicate what you have on the screen there, what age group
17 did Philip Morris decide to target with those first commercials?

18 A. Our goal was to hit kids 10 to 14, although I learned that
19 when you buy media, you actually buy 9 to 14. So our target was
20 10 to 14.

21 Q. Your target was 10 to 14. And I see in some of your
22 documents, I see the word "tweens". Is that a term that you all
23 used inside your company to refer the that group of folks?

24 A. That was a term we learned from one of our ad agencies.

25 Q. And so if we see a document that refers to tweens, that's a

1 term you all used?

2 A. That's a term we used, yes.

3 Q. That's fine. Was there a tag line that Philip Morris used
4 with these tween commercials to communicate in a shorthand way
5 what you were trying to get across?

6 A. Yes. It was, Think, don't smoke.

7 Q. As we see some of your communications, whether they be TV or
8 in print, do we sometimes see that tag line there?

9 A. Almost always, although I think there are a couple of
10 occasions where we tried different tag lines. But, in general,
11 that was the tag line.

12 Q. Why did Philip Morris choose that to be the tag line:
13 Think, don't smoke?

14 A. It was -- well, the way we generated these ads, the TV ads
15 directed at kids, it was from a kid's voice and all of it was
16 peer to peer communication. And so it was like the way to sum
17 up at the end: What's this message about? It's: Hey, think,
18 don't smoke.

19 Q. Now, when you went about trying to develop your
20 communication strategy, and I suppose your other strategies
21 there, at the outset as you were doing the initial work you told
22 the court about you did yesterday: interviewing people, reading
23 literature, did Philip Morris -- did you and others at Philip
24 Morris come up with a group of what you thought were risk
25 factors that increased the likelihood that kids will smoke?

1 A. The risk factors -- or the answer is, yes, and that came
2 from our reading of the literature.

3 Q. And at the same time, did you also try to pinpoint what were
4 called protective factors that were factors that might indicate
5 that it's less likely that kids would smoke?

6 A. Yes. The protective factors were something that we didn't
7 hit upon '98, early '99. It came a little bit later.

8 Q. I want to show you this chart. Could I have J-DEM 4020?
9 It's tab 5, Jamie.

10 And I'm going to hand you a demonstrative exhibit and
11 try to get it up on the screen for you, Dr. Levy.

12 What I put on the screen, which is J-DEM 40200, does
13 this chart accurately set forth the risk factors and the
14 protective factors that Philip Morris at least developed that
15 you used as you implemented your strategies?

16 A. Without -- the risk factors -- it's an illustrative group,
17 I'm not going to say it's exhaustive.

18 Q. That's fine.

19 A. The protective factors we looked at as kind of buckets to
20 organize our work, and so that was the way we characterized
21 them.

22 Q. That's fine. Now, I want to focus on that first risk
23 factor: peer pressure.

24 A. Yes.

25 Q. What is peer pressure? What are you referring to there?

1 A. I eventually started calling it peer influence because
2 pressure may be a less descriptive word of what happens with
3 kids.

4 But the simple fact is if kids are exposed to other
5 kids who smoke -- that is, they have friends who smoke, you can
6 see from tab data, our own data as well as data in the
7 literature -- that it has a tremendous influence on the
8 likelihood that they will also smoke.

9 Q. Well, is there a fair amount of literature on this topic
10 discussing the influence of peers on the smoking behavior?

11 A. It's everywhere.

12 Q. Let me just start with maybe -- we talked a lot in this
13 courtroom, Doctor, about the Surgeon General.

14 So, let me show you -- could I show the witness JD
15 000647? Jamie, it's tab 6.

16 And Dr. Levy, this will be the 1994 Surgeon General's
17 Report. Do you have that in front of you now?

18 A. Yes, I do.

19 Q. I take it, are you generally familiar with that report?

20 A. Yes.

21 Q. And I'm going to direct your attention, I'll put up on the
22 screen page 131 where I believe the Surgeon General talks about
23 peer pressure. Do you see the part I've highlighted on the
24 screen?

25 Is it easier for you to read the exhibit or the screen?

1 Whatever is easier for you, Dr. Levy.

2 A. Just depends on where I'm looking. I can read the screen.

3 Q. I've simply yellow highlighted. Do you see the comments
4 made by the Surgeon General?

5 "One of the areas of the widest investigation in the
6 antecedents of cigarette smoking concerns peer smoking and
7 related peer behaviors. Peers may be defined as persons of
8 about the same age who feel a social identification with one
9 another. The influence of peers has been posited as the single
10 most important factor in determining when and how cigarettes are
11 first tried."

12 I'm not going to go through the rest of it. I've
13 highlighted down at the bottom. It says, "Multiple
14 cross-sectional and longitudinal studies worldwide substantiate
15 the relationship between smoking onset and peers or friends
16 smoking."

17 I don't intend to get into a lot of detail on this, but
18 is that -- what the Surgeon General said there, is that
19 essentially what you all concluded from the literature?

20 A. Yes.

21 Q. Now, by basing -- by understanding peer pressure may be the
22 single most important factor that would cause an underaged young
23 person to smoke, did Philip Morris try to focus on that risk
24 factor as you designed that this first group of TV commercials
25 directed at the tweens?

1 A. Yes.

2 Q. And I'm going to show you -- could I show the witness J-DEM
3 040201? It's tab 7, Jamie.

4 And what I've handed you, Dr. Levy, and I'll get up on
5 the screen here in a second, is basically some -- a chart that
6 sets forth some concepts that are communicated in Philip
7 Morris's youth smoking prevention TV ads. And I'll get it up on
8 the screen here in a second. I'll put it on the Elmo.

9 I've tried to put on one chart here. Dr. Levy does
10 this chart accurately set forth essentially some of the major
11 concepts communicated in the Philip Morris's youth smoking
12 prevention TV ads?

13 A. The first four are concepts. The last one is the voice that
14 we chose to use in the commercials.

15 Q. Okay. Now, do some of these relate directly or indirectly
16 to peer influence?

17 A. The first one certainly does. I think the fourth one can,
18 in a way, in terms of trying to look cool and seeing that it
19 really backfires.

20 Q. Okay. Now, let me ask you this question, Doctor.

21 Why did Philip Morris -- well, you told us why you
22 picked the tween group, the 10 to 14s.

23 Why did Philip Morris then not include -- I think
24 Mr. Wise asked you this question or testimony yesterday. Why
25 did Philip Morris in its commercials, TV commercials, not target

1 15 to 17-year-olds?

2 A. It was our judgment that that would require different
3 creative, number one. And so we chose to start with the tweens.

4 Shortly after we were developing and running our ads,
5 the American Legacy Foundation developed their Truth Campaign
6 and from my reading of their website it was clear to me, anyway,
7 that they were targeting the older teens.

8 So it was my feeling that our focus on the young, their
9 focus on the older, the 15 to 17-year-olds, we kind of had
10 coverage where we needed to have coverage.

11 THE COURT: Did you ever talk to the people at the
12 American Legacy Foundation and try to coordinate in any way your
13 respective activities?

14 THE WITNESS: Yes, Your Honor.

15 THE COURT: And was that not productive?

16 THE WITNESS: I'd say that's a fair statement.

17 THE COURT: Go ahead, Mr. Webb.

18 MR. WEBB: Your Honor, I'll come back to that topic.
19 There's some other events that occurred, and if I don't cover
20 everything on your mind, you can ask her more questions, but
21 that topic comes up later, the interaction between those two
22 groups.

23 BY MR. WEBB:

24 Q. Now, Doctor -- in fact, let me just try to get down and get
25 through this. I'm going to show the witness J-DEM 40196, which

1 is tab 8, Jamie.

2 And I believe, Dr. Levy, what this is, is a chart of
3 the TV -- is this a chart of all of the YSP teen tween, teen TV
4 advertisements that Philip Morris eventually produced and aired
5 and actually got on the air?

6 A. It's -- it seems to be the list of all the ones that were
7 developed and on air by the time I left. Something may have
8 happened after I left that I'm not aware of.

9 Q. That's fair.

10 In fact, Doctor, just so we are clear here, I take
11 it -- I'm showing you charts that you have not seen before by
12 and large; is that correct?

13 A. That's correct.

14 Q. And because we can't talk to each other. So if I make a
15 mistake, you tell me or tell the court. Okay?

16 So, now there's 14 of those ads that are listed there.
17 It's a nice concise chart, but is it fair to say, does it take
18 quite a bit of work from start to finish to develop an ad and
19 eventually get it aired?

20 A. Yes.

21 Q. I want to walk through a little bit with that. Let me start
22 with, did Philip Morris select an ad agency and, if so, how did
23 you go about it?

24 A. We started with two ad agencies developing commercials for
25 10 to 14-year-olds, and, in fact, they developed concepts and we

1 qualitatively tested the concepts.

2 We shot the film, edited the film, created potential
3 ads called rough cuts, tested those rough cuts in our
4 quantitative -- well, in qualitative and then our quantitative
5 communication tests.

6 And based on the results from those tests we decided to
7 not run any ads developed by one of the agencies, and run -- I'm
8 going to say -- 8 of the 9 developed by the other agency.

9 Q. Okay. Now, at least based on -- looking at this chart and
10 your own recollection. During approximately what time frame did
11 Philip Morris air the tween ads, as best you can remember?

12 A. We went on air in December of '98, and I think I testified
13 yesterday that it's my understanding that the ads -- some ads
14 continued running until mid-2002.

15 Q. And you left the company and retired in -- was it March of
16 2002?

17 A. Well, I left the company in March 2002.

18 Q. And left the company at that time. Okay.

19 Now, this TV advertisement, was this a nationwide
20 campaign?

21 A. Yes.

22 Q. And what type of TV stations or cable stations did Philip
23 Morris select to run these on?

24 A. The choice really starts with what shows you want to be on
25 in terms of reaching your audience.

1 And then depending on what shows, that rolls up into
2 what cable or pay -- not pay, sorry -- cable or -- I'm missing
3 the word -- but like NBC and CBS and stations like that. So
4 basically, at the end of the day we ended up being on virtually
5 every station because they had shows that reached tweens.
6 Q. Now, I think it's probably fair to say TV advertising is not
7 particularly cheap or inexpensive, is it?
8 A. No. It's pretty -- pretty expensive.
9 Q. I don't know that you have the details in your mind now this
10 many years later. Can you tell the court, of that hundred
11 million dollar annual budget that you received from the company,
12 how much of that, at least in the early years, was spent on the
13 TV tween commercials if you remember, approximately?
14 A. My recall for '99 was -- this is kind of big chunks. Let's
15 say we had a budget of a hundred million, it may have ended up
16 being a little more. We spent maybe 10 million on programs in
17 '99; maybe, I don't know, 8 million or so on research; and the
18 remainder would have been on television advertising.
19 Q. Now, as the years went by, did that balance change a little
20 bit?
21 A. It did, by design. My plan all along was, once we could
22 start developing relationships with youth-serving organizations,
23 we would fund our support of their programs by taking money out
24 of the advertising.
25 Q. Did that happen?

1 A. Yes.

2 Q. Okay. Now, I want to talk a little bit about -- I take it
3 that before -- at some point you had to get some -- strike the
4 question.

5 Did you read certain literature at the time that
6 influenced how you and others at Philip Morris ultimately
7 decided to design this first group of commercials?

8 A. I think I testified yesterday about probably the most
9 influential literature was either, what I found on the ONDCP
10 website or literature that I read as a result, that they
11 referenced on that website that read as a result.

12 But after that, then we started doing our own
13 qualitative research to verify what we thought we were learning
14 from the literature.

15 Q. Now, at some point did you come across an author that has
16 written in this field by the name of Dr. Connie Pechmann?

17 A. Yes.

18 Q. Can you tell the court who she is?

19 A. She is a Professor at University of California. I think
20 it's Irvine.

21 Q. And at some point did you find the literature that she had
22 written on this topic to be at least helpful to you as you were
23 trying to design these commercials?

24 A. She -- yes, she had written a book chapter basically
25 discussing a number of issues around youth smoking prevention

1 advertising.

2 What I found particularly helpful in terms of designing
3 ads was the part at the end of her chapter where she talked
4 about conclusions she and others had reached based on
5 qualitative research that they had done on what teen
6 advertisement should look like.

7 Q. I'm going to show that to you.

8 Could I show the witness JE 039717? It's tab 11,
9 Jamie. I think this is the chapter you're referring to or you
10 can tell me if it is, Dr. Levy.

11 Is that the chapter authored by Dr. Pechmann that you
12 were just recounting to the court?

13 A. Yes.

14 Q. And as far as -- you mentioned that Dr. Pechmann, in this
15 chapter, discusses some qualitative testing. Is that
16 summarized -- I think it's on page 211.

17 A. I think it starts on 211 and spills over to 212.

18 Q. Okay. I'm going to go through this just briefly for the
19 court, but I've highlighted certain sections there.

20 But I'm just going to let you explain to the court,
21 what concepts that Dr. Pechmann talked about in this chapter did
22 you and others at Philip Morris eventually at least try out in
23 some of your TV commercials?

24 You can -- I know you haven't seen this for awhile. If
25 you want to read it and just summarize what concepts you see

1 that she -- that you later implemented in one fashion or
2 another.

3 A. All right. Almost all of our ads talked about smoking being
4 non-normative behavior; that is, most kids don't smoke.

5 We hit upon the issue of addiction, not in a direct
6 way, but a bit in an indirect way, talking about the fact that
7 it's hard to quit smoking.

8 In terms of youth making their own decisions, we tried
9 to stress and give credit for the fact that kids can make good
10 decisions, and that was a major theme in several of our ads. We
11 got that idea not only from this write-up but also from work
12 that the CDC had done.

13 Maybe that's also -- they referenced the CDC here, so
14 maybe they are talking about the same work that I'm talking
15 about.

16 At this point she says, "It's unclear whether ads that
17 attack the tobacco industry dissuade young people." I have to
18 tell you I think she concludes in a later publication that those
19 ads can be effective.

20 Q. That's fine. Go to the next page.

21 A. She talks about not trying to glorify nonsmokers and so we
22 tried to not do that, and we didn't show smoking. I think some
23 place she says: "Don't show smoking."

24 She also says, "Don't focus on the long-term health
25 effects." And that's really just knowing kids and the way they

1 are in terms of thinking they are immortal and they think if
2 they start smoking they can figure out they can quit and so it's
3 not going to be a big deal. So we didn't focus on long-term
4 health effects.

5 I guess that's about it, unless I missed something.

6 Q. That's fine.

7 A. And then she talks about the voice. She says, "Don't talk
8 over kids' heads or talk down to them." And so we tried not to
9 do that as well.

10 Q. Okay. Now, let me go back to the chart of the tween ads.

11 Jamie, it's tab 8. 40196.

12 When you have an ad agency working with you, as you
13 explained that Philip Morris did, as you're trying to design
14 these ads, did Philip Morris do certain testing to see if the
15 ads would be effective in trying to communicate your basic
16 message of: Think, don't smoke?

17 A. We did. We did that in the early stages when we were still
18 working with concepts because we didn't want to shoot film that
19 the concept board would suggest wouldn't be effective.

20 So once we had a rough cut -- and basically a rough cut
21 is an edit of film that you are suggesting to yourself, Okay,
22 the commercial might look like this. So when I use that term
23 that's what I mean.

24 Once we had a rough cut that we thought faithfully
25 represented what we were trying to do, we would do qualitative

1 research amongst kids.

2 I'm pretty sure we also talked to the kids parents to
3 get their input on what they thought about the ads. And then we
4 would, assuming that still looked good -- and if it didn't we
5 would make modifications and go back. So it's an iterative
6 process -- then we would do our quantitative communication test
7 to convince ourselves that -- of a few things.

8 One, that the ad clearly communicated that kids
9 shouldn't smoke.

10 That it communicated that not smoking is the right
11 decision to make.

12 That it had the ability to persuade. And we measured
13 that by asking the kids: If you had a friend who was thinking
14 about smoking, to what extent do you think this might influence
15 their decision and make them not smoke?

16 And finally, we looked at likability, because we were
17 convinced that if they didn't like the ad, the way kids are,
18 that they would hit the remote and be on to the next show and so
19 they would miss it totally.

20 Q. Now, you mentioned two types of testing. I think
21 qualitative and quantitative testing. Let me make sure it's
22 clear.

23 When you say qualitative testing, can you describe what
24 that is for the court?

25 A. Generally when people use that term -- and certainly when I

1 use that term -- it can refer to either focus groups or it can
2 refer to individual interviews. In both cases what you're
3 trying to do is get an initial feel for something, develop
4 hypotheses.

5 Focus groups and other qualitative work are not meant
6 to be generalize-able to everyone in the, you know, in the
7 public domain. They are meant to give you ideas, and that's why
8 you have to follow qualitative with quantitative testing that.

9 In our case the qualitative testing was conducted in
10 several -- and I don't remember how many markets around the
11 country, but it was enough markets that we felt like it would be
12 representative of the kids' and parents' reactions that we were
13 trying to reach.

14 Q. And let's talk about quantitative testing just for a moment.
15 What is that?

16 A. Quantitative testing, as the name implies, first of all,
17 says the sample size is large.

18 And generally the assumption is -- and it's certainly
19 what we did -- is you try to collect the data from a number of
20 locations around the country because not everyone is alike.

21 And you also make an effort to minimize. If what
22 you're trying to do is get individual kids' reactions, you're
23 trying to minimize the influence of other kids at that point on
24 the kids' opinion.

25 So in focus groups kids can influence each other

1 very -- and they do influence each other, and the moderator can
2 influence what you hear.

3 So in a quantitative test that we would run, we're
4 trying to get individual kids' and individual parent's reaction
5 to the commercial, and we are having market research field
6 services collect the data so that we are not in a position where
7 we might influence what the kids say.

8 Q. Now, as I'm listening to you, Dr. Levy, that qualitative
9 testing, which you said is -- I take it that's more interactive
10 where you have a moderator and you're actually talking to kids
11 or their parents. Is that fair to say?

12 A. And focus groups, that's true.

13 Q. And the number of people that you're actually testing is
14 relatively small?

15 A. It -- in any one focus group, depending on how you set it
16 up, usually it would be, if it's a mini group it might be three
17 kids; if it's a regular focus group it might be six or eight.
18 You could do focus groups all over the country multiple times
19 and get the sample size up, but that doesn't make it a
20 quantitative test.

21 Q. I understand. Now the quantitative testing, is that done
22 with a much larger sample?

23 A. Yes.

24 Q. Just give the court -- on the commercials that are on this
25 chart, TV commercials, the average quantitative test where

1 you're trying to test whether the message is being communicated,
2 how many kids are you testing?

3 A. As I recall, 300 kids 10 to 14.

4 We, after a meeting at the CDC, we added kids 15 to 17
5 and I think it was another 100, maybe 150 of them.

6 And then for parents, if I'm remembering, it was
7 something like 150 parents. That's per ad. So each 300 kids
8 only viewed one of these ads.

9 Q. With the quantitative testing, what is it done? How is it
10 basically carried out?

11 A. We would contract with an organization that had access to
12 market research field services. If you've been in a shopping
13 mall you've seen people with clipboards and they are
14 intercepting folks that are walking around the mall or sometimes
15 they have lists of names. Generally I don't think we ask them
16 to work from lists for the quantitative. We asked them to do
17 mall intercept recruitment.

18 Q. That's a standard technique to do quantitative testing in
19 consumer research?

20 A. It's pretty standard. Certainly the standard that I was
21 familiar with.

22 Q. Now, all of this testing you're doing, what are you trying
23 to learn at Philip Morris?

24 A. Well, we are trying to learn whether the ad communicates
25 what we want to communicate, whether it is persuasive to the

1 kids, and whether they like the ad. And I mean, this chart
2 doesn't have all the ads we went through rough-cut testing on.
3 We didn't necessarily make it every time.

4 Q. I'm going to show you some later exhibits, but there's a
5 number of commercials that were in process but you missed and
6 decided not to air. Is that fair to say?

7 A. In the first group that we started airing early -- late '98,
8 early in '99, there was one in particular that we just basically
9 said we can't run it.

10 Q. Okay. Now, to show the court just how much testing you were
11 doing in those early days to see if your commercials were
12 working, if they would communicate, let's just take -- I'll just
13 take -- I'll just pick one, Being There or any one of those.

14 At different points you described that there was
15 qualitative testing done in what I call it, the concept
16 development stage. Is that right?

17 A. Yes.

18 Q. Then what's the next test that would probably be done after
19 that?

20 A. Assuming that the qualitative looked positive and you didn't
21 need to do further refinement of the rough cut, then we would go
22 to the quantitative testing.

23 Q. Now the qualitative testing would be done at different
24 regions across the country? If you remember.

25 A. Not usually.

1 Q. Okay.

2 A. Not usually. We would do that closer to New York.

3 Q. Okay. And then the next thing though, if you did, would be
4 quantitative testing?

5 A. That's correct.

6 Q. And then how much quantitative testing do you do? One test,
7 two tests, three tests? What's normally done?

8 A. On any one commercial?

9 Q. Yes.

10 A. If the quantitative results supported the notion that this
11 ad clearly communicated that kids shouldn't smoke and it was the
12 right decision, et cetera, then if I'm recalling correctly, that
13 was it.

14 Q. Now, did you ever do any testing after the commercial was
15 actually in the marketplace, on the air?

16 A. We did ad awareness tracking.

17 Q. What's that?

18 A. Ad awareness tracking is basically once the commercial is on
19 air -- what you're trying to learn at that point is, is the ad
20 reaching the audience that you intended it to reach? And I
21 mean, that's the first and foremost thing.

22 And then you also would like to know, well, to what
23 extent are they seeing other ads that might be similar?

24 And we collected some attitudinal information at that
25 stage. I'm not going to tell you that I remember distinctly

1 everything that we did in those tracking studies, but the
2 takeaway in our ad tracking, I'm aware of at least two waves of
3 ad tracking that we did, was that awareness of our ads was
4 incredibly high, and that's both on an unaided and aided basis.
5 Certainly high enough to convince me that the media plan that we
6 had paid for was delivering these ad messages to the intended
7 audience.

8 Q. Now, by the way, if we were to compare -- the amount of
9 testing that Philip Morris did on these youth smoking prevention
10 commercials to see if they were communicating the right message,
11 how does that type of testing compare to the testing that Philip
12 Morris does when it develops brand ads for its cigarette brands?

13 A. Well, I'm not sure what they are doing today.

14 Q. I'm talking about only when you were there.

15 A. But when I was there, I don't recall testing every single
16 execution. We would test illustrative ads that would suggest
17 what the campaign was going to be like.

18 We might or might not, depending on who the brand
19 manager was, do quantitative testing. Sometimes we did
20 qualitative.

21 It really -- we followed the lead of the brand
22 management at Philip Morris in terms of what they felt they
23 needed to support their decision to either run an ad campaign or
24 not. In some cases we did a lot, some cases we did less.

25 Q. But as far as your youth smoking prevention ads, do I

1 understand what you're telling the court is that on every single
2 execution, every single ad, you did testing on each one?

3 A. That's correct.

4 Q. Now, I just want to show the court an example. I'm not
5 going to walk through much of this. But I'm going to show you
6 one quantitative testing document.

7 Could I show the witness JD 54638? It's tab 11A.

8 And I think I -- I'm going -- does that appear to be
9 some quantitative testing that was done on the tween ads?

10 A. It does.

11 Q. And I know you haven't seen these documents for years. I
12 just want to show the court some examples, so I'm going to put
13 up --

14 Jamie, could I put up Bates 4782?

15 I put on the screen -- I picked this out so you can
16 tell me what it is.

17 Well, the page I have on the screen, the top says,
18 "Amount commercial shows that not smoking is the right decision
19 to make." Can you explain to the court what we're looking at
20 there?

21 A. Let me just orient myself to the chart for a second.

22 What this appears to be is actually a comparison of a
23 number of different commercials that we had either run or were
24 thinking about running, because I don't believe Maze ever ran,
25 and I don't recall whether Self Expression ran. It doesn't ring

1 a bell with me.

2 But, okay, so what are we showing here, we asked kids a
3 number of different questions in the test. The first question
4 we asked them is what we would call an open end. That's not
5 depicted here. And that is: What's the main idea that the
6 makers of this commercial are trying to convey to you?

7 And that's in order to get, in the kids' own words what
8 they think the idea is before we start asking them a series of
9 questions, where we ask them to use a five point scale from --
10 and I don't remember whether one -- I think -- well, actually,
11 it turned out to be a four point scale. Sorry. I'm
12 misremembering. A four point scale where they can either say
13 the degree to which this commercial shows that not smoking is
14 the right decision to make and they can say, "a lot," they can
15 say "somewhat," they can say "very little" or "not at all." And
16 those are options that we give them.

17 And so, for example, in Follow The Leader we ask kids
18 age 10 to 14, that's shown up at the top of the header, kids 10
19 to 14 are asked: To what extent does this commercial show that
20 not smoking is the right decision to make? And 69 percent of
21 the kids said "A lot" for Follow the Leader, down to 52 percent
22 for Maze, and 51 percent for Parking Lot.

23 Q. Now, as someone at Philip Morris deciding whether you're
24 going to put a commercial on the air, what kind of numbers are
25 you looking to find?

1 A. Well, obviously higher is better. And as we gained more
2 experience we had a better feel for what was good and what was
3 bad.

4 Like I said, we never aired Maze. We did air Parking
5 Lot for a while. And I'm going to have to tell you that I
6 believe that it must have scored better on some of the other
7 questions or we wouldn't have put it on air.

8 But clearly: Follow the Leader, My Reasons, Being
9 Different, Karate Girl, on this question test better than the
10 ones at the bottom.

11 And it doesn't say so on this chart, but my
12 recollection is with our sample size, that you would need about
13 a 10 point difference to be significant, statistically
14 significant, and so anything that is 60 and above would be --
15 all of those are statistically equivalent.

16 Q. Now, as far as trying to figure out whether the commercial
17 is communicating, in this case, the right decision to make not
18 to smoke, what -- what categories are you looking at to see if,
19 by and large, you're getting your point across?

20 A. We generally would look at top box.

21 Q. What does that mean?

22 A. A lot.

23 Q. And what about the second box?

24 A. You could. Some people do. I like top box.

25 Q. That's fine. Let me go to another page.

1 Jamie, could I go to 4792, please? I just picked this
2 out.

3 What's this question and what's the significance of
4 this question?

5 A. This question is a measure of persuasion. It's actually
6 another measure of persuasion in my mind. The first one that we
7 looked at regarding right decision has an element of persuasion
8 in it.

9 This is a way to get kids to think about: Well, do you
10 think this ad would influence a friend? And we chose to do that
11 because we thought it would be easier for the child to think
12 about a friend who might be considering smoking, particularly
13 because most of the kids that we would query here would not have
14 tried cigarettes necessarily.

15 So, because we are trying to prevent smoking, it
16 wouldn't make a lot of sense to ask them if their thinking -- we
17 don't want to plant that seed in their mind -- but if they had a
18 friend who was thinking of it, to what extent would it convince
19 them.

20 And you can see, first of all, that the top box numbers
21 are lower here than they were in the other question. It shows
22 in my mind the difficulty of trying to get anyone to tell you
23 that advertising alone is changing anybody's mind. But it was a
24 way to compare one commercial to another on persuasion.

25 These are not bad numbers. But I've always wished that

1 they would be higher.

2 Q. Let me ask you this, Doctor. If you could put a commercial
3 on the air -- well, strike the question.

4 Do I understand that this is kind of a surrogate
5 question then?

6 You don't ask a kid himself or herself whether it would
7 affect their decision because you don't want them to even think
8 that they should be thinking about smoking.

9 A. Right.

10 Q. But is this kind of a surrogate question to see what impact
11 you would have on getting a kid not to smoke?

12 A. Yes.

13 Q. If you could get 38, 37, 35, percent of kids that were
14 smoking, that would start thinking of not smoking would that be
15 successful?

16 A. Absolutely. I'd be very happy. But I'd like it to be twice
17 that.

18 Q. I understand. Let me show you another exhibit that I think
19 is quantitative testing and you can tell me.

20 Can I show the witness JD 50578, tab 12?

21 And just, first of all, am I correct? This is another
22 Philip Morris' document that at least shows a summary of some of
23 the quantitative testing that was being done on the tween
24 commercials, this says as of January 2002?

25 A. I think what this is -- you may have said exactly -- it's

1 just a summary comparing all the tests that we've run, save a
2 few, like some of the earlier failures I don't believe are in
3 here. In fact, it doesn't look like -- yeah, none of the early
4 failures are on this chart.

5 Q. I'm going to show you some pages out of here. Could I put
6 Bates 9614 up on the screen? I just put this on the screen.

7 Again, this shows a number of commercials in the same
8 type of numbers, I guess that you showed getting. Is that
9 correct?

10 A. Yes.

11 Q. And --

12 A. Except this is amongst children 13 to 14, rather than 10 to
13 14.

14 Q. Right. Your numbers look a little higher here.

15 A. No. Actually, they look -- I'm going to say they look lower
16 without comparing them side by side.

17 Typically what we found was that the 13 to 14-year-olds
18 were a little tougher audience than the 10, 11 and 12-year-olds.
19 But if you're trying to say -- this is another kind of stacking
20 and comparing. That's exactly what this is. And also on here
21 are some ads that we didn't create.

22 Q. Okay. Let me show you -- well, who are the ones you did not
23 create?

24 A. Animated Wrapping, Monica, the Smoke You Choke, Basketball,
25 were all part of the CDC Media Resource Library.

1 Q. CDC had produced those ads?

2 A. I think the various states had produced those ads. The CDC
3 had collected them and put them on a reel that we took advantage
4 of using in our testing to compare us with other ads.

5 Q. Okay.

6 A. Now I'm confused about these 15 seconds. That MR 15, that's
7 a 15-second original lift. I'm not sure what that is. It may
8 have been something that was done later and I'm just not
9 remembering it.

10 Mind and Body was definitely one of ours. Follow the
11 Leader was ours. I Stand Out was actually a Native American ad.
12 Self Expression was ours. Who You Are was ours. Mind and Body,
13 Maze 2 was ours. I don't think we ever put it on air.
14 Barbershop Boys, I think was a 15-second one that we did. Ways
15 to Say No was ours. Karate Girl was ours. I think Mixed Kids
16 also was a 15-second version of one of ours. I don't remember
17 which one. My Reasons was ours. That was the one we ran on the
18 Super Bowl, I'm thinking 2001.

19 Q. Okay.

20 A. And Kids on the Beach is not ours. Kids Rapping is not
21 ours. Do It For Yourself is.

22 So, it's kind of a -- we're not at the bottom yet, are
23 we? Maybe there's another page, because there were other ads.

24 Anyway, the gist of what I'm trying to say is that some
25 of the ads that we did were better than others. Some of our ads

1 were not as good as ones on the media resource tape. And some
2 were better.

3 Q. That's what I was going to ask.

4 So I mean, I take it -- which I didn't know until right
5 now as I'm listening -- you are trying to see how your ads are
6 compared to other people's ads.

7 A. Yes.

8 Q. Why were you doing that?

9 A. Well, we were new at this and so it made sense to say: How
10 are we doing?

11 Q. And how did you decide you were doing?

12 A. I thought we were doing pretty well. I thought we could do
13 better.

14 Q. Now, let me go to another page. Bates 9713, Jamie.

15 I just picked this out because it's another -- you have
16 different types of questions in the quantitative research. Is
17 that fair to say?

18 A. Yes.

19 Q. And this is the degree to which a commercial is easy to
20 remember?

21 A. Yes.

22 Q. How many different questions are you asking on these
23 quantitative tests, if you remember?

24 A. I don't remember the number. It was as many as we could ask
25 in our judgment without losing the kids.

1 Q. That's fair. Let me call back the list of commercials.

2 J-DEM -- tab 8, J-DEM 40196.

3 I put the list back up on the screen, Dr. Levy, because
4 I want to play three commercials for the court. We've been
5 talking about how you designed them, how you tested them, and
6 I'm going to show three to the court. The ones I picked to
7 show, I believe --

8 MR. WISE: Your Honor, I'm going object to the
9 commercials being shown. The written direct dealt in no way
10 with the specific commercials. The questions went to testing.
11 They went to the age focus. It was not -- this is a tangent now
12 to go into specific commercials.

13 If defendants want to call Dr. Levy in their case to
14 show commercials, that's fine, but the scope of our written
15 direct did not go to specific commercials that Philip Morris
16 chose to run or develop. It was much more targeted than that.
17 And this is far outside the scope.

18 I mean, as an example, I think it was -- I held back on
19 objecting, as an example, for some of the testing, but if we're
20 going to go to the actual commercials themselves, that's nowhere
21 in the written direct.

22 THE COURT: Very briefly, Mr. Webb.

23 MR. WEBB: Very briefly.

24 The scope of the direct clearly opens up the nature of
25 these commercials. They attack the qualifications. They

1 actually introduced studies that showed our commercials. ALF
2 said our commercials were not effective.

3 I have a right to show Your Honor what we did. Okay?
4 That's all I'm doing. I'm not going to show all these. These
5 each take, I think -- how long? I think they're --

6 THE WITNESS: 30 seconds.

7 THE COURT: Objection is overruled.

8 BY MR. WEBB:

9 Q. The ones I picked out -- and I picked out -- being different
10 because it was your first one. Okay?

11 I also picked out My Reasons because you ran that on
12 the Super Bowl. I think other witnesses said that's pretty big
13 advertising audience.

14 A. The biggest.

15 THE COURT: Well, we all know that after last year.

16 MR. WEBB: We do know that.

17 BY MR. WEBB:

18 Q. And, by the way, since I just watched the Super Bowl, it
19 looks like these companies are all designing these commercials
20 especially for the -- is this designed especially for the Super
21 Bowl or do you run it elsewhere?

22 A. No. We would debut it on the Super Bowl. For example, My
23 Reasons was debuted on the Super Bowl and then we would run
24 it -- you've got a chart here saying how long we ran it.

25 Q. You're right.

1 A. So it ran into 2002.

2 Q. Okay. And then I picked Chimp because, as I understand it,
3 that was actually designed for the younger end of the age group.
4 Is that correct?

5 A. Two things. It was -- well, we found that it was appealing
6 to the younger kids more so than the older kids, but we also --
7 both Fish and Chimp directly went against the How silly you look
8 objective.

9 MR. WEBB: Now, for the record, Your Honor, I'm going
10 to now play those three commercials and they actually are in the
11 record on a CD-ROM that's marked as JD 41561.

12 Jamie, can you run those three commercials from that
13 exhibit?

14 (Video being shown.)

15 Q. That was Being Different?

16 A. Yes.

17 Q. Okay?

18 (Video being shown.)

19 Q. And the last one I think was Chimp.

20 That was My reasons?

21 A. Yes.

22 (Video being shown.)

23 Q. Now, I picked those three out, Dr. Levy -- and I don't
24 intend -- are those fairly typical of the types of messages that
25 you were trying to communicate in your youth smoking prevention

1 tween ads?

2 A. Yes.

3 Q. Now, as far as the campaign to effect tweens, let me briefly
4 talk about. Beyond TV, did you also do print ads in magazines?

5 A. Yes, we did.

6 Q. How did that come about, and what kind of magazines did you
7 run the print ads in?

8 A. Well, it came about because we said: All right, we need to
9 reinforce the message in a different medium, and print seemed
10 like a reasonable medium. We developed some print ads using
11 very similar methodologies to what I described for the
12 television ads and put them in teen-oriented magazines.

13 Q. Let me show the witness JD 50804. It's tab 27 E, Jamie.

14 And can you describe for the court what --

15 THE COURT: Somebody's cell phone or?

16 MR. WEBB: No. It was a mistake from Jamie, I think.

17 THE COURT: All right.

18 MR. WEBB: No. I'm not putting you up, Jamie. It's my
19 mistake.

20 (Laughter)

21 BY MR. WEBB:

22 Q. Dr. Levy, just so -- the document that I just handed you
23 that's marked as JD 05050804, what is that document?

24 A. It is a creative history of Philip Morris youth smoking
25 prevention advertising that was created actually after I had

1 left the company, but I have seen this document as part of my
2 preparation for appearing here today.

3 MR. WISE: Your Honor, I'm going to object if this
4 document is created after Dr. Levy's tenure at the company. The
5 written direct was limited in scope to her work at Philip
6 Morris. This goes to work that's occurred since that time. I
7 think that's not appropriate for this witness.

8 MR. WEBB: Your Honor --

9 THE COURT: Does it go to work created since she left
10 or was this document created after she left, but does it relate
11 to work done while she was there?

12 MR. WEBB: I'm going -- let me ask a foundation
13 question.

14 THE COURT: All right.

15 BY MR. WEBB:

16 Q. I have gone through this. In that book you have in front of
17 you are some print ads and I wanted to show the court some print
18 ads.

19 Were there a number of print ads designed and developed
20 while you were there?

21 A. Everything created in this document was created on my watch.

22 Q. There you go?

23 THE COURT: The objection is overruled.

24 BY MR. WEBB:

25 Q. And so I'm going to show you some print ads, or at least

1 what I think are print ads, just so we can show the court. If
2 we can to the page that's Bates stamped 7148.

3 And is this an example of print ads? Are these print
4 ads for tweens?

5 A. No. That's a print ad for parents.

6 Q. Okay. Then that's my mistake.

7 Are there print ads in there for tweens, if you can
8 find them for me, because you know these a lot better than I do.

9 What's the Bates stamp number? Can you read that,
10 Dr. Levy?

11 A. It ends with 7191. Do you need the whole thing?

12 MR. WEBB: Jamie, can you call up 7191.

13 THE WITNESS: I can give you the whole number if you
14 need it?

15 MR. WEBB: In fact, Jamie, call up 7192.

16 BY MR. WEBB:

17 Q. Do I have a tween ad on the screen now?

18 A. Yes.

19 Q. What are you trying to communicate there?

20 A. You might need to blow it up just a little bit.

21 Q. Okay. We will.

22 MR. WEBB: Jamie, can you...

23 THE WITNESS: Maybe that won't work. Let me just tell
24 you the gist of the idea here.

25 This is a print ad developed for girls 10 to 14.

1 Basically, showing a girl sitting on one of those exercise
2 things, I think, those big balls that they exercise on, and
3 basically said, "Okay. What are you going to wear tonight?"
4 And it talks about all the things, the sandals -- I think it
5 says jeans and what kind of T-shirt, et cetera, things that
6 little girls think about and talk about to each other.

7 And then at the bottom it says, "Cigarettes. No
8 thanks." So basically, hey, you know, it's not part of what you
9 do in terms of presenting yourself to your friends and to other
10 people.

11 BY MR. WEBB:

12 Q. Okay. Could I go, Jamie, to the next one, I think is 7193?

13 Is this another of the tween ads that were put in
14 magazines?

15 A. I think it is. I don't remember this one, but I think it
16 is.

17 Q. Okay. I'm going to go to 7194. "Take control. Think.
18 Don't smoke."

19 A. Yes. That's an ad for -- some of these were also images
20 that we might have used on book covers, but I think this is a
21 print ad for young boys.

22 Q. Okay. Now, what kind of magazines did you put these ads in?

23 A. Magazines that kids that are tweens read, look at.

24 Q. How do you know that?

25 A. The people that buy our media know that.

1 Q. And same thing with your TV commercials? Where do you
2 decide to run your TV commercials?

3 A. The people that buy the media have access to all the Nielsen
4 data and other data to let you know what shows kids watch.

5 Q. Let me show you J-DEM 40202 which is tab 16, Jamie.

6 And does this chart show a representation of television
7 shows where YSP youth-directed commercials have aired? If you
8 remember.

9 A. I'm pretty sure. Well, I recognize Sabrina the Teenage
10 Witch. I'm not a big watcher of these shows, so I think so.

11 Q. That's fair. Now, as far as your print campaign was
12 concerned, did Philip Morris also produce stickers -- strike the
13 question.

14 Do kids like stickers?

15 A. Kids love stickers is what we found out. They want to stick
16 them on their books. They want to stick them on their mirror.
17 They want to stick them everywhere. Their locker at school,
18 everywhere.

19 Q. Did Philip Morris design sticker sheets that could be used
20 by kids to put stickers wherever kids put stickers?

21 A. Yes, we did.

22 Q. Just for the record, Dr. Levy, I'm going to show you what
23 has been marked JD 54701 and 54702.

24 MR. WISE: Objection, Your Honor. Again, I mean,
25 advertising was talked about on the direct and television was

1 referred to, but now we are on stickers.

2 I mean, this was nowhere in the written direct. The
3 written direct talked about their testing. It talked about
4 their target markets. It wasn't the entire landscape of all of
5 their activities.

6 It was focused by design. This is the United States'
7 witness and if defendants want to explore all the other aspects
8 of Philip Morris's Youth Smoking Prevention Program that are
9 outside of the scope of the direct, they certainly have the
10 ability to do that with their own witnesses.

11 THE COURT: Well, they do, and you certainly -- not
12 "and" -- but you certainly focused on the inadequacy of the
13 program, on the lack of qualifications of the witness, lack of
14 preparation for that particular job, and suggested that the
15 program itself was an ineffective one.

16 Quite frankly, one way or other I'm going to hear this
17 testimony, whether it's in your case or whether it's in Philip
18 Morris's case.

19 I don't -- Number one, it is within the scope of the
20 direct, and number two, as a practical matter, it's going to
21 come in one way or the other.

22 So the objection is overruled.

23 BY MR. WEBB:

24 Q. Can you tell -- the two exhibits I just handed to you, could
25 you tell the court what they are?

1 A. These are.

2 THE COURT: However, I should say one thing -- excuse
3 me, Dr. Levy. That doesn't mean, Mr. Webb, you can put on your
4 whole case now.

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

6 THE COURT: I just want to make that clear.

7 MR. WEBB: I actually do not intend to do that. In
8 fact, I intend to stay within what I view as the scope of the
9 direct, and if I'm wrong, you tell me and I'll move on.

10 A. These are inserts that were put into kid magazines that have
11 stickers on them that you can peel off. And I verified that, in
12 fact, if someone wanted to they could peel one off -- I'm not
13 going to do that. And basically they have messages that tested
14 well with kids and that we thought kids would like to put on
15 lockers and whatnot, so --

16 Q. That's fine. You can put those down.

17 Now, those -- strike the question.

18 I take it as far as what magazines to put them in, you
19 used media experts to tell you where to put those stickers?

20 A. Yes.

21 Q. Now, let me move on. As far as Philip Morris's
22 communications strategy to convince kids not to smoke
23 cigarettes, I believe, as the government pointed out yesterday,
24 at some point in time did you and the people you worked with in
25 the Youth Smoking Prevention Department decide to change the

1 focus from national advertising to kids to national advertising
2 for parents?

3 A. That decision -- the answer is yes.

4 Q. Okay. When did that -- and when did that decision occur, as
5 best as you can remember now?

6 A. Well, okay. We were running both kid and parent
7 advertising. Parent introduced in the mid-'99. The decision
8 essentially to phase out the kid advertising and ramp up and
9 focus exclusively on parents was made early in 2002.

10 Q. Now just tell the court, why did Philip Morris at that time
11 decide to change the focus of its TV commercials to get -- to
12 convince kids not to smoke?

13 A. The campaign that we had been running had been on air since
14 late '98, and we had the feeling that it was time to think about
15 changing the campaign. Most advertisers do this. It was time
16 to step back, refresh, what have you.

17 I think, also, we were incredibly happy with the parent
18 work that we were doing, the creative that we were doing, and no
19 one else was really doing parent work for youth smoking
20 prevention.

21 There was some parent work that was beginning to show
22 up, as I recall, from the ONDCP. So it just seemed like
23 another -- we've never tried to be duplicative. We always
24 wanted to be adding something rather than just duplicating
25 something.

1 Q. If we get up to the time of 2002, are there quite a few
2 organizations by that time that were focusing TV commercials on
3 kids to convince them not to smoke, more than just Philip
4 Morris?

5 A. Yes. I mean, ALF: American Legacy Foundation had a
6 national campaign.

7 The State of Mississippi, if I'm recalling, had
8 advertising as one of the things they were doing. Any number of
9 states. I think Arizona was running a media campaign.

10 I'm just not recalling all of the various state
11 entities that had media, but a number of them did. So, others
12 were picking that up and that seemed fine.

13 Q. I take it Philip Morris had no problem with other people
14 doing what you were doing?

15 A. Not at all.

16 Q. And I'll come back to that a little bit later.

17 So you decided to focus on parents because you thought
18 there was a bit of a void out there as far as no one really
19 focusing on parents. Is that fair to say?

20 A. Yes.

21 Q. Now, I don't intend to get too far into this, but just tell
22 the court was there a fair amount of literature out there that
23 suggested that parents could have a pretty big influence on
24 their kids as far as risk taking behavior decisions?

25 A. There was.

1 I think I mentioned yesterday the 2000 Surgeon
2 General's Report highlighted parental influence. But my reading
3 of suggested it, there was a major study that maybe didn't
4 officially get issued until 2001. I'm pretty sure I got a
5 prepublication copy of it from CASA. I'm forgetting exactly
6 what CASA stands for, but it's affiliated with Columbia
7 University, highlighting the importance of what they call
8 hands-on parenting. There was an article by Bruce, I think it's
9 Simons Morton highlighting what he called authoritative
10 parenting.

11 There was a study in the late '80s, like it was '89,
12 highlighting the importance of the role that parents can play.

13 The ONDCP website that I had reviewed very early on
14 talked about the importance of a parent campaign.

15 I think that was where the first seed was planted in my
16 head. That was shortly after I got the job. So it was just a
17 matter of being able to ramp it up and get it done.

18 Q. Now, as far as the parent communication strategy, once you
19 decide to focus on that, did you have a tag line for that, for
20 parents?

21 A. I think the shorthand -- there may have been a longer one,
22 but the shorthand tag line was Talk, They'll Listen.

23 Q. And the general -- just so the court, the general theme or
24 message that you were trying to get across in your parent
25 communications was essentially what?

1 A. Remind parents that they do have an influence on their kids,
2 and talk to the kids about not smoking.

3 What we heard from parents in qualitative was they felt
4 like the kids weren't listening. Some of them were even kind of
5 walking away from their responsibility was the sense we had, and
6 we wanted to urge them to get back in there, get back in the
7 game with their kids, because that's what the literature
8 suggested they ought to do.

9 Q. Now, as far as -- did Philip Morris eventually develop a
10 nationwide TV campaign directed at parents?

11 A. We launched that in mid-'99.

12 Q. Now, in order to do that, did you consult with certain
13 experts to try to figure out what the best way to do it was?

14 A. We did. We did. But, again, the process was more than
15 reading literature and talking to experts. The process was also
16 talking to parents and then showing them concepts and seeing how
17 they reacted to the concepts. So it virtually mirrored what we
18 had done in the kid arena.

19 Q. And that's -- I don't want to go back through all of that,
20 but you hired an advertising agency, you did qualitative
21 testing, you did quantitative testing, you developed commercials
22 you thought would work and you put them on the air. Is that
23 fair to say?

24 A. Yes.

25 Q. By the way, did you test those parents ads just for parents

1 or did you test them with kids, if you remember?

2 A. We tested -- I'm remembering both parents and kids because
3 it was highly likely that the kids would see the ads, and so we
4 wanted to make sure that the kids understood what the message
5 was.

6 Q. Now I'm going to show you, I think, a listing of the parent
7 ads.

8 Could I show the witness J-DEM 40197? It's tab 27A,
9 Jamie.

10 And Dr. Levy, I've handed you what, at least my
11 understanding is, are the TV -- the YSP parent TV
12 advertisements. To the best of your knowledge -- I know you've
13 been away a while -- and some of these ran after you've left; is
14 that correct?

15 A. Yes, it is.

16 Q. Some of them ran before you left. Is that fair to say?

17 A. Yes.

18 Q. At least the ones -- and I'll have others -- the ones that
19 ran before you left go down to where?

20 A. Number 8.

21 Q. Okay.

22 A. But I would add that some of the other ones were developed
23 on my watch; they just didn't go on air on my watch.

24 Q. That's fine. Do these ads also run on nationwide TV?

25 A. Yes.

1 Q. On cable and network?

2 A. Yes.

3 Q. And did Philip Morris find some way to, media plans, to
4 figure out what show to put these ads on?

5 A. Yes.

6 Q. What were you looking for?

7 A. Well, we wanted to reach the most parents that we could
8 possibly reach and that changed just a bit after we got into it
9 because we also wanted to, based on our learning from the
10 quantitative, we wanted to show these ads -- show these
11 commercials on shows that parent were likely to watch with their
12 kids.

13 Q. Okay. Now --

14 A. Kind of -- I think we called it dual audience shows.

15 Q. I want to show the court some examples of the parent ads
16 that were on your watch and so, Dr. Levy, I have picked Advice,
17 Listening, and I picked Reactions, because again that ran on the
18 Super Bowl. Do you see that?

19 A. Yes.

20 Q. And let's show for the record -- these are in the record
21 here on a CD-ROM that's marked JD 41561.

22 And I'm now, Dr. Levy, going to play these three
23 commercials, and my only question will be whether these are
24 fairly typical of what you were trying to communicate with the
25 parent ads.

1 Jamie, could I run those three commercials?

2 (Video being shown.)

3 Q. I take it that was Advice?

4 A. Yes.

5 (Video being shown.)

6 Q. That was Listening?

7 A. Yes.

8 (Video being shown.)

9 Q. Now, those are fairly typical of what you're trying to
10 communicate with your parent ads, Dr. Levy?

11 A. Yes.

12 Q. Now, again, did Philip Morris develop a print campaign to
13 also try to reach parents and convince them to talk to their
14 kids about not smoking?

15 A. Yes.

16 Q. Do you still have that creative -- that exhibit that has the
17 creative history there?

18 A. Yes.

19 Q. That's JD 050804, and it's tab 27E, Jamie.

20 And, Dr. Levy, I think if you go to the page that's
21 Bates stamped 7148, which I made a mistake a moment ago, is this
22 one of the parent ads?

23 A. Yes.

24 Q. What are you trying to communicate there?

25 A. Basically, one of the things that we heard from parents is

1 that like a little bit of advice about how to start a
2 conversation with their kids about not smoking.

3 And so we did that in our brochure to parents, but we
4 also took advantage of the opportunity with print ads to do
5 that.

6 So, basically, it's showing a father with the child,
7 and the conversation starter is what's shown in the little
8 balloon I would call it, even though it's not round, says "Help
9 me understand why some kids your age smoke cigarettes."

10 Q. Okay. Let me go to the next page, 7149. It says -- this is
11 another example -- Trying to communicate to parents to talk to
12 their kids about smoking, using a basketball format here.

13 A. Yeah. The message here is, Don't miss opportunities. Hey,
14 when you're shooting hoops, talk to your kid.

15 Q. And let me go to 7151, Bates 7151. Is this another parent
16 ad?

17 A. Same idea. Don't miss the opportunity to talk to your kid.

18 Q. And again, I take it you tried to find magazines -- are you
19 trying to find magazines that parents read or kids read?

20 A. Parent.

21 Q. And again -- I guess I'm looking at the bottom -- the tag
22 line generally appears, "Talk to your kids about not smoking.
23 They'll listen," appears at the bottom of that ad?

24 A. Yes.

25 Q. Dr. Levy, at some point in time did Philip Morris find out

1 that those commercials for 60 seconds or these kind of ads, did
2 sometime you find out parents wanted more detail about how to
3 talk to their kids?

4 A. Yeah. They were 30-second commercials.

5 Q. I'm sorry. Why don't you explain how that came about?

6 A. What really happened in the qualitative that we were doing
7 with parents, and they were hungry for information, and so we
8 thought we would develop a brochure and make that available to
9 parents.

10 And we had -- on one of the parent commercials I think
11 there was a static super at the end saying Call 1-800 whatever
12 if you want a brochure about not smoking. We also made it
13 available as a download on the website for Philip Morris.

14 Q. And when you found out that, when you decided you were going
15 to design a brochure -- I don't want to get into a lot of
16 detail -- but what did you do?

17 Did you go out and try to talk to experts, test? What
18 did you do?

19 A. We did a lot of different things, but the kind of essence of
20 what we did was we hired a firm that had some experience, an
21 expertise in publishing things for parents in terms of the
22 tonality and language to use with parents, and that was an
23 outfit called Beach Front Publishing.

24 And then we got input from child development and
25 parental guidance kind of experts, I guess you would call them,

1 a fellow called Dr. Charles Flatterer who -- I think he was at
2 the University of Maryland. He had developed a program that we
3 were actually supporting on parenting practices.

4 And we also got input from a Dr. Gallagher, who was at
5 the NYU Child Studies Center. I think maybe others as well, but
6 those are the two that come to mind.

7 Q. I'm going to show you what I believe, Dr. Levy, to be the
8 first parent brochure which I believe was developed when you
9 were there.

10 Can I show the witness JD 050790? It's tab 28, Jamie.

11 And, Dr. Levy, I've handed you what I've -- strike
12 that.

13 Is that the first parent brochure that was developed by
14 Philip Morris while you were still with the company?

15 A. Yes.

16 Q. And I'm going to walk through a little bit of this with the
17 court to see.

18 How long is it?

19 A. I'd have to count the pages. I'm not sure I see page
20 numbers on here. Sorry.

21 Q. It's a fairly long document?

22 A. Maybe 20 pages.

23 Q. Okay. Does this document go into quite a bit of detail to
24 tell parents how to go about talking to their kids?

25 A. Yes. The idea was to go into enough detail that the parents

1 would stay with us without going into search detail that we
2 would get over whim and.

3 Q. I'm going to show the court a little bit about the effort
4 you made. But, first of all, who was this distributed to after
5 you got it produced?

6 A. My recollection was that we did a mailing to a million
7 parents. I was reviewing my speech at the Triennial Conference
8 and I mentioned that we also had a brochure that we sent to
9 another -- or somehow got in the hands of another 2 million. So
10 I may be misrecalling, but I'm pretty sure it was a million
11 parents were sent this directly by us.

12 Q. What other ways could parents access this?

13 A. As I mentioned, they could download it from the Internet.

14 Q. Then I saw the 1-800 number on --

15 A. They could call. But presumably, you know, if they called
16 we would also tell them about the Internet.

17 Q. I see. Now I just want to -- let's just go to the third
18 page in.

19 Jamie, could I put that up on the screen? It's Bates
20 2454. Actually, Jamie, it's -- I think it's -- you've got the
21 original. That's it. I just want to show the court.

22 If I understand what you're saying here, Doctor, is
23 that you kind of divide this into three sections: Talk the
24 Talk, Kids' Eye View, and FYI. Is that what you were doing?

25 A. Yes.

1 Q. Just briefly explain what you're trying to do they are?

2 A. Talk the Talk is tips for the parents, subject matter,
3 starting the conversation, what have you.

4 Kids' Eye View is hearing what kids have to say about
5 this topic in terms of communicating with the parents.

6 And then the FYI page was for somebody who is still
7 wanting more information, we give them a number of different
8 references.

9 Q. Let me go to Talk the Talk, I think it's on page 4. Can you
10 find that, Dr. Levy, in the copy you have that?

11 A. Yes.

12 MR. WEBB: Jamie, can I get page 4, Talk the Talk?

13 Q. And I'm just going to -- can you scroll through this?

14 I don't want to spend a lot of time, but what kind of
15 topics are you trying to educate the parents about?

16 A. How do you start the conversation?

17 Q. Okay. Go to the next page.

18 How Do I Begin? Then you talked about: How do I bring
19 up not smoking? Do you try to provide some help there?

20 A. Yes.

21 Q. And if I go to the next page: One conversation is not
22 enough. Keep talking.

23 It's interesting. Now, you go down and try to talk
24 about -- is this a delicate issue about what do you do when
25 you're a smoker yourself?

1 A. We heard from smoking parents that they particularly needed
2 help because they weren't sure how to bring up the conversation
3 because they were smoking themselves.

4 Q. And do you try to advise them on how to deal with that?

5 A. We do.

6 Q. Okay. Now go to the next page, if I could.

7 Again, as far as tricky issues are concerned, do you
8 try to help parents? This is: What if my child has already
9 tried smoking? Do you try through with them how to approach
10 that?

11 A. Yes.

12 Q. And again, let me go to the second section on page 10,
13 Dr. Levy. If you go to page 10, do you see the Kids' Eye View?
14 Goes on for a few pages; is that correct?

15 A. Yes.

16 Q. What are you trying to say to kids here? I mean, looking at
17 it from a Kids' Eye View?

18 A. Basically, what do they have to say on the topic to help
19 parents understand what they might be hearing and ways to have
20 that conversation knowing what they may hear.

21 Q. Okay. Is there several pages devoted essentially to that?

22 A. Yes.

23 Q. Then if you go right to the end on page 14, the FYI, what is
24 that for?

25 A. I think I mentioned. That's if -- if the parents still

1 wants information, you want to give them an easy reference --

2 okay, where else do I go for information on this topic?

3 Q. By the way, did Philip Morris test this brochure in the same
4 type of ways you described earlier, to make sure that you were
5 effectively communicating the messages that you wanted to
6 communicate?

7 A. My recollection is that we did focus groups. I don't recall
8 doing quantitative testing --

9 Q. Okay.

10 A. -- with this brochure.

11 Q. Okay. Now, Dr. Levy, in talking about your communication
12 strategy, did Philip Morris try to reach out and interact with
13 members of the public health community to get input and feedback
14 on what you were trying to do?

15 A. Are you saying in general?

16 Q. In general.

17 A. Yes.

18 Q. Can you just -- I'm not going to get into a lot of detail.
19 Can you tell the court as you sit here now some of the people
20 from the public health community that you had meetings with, for
21 example, where you talked about your communication strategy so
22 you could at least try to get input from the public health
23 community?

24 A. We met with the people from the CDC.

25 Q. Who was that?

1 A. Dr. Michael Eriksen I think was in charge at that point and
2 some of the people on his staff, including Jeff McKenna whose
3 work I had read.

4 Q. He's testified in this trial, Dr. Eriksen has. Just quickly
5 summarize, why were you talking to Dr. Eriksen?

6 A. Certainly Dr. McKenna who worked at CDC had done a lot of
7 work on the topic of youth smoking prevention and particularly
8 youth smoking prevention advertising, so it made sense to
9 communicate with them what we were doing, and to the extent that
10 they had feedback, get that feedback.

11 Q. In fact, did you and Dr. Eriksen exchange some letters after
12 the meeting?

13 A. A few letters, yes.

14 Q. And just give us the names.

15 Can you remember any other people you met with? I
16 don't intend to go through the nature of the meetings.

17 A. Bill Novelli from Campaign for Tobacco Free Kids.

18 Q. What is the Campaign for Tobacco Free Kids?

19 A. It's an advocacy group that is antismoking.

20 Q. And anyone else you can remember?

21 A. A fellow named Dr. Michael Cummings. He's in upstate New
22 York.

23 Q. Is that the Roswell Park Center?

24 A. Yes, that's it. Dr. Greg Cummings, who is I think head of
25 tobacco control for the State of Massachusetts.

1 Q. Is that Dr. Greg Connelly?

2 A. Ah. Connelly, yes. Sorry.

3 Q. You met with him?

4 A. Yes. And also we had a meeting with American Legacy
5 Foundation.

6 Q. And who did you meet with there?

7 A. Dr. Cheryl Heulton and someone that worked on her staff.

8 Q. I don't intend to walk through those meetings.

9 Were some of those meetings more productive than others
10 as far as being of help to you?

11 A. Yes.

12 Q. And I'll leave it at that.

13 MR. WEBB: Your Honor, I'm actually going to -- I can
14 keep going if you like or did you want -- I was looking -- I can
15 go for a little bit if you would like me to go a little bit
16 longer.

17 THE COURT: Tell me how much more you think you have.

18 MR. WEBB: I have a ways to go. I'm going to say an
19 hour and a half.

20 By the way, if Dr. Levy is not finished today, then my
21 belief is that -- I don't know what the government has -- is
22 that we are going to interrupt this afternoon to do the
23 Australian witness and Dr. Levy will be back tomorrow morning.
24 I'm not trying to do that, but if that's what happens, that's
25 what happens.

1 THE COURT: Well, I certainly hoped we could finish.
2 I'm sure the government doesn't have any idea yet how long it's
3 redirect will be because we are, oh, maybe two-thirds through
4 the direct.

5 MR. WEBB: I'd say roughly --

6 THE COURT: Mr. Wise, is that a fair assumption?

7 MR. WISE: That's a fair statement, Your Honor, yes.

8 THE COURT: Let's just take 15 minutes, please.

9 (Recess began at 10:58 a.m.)

10 (Recess ended at 11:17 a.m.)

11 THE COURT: All right, Mr. Webb.

12 MR. WEBB: Thank you, Your Honor. Jamie, could I have
13 tab 31A back on the screen?

14 BY MR. WEBB:

15 Q. JD 3043359, this is again, Dr. Levy, the first brochure.

16 And I'm going to the page with the first strategies
17 Jamie. Page 4.

18 Dr. Levy, we talked about communications. I want to
19 move on to the next two strategies that you said to the court
20 this morning that Philip Morris used to implement its Youth
21 Smoking Prevention Program. Education and communication action.
22 Let me just combine those two together as we talk about them
23 with the court.

24 Am I correct that the education strategy and the
25 community action strategy, were they primarily implemented with

1 grants to third parties that were involved in education and
2 community action type activities?

3 A. Yes.

4 Q. And let me show you a chart I used with another witness.
5 I'm going to show you J-DEM 40035A.

6 It's tab 31, Jamie.

7 And this is a chart I used with another witness,
8 Dr. Levy. But does this chart set forth some of the Philip
9 Morris' grant recipients that were involved in educational and
10 community action type programs?

11 A. Yes.

12 Q. And the ones that are on this chart, were you personally
13 involved in one way or another with all of these, if you
14 remember?

15 A. The only one I'm not recalling is YMCA.

16 Q. And the other ones -- by the way, I don't expect you to know
17 the total number of organizations or the total amount of money
18 that was given in grants over the years by Philip Morris -- but
19 was there a fairly large number of organizations that Philip
20 Morris was making grants to while you were there?

21 A. Yes.

22 Q. And tell the court, when did the grant program get going in
23 pretty good stead compared -- strike the question.

24 Did it take a while for the grant program to get going?

25 A. It did.

1 Q. What happened?

2 A. I think the issues that required some time were the same for
3 Life Skills Training, which was a major effort, as well as
4 National 4-H Council which was a major effort.

5 And I'll talk, if you want me to, about some of the
6 other organizations, but I think they are illustrative. And
7 Life Skills Training is a program, school-based program, for
8 Middle School kids, 3-year program.

9 It's been evaluated, I don't know, numerous times and
10 been shown to be effective in preventing youth risk behavior,
11 including youth smoking up to and through the 12th grade. So
12 it's an excellent program. CDC has identified it as a program
13 that works. All of that's good.

14 Now, the problem. How does Philip Morris -- and we
15 actually did this together with Brown & Williamson -- how do
16 Philip Morris and Brown & Williamson support the implementation
17 of Life Skills Training in schools?

18 What we did was we tried to meet with school
19 superintendents, either at the local or state level, and explain
20 to them why we were interested in supporting Life Skills
21 Training and tried to solicit their agreement to let us fund
22 that through a grant to them.

23 Q. And what happened?

24 A. Sometimes we were very successful.

25 The State of West Virginia -- we funded statewide

1 implementation of Life Skills Training in the State of West
2 Virginia.

3 Sometimes we weren't so lucky. We were unable to fund
4 Life Skills Training, I think, any place in California.

5 Q. And what was the problem?

6 A. Basically the problem was that the school systems were
7 either suspicious on their own about our motives or their
8 suspicions were, at the very least, heightened by pressure that
9 they were put under by groups like the Campaign for Tobacco Free
10 Kids.

11 Q. Explain that a little bit. What happened there?

12 A. Well, the Campaign for Tobacco Free Kids did any number of
13 things to apply pressure to schools. They would send letters
14 to -- they, in fact, sent -- they, along with some other health
15 organizations, like American Lung Association and American
16 Cancer Society, sent letters to the heads of State Boards of
17 Education in all states urging them to not accept funding from
18 Philip Morris and Brown & Williamson.

19 They also ran ads in publications that were directed
20 primarily to educate educators.

21 Q. Well, let's just go through Life Skills, let me go through
22 the story regarding Life Skills Training. Let me for a moment
23 stop here.

24 Can you explain to the court, essentially what was that
25 program?

1 A. Well, Life Skills Training, like I said, was a school-based
2 program for Middle School students that had been developed by a
3 Professor at Cornell University and it involved a total of 30
4 classroom sessions over three years.

5 Q. Okay.

6 A. And they were sessions that talked about health effects of
7 smoking and drinking alcohol and drug use, among others.

8 They talked about decision making; tried to teach kids
9 how to make good decisions, talked about assertiveness skills.
10 Basically, it's broader than just youth smoking prevention. It
11 goes to the point of root causes of youth risk behavior.

12 Q. Based on what -- you said it a moment ago in one of your
13 answers that several government agencies had certified this as
14 an effective program.

15 MR. WISE: Your Honor, I'm going to object at this
16 point. There's no mention of Life Skills Training programs in
17 the written direct. We are really into the weeds now.

18 THE COURT: I think it's getting too detailed. The
19 objection is sustained.

20 MR. WEBB: Okay, Your Honor, I'll try to move it along.

21 BY MR. WEBB:

22 Q. As far as problems that you encountered with some of your
23 other grants -- I'm just going to the National 4-H Council and
24 then I'll leave this behind. Can you describe for the court
25 what kind of problems -- strike the question.

1 As far as Life Skills Training is concerned, let me
2 show you JD 41450, which is tab 35, Dr. Levy, which I think is
3 Philip Morris's second youth smoking prevention brochure.

4 MR. WISE: Your Honor, I again object if we're talking
5 about Life Skills Training. The objection was sustained. I
6 don't know....

7 THE COURT: Where are we going now?

8 MR. WEBB: I was going to show her one page which
9 summarizes in one paragraph the extent and nature of what
10 happened with this program, how many schools they reached. One
11 paragraph and I'm moving on.

12 MR. WISE: None of that in the written direct. That's
13 all outside the scope.

14 THE COURT: I understand. This final question may be
15 asked.

16 BY MR. WEBB:

17 Q. And if I could go to the page in there that's Bates 57225,
18 please. And Dr. Levy, all I want to do is just call to your
19 attention. I see a quick summary.

20 Is this the second brochure that was published by the
21 Youth Smoking Prevention Department at Philip Morris?

22 A. Yes.

23 Q. If you go to the page that I put on the screen. Do you see
24 a summary of the Life Skills Training Program in Philip Morris?

25 A. I see it on the screen. It appears to be missing here. I

1 don't think it's in here. I can't find it, but I see it on the
2 screen.

3 Q. Do you see it on the screen?

4 A. Yes.

5 Q. And I noticed down there that, regardless of the problems
6 that you described to the court earlier, that Philip Morris
7 ultimately was able to make grant commitments of more than
8 \$11 million to school districts in 18 states so that more than
9 300,000 Middle School students received Life Skills Training in
10 the classroom.

11 Does that summarize essentially what you recall the
12 success of the program being while you were there?

13 A. That was true as of the fall of 2001, as I recall.

14 Q. Okay. And you then left several months later?

15 A. Yes.

16 Q. Okay. Could I have tab 31 back on the screen, Jamie? The
17 chart of grant recipients.

18 As far as the National 4-H Council, I'm just going to
19 ask you to quickly summarize for the court what Philip Morris
20 attempted to do there and what issues you ran into -- what
21 problems you ran into with the public health community.

22 MR. WISE: Your Honor, I'm going to object again.
23 There's no mention of a National 4-H Council in the written
24 direct. We are again going to a level of detail and on a
25 tangent that really is outside the scope of this examination.

1 MR. WEBB: Your Honor, they attacked our entire Youth
2 Smoking Prevention Program, including --

3 MR. WISE: Your Honor --

4 MR. WEBB: -- including our entire programs, that we
5 had the wrong direction in the program, that our people were not
6 qualified, and that they did not have the experience and
7 qualifications.

8 In light of -- Your Honor, I don't intend to belabor
9 this. I want to just -- I want to go through one more of these
10 and then I'm going to move on to the last prong of the program.
11 But there is -- events -- there were frustrations that this
12 company encountered that I think show -- if there are defects in
13 our program we had problems. There were growing pains. And I
14 think Dr. Levy can at least explain that to the court in light
15 of the attack on her and her qualifications so that we can at
16 least explain that we weren't perfect, but we were trying to do
17 a good job.

18 And the 4-H events, I'll summarize very quickly through
19 her testimony, tell a story of some of the problems that this
20 company encountered because people in the public health
21 community did not want to accept Philip Morris being involved in
22 youth smoking prevention. They just didn't want us there. And
23 we are still there today, but -- anyway, that's why it's
24 relevant, Your Honor.

25 MR. WISE: Your Honor, I feel like that's all fine and

1 good, but the focus of the written direct was on the
2 advertisements, was on Dr. Levy's qualifications with a
3 4-H Council in difficulties, Philip Morris had with the public
4 health community have nothing to do with Dr. Levy's
5 qualifications, have nothing to do with the advertisements
6 Philip Morris was running and whether those were effective.

7 This is an area outside the scope. Even if Mr. Webb
8 does it quickly, it's still outside the scope. And while he
9 said it tells a story, it's not a story that's in the written
10 direct.

11 THE COURT: There may be brief testimony on the
12 4-H Council at this point.

13 Go ahead, please.

14 BY MR. WEBB:

15 Q. Dr. Levy, just tell the court what Philip Morris tried to do
16 with the 4-H Council, what happened, and what your degree of
17 success or failure was?

18 A. We funded the development and implementation of a Youth
19 Smoking Prevention Program. The need for that had been
20 highlighted by some of the kids that were 4-H members.

21 And it was a rough road. I would say it was rougher
22 for them than for us, frankly, because of the attacks that were
23 lodged against us and against them for being willing to take
24 grant monies from us.

25 Q. And don't get into a lot of detail. Did the public health

1 community run ads attacking Philip Morris and 4-H for being
2 involved in funding this program?

3 A. I believe they did.

4 Q. I'm not going to show you the ads, but ultimately in spite
5 of the public -- in spite of the criticism from the public
6 health community, did the National 4-H Council decide to accept
7 Philip Morris's grant money?

8 A. They accepted our grant money and developed and implemented
9 a program that they then changed. And when I left, they were in
10 the final throes of evaluating that program.

11 Q. That's fine.

12 Now, let me move on, Dr. Levy, to -- if I could call
13 back up on the screen the last prong of Philip Morris youth
14 smoking prevention strategy called access prevention. The last
15 prong of your strategy is access prevention; is that right?

16 A. That's correct.

17 Q. And I don't intend to get into a lot of detail about it, but
18 did Philip Morris -- can you generally give the court an
19 overview of that strategy?

20 A. The strategy, as we originally envisioned it, would take the
21 We Card Program, which I described yesterday, and bring it into
22 our department and we would oversee it.

23 Shortly after that happened, the Master Settlement
24 Agreement was signed and so there were additional access
25 prevention initiatives that were taken on by the Sales

1 organization, and I think in my written direct there's some
2 mention of them.

3 But I think the important thing that we added in youth
4 smoking prevention to this effort was by looking at the youth
5 risk behavior survey data of, published by the Centers for
6 Disease Control, what we realized was that a major source of
7 cigarettes for kids is not at retail. In fact, the most
8 prevalent reported source of cigarettes for kids, both 11 to 14
9 and 15 to 17, are their friends.

10 We chose to address that, at least in part, through our
11 parent communications where we developed a print campaign --
12 well, sorry. Let me -- no -- where we developed advertising.

13 In particular, there was an ad called Meet the
14 Competition, and I think that one ran on the Super Bowl at the
15 same time as the one you showed.

16 The gist being, Meet the Competition. Know who your
17 kids friends are because friends will influence your children
18 and you need to know whether those friends are smoking and
19 engaging in other risky behaviors.

20 We also, from the youth risk behavior survey data,
21 identified getting cigarettes from another family member as a
22 way that kids got cigarettes. That was the second most
23 prevalent way that, if I'm remembering correctly, that younger
24 kids got cigarettes.

25 So we developed a print campaign that basically -- we

1 call it the Milk and Cookies Campaign because that was one of
2 our ads showing milk and cookies. What we wanted to remind
3 adults who have children in their home is if the adults smoke,
4 they need to keep their cigarettes under control so that they
5 don't just like -- mother leave her pocketbook with cigarettes
6 in it around for the child to gain access.

7 We also from the same youth risk behavior survey data
8 identified third-party purchasing. And what I mean by that is
9 you ask an adult to buy cigarettes for you. That was the second
10 most prevalent way that kids 15 to 17 got cigarettes, and I
11 think it was the third most prevalent way -- or maybe it was
12 equivalent to family members that the younger kids got
13 cigarettes.

14 And there, because it's a problem of kids asking
15 someone to buy cigarettes for them, we developed a point of sale
16 campaign that was implemented to remind adults to not buy
17 cigarettes for kids.

18 Q. And I don't intent to go into it, but in that creative
19 history document that you still have in front of you, which is
20 50804, JD 50804, am I correct the magazine advertising, the
21 print ads that you developed that you called milk and cookies
22 are ads to convince parents to keep their cigarettes away from
23 their kids; if you go to the pages -- if you go to page -- go to
24 the Bates that's Bates 7224.

25 Jamie, if I could call that up. It's tab 46.

1 Is this an example that I put on the screen of your
2 milk and cookie ads? Were you trying to communicate to parents
3 to keep cigarettes away from their kids?

4 A. Yes. In fact, this is the milk and cookie.

5 Q. This is the milk and cookies.

6 There are others similar to this; is that correct?

7 A. Yes.

8 Q. How long did this campaign run, do you remember?

9 A. No, I don't.

10 Q. As far as the effort to affect third party purchasing
11 cigarettes at point of sale. If you could go to the page in
12 there that's marked Bates 7231. It's tab 47, Jamie.

13 Is this the type of signage that you placed at retail?

14 A. Yes.

15 Q. And what is this designed to do?

16 A. As I mentioned, just right at the point of purchase where
17 this third party purchasing might happen, say to people, "Hey,
18 don't do this." And this one I can tell you is still in effect
19 because it's on all the -- it's on all the store doors that I
20 see.

21 Q. Let me talk about one other access prevention activity that
22 I think is part of your program.

23 Did Philip Morris develop a retailing effort that if
24 stores in states get caught selling cigarettes to minors and get
25 prosecuted so that they are actually convicted, arrested and

1 convicted for that, that Philip Morris would revoke or would do
2 something to punish them under your retailing program?

3 A. Yes. That was under the auspices of the Sales organization
4 and it was part of the Retail Leaders Program.

5 Q. And I'll have other witnesses describe that in more detail,
6 but I want to focus on just what you were doing.

7 Am I correct the Youth Smoking Prevention Department,
8 did you undertake the process of trying to interact with state
9 authorities and try to get information about which retail stores
10 actually had been caught selling cigarettes to minors?

11 A. Yes. The only way that we could gain information to give to
12 the Sales organization regarding fines and conviction was from
13 the state authorities.

14 The only state that gave us those data on a regular
15 basis was the State of Washington and sporadically some other
16 entities would give us information, but regularly the State of
17 Washington was the only state.

18 Q. Did you have people in your department that were responsible
19 for contacting all 50 states to try to get this information?

20 A. Yes, on more than one occasion.

21 Q. And by the time you left Philip Morris was successful in
22 getting that type information from just one state?

23 A. As I recall, it was still the State of Washington.

24 Q. Was that another frustration that you found as you tried to
25 carry out your job here?

1 A. It was one.

2 (Pause)

3 THE COURT: As you turn all these pages, does that
4 mean, Mr. Webb, you're cutting back on your questioning?

5 MR. WEBB: I'm listening to Your Honor's rulings and
6 I'm cutting back. Okay? So I intend to do that. I'm cutting
7 back substantially based on the last couple of rulings.

8 BY MR. WEBB:

9 Q. Now, at the time Philip Morris created its Youth Smoking
10 Prevention Department, the MSA did not exist at that time; is
11 that correct?

12 A. That's correct.

13 Q. And am I correct at that time when Philip Morris created
14 this department, there was no regulation or requirement or legal
15 obligation to create the department. Is that fair to say? That
16 you're aware of.

17 A. That's correct.

18 Q. But the MSA did come into existence several -- came in, in
19 November of 1998; is that correct?

20 A. Yes.

21 Q. And there are provisions in the MSA dealing with the need to
22 have a commitment to youth smoking prevention; is that correct?

23 A. Yes.

24 Q. And I don't intend to run through those details right now,
25 Dr. Levy, but by the time the MSA came into being and had the

1 requirements that there be a commitment to youth smoking
2 prevention, was Philip Morris already way down the road in
3 evidencing its commitment to youth smoking prevention?

4 A. We were certainly down the road.

5 Q. I'll strike the word "way."

6 A. Yeah. I think we were down the road.

7 Q. Okay, that's fair.

8 Now, when the MSA got in place and the Attorney
9 Generals were doing what they were supposed to do under the MSA,
10 did you yourself over the years have meetings with the Attorney
11 Generals to talk to them about some of the youth smoking
12 prevention issues that you've been talking to the court about?

13 A. Yes.

14 Q. And how often did those meetings take place?

15 A. These were meetings -- my recall would be about every --
16 roughly every six months.

17 Q. Okay.

18 A. I wouldn't be the only one there from Philip Morris.

19 Q. And other people were there from Philip Morris; is that
20 correct?

21 A. Yes.

22 Q. Were youth smoking prevention issues discussed with the
23 Attorney Generals?

24 A. Yes.

25 MR. WISE: Your Honor, I'm going to object at this

1 point. There was no testimony about meetings with Attorney
2 Generals or anything of this nature in the written direct. It's
3 outside the scope.

4 MR. WEBB: Your Honor, I don't think it's outside the
5 scope. When they attacked our entire program as being
6 ineffective and that we weren't qualified or weren't even trying
7 to develop a good program, the fact that we met with attorney
8 Generals and tried to discuss some of our problems and our
9 frustrations, it shows how hard this company was trying to
10 implement a program. Maybe we weren't perfect.

11 I don't intend to belabor. I'm just going to bring out
12 that there were some basic topics discussed with the Attorney
13 Generals.

14 THE COURT: No. I'm going to sustain the objection.

15 BY MR. WEBB:

16 Q. Now, Dr. Levy, do you recall in your written direct
17 examination where the government asked you some questions about
18 a study that was done by the American Legacy Foundation that
19 addressed some of the ads that Philip Morris was running on the
20 air?

21 A. Yes.

22 Q. I want to tell the court how that came about.

23 First of all, are you familiar under the MSA with what
24 is known as the Triennial Conference?

25 A. Yes, I attended the first one.

1 Q. And when was that?

2 A. That was in October of 2001.

3 Q. And did you make a presentation -- who was at the Triennial
4 Conference?

5 MR. WISE: Your Honor, I object at this point. The
6 questions in the written direct were solely limited to this
7 American Legacy Foundation study. There were no questions about
8 the Triennial Conference.

9 I think I know where Mr. Webb is going. But all of
10 this is extraneous to what was in the written direct and it's
11 outside the scope.

12 MR. WEBB: Your Honor, in the written direct they talk
13 about in detail a study done by ALF attacking our commercials.
14 It got presented to her at this conference. I'm just going to
15 bring out what happened. At this conference ALF got up and made
16 a presentation about our commercials, and she will explain what
17 she did.

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

19 BY MR. WEBB:

20 Q. Now, at the conference you're there, a lot of Attorney
21 Generals are there?

22 A. Yes.

23 Q. ALF is there?

24 A. Yes.

25 Q. Did you make a presentation yourself describing the Philip

1 Morris Youth Smoking Prevention Program?

2 A. Yes.

3 Q. And at some point did ALF make a presentation?

4 A. Yes, the following day, Dr. Lyndon Haviland made a
5 presentation.

6 Q. And tell the court what you learned from Dr. Haviland's
7 presentation?

8 A. Basically, she said they had conducted an ad awareness
9 tracking study, and that as part of that study they had also
10 looked for awareness of Philip Morris youth smoking prevention
11 ads.

12 And that through an analysis of their data they
13 concluded that two of our ads conveyed to kids -- no, let me
14 back up -- that two of our ads made kids more open to smoking.

15 Q. Okay. Now, did Dr. Haviland identify the two ads that made
16 kids more open to smoking?

17 A. Yes.

18 Q. And now at the time you heard her say that, were both those
19 ads still on the air?

20 A. No. One ad, Bus, had stopped running. And in fact -- well,
21 she said this in the fall of 2001. I believe we had stopped
22 running Bus in the fall of 2000.

23 Q. Okay.

24 A. The other ad was still on the air. It was an ad called
25 Karate Girl.

1 Q. As the head of Philip Morris Youth Smoking Prevention
2 Department, after Dr. Haviland was completed with her
3 presentation, tell the court what you did.

4 A. I went up to her at the end of her presentation and asked
5 her if we could meet to learn more about their study because in
6 the 20-minute presentation or so I didn't get enough information
7 to really understand what they had done.

8 Q. Now, had they published the study at that point?

9 A. No, they had not.

10 Q. But they made the presentation.

11 Now, did you have any access to any data at that point?

12 A. Not really. There was some summary information on a chart,
13 but there was no written handout. I didn't have much. But I
14 got her to agree to meet in the future and discuss the study in
15 more detail.

16 And then I called back -- I was in Kansas City -- I
17 called back to New York and spoke to Denise Cohen who was in
18 charge of our communications area, told her what I had just
19 heard and told her to contact our ad agency and tell them to
20 stop running Karate Girl.

21 Q. You made the decision right there to take it off the air?

22 A. I felt that it was the right thing for me to do, it was the
23 right thing for the company to do until we learned more.

24 Q. And did you try to learn more?

25 A. I did.

1 Q. Okay. Did you attend a meeting in Washington, DC with
2 representatives of ALF?

3 A. That meeting took place sometime in December, which was --
4 yeah, it was sometime in December.

5 Q. Okay. You were at the meeting?

6 A. Yes, I came to the meeting and Denise Cohen came, and I
7 think that at that point Jeannie Benom came as well so that we
8 could all hear what they had to say.

9 Q. And tell the court what happened in that meeting.

10 A. In that meeting they gave a more lengthy presentation. As I
11 recall, the speaker was a gentleman who was a contractor with
12 American Legacy, and he gave us more detail; made it clear to me
13 that it was a very sophisticated analysis they had done, and
14 made me even more desirous to look at the data, the underlying
15 data, that they had collected.

16 Q. Did they provide you the underlying data in this meeting?

17 A. No, they didn't. I communicated with them on several
18 additional occasions asking for underlying data.

19 And my final letter that I sent them, I think it was
20 towards the end of February, right before I left the company, I
21 told them my concerns based on the questionnaire, which we had
22 been able to download from the Internet, and I explained my
23 question -- my questions and concerns based on their methodology
24 and urged them to please make the underlying raw data available
25 so that we could look at them.

1 Q. I'm going to show you some of those letters so I have them
2 in the record.

3 You mentioned -- I want to make sure we get a complete
4 story for the court, because this was something the government
5 went into a fair amount in your direct.

6 You said you did find one document called the
7 questionnaire that they had used in the study?

8 A. Yes, it was available on their website.

9 Q. Did Philip Morris, at least based on the questionnaire
10 without having any data, were there at least some concerns that
11 you developed as far as the fairness of the study?

12 A. I think the major concern -- the answer is yes.

13 The major concern that we had was at the time they
14 collected their data we had nine youth smoking prevention tween
15 ads running. They asked about only two of the nine that were
16 running, and they asked about two that had not been run
17 recently.

18 So, based on our estimate of our ad spending, they had
19 missed roughly 60 percent of the ads that we were running at
20 that time.

21 Q. Why was that of some concern based on the study conclusions?

22 A. The analysis, as I understood it, depended upon them being
23 able to classify their kids that they interviewed as to whether
24 the kids had viewed only their ads, the truth ads, or whether
25 the kids had viewed only youth smoking prevention ads from

1 Philip Morris or a combination.

2 When you miss 60 percent of Philip Morris' ads, and we
3 know from our own study that our ad awareness is in the 80
4 percent plus range, I have to believe they've misclassified
5 kids.

6 Q. By the way, when they did the test did they show the kids
7 all of their ads, if you remember?

8 A. Well, this was a tracking study and so they weren't showing
9 any ads, but they queried the kids about all of their ads.

10 Q. Now you had concerns, but you didn't have the data. Is that
11 fair to say?

12 A. That's fair.

13 Q. Okay. And so let me show you a series of letters between
14 you and ALF.

15 Can I show the witness JD 054632? It's tab 55.

16 And I'm just going to have you tell us if these are
17 letters that went back and forth between you and the ALF
18 organization, and you can -- why don't you just go ahead and
19 just thumb through those to see if these -- I don't intend to
20 publish them.

21 But if you just go through the different letters that I
22 put in this exhibit. Do they appear to be letters that you're
23 sending to ALF?

24 A. Yes.

25 Q. And you mentioned that -- you mentioned a moment ago in your

1 testimony to the court the last letter in the series, which I
2 believe is dated February 21, 2002; is that correct?

3 A. Yes.

4 Q. And I'll put that up on the screen, if I might.

5 And I noticed you -- you now have been trying to get
6 data from ALF for several months. Is that fair to say?

7 A. From mid-December to mid-February.

8 Q. Okay. And you advise ALF that you're still trying to get
9 the raw data there, is that correct, and the weighting that they
10 had done?

11 A. Yes. As an interim step, what we were trying to also do was
12 get a set of cross tabs. That wouldn't be raw data, but if we
13 could at least get cross tabs we could see the sample sizes that
14 fit into various boxes.

15 Q. Let's go to the second page of the letter.

16 You make it clear to ALF that -- let me ask the
17 question.

18 The Karate Girl ad, for example, that you took off the
19 air, had Philip Morris done extensive qualitative and
20 quantitative testing of -- strike the question.

21 Both of the commercials, Bus and Karate Girl, had
22 Philip Morris done some pretty extensive testing to see if the
23 not smoking message had gotten across?

24 A. We did.

25 MR. WISE: Your Honor, I object.

1 There were one or two questions in the written direct
2 about this study by the American Legacy Foundation, and now to
3 have gotten into the exchange of letters and the triennial
4 meeting where it was presented and all of this extraneous --

5 THE COURT: Mr. Wise, I don't know how many questions
6 there were. I'd have to go back and look.

7 What I know is that as I read the testimony, whatever
8 the number of questions and answers, it was a significant
9 subject in which a respected advocacy organization was making a
10 very severe charge against Philip Morris in terms of the
11 adequacy of its expensive ads.

12 So, this is certainly not beyond the scope of the
13 direct, and the objection is overruled.

14 MR. WEBB: Could -- what was the last question asked?

15 THE COURT: This was the question, everybody.

16 (Reading) Both of the commercials, Bus and Karate Girl,
17 had Philip Morris done some pretty extensive testing to see if
18 the not smoking message had gotten across?

19 MR. WEBB: That's my question.

20 THE WITNESS: Every ad we put on air went through that
21 rigorous testing that I described earlier, so these had as well.

22 BY MR. WEBB:

23 Q. Now, when you found out about the ALF study that they said
24 they had done, did you go back and look at that testing?

25 A. Yes.

1 Q. And did you find any -- I mean, at Philip Morris, could you
2 all figure out what it is that you had missed or what had
3 happened here?

4 A. No, and we -- I couldn't see anything that we had missed.
5 What I wanted to see is what they had found and we needed raw
6 data to do that.

7 Q. And as of the time you left the company, had you gotten the
8 raw data yet?

9 A. No.

10 Q. Dr. Levy, is it your understanding that after you left
11 Philip Morris, that the study itself actually got published in a
12 publication? Is that your understanding?

13 A. Yes.

14 Q. To this day as you sit before this court, have you ever seen
15 that study?

16 A. I actually did look at it over the weekend.

17 Q. I didn't know that. You looked at it this weekend?

18 A. Yes.

19 Q. I'm not sure what to ask you because I don't know what you
20 learned. But --

21 THE COURT: But you know the basic rule of trial
22 practice.

23 MR. WEBB: I do know that and that's why I'm thinking
24 for a second, Your Honor.

25 BY MR. WEBB:

1 Q. When you were deposed in this case the government didn't
2 show you the study during your deposition. Is that fair to say?

3 A. It hadn't been published yet.

4 Q. Well, when you got your written direct last Monday a week
5 ago, did they give you the study?

6 A. No.

7 Q. You went and found it this weekend?

8 A. Yes.

9 Q. Okay.

10 A. Well, I think I had it in --

11 THE COURT: Excuse me. Wait just a minute, Dr. Levy.

12 There's no question pending.

13 BY MR. WEBB:

14 Q. I want to make sure.

15 When I said you looked at it this weekend, do you want
16 to correct that answer?

17 A. I looked at it this weekend.

18 I had it in my possession sometime during -- I'm losing
19 track of time. I'm sorry. I had it in my possession during the
20 preparation of my corrections to my written testimony.

21 Q. You know, I'm going to ask you, Dr. Levy -- against all
22 instincts of me -- what did you learn this weekend when you
23 looked at it?

24 A. Not really very much more than what I already knew.

25 There was really nothing that would speak to my concern

1 about, that I recall, about the bias, the underlying bias in the
2 data collection.

3 Q. And there will be other witnesses that will talk about.
4 You've done no analysis of the data. Is that fair to say?

5 A. I never saw the data.

6 Q. Dr. Levy, I'm going to -- I'm just about done with youth
7 smoking prevention.

8 Could I show the witness JD 043359? It's tab 56. And
9 it's your -- I want to go to the page that's Bates 6338.

10 And as I wind this down, I want to put on the screen a
11 statement that is made in your brochure that, "We believe that
12 youth smoking is a complex problem to which there is no silver
13 bullet solution."

14 Let me ask you to tell the court. By the time you
15 spent four years doing this work and you left the company, did
16 you still believe that was the case?

17 A. More so than when this was prepared.

18 Q. Would you explain that to the court?

19 A. The more reading I did, the more confirmation that I saw
20 that -- the people who were publishing in this area mentioned
21 time and again multiple interventions to address the issue.

22 Q. And when you left the company in the spring of 2002 after
23 four years of doing this work, did you still believe that having
24 a comprehensive strategy like Philip Morris had was at least,
25 based on what you learned, was the best way to approach the

1 youth smoking prevention problem in America?

2 A. Yes.

3 Q. Why?

4 A. The literature says so. And, actually, at the triennial
5 meeting I had the opportunity to speak a bit with the people
6 from the state of Mississippi. They were implementing a
7 comprehensive program. The state of Florida had done that prior
8 to my even taking the youth smoking prevention job.

9 So it was happening at the state level, comprehensive
10 programs were being implemented, some with different flavors
11 than others, but I was aware of no organization that only did
12 one type of program or advertising or anything. That everyone
13 was trying to do multiple approaches because they knew it would
14 take multiple approaches to work.

15 Q. Now, Dr. Levy, if you look back upon those four years that
16 you were there. As time went on -- let's go up to about the
17 time that you left, okay?

18 As the years went by, were a number of different
19 organizations doing things similar to what Philip Morris was
20 doing, trying to bring a focus in America on the problem of
21 underaged smoking behavior?

22 A. Yes.

23 Q. If you can, just list off -- for example, some other tobacco
24 companies were engaged in programs. Is that fair to say?

25 A. Yes.

1 Q. Okay. And there were --

2 A. As I mentioned, some states clearly were undertaking those
3 efforts. Triennial. I heard Mississippi, I heard Arizona.
4 Seems like New Jersey as well. I think the State of New York,
5 if I'm recalling, may have been going in that direction. So --
6 and ALF, even, the American Legacy Foundation, on their website
7 described efforts that would be in my view multifaceted.

8 Q. Now, by the way, just so we have it in the record, ALF,
9 which is known as the American Legacy Foundation, how is it
10 funded?

11 A. Through the Master Settlement Agreement.

12 MR. WISE: Your Honor, I'm going to object.

13 THE COURT: Sustained.

14 MR. WEBB: That's fine.

15 BY MR. WEBB:

16 Q. As far as overall impact, as you look back on those
17 four years, Dr. Levy, do you believe that you and these other
18 organizations during that 4-year time period actually were
19 successful in having some impact on youth smoking rates?

20 A. I like to believe that we all had an effect. Clearly, the
21 youth smoking rates were coming down. That was good.

22 It was impossible then and it's impossible for me
23 sitting here today to say what part of that decline could we
24 claim. I can't do it and I'm unwilling to do it.

25 But I believe that we had an impact because we were

1 doing things that the Surgeon General and other experts
2 recommended. It's common sense to me that we had to be having
3 some positive influence on that decline.

4 Q. Okay. As far as the decline that you just mentioned in your
5 testimony, let me show you J-DEM -- strike the question.

6 Are you familiar with a study conducted by the
7 University of Michigan known as Monitoring the Future study?

8 A. Yes.

9 Q. And tell the court, what is that study?

10 A. It's a school-based survey, used to be only of high school
11 seniors, now they include students in lower grades.

12 Well, when I say "now," they started doing that -- I
13 forget. When I look at the chart I'll be able to tell.
14 Basically, they are looking at youth risk behavior, in general.
15 The youth smoking is one of the measures. They also look at
16 under teenage alcohol use, et cetera. And they report those
17 results annually.

18 Q. Let me show you J-DEM 40199, which is tab 57, Jamie. And
19 just on the point that you made in your testimony. This is from
20 the Monitoring the Future study.

21 But the decline in smoking rates is taking place during
22 this time period of 1988 to 2002. Is that fair to say?

23 A. Yes.

24 Q. I take it there's different people have measured the decline
25 in different ways, but is this considered a respected study?

1 A. Oh, absolutely.

2 THE COURT: By the way, Dr. Levy --

3 THE WITNESS: This is only high school seniors, by the
4 way.

5 THE COURT: I understand that.

6 I assume these rates have been broken out for boys and
7 girls; is that correct?

8 THE WITNESS: Yes. Yes. I know we always broke ours
9 out by boys and girls, also.

10 THE COURT: Am I correct that the rate of decline is
11 quite different for boys and girls?

12 THE WITNESS: Your Honor, if I remember correctly --
13 and I've not reviewed those data since I arrived here in
14 Washington -- the rate of decline -- well, rather than talking
15 about rate of decline, the incidence of smoking amongst girls,
16 if I'm recalling correctly, is higher than the incidence of
17 smoking among boys. I don't think that was always true, but I
18 believe it was true during this time frame.

19 THE COURT: When you use the word "incidence,"
20 though -- and I know you chose your words carefully -- that's a
21 different word than "rate."

22 I believe what you're saying is that during the time
23 frame there was a higher percentage of girls smoking than boys
24 smoking. Is that correct?

25 THE WITNESS: Yes, Your Honor. And I believe the word

1 "rate" in the context of this chart is also talking about
2 percentage incidence.

3 THE COURT: All right. I just wanted to know whether
4 the decline in smoking was at a lower rate for girls than for
5 boys.

6 THE WITNESS: Without the data in front of me -- if I'm
7 correct in remembering the incidence rate -- equivalent words in
8 my mind -- was higher for girls, I'm going to assume, until we
9 see the data, that boys were declining more rapidly than girls.
10 Those data are readily available. I haven't reviewed them.

11 BY MR. WEBB:

12 Q. Now, Doctor, I think you indicated that -- by the way, if we
13 just try to look at, at least upon what you know from your
14 involvement in this effort to try to prevent kids from smoking.
15 The focus that got put on this social problem between 1998 and
16 2002, do you know of any other time ever that there's been that
17 kind of focus put on the problem? If you know.

18 A. Of underaged smoking?

19 Q. Of underaged smoking.

20 A. Not that I'm aware of.

21 Q. And I think you told the court a minute ago that you
22 can't -- you're not going to -- I take it Philip Morris is not
23 going to claim credit for any percent of this. Is that fair to
24 say?

25 A. I'm certainly not. When I was there, no one at Philip

1 Morris would, either.

2 Q. But do you believe that the combined -- based on your
3 experience, do you at least believe the combined efforts of
4 whatever Philip Morris, these other companies, as well as all
5 the other organizations, the focus they put on it during those
6 years, do you at least believe it had an impact on smoking
7 rates?

8 A. If you were to look -- the answer is yes.

9 If you were look at the historical data from Monitoring
10 the Future, what you would see is youth smoking rates started
11 growing on or around 1991-92, and in the time frame '97-98
12 they -- depending on the age group, whether it's 8th graders,
13 10th graders, or 12th graders -- there was an inflection point
14 which meant that the rate started to decline.

15 Q. Now, Dr. Levy, let me ask you one last question on youth
16 smoking prevention.

17 The government in its written direct and its oral
18 direct, I take it you generally have a sense the government
19 believes there's some imperfections in Philip Morris's Youth
20 Smoking Prevention Program. Is that fair to say?

21 A. Yes.

22 Q. I just want to ask you a question.

23 Based on your experience, do you believe that program
24 was perfect and had no problems with it?

25 A. No.

1 Q. Tell the court why.

2 A. Well, we were -- I mean, as everyone knows, we were new at
3 doing this. And, we read the literature. We worked with our ad
4 agencies. We did everything we could to put a good program in
5 place and build on it as we moved forward.

6 We got better, I believe, over time. We certainly got
7 more experience in how to work with community groups and youth
8 groups in terms of getting funding out to them and supporting
9 their programs.

10 I think our advertising efforts to parents, even though
11 we never measured which was better, intuitively I believe
12 because we were experienced in, if you will, talking to adults,
13 I think that was right out of the blocks a better effort perhaps
14 than our kid advertising was.

15 I think all in all for the four years that I was there,
16 I think we accomplished a heck of a lot.

17 Q. Are you proud of what you did?

18 A. Very. It's why I'm here.

19 Q. Dr. Levy, let me leave behind and touch upon a few other
20 areas that the government touched upon in its written and oral
21 direct examination.

22 I want to talk to you about -- do you recall the memo
23 that the government showed you in your written direct and in
24 your oral questioning, a document that referred to "burying
25 information." Do you recall that?

1 A. Yes.

2 Q. I -- let me -- could I have Dr. Levy's written direct? It's
3 on page 9. It's tab 61, Jamie.

4 And the government showed you this memo. It's a memo
5 from Dr. Osdene -- to Dr. Osdene from Dr. Dunn and it's about a
6 proposed study by Levy.

7 I take it that's you, Dr. Levy; is that correct?

8 A. Yes.

9 Q. And the government went through the memo, this memo, and in
10 the body of the memorandum the government is absolutely correct
11 in what's set forth here is what the memo says. Is that your
12 understanding?

13 A. Yes.

14 Q. And it says here that, "If the results that are obtained
15 with nicotine are similar to those gotten with morphine and
16 caffeine, we will want to bury it." Do you see that?

17 A. Yes.

18 Q. I want to ask you some questions about that.

19 First of all, can you tell the court, back in the
20 1970s -- 1977, did you ever see the memo back at that time?

21 A. No.

22 Q. And you knew Dr. Osdene and Dr. Dunn, I take it?

23 A. Yes.

24 Q. And they were your superiors?

25 A. I worked for Dunn who worked for Osdene.

1 Q. Now, tell the court, when is the first time you ever came to
2 learn about the existence of this memo as best you can remember
3 now?

4 A. I don't remember the year. I remember reading about this
5 memo. If I'm recalling correctly, I remember reading about it
6 in either the Wall Street Journal or the New York Times.
7 Shortly after that --

8 Q. Let me stop you. You read it about it, was at the time that
9 smoking and health litigation was becoming a big issue?

10 A. It may have been.

11 Q. Do you know whether that Wall Street Journal reflected
12 anything that was produced in discovery if you know?

13 A. I have no idea.

14 Q. Fine. Go on. What happened?

15 A. Shortly after that, I believe it was two lawyers -- I don't
16 remember what firm they worked with, or they may have been
17 in-house lawyers, I don't recall -- came to me and showed me the
18 memo.

19 Q. And what happened?

20 A. As I testified yesterday, I was furious. But then they
21 asked me to take a look in my lab notebook.

22 I believe they gave me a Xerox copy of my lab notebook
23 and asked me to find the data that I had collected and tell them
24 what it showed.

25 Q. I'm going to show that lab notebook here in just a minute,

1 Dr. Levy. Let me show you the memo itself.

2 Could I show U.S. Exhibit 22285? It's tab 60, Jamie.

3 Dr. Levy, to the extent that memo states that something
4 is going to be buried or destroyed, I take it this document was
5 not buried or destroyed. It's here in the courtroom; is that
6 correct?

7 A. Right.

8 Q. I want to show you -- the actual proposal that is being
9 referred to there, the proposed study by Levy.

10 Could I show the witness U.S. Exhibit 21421. It's tab
11 62, Jamie.

12 Is this the proposal that Dr. Dunn and Dr. Osdene are
13 discussing?

14 A. I think it is.

15 Q. Okay. And it's dated November 1, 1977; is that correct?

16 A. Yes.

17 Q. And just because we're going to go to the lab notebook, can
18 you just tell the court in general terms -- you don't need a lot
19 of detail -- what was the study and what were you doing here?

20 A. Basically, I was trying to replicate with nicotine a study
21 that I had read about in the literature.

22 MR. WISE: Your Honor, we went through all of this.

23 THE COURT: I do believe we did.

24 MR. WISE: I think it's repetitive.

25 MR. WEBB: That's fine. I'll move on.

1 BY MR. WEBB:

2 Q. This document obviously is not buried and destroyed, and
3 it's in the courtroom. Is that fair to say?

4 A. Yes.

5 Q. You did the research; is that correct?

6 A. Yes.

7 Q. And I believe you touched upon this yesterday, but I want to
8 make sure there's a clear record. I want to describe -- you
9 went through different phases of this research. Is that
10 correct?

11 A. Yes.

12 Q. And you ran into some failures or problems; is that correct?

13 A. I would say I ran into -- yes. I didn't -- I ran four
14 experiments and I wasn't able to demonstrate either withdrawal
15 syndrome from nicotine or with the one caffeine study. I did
16 not demonstrate caffeine withdrawal to my satisfaction.

17 Q. Okay. Now, other researchers had seemed to be able to --
18 they had use some methodology with caffeine and morphine; is
19 that correct?

20 A. Yes.

21 Q. But you were not able to duplicate that a scientist in your
22 laboratory?

23 A. I was not. Upon reviewing what I did, I don't remember -- I
24 haven't reviewed the study that I reference in this memo
25 recently, so I don't recall exactly all of the groups that they

1 included in their study.

2 But I conducted the study as I was trained to conduct
3 taste aversion studies when I was a post doctoral student and I
4 didn't demonstrate caffeine withdrawal to my satisfaction.

5 THE COURT: By the way, you didn't attempt to
6 demonstrate morphine withdrawal, did you?

7 THE WITNESS: No, Judge, I didn't.

8 BY MR. WEBB:

9 Q. So the bottom line, after all your testing, did you -- what
10 did you learn from this?

11 A. Not a heck of a lot, other than -- I obviously had some
12 problem in the lab that I was in at the time demonstrating this
13 phenomenon.

14 Q. Now, the study did at least show -- you did not observe
15 withdrawal from nicotine. Is that fair to say?

16 A. I didn't.

17 Q. But did you ever try to use that and take in any position on
18 any nicotine or addiction issues over the years because -- did
19 you ever try to use that?

20 A. Not -- not per se, no, because I didn't trust what I was
21 doing in the lab. I didn't have confidence that my procedures
22 were adequate for whatever it is. I never understood why. But
23 I didn't have any confidence, so I just set it aside.

24 Q. I'm now going to show you an exhibit that is marked as JD
25 040024 and ask you to tell the court the exhibit that I've just

1 handed you, what that is.

2 A. This is a lab notebook that reflected the work that was
3 ongoing in the behavioral research lab -- rat lab, if you
4 will -- at the time that I was there.

5 Q. Doctor, in preparing for -- so we can save time here in
6 court -- in preparing for your testimony, did I ask you to look
7 at that book so that -- and I've asked you the questions -- does
8 that exhibit, JD 40024, does that contain all of your laboratory
9 work that you did in connection with this study?

10 A. Yes, I believe it does.

11 Q. And, in fact, I think for the record, does it appear that
12 your work begins on page -- that's stamped 7647? I tried to tag
13 that page.

14 Is that the beginning of your research in that book?

15 A. I believe it is, yes.

16 Q. And then if you go page by page through the rest of that lab
17 notebook, do we see the work you did not only on nicotine, but
18 when you tried to check out caffeine, does it also reflect all
19 of it in there?

20 A. Yes. And then I think -- let me just tell you where it all
21 ends. There's some other work interspersed.

22 But the final study, frankly -- actually, it was one of
23 the middle studies I had forgotten about. This one, I think I
24 did recall.

25 It may be the last page of the book. I'm not able to

1 find it quickly. But it's towards the very end of the book.

2 MR. WEBB: Your Honor, I'm actually going -- in fact,
3 can I show the witness a copy of this, JD 040024A?

4 Q. Dr. Levy, what I've done is I've Xeroxed a copy of the lab
5 notebook.

6 MR. WEBB: Your Honor, I'm going to move to substitute
7 a copy for the original, although I want the original here. The
8 government can use it to cross-examine.

9 This is a fairly important exhibit that's used in other
10 trials, and if I could substitute a copy. If it's ever needed
11 by the court we will, of course, bring it back. Okay? But I
12 believe I can certify to the court that what is there is a copy.
13 The exhibit marked as 40024A is an exact Xerox copy of
14 Exhibit 40024.

15 THE COURT: Does the government have any problem with
16 that?

17 MR. WISE: No, Your Honor.

18 THE COURT: All right, that may be done.

19 BY MR. WEBB:

20 Q. Let me go to another part of your written direct
21 examination, Dr. Levy.

22 Do you recall the government in its written direct
23 examination and its oral questions asking you questions about a
24 research project at Philip Morris that involved research
25 concerning nicotine analogues?

1 A. Yes.

2 Q. And were you personally involved in that research?

3 A. Yes.

4 Q. And can you tell the court your best recollection of when
5 that research took place?

6 A. I obviously was a little confused yesterday in my written
7 direct about exactly when the rat lab was set up, but based on
8 some of the documents I've been shown I can only conclude that
9 it must have been in late 1977.

10 Q. Okay. Now, at the time that Philip Morris began
11 conducting -- well, can you describe for the court what was
12 Philip Morris doing with this research?

13 A. At least from my part of it, it was really quite simple.
14 Could we find a nicotine analogue that would have the central
15 nervous system effects of nicotine without the peripheral
16 nervous system effects.

17 Q. What are the peripheral nervous system effects?

18 A. I'm sure they are more than what I can tell you. But the
19 two that I focused on in terms of remember: Heart rate,
20 increased heart rate and increased blood pressure because they
21 would be implicated in cardiovascular disease.

22 Q. So was this project part of a project to at least explore
23 the possibility of developing a safer cigarette that would
24 eliminate at least some of the health hazards of smoking?

25 A. In the beginning I understood it to be exactly that.

1 Q. Now, how long did you work on the project? If you remember.

2 A. Until the time I left the rat lab I was working on nicotine
3 analogues, so that would have been -- in 1980 I left, so until
4 1980.

5 Q. Now, I don't want to get into a lot of detail about it, but
6 just so it's clear.

7 The process that was followed to try to find a nicotine
8 analogue, does the process at least start with trying to come up
9 with the analogues?

10 A. The synthetic organic chemists have to make the compounds.

11 Q. And where do they work?

12 A. Philip Morris.

13 Q. And then after they make the compounds, where do you come
14 into the picture?

15 A. I come in, in doing behavioral evaluation of the analogue.

16 Q. What are you looking for?

17 A. Basically, can it mimic nicotine?

18 Q. On the central nervous system?

19 A. Correct.

20 Q. If you find that the analogue could mimic nicotine, do you
21 send that on to someone else to see what the effect it would be
22 on the peripheral systems?

23 A. I'm not clear about the sequence because I wasn't managing
24 that part of it.

25 Q. Okay.

1 A. At some point outside investigators would get involved as
2 per the memo that I was shown yesterday doing tests of
3 peripheral nervous system activity, et cetera.

4 Q. Now, at the time that you -- when did you leave the position
5 as a scientist in the behavioral research area?

6 A. I don't know that I recall the month. It was, if I'm
7 remembering correctly, 1980.

8 Q. I think that's what your written direct says.

9 A. No. It must have been 1980.

10 Q. 1980. At the time that you left, at least to your
11 knowledge -- strike the question.

12 Would it be fair to say that during that time, would
13 you be called a bench scientist? Is that the right --

14 You're doing hands on work in a laboratory; is that
15 right?

16 A. I was doing basic research.

17 Q. Basic research?

18 A. The way I would describe it.

19 Q. You were not in charge of this program?

20 A. No.

21 Q. To the best of your knowledge, based on what you knew by the
22 time you left had Philip Morris been able to determine and find
23 any nicotine analogue that could be implemented in a commercial
24 cigarette, at least at the time that you left there?

25 A. No.

1 Q. And after that, have you ever -- do you know of Philip
2 Morris ever being able to do that? If you know.

3 A. I don't know.

4 Q. That's fine. Now, Dr. Levy, let me ask you a question
5 about.

6 Yesterday, Mr. Wise asked you a question about Philip
7 Morris's consumer research regarding lights and low-tar
8 cigarettes, and I'm going to show you --

9 Can I show the witness U.S. Exhibit 76061, which I
10 believe is in evidence. This is what is called Monograph 13.
11 And I'll get this exhibit for you, Dr. Levy.

12 MR. WISE: Your Honor, I'm going to object. Mr. Webb
13 objected to when I tried to ask this witness about light and
14 low-tar cigarettes and that objection was sustained and that
15 line of questioning didn't happen.

16 MR. WEBB: There's one question and answer that did
17 happen. Okay?

18 There's a question in the record where she gave an
19 answer about what certain research results showed with tar --
20 with lights and low tar, one question, one answer, and all I'm
21 trying to do is clarify that question and answer. I don't
22 intend to go anywhere beyond that.

23 MR. WISE: Your Honor, I think if it was -- I mean, if
24 Mr. Webb is going object to my being able to ask that, for him
25 to now stand up and say he should be able to ask about that, I

1 just think that's --

2 MR. WEBB: I don't mind if that -- maybe, I think -- I
3 don't remember my objection, but my understanding is that that
4 question and answer was not struck. If it is struck, I will not
5 go into it because it's not that important to me. But....

6 THE COURT: I don't think it was struck. Certainly, as
7 a matter of principal, you're correct. If you were not allowed
8 to ask any questions, there couldn't be any cross at this time.
9 If there was a question and answer that's in the record, then
10 Mr. Webb has a right to follow up on that particular question
11 and answer.

12 Do you, by chance, happen to have it?

13 MR. WEBB: I do.

14 If the government doesn't have any objection to
15 striking it, I will move on. Do you know the question and
16 answer I'm talking about?

17 MR. WISE: I don't.

18 THE COURT: Obviously, nobody can remember the question
19 and answer except maybe Mr. Webb. Let's just come back to this
20 in a couple of minutes.

21 MR. WEBB: I'm going to leave it behind and I'll come
22 back right after lunch and do it very quick, Your Honor. I've
23 got it here and I'll have to find it.

24 BY MR. WEBB:

25 Q. Now, just on a couple of miscellaneous points, Dr. Levy.

1 You testified in response to one of Mr. Wise's
2 questions yesterday that Steve Parrish was among the people who
3 served on the Philip Morris USA Senior Team.

4 Do you recall that testimony?

5 A. Yes.

6 Q. Now, Mr. Wise asked you -- he stated in a question that
7 Mr. Parrish's title was Senior Vice President for Corporate
8 Affairs when he served on the Senior Team for Philip Morris USA.

9 And my question to you is, if you think back upon those
10 years, am I correct the title that Mr. Parrish held at Philip
11 Morris USA when he served on Philip Morris USA's Senior Team,
12 his titles at that time were Senior Vice President and General
13 Counsel and Senior Vice President for External Affairs. Is that
14 correct, to the best of your recollection?

15 MR. WISE: Your Honor, I'm just going to object on the
16 grounds that the leading in that question was --

17 THE COURT: He's allowed to lead.

18 MR. WISE: But, Your Honor --

19 THE COURT: It's cross-examination.

20 MR. WISE: It is a friendly witness.

21 THE COURT: I understand that, but he can still lead.

22 Go ahead, please.

23 BY MR. WEBB:

24 Q. Do you recall my question now?

25 A. Yes. Those titles seem familiar to me, but I will tell you

1 that I'm a bit confused because I'm recalling him being in
2 charge of USA Corporate Affairs at some point. So maybe that
3 was the External Affairs' title.

4 Q. Okay. That's fair. That's fine.

5 Now, Dr. Levy, in reading over a transcript of your
6 testimony yesterday -- let me ask it this way.

7 Am I correct, the Retail Leaders Program, do you recall
8 asking -- being asked some questions about that yesterday?

9 A. Yes.

10 Q. And you generally recall that the Retail Leaders Program
11 replaced the Retail Masters Program. Is that correct?

12 A. Yes.

13 Q. And the retail program was something that was not under your
14 supervision; is that correct?

15 A. That's correct.

16 Q. To the best of your recollection, Dr. Levy, did the Retail
17 Leaders Program replace the Retail Masters Program by being
18 announced in 1998 and rolled out in 1999?

19 Do those years seem about right to you? If you
20 remember.

21 A. I really don't remember. I'm sorry. I don't remember.

22 Q. Do you remember it being in the late 1990s when it was
23 rolled out, if you remember?

24 A. Could be. I'm foggy. I'm remembering 1992, I think, for
25 Retail Master -- I'm confused about the dates. I'm sorry.

1 Q. That's fair. If you don't remember, just tell me you don't
2 remember.

3 A. I don't remember.

4 Q. Counsel asked you some questions yesterday about the retail
5 program, and I just want to make sure the record is clear on
6 this.

7 And there will be other witnesses that are going to go
8 into this in more detail. So I take it you agree there are
9 people at Philip Morris that know more than you about retail. Is
10 that fair to say?

11 A. I certainly hope so.

12 Q. But you talked about -- counsel asked you a number of
13 questions yesterday about the Retail Leaders Program.

14 Am I correct, were you generally aware from being on
15 the Senior Team that there were incentives built into that
16 program that Philip Morris believed would actually reduce the
17 visibility of the cigarette category of retail? Were you
18 generally aware of that?

19 A. I was certainly aware of that because -- well, because the
20 Senior Team, but also those were the kinds of topics that were
21 addressed with AGs, and I believe I also touched upon them at
22 the triennial presentation that I made.

23 Q. Were you at least generally aware that Philip Morris's
24 Retail Leaders Program put incentives into their program so that
25 retailers would be incentivized to get rid of all the clutter

1 where advertising might be in multiple locations throughout the
2 store, to try to get the category centralized in one location?

3 Did you at least generally understand that was at least
4 what Philip Morris was attempting to do?

5 A. My recollection is that retail leaders was moving in that
6 direction right about the time that I was leaving the company.

7 I clearly remember the incenting for nonself-service,
8 incenting for We Card training, that sort of thing.

9 Q. Okay.

10 A. But the plan, as I understood it, was in 2002 to do the
11 things that you've described, and I don't know to what extent
12 they were being implemented while I was still there.

13 Q. That's fair. The other -- strike the question.

14 The other incentive portion of the Retail Leaders
15 Program you mentioned was to incentivize retailers to try to
16 convert their cigarette displays so they would be behind the
17 counter in a nonself-serve setting. Is that fair to say?

18 A. Yes.

19 Q. What was the purpose of that?

20 A. Well, the purpose in my mind was primarily to get cigarettes
21 out of easy reach of kids, because, like it or not, there was
22 the potential for, anyway, shoplifting to go on.

23 I'm trying to think. The retailers fought it a bit as
24 I'm recalling. That's why we had to incent them to go
25 nonself-service because it was easier for their adult consumers

1 to come in, grab a pack of what they wanted and pay for it.
2 Convenience stores, they want a quick transaction. That was a
3 quick transaction. Rather than have a clerk have to get their
4 hands on the right packing.

5 Q. And what was the status of that when you left, if you
6 remember?

7 A. My recall is that we had an incentive in place to reward, if
8 you will, or motivate retailers to go nonself-service. I
9 believe it was talk of requiring that later.

10 MR. WEBB: I have one topic left, Your Honor, which I
11 would say would take very few minutes. Five minutes,
12 eight minutes, and then this one little point that I left
13 behind.

14 Would it be okay to recess now and come back or -- what
15 would you like me to do?

16 THE COURT: No, I'd like to finish now and then there
17 will be one question and answer to come back to after lunch.

18 MR. WEBB: Fine.

19 BY MR. WEBB:

20 Q. Dr. Levy, I want to go to another area of your written
21 direct.

22 Do you recall in your written direct that you were
23 asked some questions about Philip Morris USA's denicotized-
24 denicotined cigarette. Do you recall that?

25 A. Yes.

1 Q. In fact, counsel yesterday showed you this exhibit. Let me
2 show it to you, U.S. Exhibit 20098. And I'm going to ask if I
3 could hand U.S. Exhibit 20098. Jamie, this is tab 69A. And
4 I'll call this exhibit up. And the page I want, I believe it
5 was called to your attention yesterday. It's Bates stamped
6 8060.

7 And at the bottom of the page, I believe counsel called
8 to your attention that this statement was made. "If the
9 industry's introduction of acceptable low nicotine products does
10 make it easier for dedicated smokers to quit, then the wisdom of
11 the introduction is open to debate."

12 Do you see that?

13 A. Yes.

14 Q. Regardless of what is stated in that document -- and the
15 government asked you some questions in your direct examination
16 about the denicotined product -- did, in fact, in the 1980s, did
17 Philip Morris develop a process for removing nicotine from
18 tobacco that was similar to removing caffeine from coffee? Do
19 you recall that?

20 A. Yes.

21 Q. And I don't intend to get into a lot of detail about that,
22 but was that a safer cigarette project that was ongoing while
23 you were at Philip Morris?

24 A. In a sense, it was.

25 Q. Okay.

1 A. To the extent that someone was worried about nicotine being
2 in their cigarette, it was a safer product.

3 Q. And the government brought out -- you did some consumer
4 research on the product; is that correct?

5 A. Yes.

6 Q. And --

7 A. In fact, we did quite a lot.

8 Q. You did a lot of consumer research.

9 And when did you come into the picture regarding the
10 denicotined product?

11 A. I may still have been in Richmond in my manager product
12 evaluation and brand development position when I first heard
13 about it.

14 The timing, which is not clear to me, was right around
15 the time that Philip Morris became aware of the process that had
16 been used to decaffeinate coffee, and I think that was by
17 General Foods.

18 Q. Can you generally describe your recollection of what effort
19 Philip Morris made to develop this product, and did it actually
20 get into the market?

21 A. We did more than one, as I recall, test market.

22 Just the simple fact of trying to take the nicotine out
23 of tobacco and leave something that was potentially smokeable,
24 my recollection was it was a feat, and in fact a special plant
25 was built down I-95 south of Richmond for that purpose.

1 Q. They built a plant just to make the product?

2 A. Right. Well, to make -- to make the tobacco.

3 Q. That would go into the cigarette rod?

4 A. Correct.

5 Q. And had you learned that Philip Morris invested about
6 \$300 million in this project while you were at Philip Morris?

7 A. That was the number I heard kicked around, yes.

8 Q. And Philip Morris advertised the product; is that correct?

9 A. As part of the test markets, yes.

10 Q. Can I show the witness JD 053836? Jamie, that's tab 70.

11 Can I blow that text up a little bit bigger, Jamie?

12 Were you involved -- the advertising that Philip Morris
13 did to advertise this as a denicotized tobacco, Philip Morris
14 actually tells the public that it's the only cigarette made from
15 denicotined tobacco. There's less than point one-tenth of a
16 milligram of nicotine. Do you see that?

17 A. Yes.

18 Q. Now, that type of advertising where Philip Morris
19 communicated to the American public that it had denicotized
20 tobacco, you did some consumer research on what that
21 communicated to the public -- to consumers. Is that correct?

22 A. Yes.

23 Q. And the government refers to that in your written direct
24 examination.

25 Can I show the witness U.S. Exhibit 20356, please?

1 Do you recognize that as a document that was given to
2 you by the government and you referenced in your written direct
3 examination?

4 A. Yes.

5 Q. And I notice here that -- is this qualitative -- this is
6 qualitative research; is that correct?

7 A. Yes.

8 Q. Does that mean this is a focus group?

9 A. They may have done individual interviews. I don't recall.
10 But it says here some place what they did.

11 Q. What were you testing here?

12 A. I think, if I'm recalling now -- this was not my work,
13 okay -- but as I recall this memo, it was basically to introduce
14 the concept and let the respondents smoke one cigarette and get
15 reactions from that one cigarette, a so-called single stick
16 test.

17 Q. And when you tell people that you've taken the nicotine out
18 of cigarettes, the statement that is made here that virtually
19 everyone identified with a health benefit. Is that your general
20 recollection of what people thought when they found out that you
21 had taken nicotine out of a cigarette?

22 A. They thought that, among other things.

23 Q. Okay. They thought that it was a health benefit.

24 What else did your consumer research show?

25 A. That it might be easier to quit, and they were concerned

1 about what it would taste like, although they were pleasantly
2 surprised in the single stick test about the taste. They felt
3 they needed more experience with the product to know for sure
4 what it would taste like.

5 Q. Now, you're aware here, the government suggests in the
6 written direct that you didn't go far enough in your
7 advertising. Do you recall that?

8 A. No, I don't.

9 Q. Okay. Let me ask you. The advertising that Philip Morris
10 did do, were you aware that even with the advertising Philip
11 Morris did do, that the public health community came down on top
12 of Philip Morris accusing Philip Morris of making health claims?

13 MR. WISE: Your Honor, I object at this point. I think
14 perhaps the reason why Dr. Levy can't recall is I don't recall
15 that this actually is addressed in the written direct. I could
16 be wrong.

17 MR. WEBB: That was certainly the suggestion I took
18 from the written direct, is that Philip Morris did something
19 wrong here because we didn't market this product correctly.

20 MR. WISE: Maybe Mr. Webb could point to the page that
21 he's referring to. I have no memory of that either.

22 MR. WEBB: Your Honor, I don't have the written direct
23 in front of me. I'll move on. It's not that important.

24 THE COURT: All right.

25 BY MR. WEBB:

1 Q. Doctor, what happened to this product in the marketplace?

2 A. Like I said, I think we did more than one test market.

3 Basically, it failed.

4 Q. Do you remember how many test markets you used?

5 A. More than one. I'm going to say four, sticks in my mind.

6 MR. WEBB: Your Honor, that's all the --

7 A. We didn't give up.

8 Q. You kept trying and --

9 A. Right --

10 Q. -- it didn't -- people didn't like it, did they?

11 A. The research I did suggested that the problem was that this

12 cigarette didn't have enough taste or impact.

13 THE COURT: Those are two very different things.

14 THE WITNESS: Yes, they are, Your Honor.

15 And "impact" in my experience would be mediated by
16 nicotine, and so it didn't have the mouth feel and -- kind of
17 the same thing you get from Chinese mustard, it didn't have
18 that.

19 THE COURT: In other words, would it be accurate to say
20 in a lay person's terms that the cigarette, the denicotized
21 cigarette did not produce the rush that nicotine produces?

22 THE WITNESS: I'm pretty sure that would be true.

23 But what they were reacting to was not kind of a rush
24 phenomenon, it's more of a feeling like you can tell that you've
25 got smoke in your mouth and you're inhaling it into your lungs.

1 I'm not a smoker. I could inhale the smoke from the cigarette.

2 So, it just -- it didn't have enough -- what was often
3 described as taste by the smokers, I read that as taste and
4 impact.

5 MR. WEBB: Your Honor, I have no more questions except
6 for that one small area and I'm finished.

7 THE COURT: All right. Mr. Wise, now I think you ought
8 to be able to give me at least a rough idea of how long your
9 redirect will be.

10 MR. WISE: Your Honor, I think 45 minutes and I'll see
11 if I can shorten it over the lunch break.

12 THE COURT: That will be fine. Let's come back at a
13 quarter of 2:00, please, everybody.

14 (Lunch recess began at 12:38 p.m.)

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1 INDEX

2 WITNESS: PAGE:

3 CAROLYN LEVY
4 CROSS-EXAMINATION by Mr. Webb 12602

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7 *****

8 CERTIFICATE

9 I, EDWARD N. HAWKINS, Official Court Reporter, certify
10 that the foregoing pages are a correct transcript from the
record of proceedings in the above-entitled matter.

11 Edward N. Hawkins, RMR

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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.
	.	February 9, 2005
	.	
Defendants.	.	
.	

VOLUME 62
AFTERNOON SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 AFTERNOON SESSION, FEBRUARY 9, 2005

2 THE COURT: All right, good afternoon, everybody.

3 Mr. Webb, did you find that question and answer?

4 MR. WEBB: I did. I'm going to have Jamey put that on the
5 screen right now so you'll see it, and then I probably have a
6 minute and a half of questions. Let me try to get it up on the
7 screen. It's on page 12491 from yesterday's Court hearing --
8 yesterday's trial proceeding, and while Jamey's putting it up I
9 can read it to Your Honor if you want, or I can wait a second for
10 it to come up on the screen.

11 THE COURT: Why don't you start reading it, please.

12 MR. WEBB: I will. The question referring to is a
13 question by the government, "Now you also learned through your
14 consumer research that the public perceived light and low tar
15 cigarettes as conferring a health benefit as being healthier than
16 full flavor cigarettes; isn't that right?" And Dr. Levy's answer
17 was, "I think that's a fair statement, what I would normally hear
18 from smoke -- what I would normally hear smokers say when I was
19 in consumer research doing qualitative research, was that the
20 light taste of the cigarette conveyed to them the notion that it
21 might be healthier."

22 I simply have two or three questions. I want to clarify
23 or go into a couple of points about what the witness meant by
24 that. I haven't, obviously, talked to her. However, I do agree
25 with the government, I did notice that the next question I then

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1 objected and you sustained the objection, so if this question is
2 still in the record, I want to clarify it. If it should be
3 struck I don't mind and it doesn't matter to me.

4 THE COURT: Well, I don't think there was any motion to
5 strike it.

6 MR. WEBB: No.

7 THE COURT: And so I didn't strike it, so it's in the
8 record.

9 MR. WEBB: Let's go. I'll do it and be very, very brief.

10 CONTINUED CROSS-EXAMINATION OF CAROLYN LEVY, Ph.D.

11 BY MR. WEBB:

12 Q. Dr. Levy, I put up on the screen some testimony that you
13 gave yesterday. Do you have that in front of you now?

14 A. I see it on the screen, yes.

15 Q. Okay. And let me -- as far as the answer that you gave
16 about qualitative research, I believe you told the Court this
17 morning that qualitative research, because it's done in a
18 smaller group of people with an interactive back and forth, that
19 it can't be generalized to the entire public, is that
20 essentially correct?

21 A. That's totally correct.

22 Q. Totally correct, okay. And yesterday when Mr. -- am I
23 correct, Dr. Levy, when Philip Morris did do the type of
24 consumer -- you can leave that up on the screen, if you could,
25 Jamey -- when Philip Morris did do the type of consumer

1 research, the qualitative research you're referring to in that
2 answer regarding low tar and light cigarettes, do you recall
3 that Philip Morris would receive a variety of different
4 responses as to reasons why consumers might choose to smoke a
5 low tar or light cigarette? Is that fair to say?

6 A. Are you asking through qualitative?

7 Q. Yes, would you receive a variety of different types of
8 answers?

9 A. Yeah.

10 Q. Okay. Well --

11 A. I mean, it would be rare in a focus group to get total
12 agreement on anything.

13 Q. Okay. That's what I thought. Am I correct, for example,
14 one of the reasons I think that would come through is that some
15 people would choose to smoke a light cigarette or low tar
16 because of taste; is that fair to say?

17 A. I think it's absolutely true, particularly as the light
18 segment got more established, that was the taste that people
19 preferred.

20 Q. Another reason people would give is that there's health
21 benefits; is that correct?

22 A. Yes.

23 Q. And did sometimes people give the answer that their
24 friends were smoking light cigarettes, peers were smoking light
25 cigarettes?

1 A. We would hear that from the younger adult people. I
2 mean, Marlboro Light was the best selling cigarette that I'm
3 remembering amongst 18 to 24s.

4 Q. In fact, as far as the type of responses you would get,
5 I'm going to show you Monograph 13, which summarizes the
6 responses they've gotten in surveys.

7 Could I have U.S. Exhibit 76061 -- I'm sorry, I'm going to
8 use the JE, in joint Exhibit 76061, it's tab 76, Jamey. And --

9 MR. WISE: Your Honor, I'm going to object until we get
10 into Monograph 13. I think this one question doesn't warrant now
11 moving into this document. It was -- Mr. Webb has addressed the
12 issue of what Dr. Levy was discussing as far as the qualitative
13 research goes, but I can't -- after having been cutoff from
14 exploring the subject any further to now go into Monograph 13, I
15 just think that's inappropriate at this time.

16 MR. WEBB: I'm going to show --

17 THE COURT: I'll allow a couple of questions. Go ahead,
18 Mr. Webb.

19 BY MR. WEBB:

20 Q. Looking at Monograph -- have you -- do you know what
21 Monograph 13 is, Dr. Levy?

22 A. I think I've heard of it. I'm not sure I remember much
23 about it.

24 Q. And I'm not going to test your knowledge of it or your
25 recollection, I'm just going to go to a page, it's actually page

1 194 in this document, and I think -- it's on the screen now if
2 you --

3 A. Okay.

4 Q. Actually, Jamey, would you go up a little higher on that
5 document on that page? Go up to the top, Jamey.

6 MR. WISE: Your Honor, I'm going to object. I was looking
7 at the realtime. I think Dr. Levy just said she thinks she's
8 heard of it but she doesn't think she remembers much about it. I
9 don't know that proper foundation has been laid to ask about this
10 document.

11 MR. WEBB: This document is actually in evidence, I'm just
12 going to find out if she agrees or disagrees with some of their
13 conclusions very briefly.

14 BY MR. WEBB:

15 Q. Do you see the heading there called "reasons for smoking
16 or switching to light cigarettes"? Do you see that?

17 A. Yes.

18 Q. And if you go down to the second paragraph -- the second
19 paragraph, it's -- do you see where it says, "In the same
20 national telephone survey, the reasons given by current daily
21 smokers for why they chose to smoke ultralight, light cigarettes
22 were" and then they get "a step towards quitting", a certain
23 percent gave that reason, "reduced risk", some percent gave that
24 reason, "reduced tar", another percent gave that reason,
25 "reduced nicotine", another percent gave that reason, and

1 "prefer the taste", another percent gave that reason.

2 My only question is, those type of answers, I'm not
3 talking about the percentages, but just -- I'm not trying to get
4 into granular deep -- but the types of answers that is reported
5 in this type of survey, are those similar to the types of
6 answers you would get in your qualitative research, Dr. Levy?

7 A. I think so. I particularly remember the quitting with
8 regard to the low nicotine cigarettes. The others, I would say,
9 would be typical of light cigarettes and probably ultra-light as
10 well.

11 Q. Okay that's fair. Let me ask you just one last question.
12 When you said yesterday that in the consumer research done at
13 Philip Morris, that smokers associate the taste with health, I
14 take it, based on your answer earlier, that not everyone gets --
15 not everyone gave that answer; is that fair to say?

16 A. Yes, that's true.

17 MR. WEBB: I have no more questions.

18 THE COURT: All right. Now, we need to discuss the
19 scheduling. My understanding is that even though our deposition
20 is scheduled to begin at 2:30, that people are going to need
21 about 15 minutes to set up the equipment and triple test it,
22 which puts us at 2:15, I gather rather than the 2:45.

23 Mr. Wise, you've had the lunch break now. You had said
24 you were going to have about three-quarters of an hour. Is that
25 still your estimate?

1 MR. WISE: I've reduced it, Your Honor, I think to, I
2 think, to about a half an hour. I mean, I can try -- depending
3 on how it goes, we can try to do it in that amount of --

4 THE COURT: And I have one other question. Do I
5 understand that there's a cutoff on the Australian end, which I
6 never did -- I hadn't heard that before today, as to how late
7 that deposition could go?

8 MS. EUBANKS: Your Honor, I don't know that it's
9 necessarily a cutoff or not. I learned last night that it's
10 possible that the witness's attorney may have to leave at 9:30
11 Australian time, which is 5:30 our time. I don't know, A,
12 whether that's actually going to take place, and B, whether
13 Mr. Welch, who is appearing, obviously, voluntarily will have a
14 problem if his counsel departs. So I guess I don't know. But I
15 do want the Court to be apprised of the fact, too, that at 2:15
16 when the call does begin to take place, there is nothing that
17 would prohibit us from going forward with testimony, however,
18 there will be at the other end, a conference room in Sydney,
19 where they will be able to observe what's going on in the
20 courtroom here during that 15-minute period. So it's obviously
21 up to Your Honor whether you want to recess at 2:15 to place the
22 call and get the connection or whether you would prefer just with
23 the knowledge that there would be -- the proceedings would be
24 taking place not just here but projected into a courtroom -- a
25 room in Sydney while we were continuing.

1 Mr. Wise does have about 30 minutes. I think it's
2 probably really a good 30 minutes, and I don't want him to try to
3 cut it short. We've already cut down 15 minutes.

4 THE COURT: Well, first of all, I don't have any objection
5 to the people in Australia observing the courtroom. It's an open
6 public courtroom, so it would be as if they were sitting in the
7 United States, although I guess they couldn't observe it on a
8 camera, could they?

9 MR. WEBB: And, Your Honor, if there's any -- I talked to
10 Ms. Eubanks and Mr. Wise, and if there's any chance that we could
11 do 30 minutes now and finish, because of certain health -- I
12 would much stronger prefer if it's possible to finish today, and
13 if it's not it's not and Dr. Levy will be back tomorrow.

14 THE COURT: That's why I wanted to know what the cutoff --
15 whether there was some kind of an arbitrary deadline on the
16 Australian end. If there's not, then I would want to finish
17 Dr. Levy's testimony and then go to the, obviously, the
18 Australian deposition.

19 Mr. Frederick, you need to weigh in too.

20 MR. FREDERICK: Just very briefly, my only request on the
21 Australian end that is Mr. Welch be asked to exclude himself from
22 the conference room while we do the set up.

23 THE COURT: He be what?

24 MR. FREDERICK: Excused from the conference room while
25 we're setting up, just like any witness can't sit in the

1 courtroom and watch, just like Mr. Welch.

2 THE COURT: That's true, the rule on witnesses would also
3 apply.

4 MR. FREDERICK: Thank you.

5 MS. EUBANKS: Your Honor, Mr. Spiegel had advised me that
6 he spoke with Mr. Welch later last night and that it is actually
7 accurate that at 9:30 Sydney time that Mr. Welch's lawyer leaving
8 will affect his ability to testify, and that's 5:30 our time.

9 THE COURT: Do counsel think that the entire proceeding
10 can take place in three hours or less?

11 MS. EUBANKS: Well, I guess that depends on -- what is it
12 a 29 page --

13 THE COURT: I know. Are you going to do any direct?

14 MS. EUBANKS: Well, no, we're going to -- he's a friendly
15 witness and we think that's --

16 MR. FREDERICK: Your Honor, I would imagine we can get it
17 done in three hours.

18 THE COURT: Pardon?

19 MR. FREDERICK: I imagine we could get it done in
20 three hours or less. I think mine would be under two hours, I
21 can't imagine that the government is going to have an hour long
22 redirect.

23 MR. SPIEGEL: If yours is under two I think we can
24 definitely get it done in three.

25 THE COURT: But of course, we're also trying to get

1 Dr. Levy done.

2 MS. EUBANKS: Your Honor, I'm sorry, I think that, you
3 know, given the hour now and the timing for doing it and what I
4 know that Mr. Wise has, that it's not likely that we're going to
5 finish the testimony of this witness today, and even if we
6 started right now, because I think it's essential that we start
7 Mr. Welch, if we possibly can, at 2:30, that's 6:30 in the
8 morning Sydney time, and if his lawyer does have to leave, then
9 at least we have the likelihood of completing that witness.

10 MR. WEBB: Well, Your Honor, I think -- we've certainly
11 gone out of our way to try to accommodate government witnesses in
12 this case, if there's any chance of getting Dr. Levy out of here
13 today I certainly would like to try to do it and I can't
14 imagine -- well, first of all, I don't know where Mr. Welch gets
15 off deciding he's going to leave a proceeding at 5:30, but I
16 guess I'm not going to go there right now, I'll just make that
17 observation.

18 If we could start with Dr. Levy, let Mr. Wise ask his
19 questions, if it takes longer maybe she'll come back, maybe we
20 can get it done in 24 minutes.

21 MS. EUBANKS: Well, Your Honor, we would get it done if
22 the witness confines her answers to yes or no.

23 THE COURT: Oh, this witness has been very responsive nor
24 has she been evasive, so you know, witnesses are damned if they
25 do and damned if they don't, Ms. Eubanks, and this witness

1 doesn't fall into either category in my view. So I don't think
2 that's been the problem. We will start now. As I understand it,
3 we can go forward, even while they're setting up, is that right
4 or is that wrong?

5 MS. EUBANKS: That's correct.

6 THE COURT: Then we will go forward. Somehow it will have
7 to be conveyed to Mr. Welch that he can't sit in. I don't know
8 how in the world you're going to do that.

9 MS. EUBANKS: I don't think we can.

10 THE COURT: Will we see them while they're setting up?

11 MS. EUBANKS: I don't think so.

12 MR. FREDERICK: Your Honor, it's not a big issue, although
13 our counsel will call the counsel and make the request.

14 MS. EUBANKS: But I do want to make it very clear, Your
15 Honor, in light of Mr. Webb's statement about how the witness
16 gets off deciding he's going to be unavailable. I just want to
17 make it clear on the record here, that the witness is appearing
18 voluntarily, that he's not within the control of the United
19 States, and if we could control the witness --

20 MR. WEBB: I withdraw my comment.

21 MS. EUBANKS: Thank you.

22 THE COURT: Let's move on, everybody. And it may be, just
23 so Dr. Levy knows, that you have to make an unpleasant choice
24 later in the day, and you may have to decide if we've only got a
25 short amount of testimony and I would want an iron clad

1 representation from the government, that if we only have a half
2 an hour more testimony, I would be willing to do that until 6:00
3 tonight. So you may have to decide whether you want to be
4 excused until approximately 5 or 5:30 and come back and finish,
5 or whether you would prefer to come back tomorrow morning and get
6 your testimony concluded, but you don't have to decide that right
7 now.

8 THE WITNESS: Okay.

9 THE COURT: Mr. Wise.

10 MR. WISE: Thank you, Your Honor.

11 REDIRECT EXAMINATION OF CAROLYN LEVY, Ph.D.

12 BY MR. WISE:

13 Q. Good afternoon, Dr. Levy.

14 A. Good afternoon.

15 Q. I would like to pick up right where we left off.

16 Mr. Webb asked you a series of questions about the statement you
17 made yesterday in testimony that you were aware that consumers
18 perceived a health benefit from smoking light and low tar
19 cigarettes. Is that your recollection of what just happened?

20 A. Yes.

21 Q. And Mr. Webb asked you, and you had given testimony, that
22 you were aware of that from qualitative research, which you, I
23 think, then clarified you meant focus groups in response to a
24 question from Mr. Webb; is that right?

25 A. Yes.

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1 Q. And you were also aware of quantitative research that
2 Philip Morris did where respondents in a telephone survey
3 reported that the reason they smoked a Marlboro brand, a light
4 low tar Marlboro brand was because of the perception that it
5 conferred a health benefit; isn't that right?

6 A. I remember asking questions like that as part of consumer
7 tracking, so if -- are you referring to consumer tracking data?

8 Q. I am.

9 A. I remember asking those questions. I'd have to look at
10 some data to be able to tell you. The thing about witnessing
11 focus groups is they're much easier to recall than reams of data
12 that have been collected over the years and consumer tracking.

13 Q. Why don't we look at a little data then. Chris, could I
14 have U.S. Exhibit 22222. I don't know, do you have a copy yet,
15 Dr. Levy? I'll ask you about the first two pages, maybe if I
16 could do it on the screen.

17 A. I'm not able to read what's on this screen.

18 Q. Why don't I give you -- how about now? I can give you my
19 copy.

20 A. I can read it now that it's been blown up.

21 Q. Okay. You'll see this is a memorandum on Philip Morris
22 USA interoffice correspondence letterhead, it's dated October
23 21st, 1994, correct?

24 A. I'm sorry, I was trying to read the first paragraph.
25 Just the date of the memo?

- 1 Q. And that it's on Philip Morris USA letterhead?
- 2 A. Yes.
- 3 Q. And it's 1994, you would have been a Senior Vice
4 President of Sales and Marketing Information; is that right?
- 5 A. Marketing and Sales Information.
- 6 Q. Marketing and Sales Information.
- 7 A. Yes.
- 8 Q. And the subject line is "Marlboro Medium smoker image
9 study"; is that correct?
- 10 A. Yes.
- 11 Q. Do you recall doing consumer research on consumer
12 perceptions of Marlboro Medium?
- 13 A. I don't remember this study. I'm reading down, I don't
14 remember the study. I need to look at the methodology. Maybe
15 that will -- it doesn't seem to be the tracking study.
- 16 Q. Well, if we look -- I think Chris, if you scroll down
17 under background and methodology, since we just asked about the
18 methodology, the second paragraph "To achieve the above
19 objective a quantitative telephone study was conducted
20 nationally using 154 Marlboro Medium smokers. We obtained the
21 names of the Medium smokers from continuous tracking."
- 22 A. Right. So what that would have been, then, is a call
23 back study.
- 24 Q. Based on data you collected through continuous tracking?
- 25 A. That would be my understanding from that description.

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1 Q. And just so we understand what the objective is, if we
2 read the paragraph above, "Marlboro Medium was introduced in
3 June 1991 as an alternative to low tar cigarettes for full
4 flavor smokers seeking a lower tar product. We have not
5 conducted any studies since the packaging introduction to help
6 us identify who the Medium smokers are and how these smokers
7 perceive themselves within the Marlboro franchise. Therefore,
8 the objective of the current study was to understand the
9 Marlboro Medium smoker and to determine how these smokers see
10 themselves in relation to the Red and Lights smokers."

11 Is it correct, Dr. Levy, that the Marlboro Medium was
12 introduced in June 1991?

13 A. That's roughly my recollection, yes.

14 Q. And do you recall, perhaps -- do you recall consumer
15 research around this time to test consumer perceptions of this
16 particular brand?

17 A. In '91?

18 Q. No, I'm sorry -- well, yes, we'll start with '91.

19 A. '91 I do recall this -- I don't recall this study, but I
20 recall work being done in June of '91, or prior to June of '91.

21 Q. Let's go to page 2 and we'll just -- under the heading
22 "reasons for smoking Medium," the study reports, "Most smokers
23 said they chose Medium because of its perceived health benefits.
24 Over half of the Medium smokers said they started smoking Medium
25 because they wanted a cigarette with low tar and nicotine,

1 56 percent. For many respondent the name "medium" communicated
2 information on this product feature, with almost one-quarter,
3 24 percent, of these smokers saying that "medium" refers to the
4 cigarette's lower tar and nicotine."

5 Now, does that result -- is that result similar to the
6 results that you saw, as you've said, when you were doing work in
7 1991?

8 A. I can't tell you, because the work that we were doing in
9 '91 may have covered this area, but it particularly was related
10 to strength estimates of Marlboro Red and Marlboro Lights and
11 where Medium fit on that strength continuum, and it fit
12 in-between the two.

13 Q. But you do recognize that this reports that most smokers,
14 here the statistics is 56 percent, said they chose Medium
15 because of its perceived benefit; is that correct?

16 A. Well, the most is most. Presumably it's at least half.
17 The 56 percent relates to wanting a cigarette with lower tar and
18 nicotine. So I don't want to belabor the point, but I don't
19 know what the most was and we'd have to look at the cross tabs
20 to know.

21 Q. Just so the record is clear, as you've said --

22 A. It should be -- I would be shocked --

23 Q. Dr. Levy, if I could just finish my questions.

24 A. Sorry.

25 Q. "Most", as I think just testified, would refer to more

1 than half?

2 A. I would think so.

3 Q. Now, Dr. Levy, we also -- you were also asked some
4 questions by Mr. Webb about the memorandum that we discussed in
5 your direct exam from Dr. Dunn to Dr. Osdene that talked about
6 your withdrawal study, and you were shown your notebook and a
7 number of other items, and I just want to -- I just want to make
8 sure the record is clear on this point, since there was a good
9 deal of testimony on this in cross. I think we've got the
10 memorandum up on the screen. It's your testimony, Dr. Levy,
11 that you did not produce results that showed nicotine led to --
12 nicotine cessation caused withdrawal in rats; isn't that
13 correct?

14 A. Yes, that's correct.

15 MR. WEBB: Your Honor, this is -- never mind.

16 THE COURT: I didn't hear the witness's answer, although I
17 know she gave one.

18 THE WITNESS: That's correct.

19 BY MR. WISE:

20 Q. So the results in your notebook that we saw -- I think
21 you saw a copy of -- the results in your notebook were that rats
22 did not experience withdrawal after nicotine cessation; isn't
23 that correct?

24 A. The numbers would show that. What I concluded was that
25 my studies had been failures, basically.

1 Q. Dr. Levy, aside from your conclusion about the study
2 being a failure, my question is just limited to establishing the
3 fact, just so the record is clear, your notebook, the results
4 from this study did not show that rats experienced withdrawal
5 after nicotine cessation; isn't that right?

6 A. I believe that's correct with the exception of the
7 study -- the second study I did where I raised the level of
8 nicotine, and I'm not clearly recalling those results, but I
9 believe there might have been a hint of withdrawal. But I'm not
10 recalling the results clearly. The first study, no effect of
11 the nicotine withdrawal, clearly no effect. The last study,
12 clearly no effect. The second study, where I raised the
13 nicotine dose, the problem that I'm recalling from my review of
14 the notebook over the weekend was that the high nicotine dose in
15 the rats that were given nicotine throughout the study caused,
16 obviously, some sort of decline in their preference for sodium,
17 which made the whole thing cafluey in my mind, to use kind of a
18 nontechnical term, but I don't remember what the difference was
19 between the rats that had nicotine throughout and the ones who
20 had nicotine and then saline on the test day. I can't speak
21 clearly to that one study.

22 Q. Dr. Levy, is it your testimony that you can't remember,
23 which is what I think you said when you started your answer, or
24 that you can't interpret the data, because I think -- I think
25 you've now said two things?

1 A. I can't remember exactly what all the -- there were four
2 groups in each study, I can't remember the exact results for
3 that second study. I remember that the group that got nicotine
4 throughout showed a very low Saccharine intake, which was a
5 problem because they shouldn't have. I don't recall what the
6 other group that had nicotine and then saline on the test day
7 showed.

8 Q. You did testify you reviewed your notebook?

9 A. I did, and I feel pretty confident if I had seen anything
10 that rose to the level of evidence of nicotine withdrawal, I
11 would have reported it to you because I would have remembered
12 it.

13 Q. And as you've said, you considered the experiment a
14 failure ultimately?

15 A. Ultimately, I found it not enlightening at all.

16 Q. Now, Dr. Levy, you testified that you were the terrified
17 when Philip Morris CEO, Michael Szymanczyk asked you to become
18 the Senior Vice President of Youth Smoking; isn't that right?

19 A. Yes.

20 Q. And you testified that Mr. Szymanczyk came to you and
21 said -- and this is the word you used from the testimony
22 yesterday, that youth smoking rates and rising youth smoking
23 rates had become a "distraction" for Philip Morris; isn't that
24 right?

25 A. Yes.

1 Q. Now, is it fair -- it's fair to say, isn't it, that one
2 of the reasons you were terrified is because you had no
3 prevention experience when you were offered this position; isn't
4 that right?

5 A. I think that's part of it. The other thing that --

6 Q. Dr. Levy, my question was, is it fair to say that that's
7 one of the reasons?

8 A. Yes.

9 Q. And Mr. Szymanczyk put you in that position of Senior
10 Vice President of Youth Smoking Prevention rather than hiring an
11 expert in prevention from outside the company; isn't that right?

12 A. Yes.

13 Q. And, in fact, when you became Senior Vice President and
14 you chose people to come and work in that office, you chose --
15 you also chose people from inside Philip Morris; isn't that
16 right?

17 A. Yes.

18 Q. Including Jeanne Bonhomme, for instance, who had worked
19 with you, and I think for you in Consumer Research; isn't that
20 right?

21 A. Yes.

22 Q. And prior to being named Senior Vice President for Youth
23 Smoking Prevention, you had spent the last 18 years, or 14 to 18
24 years, doing consumer -- essentially consumer research; isn't
25 that right?

1 A. And product testing and business planning -- I mean, I
2 would have to total up the years. It was a significant number
3 of years doing either product testing work or consumer research
4 work.

5 Q. But none of that time was spent doing work on youth
6 smoking prevention?

7 A. None of that work was on youth smoking prevention or
8 youth smoking.

9 Q. And you've testified that Philip Morris had programs that
10 were directed at youth smoking prevention before you were named
11 to that position in 1998; isn't that correct?

12 A. Yes.

13 Q. But that you had not had any involvement with those
14 programs; isn't that correct?

15 A. Yes.

16 Q. Now, Dr. Levy, you also testified that you were aware
17 that 85 percent of people start smoking before the age of 18 and
18 therefore, when you were having conversations with
19 Mr. Szymanczyk, it was clear that if your work was successful it
20 would have a significant negative impact on Philip Morris's
21 business; isn't that correct?

22 A. I'm not sure about the 85 percent.

23 Q. Well, was it before --

24 A. Let's not quibble about that. I think we resolved some
25 of those issues. I knew, and I said to Mr. Szymanczyk, that if

1 we were successful it would impact the adult business over the
2 long term in a negative way.

3 Q. In a negative way?

4 A. Yes, yes. Specifically what I told him --

5 Q. Dr. Levy, just for the sake of time, just for the sake of
6 time, Your Honor, I think --

7 THE COURT: Go ahead. Next question.

8 BY MR. WISE:

9 Q. And you testified that Mr. Szymanczyk -- I think you used
10 the word "upgraded" the position -- so that you would be
11 reporting directly to him and no one else; isn't that right?

12 A. The upgrade really referred to, rather than have a Vice
13 President of Youth Smoking Prevention programs reporting in to
14 Ellen Merlo he would have a Senior Vice President of Youth
15 Smoking Prevention reporting directly to him.

16 Q. Just so the record is clear, Mr. Szymanczyk changed the
17 organizational structure so that you would report directly to
18 him; isn't that right?

19 A. Yes.

20 Q. And even when you were named to this position, -- well,
21 let's back up. Prior to being named to this position, you had
22 sat on the Senior Team as a member -- as the head of Marketing
23 and Sales Information; isn't that right?

24 A. Yes.

25 Q. And you continued to sit on the Senior Team after you

- 1 were named Senior Vice President for Youth Smoking Prevention;
2 isn't that right?
- 3 A. Yes.
- 4 Q. And you and your staff apprised the Senior Team of the
5 work you were doing in your office on youth smoking prevention;
6 isn't that right?
- 7 A. We would do updates periodically.
- 8 Q. For instance, the presentation we saw yesterday?
- 9 A. That kind of thing, but usually in more detail than that.
- 10 Q. And you would present these detailed -- these matters in
11 detail, as you've said, and the Senior Team would provide input
12 or other forms of guidance, just generally, it's fair to say
13 that, isn't that --
- 14 A. I wouldn't use the word "guidance". The guidance that I
15 got from above came from Mike Szymanczyk.
- 16 Q. Well, let's stay with that, then. In fact, you said that
17 Mike Szymanczyk had, I think, you used the phrase "direct" --
18 you were a direct report to Mike Szymanczyk?
- 19 A. Yes.
- 20 Q. So Mike Szymanczyk had final authority over the decisions
21 you made as the head of Youth Smoking Prevention; isn't that
22 right?
- 23 A. If he disagreed with something that I was doing, he would
24 tell me that.
- 25 Q. And, in fact, if you made a recommendation that he

1 disagreed with that related to youth smoking, his position would
2 prevail; isn't that right?

3 A. Not really. I mean, I can give you one example.

4 Q. Well, if you could just answer my question.

5 A. No.

6 Q. Well, you made a recommendation to Mike Szymanczyk based
7 on research you had done in youth smoking prevention that young
8 people were price sensitive, in other words, sensitive to the
9 price of cigarettes; isn't that right?

10 A. Yes.

11 Q. And you made a recommendation that Philip Morris should
12 stop opposing increases in excise taxes because of that fact;
13 isn't that right?

14 MR. WEBB: Your Honor, I'm going to object. I did not go
15 into excise taxes or anything about that. This is a subject
16 matter that's actually gone into in the written direct. Counsel
17 did not go into it in his oral direct, I stayed away from it in
18 my redirect and this is an area that is clearly outside the scope
19 of my questions.

20 MR. WISE: Your Honor, the questions went to the
21 interactions between Mr. Szymanczyk and this witness. There was
22 questions about the sincerity of Mr. Szymanczyk's commitment to
23 youth smoking, how this position was created, their interactions
24 once this is created, which is an example of one of those it's
25 well within the written direct and certainly within the scope of

1 the exam. And Mr. Webb asked a number of questions of this
2 witness as to this relationship and I have one question that I
3 want to explore.

4 MR. WEBB: Because it's in the written direct. We have a
5 record of it. It's there.

6 THE COURT: I'm going to overrule the objection. Go
7 ahead.

8 BY MR. WISE:

9 Q. Now, Dr. Levy, just so we know where we are, you've
10 testified -- when I asked you if Mike Szymanczyk had final
11 authority over decisions you made as head of Youth Smoking
12 Prevention, you said no. Do you recall giving that testimony?

13 A. Just a couple minutes ago.

14 Q. Exactly. And you've testified that you learned that
15 youth were price sensitive; isn't that right?

16 A. By the way, I don't think I said -- I think I said "not
17 really"; is that correct? Can we just check? I think there's a
18 difference between "no" and "not really".

19 Q. Well, I'll ask it again, and this way we don't have to
20 check. Did Mike Szymanczyk have final authority over your
21 decisions as the head of Youth Smoking Prevention?

22 A. Not all the time.

23 Q. Well --

24 THE COURT: All right, now, Mr. Wise, do you have one more
25 question on this, because we do have to break in order to do some

1 setting up for the Australian deposition, but if you had one more
2 question.

3 MR. WISE: I do just on this one point.

4 THE COURT: One.

5 MR. WISE: Yes.

6 BY MR. WISE:

7 Q. And one of the recommendations you made to Mike
8 Szymanczyk that he chose not to adopt, that he chose to
9 overrule, was that Philip Morris should stop opposing excise tax
10 increases; isn't that right?

11 A. What I recommended to Mr. Szymanczyk specifically was to
12 stop fighting state excise tax increases and instead of that,
13 use lobbyist to try to prevail upon the state governments that
14 raised excise taxes, to use some of the proceeds from those
15 excise taxes to fund youth smoking prevention programs. So that
16 was my recommendation.

17 Q. And it's a fact that your recommendation to stop opposing
18 excise taxes was not adopted; isn't that right?

19 A. I don't know the answer. It hadn't been adopted by the
20 time I left the company.

21 MR. WISE: Thank you, we can break now.

22 THE COURT: All right, Dr. Levy, you may step down. You
23 may think about the alternatives I presented to you, although if
24 it gets too late, I may have to withdraw that offer.

25 THE WITNESS: Okay, my intention would be to proceed if

1 feasible.

2 THE COURT: All right. If feasible. Now, who is in
3 charge of this whole business this afternoon? Is there any one
4 person?

5 MR. SPIEGEL: Yes, Your Honor, Brett Spiegel for the
6 United States. I'll be taking the witness.

7 THE COURT: All right. Do we actually need to stop Court,
8 though, for you to test anything or from the note I got whether
9 you just needed the video projector?

10 MR. SPIEGEL: We need to be able to make the connection
11 here and test it up, both the sound and the video, and that
12 should only take a few minutes. We can either all remain here or
13 not, as you would prefer.

14 THE COURT: Maybe it will take less time if I remain here.

15 MR. SPIEGEL: Okay.

16 THE COURT: Let's do it that way.

17 (Brief pause.)

18 THE COURT: Are we actually ready to begin?

19 MR. SPIEGEL: Not just yet, but we're close.

20 Okay, I think we can bring in Mr. Welch. I think we're
21 otherwise ready to go.

22 THE COURT: Let me ask one question that was raised
23 earlier. We don't have to use any particular mics in the
24 courtroom, do we, for them to hear us?

25 MR. SPIEGEL: No.

1 THE COURT: All right. When Mr. Welch is brought in, I'll
2 just announce the case, again, for the record, so he knows. I'll
3 just make an introductory comment to him, and then he will be
4 brought forward by the government. Ms. Hightower will swear him
5 in as a witness and then I assume the government will present his
6 testimony; is that right?

7 MR. SPIEGEL: Yes. And also, Your Honor, we do have
8 counsel there present in Australia.

9 THE COURT: Thank you, and I will ask him to identify
10 himself, but yes, you can bring everybody in now.

11 (Brief pause.)

12 MR. SPIEGEL: Good morning, Mr. Welch, can you hear me all
13 right?

14 THE WITNESS: Yes, I can.

15 THE COURT: All right, Mr. Welch, I'm Judge Kessler.
16 We're obviously --

17 THE WITNESS: Hi, good morning.

18 THE COURT: Pardon? Who was that everyone?

19 MR. SPIEGEL: That's his counsel, Mr. Roland Keller.

20 THE COURT: I will call on him in minute.

21 Mr. Welch, this is the case, I think you know, of United
22 States of America versus Philip Morris, CA 99-2496. We're going
23 to proceed with your testimony today. I understand that you do
24 have counsel, and I'd like that individual, if he would please
25 step forward again, and give his name for the record, please.

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1 MR. KELLER: Can you see me, Your Honor?

2 THE COURT: Yes, I can, thank you, I can.

3 MR. KELLER: My name is Keller, that's spelled K-E- double
4 L -E-R; my first name is Roland, R-O-L-A-N-D. I'm a registered
5 lawyer in the state of New South Wales, Sydney, Australia.

6 THE COURT: All right.

7 MR. KELLER: My address is Level 31, 52 Martin,
8 M-A-R-T-I-N, Place, Sydney.

9 THE COURT: All right. Thank you.

10 Mr. Welch, we have a court reporter so that everything
11 will be on the record. I would simply ask you to speak slowly so
12 that our court reporter can get down everything, and he may be
13 unfamiliar with -- I don't want to say your accent, but what at
14 least to us is your accent, and we will proceed and you will be
15 sworn in at this time by our courtroom clerk, please.

16 THE COURT: Thank you.

17 (JOHN BASIL WILLIAM ST. VINCENT WELCH, GOVERNMENT'S
18 WITNESS, SWORN)

19 DIRECT EXAMINATION OF

20 JOHN BASIL WILLIAM ST. VINCENT WELCH

21 BY MR. SPIEGEL:

22 Q. Good morning, Mr. Welch. Brett Spiegel here for the
23 United States. Could you first please state your full name for
24 the record.

25 A. John Basil William St. Vincent Welch.

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1 Q. Thank you. Mr. Highfield, can you please announce your
2 appearance?

3 MR. HIGHFIELD: Yes, I am here, Mr. Spiegel, Anthony
4 Highfield, Ebsworth & Ebsworth.

5 MR. SPIEGEL: Thank you very much. Mr. Highfield, can you
6 please hand to Mr. Welch his written direct testimony?

7 MR. HIGHFIELD: Yes, I've done that.

8 BY MR. SPIEGEL:

9 Q. Mr. Welch, is that your written direct testimony in this
10 case?

11 A. I believe so.

12 Q. And do you formally adopt that testimony as your written
13 direct testimony in this case?

14 A. I do.

15 Q. Thank you very much.

16 MR. SPIEGEL: At this time, Your Honor, the United States
17 would like to offer Mr. Welch's written testimony into evidence.

18 THE COURT: And that testimony may be accepted into the
19 record at this time.

20 MR. SPIEGEL: We now tender the witness.

21 THE COURT: All right. Mr. Welch, we are now going to
22 have cross-examination.

23 Mr. Frederick, why don't you introduce yourself, although
24 you may have met, I don't know.

25

1 CROSS-EXAMINATION OF

2 JOHN BASIL WILLIAM ST. VINCENT WELCH

3 BY MR. FREDERICK:

4 Q. No, actually, Mr. Welch, we have not met. My name is Tom
5 Frederick, and I represent Philip Morris USA, Inc. and Altria
6 Group, Inc., sir. Good morning.

7 A. Good morning.

8 MR. FREDERICK: Your Honor, for the record, Philip Morris
9 has Australian counsel present who I don't believe introduced
10 himself yet. Mr. Maher, would you like to introduce yourself for
11 the record, please.

12 MR. MAHER: Your Honor, my name is Andrew Maher. I'm a
13 solicitor at Allens, Arthur, Robinson in Melbourne, Australia,
14 and I'm, as Mr. Frederick has indicated, Australian counsel for
15 Philip Morris USA and Altria Group, Inc.

16 THE COURT: All right. Thank you.

17 BY MR. FREDERICK:

18 Q. And Mr. Welch, can you hear me okay, sir? I just want to
19 be sure.

20 A. Yes, I can.

21 Q. Now, Mr. Welch, am I correct that you worked for the
22 Tobacco Institute of Australia for about a little more than a
23 year, from January 21st, 1991 until late April 1992, sir?

24 A. That's correct.

25 Q. And if I refer to the Tobacco Institute of Australia from

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- 1 time to time as the TIA, you'll understand that I'm, in fact,
2 referring to the Tobacco Institute of Australia, sir?
- 3 A. I do.
- 4 Q. And just so the Court is clear, the Tobacco Institute of
5 Australia, or the TIA, is not the same thing as the Tobacco
6 Institute that used to exist here in the United States; is that
7 correct?
- 8 A. A separate organization.
- 9 Q. And they had different member companies, correct, sir?
- 10 A. I beg your pardon?
- 11 Q. I'm sorry. The Tobacco Institute of Australia had
12 different member companies than the Tobacco Institute here in
13 the United States, correct?
- 14 A. I'd have no idea.
- 15 Q. Sir, before you took your job at the Tobacco Institute of
16 Australia in January of 1991, you had never worked in the
17 tobacco industry; is that correct?
- 18 A. That's correct.
- 19 Q. And you had -- after you left your job at the TIA in
20 April of 1992, you had nothing further to do with the tobacco
21 industry after that point; is that correct?
- 22 A. That's correct.
- 23 Q. And you have not worked outside of Australia, true?
- 24 A. That's not correct.
- 25 Q. You've not been employed by Tobacco Institute or any

1 other tobacco company outside of Australia; is that correct?

2 A. That is correct.

3 Q. Sir, you have not -- do you know who the defendants in

4 this case are?

5 A. I do.

6 Q. Now -- and you've never worked for any of those

7 defendants; is that correct?

8 A. That's correct.

9 Q. Now, just so the record's clear, the testimony you're

10 going to give today relates to a job you held for a little more

11 than a year approximately 13 years ago; is that correct?

12 A. That's correct.

13 Q. Now, the TIA was a trade association, correct?

14 A. A trade or an industry association, that's correct.

15 Q. And it's common in Australia for most large industries to

16 have trade associations or organizations; isn't that true?

17 A. It's common.

18 Q. And, in fact, you have acted as the CEO for other such

19 trade associations, correct?

20 A. No, that's not correct.

21 Q. Sir?

22 A. I have acted as the Executive Director of the Oil

23 Industry Industrial Secretary.

24 Q. All right. I see. I stand corrected, sir.

25 Now, your job, your principal responsibility during your

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1 15 months at the TIA was to act as an industry spokesperson and
2 lobbyist; is that true?

3 A. That is correct.

4 Q. And during those 15 months, a number of legislative
5 initiatives were under active consideration in various
6 Australian states, including most prominently, initiatives
7 dealing with sponsorships by tobacco companies. Do you recall
8 that?

9 A. I do, and that is correct.

10 Q. And you spent almost half your time, I believe you said
11 40 percent at your deposition, while the CEO of the TIA on the
12 road meeting with politicians and bureaucrats; is that correct?

13 A. That is correct.

14 Q. And the issues you dealt with during those 15 months
15 while you were the head of the TIA were principally local
16 issues, correct?

17 A. That is correct.

18 Q. And your principal concerns were local concerns, correct?

19 A. That's correct.

20 Q. Now, sir, in your written testimony you state that you
21 left the TIA after a little more than a year as CEO, as CEO
22 based on "mutually agreeable" -- on a "mutually agreeable
23 arrangement", do you recall that testimony, sir?

24 A. I do.

25 Q. But just so the record's clear, sir, it is a fact that

- 1 you understood that there was dissatisfaction with your
2 performance as the CEO of the Tobacco Institute of Australia,
3 correct?
- 4 A. That's correct.
- 5 Q. And you do recall that the Tobacco Institute of Australia
6 failed to conduct a salary review that you thought you were
7 entitled to after 12 months on the job, correct?
- 8 A. It wasn't that I thought, it was in my contract.
- 9 Q. And you were not given the budget that you thought you
10 needed to do your job as the CEO of the TIA, correct?
- 11 A. No, that's not correct, I was given a budget, and then it
12 was withdrawn.
- 13 Q. All right. Thank you, sir. There was a change of
14 direction; is that true in terms of your budget?
- 15 A. That's correct.
- 16 Q. I'm sorry, I talked over you. Just so the record is
17 clear, there was a change in direction in your budget, correct?
- 18 A. That's correct.
- 19 Q. And funding that you thought the TIA -- at that time
20 member companies had agreed to give you, was cut back, correct?
- 21 A. That's correct.
- 22 Q. And so some of your proposed lobbying initiatives were
23 shot down by the member companies; is that true?
- 24 A. I wouldn't say that.
- 25 Q. But they weren't funded; is that true?

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- 1 A. That's correct.
- 2 Q. Now, after you left the TIA, you made a decision not to
- 3 have any further contact with the tobacco industry, correct?
- 4 A. I didn't make that decision.
- 5 Q. But you didn't have any contact; is that true?
- 6 A. That's correct.
- 7 Q. Do you recall testifying at your deposition that you made
- 8 that decision not to have further contact?
- 9 A. I don't recall that.
- 10 Q. All right. Now, some time in 2002, about -- or maybe
- 11 2003, about 10 years after you left the TIA, you saw press
- 12 reports on something called the McCabe case in Australia; is
- 13 that true?
- 14 A. That's correct.
- 15 Q. And McCabe was a smoking and health case brought against
- 16 the British American Tobacco Australia Services Limited, a
- 17 successor to Wills which was one of your former TIA members,
- 18 correct?
- 19 A. That's correct.
- 20 Q. And when you heard about the McCabe case, you actually
- 21 sought out the plaintiff's lawyer who was suing Wills at the
- 22 time, didn't you?
- 23 A. I did.
- 24 Q. Now, you've never read the McCabe decision, correct?
- 25 A. I've never read the McCabe decision, no.

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1 Q. But you did call the McCabe plaintiff's lawyer, Peter
2 Gordon, correct?

3 A. I did.

4 Q. And by the way, are you aware that Mr. Gordon also
5 represents another witness in this case, Fred Gulson?

6 A. I am.

7 Q. Now, Mr. Gordon got you on TV, didn't he?

8 A. Yes.

9 Q. And just so we're clear, so the record's clear, the TIA
10 was not a defendant, was not a defendant in the McCabe case,
11 correct?

12 A. Not that I'm aware.

13 Q. And as a matter of fact, you didn't see a copy of Wills
14 Document Retention Policy while you were at the TIA, did you?

15 A. I beg your pardon?

16 Q. You never saw a copy of the Wills Document Retention
17 Policy while you were at the TIA, correct?

18 A. Not that I recall.

19 Q. Now, you know -- by the way, are you aware, sir, that the
20 McCabe case decision was reversed by the Court of Appeals in
21 December of 2002?

22 A. I am.

23 Q. And that was before you contacted Mr. Gordon; is that
24 correct?

25 A. I beg your pardon?

1 Q. Was it reversed before you contacted Mr. Gordon?
2 A. I'd have no idea.
3 Q. Now, sir, when did you contact Mr. Gordon, do you recall
4 that?
5 A. I contacted him when I was on the ride on my mobile phone
6 on the way to Tiree; the date I have no idea.
7 Q. All right. By the way, sir, what time is it there today
8 in Sydney right now?
9 A. It's 10 to 7 in the morning.
10 Q. And what time did you have to wake up this morning to
11 provide this testimony?
12 A. About 4:30.
13 Q. And is that your normal waking time, sir?
14 MR. SPIEGEL: Objection, relevance.
15 THE COURT: Sustained.
16 BY MR. FREDERICK:
17 Q. Sir, let's turn to your testimony concerning the TIA's
18 Document Retention Policy. Now, according to your testimony,
19 there was a written Document Retention Policy that you found
20 when you arrived at the TIA in late January 1991; is that
21 correct, sir?
22 A. I was advised of the Document Retention Policy as part of
23 my induction.
24 Q. Well, sir, if you turn to your direct examination at
25 pages -- page 7, lines 15 to 19. Do you have that before you,

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1 sir?

2 A. I do.

3 Q. And just so the record's clear, your testimony before the
4 Court today is that the TIA had a written Document Retention
5 Policy at the time you started at the TIA; is that correct, sir?

6 A. That is correct.

7 Q. Now, sir, at the time -- I believe your testimony at your
8 deposition is that no one brought this policy to your attention,
9 you just found it; is that true?

10 A. I don't recall precisely how I became aware, but it was
11 part of my induction.

12 Q. All right. Well, if you turn to page 8, lines 9 through
13 12 of your direct examination provided to the Court today, do
14 you see -- are you with me, sir?

15 A. I -- yes, I'm reading it.

16 Q. And do you see the question is, "Do you recall who
17 physically gave you the Document Retention Policy when you
18 started at the TIA?"

19 And your answer is, "I can't recall ever being given it.
20 It was in existence at the Tobacco Institute when I arrived. I
21 can't recall somebody coming to me and saying, quote, there it
22 is, read it, unquote." Do you see that, sir?

23 A. I do.

24 Q. And that is your testimony here today, correct?

25 A. That's correct.

1 Q. Now, sir, in your written direct testimony you state that
2 it was your "understanding" that the document re -- written
3 Document Retention Policy you found in your files was -- let me
4 direct your attention, sir, to page 8 line 6 through 8. That's
5 where I'm reading from. Your written direct testimony states
6 that it was your understanding that the written Document
7 Retention Policy you found in your files "was formulated by the
8 government and foreign public affairs officers at meetings and
9 then supplemented by various legal advice." Do you see that,
10 sir?

11 A. I do.

12 Q. And just so the record is clear, you weren't at any such
13 meetings where this policy was formulated; is that true?

14 A. I wasn't at the meetings before I was employed.

15 Q. And that's my point, you weren't at any meetings where
16 the policy that you testified you found upon your arrival, you
17 weren't at my meetings where that policy was developed, correct,
18 sir?

19 A. That's correct.

20 Q. Now, you've not seen the TIA policy, Document Retention
21 Policy, for more than 12 years, true?

22 A. That's correct.

23 Q. But as you recall it now, and I'm going to reference
24 pages -- it's tab 64, Jamey -- pages 7 and 8 of your testimony,
25 as you recall it now, you believe it was a two-page policy that

1 basically said if a document is potentially damaging to the
2 industry, and/or its member companies, after you've read it,
3 destroy it. And if it is favorable to the industry's position
4 and not potentially damaging, after you read it, then keep it.
5 Is that a fair summary of what you recall the two-page document
6 said?

7 A. That's a fair summary.

8 Q. And the policy had no schedule or other details about
9 what needed to be kept or what should not be kept; is that
10 correct?

11 A. I don't recall the precise details.

12 Q. Now -- well, that's what you -- if I'm not mistaken, sir,
13 did you say that at page 8 lines 2 through 5 of your direct
14 examination? Let me just -- do you see page 2 through 5 at line
15 2 of page 8 you were asked, "Did the Document Retention Policy
16 list any type of schedule of what documents had to be retained?"

17 "Answer: No, it was a general description. If a
18 document were potentially damaging, it would be treated in one
19 fashion, if not, in another."

20 Do you see that testimony, sir.

21 A. I do.

22 Q. And so your best recollection as you sit here today,
23 there was no schedule attached to the document; is that true?

24 A. Not that I recall.

25 Q. And when Mr. Spiegel -- do you recall when Mr. Spiegel at

1 your deposition which took place -- your deposition in this case
2 took place on January 14th of this year; is that correct, sir?

3 A. That's correct.

4 Q. And when Mr. Spiegel asked you at your deposition what
5 the purpose of the Document Retention Policy was, do you recall
6 testifying that it was "good housekeeping", and, "you don't keep
7 stuff you don't need and no longer have a use for." Do you
8 recall giving testimony?

9 MR. SPIEGEL: Objection. If Mr. Frederick is going to ask
10 him questions regarding the deposition, it should be shown to
11 him.

12 MR. FREDERICK: All right.

13 THE COURT: It should be.

14 MR. FREDERICK: All right, fair enough. Mr. Maher, can
15 you give Mr. Welch a copy of his deposition transcript? And this
16 is tab 66, Jamey.

17 MR. MAHER: Sir, which page?

18 THE WITNESS: 66.

19 THE COURT: Mr. Frederick, what page?

20 MR. FREDERICK: I'm sorry, page 137, line 14, to page 138,
21 line 3.

22 BY MR. FREDERICK:

23 Q. Sir, if you want to take a moment to review that again,
24 it's page 137 line 14 to page 138 line 3. Just let me know when
25 you've had a chance to review it, sir.

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- 1 A. Yes, I've reviewed that.
- 2 Q. And in response to Mr. Spiegel's question, you told him
- 3 you understood the purpose of the Document Retention Policy to
- 4 be good housekeeping, correct?
- 5 A. In general, yes.
- 6 Q. And you also -- you'd find that phrase to, making sure
- 7 you don't keep stuff you don't need and no longer have a use
- 8 for, correct?
- 9 A. That's correct.
- 10 Q. And when you say in your direct testimony, and I'm
- 11 referencing now page 13 lines 9 through 12, if you want to get
- 12 that back before you, sir. When you say in your direct
- 13 testimony --
- 14 A. Yes, I've got that.
- 15 Q. Okay, page 13, are you there, sir?
- 16 A. I am.
- 17 Q. And when you say in your direct testimony that you had
- 18 shredders in your office and that documents were destroyed on a
- 19 daily basis, you are including in that description routine
- 20 incoming correspondence and drafts that you concluded you no
- 21 longer needed to retain, correct?
- 22 A. That's correct.
- 23 Q. Now, in getting rid of correspondence was not so much a
- 24 sensitivity issue as it was a matter of getting rid of what was
- 25 out of date and no longer needed; is that correct?

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1 A. That would be correct.

2 Q. And certainly, the lack of storage space at the TIA's
3 offices was one motivation for a Document Retention Policy,
4 correct?

5 A. That had an impact on the decision, yes.

6 Q. And, I believe in one of your press interviews you told
7 the interviewer that it was prudent to have such a policy and
8 that such policies were not limited to the tobacco industry but
9 were quite common amongst a number of industries, do you recall
10 saying that, sir?

11 A. I do.

12 Q. Now, sir, let me ask you this: Is it possible that you
13 have had a failure of recollection and that you're entirely
14 mistaken in your testimony that the TIA had an existing Document
15 Retention Policy when you became the CEO of the TIA in January
16 of 1991?

17 A. Could you repeat that?

18 Q. Sure. Is it possible that you have had a failure of
19 recollection and that you are entirely mistaken in your
20 testimony that the Tobacco Institute of Australia had an
21 existing Document Retention Policy when you became the CEO in
22 January of 1991?

23 A. It is possible but not probable.

24 Q. Well, sir, isn't it the truth that not only was there no
25 Document Retention Policy at the TIA when you arrived there in

1 January of 1991, but that no such policy was implemented before
2 you left in April of 1992?

3 A. That's not correct.

4 Q. Sir, isn't it the truth that the reason no such policy
5 was implemented is that you cancelled its implementation due to
6 budgetary concerns?

7 A. That's not correct.

8 Q. Well, let's look at some documents, sir. Can you please,
9 Andrew, hand the witness -- and this is tab 12, Jamey. Hand the
10 witness JD 054642, which is a letter dated December 14, 1991
11 from Mr. Welch to John Devine, and let me know when you have
12 that in front of you, sir.

13 A. I have it in front of me. I'm reading it.

14 Q. And --

15 MR. SPIEGEL: Objection, Your Honor. This document is not
16 a document that was ever produced to the United States, nor a
17 document the United States would have ever had access to in this
18 litigation.

19 MR. FREDERICK: And Your Honor, this is cross-examination.
20 They did not name this individual as a witness until April of
21 2004 or March of 2004. There was no occasion for this document
22 relating to this witness. We had to scramble to find the
23 relevant documents in order to cross-examine him here today.

24 MR. SPIEGEL: Is this -- are these documents documents
25 that are coming from one of the defendants?

1 MR. FREDERICK: You know, Mr. -- well, first of all, do I
2 have to address that? Would you like me to answer that question,
3 Your Honor.

4 THE COURT: No, I don't think that's relevant.

5 MR. SPIEGEL: Your Honor, this is a document that the
6 United States did not have an opportunity to get, apparently, in
7 discovery, and in this situation, clearly, it's being used as
8 both a sword and a shield in that certain documents aren't being
9 produced to the United States, but when they're convenient for
10 defendants they are then being used during the course of
11 litigation.

12 THE COURT: But you can't demonstrate that you ever had a
13 right to it.

14 MR. SPIEGEL: Nevertheless, for purposes of unfair
15 surprise, it seems that for them to be able to use certain
16 documents and withhold others on the grounds they previously
17 argued that documents that belong to Wills they didn't have
18 access to, much less documents that belonged to Tobacco Institute
19 of Australia, and now they actually are able to, apparently, get
20 their hands upon these documents when it's convenient for them.

21 MR. FREDERICK: Well, first of all, Your Honor, this has
22 nothing to do with Wills. These are Philip Morris International
23 documents. Second, they had -- these aren't covered by any
24 discovery requests. Third, as I already stated, this witness
25 wasn't even known to us as a possible witness until March of

1 2004. There was no occasion for them to make a document request
2 relating to this witness.

3 In terms of unfair surprise, I think Your Honor may recall
4 I made a similar argument yesterday and received a somewhat cold
5 reception from the Bench for which I understand the reasons why,
6 but I certainly think on cross-examination when they've brought a
7 witness, they have this gentleman up at 6:30 in the morning
8 testifying from Australia, I ought to be able to cross-examine
9 him.

10 THE COURT: The bottom line is that it has not been shown
11 to me that the defendants had any obligation to produce this
12 document. If they didn't have an obligation to produce it, then
13 they certainly have a right to use it on cross-examination. The
14 government will at some point take a brief break, at some point,
15 and the government can look at it at that point, but the
16 objection's overruled and you may proceed, Mr. Frederick.

17 MR. SPIEGEL: Just one more point I would like to be made
18 clear here, Your Honor, is that this is a document that's in the
19 possession, custody and control of the defendants and which would
20 have come within the United States' documents requests, it's
21 clear it's in their custody, possession and control because
22 they're able to get it when they needed it yet they weren't able
23 to provide it to the United States when they requested it.

24 THE COURT: Those two sentences don't follow logically or
25 certainly not necessarily. Let me put it that way. Let's

1 proceed, Mr. Frederick.

2 MR. FREDERICK: All right. Thank you, Your Honor.

3 BY MR. FREDERICK:

4 Q. Mr. Welch, have you had a chance to look at, and I

5 realize it's a fairly lengthy document, but at least familiarize

6 yourself with what JD 054642 is?

7 A. I've familiarized myself with the letter on Tobacco

8 Institute letterhead dated December 24th of 1991 and signed by

9 myself.

10 Q. And just so -- as we go through here, just so you know,

11 there's a little number on the front at the bottom that says

12 JD-054642. So sometimes I'll refer to numbers like that as we

13 deal with the documents, just to make sure we're talking about

14 the same document. Understood?

15 Now, sir, you sent this letter in December of 1991 to John

16 Devine, correct?

17 A. That's correct.

18 Q. And just for the record, who is John Devine and what was

19 his relationship to you at this time?

20 A. He was the chairman of the Tobacco Institute of Australia

21 and he was employed by Rothmans.

22 Q. And did that, essentially, make him your boss as the CEO?

23 A. At that time, yes.

24 Q. Now, Mr. Welch, the letter you have marked as JD 05465 --

25 642 -- 054642, kind of served as a recap of your first year on

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1 the job, correct?

2 A. It did.

3 Q. And it came to pass that in December of 1991, although
4 you didn't know it at the time, you only had a few months left
5 at the TIA; is that correct?

6 A. That's correct.

7 Q. And if you turn to attachment 3 of your letter, and it's
8 a ways in, but if you get there, that's -- there it is, Jamey,
9 on the screen.

10 It's -- the heading is "strategic plan" at the top and
11 there's attachment 3 handwritten in the upper right hand corner,
12 and let me know when you have that page, sir.

13 A. I have attachment 3.

14 Q. All right. And if you look at that a moment, it appears
15 to be 23 pages long and contains a number of different
16 proposals, correct?

17 A. That's correct.

18 Q. And again, just so the record's clear, these are
19 proposals -- these are your strategic plan proposals for the TIA
20 for the upcoming year, 1992; is that correct?

21 A. That's correct.

22 Q. And just to briefly get a sense of some of the range, tab
23 175, Jamey.

24 If you go to page 8, you list various proposals relating
25 to juvenile smoking issues, correct?

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1 A. I have page 8, yes.

2 Q. And if you go to page 17 of attachment 3 -- that's tab
3 176, Jamey -- you identify various issues relating to that
4 Tasmania that you wanted to address in 1992, correct?

5 A. Can't answer that at the moment.

6 MR. KELLER: Mr. Frederick, I'm sorry to intervene, Your
7 Honor, but I'm a little concerned that the document that's been
8 handed to my client, I haven't seen before. We are now ripping
9 through 40-odd pages of material, and one thing that seems to me
10 is the letter of the 24th of December, 1991, and again, I
11 apologize if Your Honor does not have a copy, if I could -- if I
12 breach your protocols, please let me know, but the document dated
13 24th December 1991 seems to me to refer to only two attachments.
14 Mr. Frederick is putting questions to my client about a third
15 attachment on the basis that that forms part of the letter of the
16 24th of December 1991, and in fairness to my client, I think that
17 needs to be clarified before this line of questioning is
18 followed.

19 THE COURT: Mr. Frederick.

20 MR. FREDERICK: Your Honor, if Mr. Welch would like to go
21 --

22 MR. KELLER: I'm sorry, Mr. Frederick, can I just
23 intervene again. Your Honor, it is very, very difficult to hear
24 Your Honor's response. We can hear Mr. Spiegel, and we can hear
25 Mr. Frederick's very clearly. Your Honor disappears in the

1 rustle of paper from time to time.

2 THE COURT: Can you hear me now?

3 MR. KELLER: I can now, Your Honor.

4 THE COURT: All right. I'll be sure, and Mr. Spiegel will
5 be sure, to speak directly into the mics and to speak up.

6 Mr. Frederick is going to clarify the issue or ask further
7 questions about the document and its attachments.

8 MR. FREDERICK: Yeah, and I'll just represent, we'll get
9 back to what I really want to ask about in a moment which is a
10 very small part of the document, but to orient the witness and
11 his counsel as to the document, Mr. Welch, if you go back to page
12 3 of your letter to Mr. Devine.

13 THE WITNESS: Yes, I've got page 3.

14 BY MR. FREDERICK:

15 Q. And do you see down -- a little ways -- it says "attached
16 to this report attachment 1" at the top?

17 A. Yes.

18 Q. And it describes attachment 1?

19 MR. KELLER: Attachment 2.

20 MR. FREDERICK: Is Mr. Welch? Is that Mr. Welch
21 testifying or Mr. Keller?

22 THE COURT: That question was for Mr. Welch to answer,
23 please.

24 THE WITNESS: I can see that --

25 MR. FREDERICK: Go ahead, sir.

1 THE WITNESS: I can see page 3, yes.

2 BY MR. FREDERICK:

3 Q. And at the top it says "attached to this report is" -- it

4 references an attachment 1, correct?

5 A. Yes.

6 Q. And then below that it references an attachment 2,

7 correct?

8 A. Yes.

9 Q. And if you go two paragraphs down, it states, "as an

10 ongoing exercise and bearing in mind change priorities and

11 financial constraints, a review of the industry plan has been

12 conducted. That report is attachment 3 and includes an

13 implementation plan on a national and state by state basis." Do

14 you see that, sir?

15 A. I do.

16 Q. And when you say "national and state by state basis" just

17 so there's absolutely no misunderstanding, you're referring to

18 Australia and Australian states, correct?

19 A. That's correct.

20 Q. Now, sir, does that help you -- now, let's go back to

21 attachment 3 of this document, because I really just have a very

22 specific question which I'll now get to. And if you turn to

23 page 4 of attachment 3, the heading on that page should read

24 "legal", and let me know when you get there.

25 A. I have attachment 3. Where did you direct my attention?

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- 1 Q. Page 4.
- 2 A. Page 4.
- 3 Q. Heading -- do you see the heading there that says
- 4 "legal"?
- 5 A. Yes, I've got that.
- 6 Q. And if you go down to the second point, you'll see,
- 7 "initiate and oversee a retention policy which best serves the
- 8 interests of the industry." Do you see that?
- 9 A. I do.
- 10 Q. Now, Mr. Welch, does the fact that one of your goals for
- 11 the coming year was to "initiate and oversee a retention policy"
- 12 at the TIA, suggest to you that there was no such policy in
- 13 place when you wrote this letter in December of 1991?
- 14 A. No, it does not.
- 15 Q. Well, sir, let me go to your -- in your direct testimony
- 16 you identify an outside lawyer named Steven Klotz. Do you
- 17 recall that?
- 18 A. I do.
- 19 Q. And Mr. Klotz, that's K-L-O-T-Z, Mr. Klotz was seconded
- 20 to work on the TIA on a part-time basis and provide legal
- 21 advice, correct?
- 22 A. That's correct.
- 23 Q. And according to your testimony, Mr. Klotz was charged
- 24 with examining and implementing the policy; is that correct?
- 25 A. That's correct.

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1 Q. Now, do you recall that Mr. Klotz was not seconded to the
2 TIA until September 1991, which was only a few months before you
3 wrote this letter?

4 A. I can't recall precisely when Mr. Klotz was seconded.

5 Q. Now, you don't have any reason to doubt Mr. Klotz's
6 integrity do you, sir?

7 A. He's a lawyer.

8 Q. Well, did you -- and I would accept that answer, but for
9 professional pride. If you -- could I have tab 77, please?

10 A. Can you repeat that, please?

11 Q. I'm sorry, sir. You need to go to your deposition
12 transcript at page 76, lines 3 through 19.

13 A. Yes, I have that.

14 Q. And you see, sir, you pretty much gave, initially, the
15 same answer you just gave me, but down at lines 18 and 19 you
16 did state that you don't doubt Mr. Klotz's integrity, correct,
17 sir?

18 A. No, I don't doubt his integrity at all.

19 Q. All right. Now, do you recall that Mr. Klotz determined,
20 after he came to the Tobacco Institute of Australia in September
21 of 1991, that there was no Document Retention Policy in place?

22 A. I don't recall that.

23 Q. All right. Let's -- Andrew, please hand Mr. Welch
24 JD-054641 -- and that's tab 11, Jamey. And let me know when you
25 have JD 054641, Mr. Welch, and take a moment to review it and

- 1 let me know when you're ready to proceed.
- 2 A. Yes, I've got that.
- 3 Q. Now, Mr. Welch, JD 054641 is a March 4, 1992 memorandum
- 4 from you to all staff. I take it that's all staff at the
- 5 Tobacco Institute of Australia, correct?
- 6 A. That would be correct.
- 7 Q. And it appears that this two-page -- is this -- by the
- 8 way, is this the two-page Document Retention Policy -- it is a
- 9 two-page document, correct, sir?
- 10 A. It is.
- 11 Q. And is this the two-page Document Retention Policy about
- 12 which you've testified in your direct testimony?
- 13 A. No, it's not.
- 14 Q. Well, sir, it is two pages long and it is dated March 4,
- 15 1992, more than a year after you arrived at the Tobacco
- 16 Institute of Australia, correct?
- 17 A. That's correct.
- 18 Q. And this is a little more than -- you had just a little
- 19 more than one month left in your job at this time, correct, as
- 20 it turns out?
- 21 A. That's correct. That's correct.
- 22 Q. And the subject line of the memo reads, "implementation
- 23 of a Document Retention Policy." Do you see that?
- 24 A. I do.
- 25 Q. And if you go to page 2 of the document, do you see

- 1 towards the middle of the page where there's a line reading, "if
2 the answer to that question is "not sure", you must discuss its
3 retention or not with the document retention officer, paren, who
4 is yet to be appointed, close paren. Do you see that, sir?
- 5 A. I do.
- 6 Q. Now, sir, again, does the fact that you were proposing to
7 implement a Document Retention Policy in March 1992 and that no
8 document retention officer had been appointed suggest to you
9 that there was no such policy in place at that time at the
10 Tobacco Institute of Australia?
- 11 A. It does not.
- 12 Q. Now, sir, in point of actual fact, this policy was never
13 implemented before you left, correct?
- 14 A. Not that I'm aware.
- 15 Q. Well, let's go to tab -- Andrew, please hand the witness
16 JD 054640, and that's tab 10, please. And let me know when you
17 have received that document and had a chance to look at it,
18 Mr. Welch. For the record it should be a March 12, 1992 memo
19 from Meredith Darke to Donna Stout in Maine. Do you have that,
20 sir?
- 21 A. I do.
- 22 Q. And take a moment to look at it if you would like, and
23 let me know when you're ready to proceed.
- 24 A. Yes, I'm ready to proceed.
- 25 Q. Now, Meredith Darke, am I pronouncing her last name

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- 1 right, is it Darke?
- 2 A. That's correct.
- 3 Q. Meredith Darke was your executive assistant while you
4 were the CEO of the TIA; is that correct?
- 5 A. She was my secretary.
- 6 Q. And Ms. Stout in Maine was a lawyer at the Clayton Utz,
7 however you say it, law firm?
- 8 A. That's correct.
- 9 Q. Now, sir, you see the "re" line of the document reads,
10 "Clayton Utz/TIA-training program Document Retention Policy. Do
11 you see that, sir?
- 12 A. I do.
- 13 Q. And if you go down Ms. Darke's memo reads, "With
14 reference to our telephone conversation of today, please accept
15 our apologies for any inconvenience caused by the cancellation
16 of the scheduled training programs in May 1992 and postponement
17 of the Document Retention Policy. As advised, the Institute has
18 suffered budgetary cutbacks, and accordingly, we will have to
19 delay both of these items until the next financial year." Do
20 you see that, sir?
- 21 A. I do.
- 22 Q. And I take it it would be fair to assume that Ms. Darke
23 didn't send this out on her own, correct?
- 24 A. I've never seen that letter before.
- 25 Q. Now, you've never seen this before?

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- 1 A. No.
- 2 Q. Are you aware that you postponed the implementation of
3 the Document Retention Policy due to budgetary cutbacks, do you
4 recall that?
- 5 A. No, I don't.
- 6 Q. Well, sir, you said in your direct testimony that while
7 the Document Retention Policy was 20th on your list of
8 priorities when you came to the TIA, it had become a major
9 priority and extremely important, the second or third or fourth
10 priority at the TIA, later in your tenure there; is that
11 correct?
- 12 A. That's correct.
- 13 Q. But, at least according to Ms. Darke's memo, which is all
14 I can refer you to here today, the training programs to
15 implement that policy weren't even scheduled to begin until May
16 of 1992, is that what the document says, sir?
- 17 A. Yes. That is not correct. The training programs with
18 Clayton Utz had nothing to do with document retention; it had to
19 do with the understanding of epidemiology and various scientific
20 reports.
- 21 Q. Well, sir, that's not what this document says, is it?
- 22 A. That's not my document.
- 23 Q. Well, you were the head of the TIA at this time, weren't
24 you, sir?
- 25 A. I was.

- 1 Q. And Ms. Darke worked for you, correct?
- 2 A. She did.
- 3 Q. Now, sir, it is a fact in 1992 you had severe budgetary
4 problems, correct?
- 5 A. That's correct.
- 6 Q. But this document does nothing to refresh your
7 recollection that not only was there no Document Retention
8 Policy in place when you arrived in January of 1991, there was
9 none implemented before you left in April of 1992, is that your
10 testimony, sir?
- 11 A. Can you repeat that?
- 12 Q. Sure. This document, Ms. Darke's memo and the other
13 document, the two other documents I showed you a moment ago, do
14 nothing to help refresh your recollection that not only was
15 there no Document Retention Policy in place at the TIA when you
16 arrived in January of 1991, but no such policy had been
17 implemented before you departed in April of 1992, you did not
18 agree with that, is that your testimony?
- 19 A. Are you making testimony or asking me a question?
- 20 MR. KELLER: I object to that, Your Honor. Again, I've
21 indicated before there are over 40 pages of paper here.
22 Mr. Frederick is putting a question which I believe is unfair to
23 my client in that my client has followed -- referred to various
24 pages that I myself have yet to read all of the pages that have
25 been handed to us. And if Mr. Frederick wishes to continue along

1 this line of questioning, I would ask that we be given time to
2 read the whole of the document before such a question is put to
3 my client.

4 MR. FREDERICK: Well, Your Honor, all I can say is let's
5 break up the documents. The one he has, the Darke memo, is one
6 page, two, three paragraphs, the one before that, it was two
7 pages, the one before that was 51 pages, only one page is
8 relevant to the testimony I'm seeking to elicit. In any event, I
9 believe those are the rules of the game in the courtroom and
10 that's how we proceeded with other witnesses. It's obviously
11 your discretion as to what you choose to do here.

12 THE COURT: Well, the objection is overruled. Let's
13 proceed now.

14 BY MR. FREDERICK:

15 Q. Now, Mr. Welch, just so we're clear here, I'm not trying
16 to argue with you.

17 THE WITNESS: I didn't hear what Your Honor said.

18 MR. FREDERICK: Pardon me, sir?

19 THE WITNESS: I didn't hear what Your Honor said.

20 THE COURT: The objection was overruled.

21 THE WITNESS: Thank you.

22 BY MR. FREDERICK:

23 Q. Now, sir, if you can go back to JD -- the two-page
24 document, JD 054641, your March 4, 1992 memo to all staff, sir.
25 Do you have that?

- 1 A. I do.
- 2 Q. Just so the record is clear, do you recall seeing this
3 document before today?
- 4 A. Yes, I do.
- 5 Q. And it's -- you issued it, correct, sir?
- 6 A. That's correct.
- 7 Q. Now, sir, how does this two-page document that you have
8 before you differ from the two-page document, about which you
9 testified in your direct examination by the government?
- 10 A. I have no idea.
- 11 Q. Now, sir, here's what I'm trying to get to, sir. The
12 document that you issued in March 4th of 1992 has a subject line
13 "implementation of a Document Retention Policy". Ms. Darke's
14 memo indicates that the implementation of the Document Retention
15 Policy was cancelled, and in any event, any training related
16 thereto wasn't going to take place until May of 1992, and yet
17 I'm just asking, sir, I'm not trying to argue with you, is it
18 still your testimony that there was a written Document Retention
19 Policy when you arrived at the Tobacco Institute of Australia in
20 January of 1991?
- 21 A. To the best of my recollection, that is my testimony.
- 22 Q. And the best of your recollection it was a two-page
23 policy, correct?
- 24 A. That's correct.
- 25 Q. But you don't recall how that two-page policy you believe

1 was in existence in January of 1991 differs from the two-page
2 document that you issued in March -- on March 4th of 1992,
3 correct?

4 MR. SPIEGEL: Objection, asked and answered, this line of
5 question is repeating.

6 THE COURT: The objection is sustained.

7 BY MR. FREDERICK:

8 Q. All right, sir, let me move on. Regardless of whether or
9 not the TIA ever actually had a Document Retention Policy in
10 place, you do recall that while you were CEO of the TIA, you
11 were under strict instructions from its members that if there
12 was litigation you were not to destroy documents, correct?

13 A. That's correct.

14 Q. And that policy was respected while you were the CEO of
15 the TIA, correct?

16 A. It was.

17 Q. And you never did anything in connection with document
18 retention that you thought was illegal, correct?

19 A. That's correct.

20 Q. Now, sir, we referenced a moment ago, you were deposed in
21 this case on January 14th, 2005 at the American Consulate in
22 Sydney, Australia, correct?

23 A. That's correct.

24 Q. And at the time of your deposition, you had not yet
25 prepared any written testimony for this case, had you?

- 1 A. No, I had not.
- 2 Q. Now, you state in your written direct testimony that you
3 were represented by counsel, correct?
- 4 A. That's correct.
- 5 Q. And as a matter of fact, the Australian Attorney
6 General's office advised you to retain counsel, correct?
- 7 A. They recommended it.
- 8 Q. And your counsel, Mr. Keller, who is with you today,
9 represented you at your deposition, correct?
- 10 A. That's correct.
- 11 Q. Now, you have had at least one or more conversations with
12 the government's counsel, Mr. Spiegel, who is with me here today
13 in the courtroom, since your deposition, correct?
- 14 A. I have.
- 15 Q. As a matter of fact, did Mr. Spiegel meet with you in
16 Sydney and meet the day after your deposition?
- 17 A. No, he did not.
- 18 Q. Did he ever meet with you in Sydney?
- 19 A. Yes, I met him on the day of the deposition.
- 20 Q. And have you -- did you talk to him after the deposition
21 at some point?
- 22 A. I had a beer with him.
- 23 Q. I couldn't understand your answer, sir, I'm sorry.
- 24 A. I had a beer with him.
- 25 Q. Well, how did your written direct testimony today get

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1 prepared? Did you do it or did Mr. Spiegel draft it for you?
2 A. Mr. Spiegel drafted it for me.
3 Q. And did you discuss it with Mr. Spiegel after you
4 received it from him?
5 A. I made amendments and faxed it back to him.
6 Q. Did you ever talk to him about it?
7 A. Yes.
8 Q. On the telephone or in person?
9 A. On the telephone.
10 Q. Was Mr. Keller, your lawyer, involved at that time?
11 A. No, he was not.
12 Q. Did Mr. Spiegel say it was okay to proceed without your
13 lawyer being present?
14 A. That was never discussed.
15 Q. Now, did the draft Mr. Spiegel provided you, I take it it
16 had, at least, some answers in it, proposed answer?
17 A. I beg your pardon?
18 Q. The draft of your testimony provided to you by
19 Mr. Spiegel had, at least, some proposed answers in it, correct?
20 A. It did.
21 Q. Did it have all answers to all the questions?
22 A. I can't recall.
23 Q. Now, did you keep the draft that the government provided
24 to you of your direct testimony and a copy of your changes
25 thereto?

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- 1 A. I have a Document Retention Policy. I got rid of it.
- 2 Q. All right. And did Mr. Spiegel ask you to keep a record
3 of your changes?
- 4 A. No, he did not.
- 5 Q. Now, at the end of your direct examination, you testified
6 that the reason you agreed -- you stated that the reason you
7 agreed to testify here today was that you're sick of people
8 manipulating and distorting the truth and then hiding behind
9 spin doctors, do you recall that?
- 10 A. I do.
- 11 Q. But if we go through your testimony, isn't it true that
12 Mr. Spiegel's put a little spin on some of your deposition
13 testimony for purposes of your direct examination?
- 14 A. I wouldn't agree to it if it was spinned.
- 15 Q. All right. Well, let's look at some of it, sir. Do you
16 recall that there's some questions and answers in your written
17 testimony, at pages 20 and 21, concerning the policies of the
18 member companies of the Tobacco Institute of Australia; that is,
19 the document retention policies? Do you have that before you,
20 sir?
- 21 A. I have pages 20 and 21.
- 22 Q. All right. Well tab 108, Jamey.
- 23 Let me direct your attention to your written testimony at
24 page 20, line 16 through 21 where you state as follows:
- 25 "Question: Were the document retention policies of the

1 member companies similar to the Document Retention Policy at the
2 TIA?"

3 "Answer: Yes. While I don't recall the specifics of all
4 the policies, all of the policies were similar to each other and
5 the TIA's policy. The purpose of each of these policies was the
6 same, to prevent potentially damaging documents from being
7 discovered, so significant differences would have made little
8 sense." Do you see that, sir?

9 A. I do.

10 Q. Now, when you refer to "all of the policies", you were
11 referring to the four members of the Tobacco Institute of
12 Australia at the time you were there, Philip Morris Australia
13 Limited, Wills, Rothmans Holding Limited and the RJR Australian
14 affiliate; is that correct?

15 A. R.J. Reynolds.

16 Q. The Australian company?

17 A. Yes, that's correct. That's correct, that's correct.

18 Q. Thank you. Now, let's go back, let's go to page 20, line
19 18 of your testimony Mr. Welch. You state there that you don't,
20 quote, don't recall the specifics of all of the policies,
21 unquote. Do you see that?

22 A. I do.

23 Q. That's page 20, line 18, Jamey.

24 And now just so the Court is clear, Mr. Welch, the fact is
25 that not only do you not recall the specifics of all of the

1 policies, you don't recall the specifics of any Document
2 Retention Policy of any member company of the TIA, correct?

3 A. That's not correct.

4 Q. Well, sir, when you testified -- I'm going to ask about
5 that in a second based upon your deposition testimony, but when
6 you testified at page 20, line 16 to 21 in your written
7 examination that you don't recall the specifics of all the
8 policies, but that all of the policies were similar to each
9 other and the TIA's policy, who wrote that, you, Mr. Spiegel or
10 somebody else?

11 A. I don't know what you're talking about.

12 Q. Well, who wrote the answer, the answer to the question,
13 the questions at line 16 and 17 on page 20, the answers at lines
14 18 through 21 at page 20 -- page 20? Did that -- when
15 Mr. Spiegel sent you a draft, is that the answer he included in
16 the draft?

17 A. I got rid of the draft, so I won't know, but that is what
18 I said.

19 Q. And -- all right. So you can't tell me whether you
20 drafted that language or Mr. Spiegel drafted it, is that your
21 testimony?

22 A. Mr. Spiegel sent me a draft and after I agreed with the
23 draft, that would have been what I agreed to.

24 Q. Now, in lines 20 and 21 you state -- who wrote the
25 language, quote, so significant differences would have made

1 little sense, unquote, in reference to the policies of the
2 various companies? Was that you or Mr. Spiegel?

3 MR. SPIEGEL: Objection, asked and answered.

4 MR. FREDERICK: That wasn't asked and answered.

5 THE COURT: The objection is overruled. The witness may
6 answer.

7 THE WITNESS: The simple fact that is Mr. Spiegel drafted
8 the document and I approved it.

9 BY MR. FREDERICK:

10 Q. All right. Let's talk about that.

11 A. With my amendments.

12 Q. I'm sorry, go ahead sir. I cut you off.

13 A. After I made amendments.

14 Q. All right. Let's talk about the testimony that you gave
15 here at page 20 line 16 through 21. For starters, I'm correct,
16 am I not, that you have never seen the Document Retention Policy
17 of Philip Morris Australia, correct?

18 A. Not that I can recall.

19 Q. And you don't know the details of what could or could not
20 be destroyed or retained or was supposed to be retained under
21 the Philip Morris Australia policy, do you?

22 A. No, I do not.

23 Q. And you do not know how that policy was implemented and
24 what was retained or not under that policy, correct?

25 A. By Philip Morris, no.

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1 Q. And you don't know whether there was a document disposal
2 suspension notice preventing the destruction of documents issued
3 to Philip Morris Australia requiring the retention of documents
4 related to smoking and health issues, do you?

5 A. No, I do not.

6 Q. And the same is true, that you don't know about the
7 content of any Document Retention Policy, the same is true for
8 all the member companies of the Tobacco Institute of Australia,
9 correct?

10 A. Correct.

11 Q. And so, sir, going back to your testimony at page 20 line
12 16 to 21, you still -- your testimony here to this Court is
13 still that all of the policies were similar to each other and
14 the TIA's policy, is that still your testimony here today, sir?

15 A. That's the best of my recollection.

16 Q. All right, sir, let me go on. Let's go to tab 117,
17 Jamey. Page 22, line 17 to 23. And there you're asked:

18 "Question: Did the member companies ever share any of
19 their internal scientific research with you?"

20 "Answer: Yes, there were occasions when the government
21 and public affairs officers would consult with me and other
22 members of the TIA on their internal activities in that regard."

23 "Question: Did the member companies ever send their
24 internal scientific studies or research to the TIA library?"

25 "Answer: Yes. From time to time they would."

1 Do you see that testimony, sir?

2 MR. KELLER: We've not been handed a document.

3 MR. FREDERICK: I'm sorry.

4 MR. KELLER: Are you referring to the --

5 MR. FREDERICK: I apologize for not orienting the witness.

6 BY MR. FREDERICK:

7 Q. Sir, get your direct testimony, your written direct

8 testimony provided to the Court. My apologies.

9 A. I have it.

10 Q. Page 22 line 17 through 23 is what I just read to the

11 Court, and if you could just take a moment to read that, I'm

12 going to ask some questions about it.

13 A. Yes, I've got that.

14 Q. Now, you state here that the member companies of the TIA

15 shared their internal research with the TIA, but you also have

16 admitted they were fiercely competitive; is that correct?

17 A. That's correct.

18 Q. And sir, you didn't mean to imply by this answer that the

19 company shared proprietary company research with the TIA, did

20 you?

21 A. I don't understand the question.

22 Q. Well, do you recall that when my partner, Mr. Palay, took

23 your deposition last month, you told him that to your knowledge

24 the member companies of the TIA did not share proprietary

25 company research with the TIA?

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1 A. I still don't understand your question.

2 Q. Sir -- well, I'll tell you what, get your deposition
3 testimony -- this is tab 119, Jamey. And I'm going to -- I'm
4 referencing page 115 of your deposition testimony, Mr. Welch,
5 lines 8 through 12.

6 A. Not to my knowledge.

7 Q. And just so the record is clear, when you were asked the
8 question:

9 "Question: I just want to make it clear, it's not your
10 testimony, is it, that the company shared proprietary company
11 research with the TIA?"

12 And your answer was, "Not to my knowledge."
13 Correct?

14 A. That's correct.

15 Q. And that remains your testimony here today?

16 A. It does.

17 Q. Now, sir, to the extent that the TIA collected
18 unpublished studies, those would have been studies such as Ph.D.
19 theses and the like, not internal proprietary company research,
20 correct?

21 A. Correct.

22 Q. Now, why did you leave -- let's go back to, Jamey, for us
23 it's tab 117. For you, Mr. Welch, go back to your written
24 direct testimony page 22 line 17 through 23. Are you there,
25 sir?

1 A. I am.

2 Q. When you were asked the question beginning at line 21,
3 "Did the member companies ever send their internal scientific
4 studies or research to the TIA library?"
5 Your answer was, "Yes, from time to time they would."
6 Why did you leave out of that answer the fact that
7 proprietary company research was not exchanged by the member
8 companies of the Tobacco Institute of Australia to your
9 knowledge?

10 A. I don't understand the question.

11 Q. Sir, if you look at your -- you were asked a question --
12 if you look at page 22 of your written examination to the
13 testimony you provided to this Court today, you were asked the
14 question:
15 "Did the member companies ever send their internal
16 scientific research -- studies or research to the TIA library?"
17 Do you see that question?

18 A. I do.

19 Q. And your answer was:
20 "Yes. From time to time they would."
21 Do you see that answer, sir?

22 A. I see that answer.

23 Q. And do you think it would have been a more accurate
24 answer to make clear to the Court that the, quote, internal
25 scientific studies or research that the member companies sent to

1 the TIA library did not -- were things like Ph.D. theses and not
2 internal proprietary company research? Do you think that would
3 have been a more honest answer, sir?

4 MR. SPIEGEL: Objection, argumentative.

5 THE COURT: No, the objection is overruled. The witness
6 may answer.

7 THE WITNESS: I refuse to answer that question.

8 MR. FREDERICK: He refuses to answer the question.

9 THE WITNESS: (Inaudible)

10 MR. FREDERICK: I don't think we heard exactly what you
11 said here, Mr. Welch.

12 THE WITNESS: I believe that the advice I received from
13 the Attorney General of Australia was that when I chose to refuse
14 to answer a question I was entitled to do so, and I refuse to
15 answer that question.

16 MR. FREDERICK: Then I'll move to strike his testimony in
17 its entirety, Your Honor.

18 THE COURT: Are you saying, Mr. Welch, that the advice
19 that you received from the Australian Attorney General's Office
20 was that any time you wanted to refuse to answer a question you
21 could?

22 THE WITNESS: That's correct.

23 MR. SPIEGEL: That is advice that he did receive from
24 the -- this was based upon the application that was made by
25 defendants that the United States aided them with in order to be

1 able to get him to be able to testify from Australia.

2 MR. FREDERICK: And, Your Honor, that pertains to
3 deposition testimony that Mr. Welch gave. That permission was
4 neither sought nor required for this trial testimony, so I don't
5 think any instruction from the Australian Attorney General has
6 anything to do with what we're doing today, and in any event,
7 even if it were applicable under Australian law, you sit in this
8 courtroom and you make the decisions as to what a witness can
9 refuse to answer and I do object to his refusal to answer this
10 question.

11 THE COURT: Does the government have anything further to
12 say and then I'll instruct Mr. Welch?

13 MR. SPIEGEL: I actually believe that Mr. Frederick is
14 right on this point. We did consult with the Australian Attorney
15 General.

16 THE COURT: I want to make sure that Mr. Welch can hear
17 everything being said. Mr. Welch can you hear Mr. Spiegel?

18 MR. SPIEGEL: John, can you hear me?

19 THE WITNESS: I can hear you, yes.

20 THE COURT: All right.

21 THE WITNESS: I can.

22 MR. SPIEGEL: There was correspondence between
23 Mr. Highfield and the Australian Attorney General's Office in
24 relation to this particular proceeding, and the understanding
25 that the United States had in relation to that was that there

1 were no additional requirements, and that the position that was
2 in existence for the deposition in Australia, those terms do not
3 apply to his testimony in this Court today.

4 MS. EUBANKS: And, Your Honor, if I might, in terms of an
5 additional objection to the question, the objection that
6 Mr. Spiegel raised was, of course, overruled by the Court. He
7 was asked, Mr. Welch was asked whether his answer was honest or
8 not, and the argumentative objection was overruled. But we would
9 ask that the question simply be rephrased for purposes of being
10 able to move along, and if Mr. Frederick wants to show or impeach
11 the witness with prior testimony, certainly we wouldn't object to
12 that. But we would think it might address the witness and his
13 counsel's concerns if the question merely were rephrased or if he
14 were presented with information to indicate that there is an
15 inconsistency in any of his testimony.

16 MR. FREDERICK: Your Honor, I've already impeached the
17 witness. I don't think I have to do it again, and I want him to
18 answer my question, and I think the Judge has overruled the
19 objection and I don't think we ought to let the witness and his
20 lawyer dictate to this Court how we're going to proceed here.

21 THE COURT: I want to be very clear. The United States
22 government, though, is in agreement that the rules that applied
23 to the deposition, the taking of the deposition, do not apply to
24 the taking of this testimony; is that right?

25 MR. SPIEGEL: It is the United State's position that those

1 do not apply separately, of course, due to the fact that he's not
2 here in the United States, there are other issues, obviously,
3 whether he needs to answer questions or not, but I do not believe
4 that based upon that previous advice that that advice would be
5 relevant here today.

6 THE COURT: All right, Mr. Welch, let me explain to you.
7 Both the lawyers in the United States, both for the government
8 and for the defendants, are in agreement that the advice that you
9 received from the Australian government applied only to the
10 deposition. That advice does not apply to the testimony you're
11 giving today. Therefore, under the rules that are in effect in
12 the United States, you are required to answer the last question
13 that was asked of you. Mr. Frederick can certainly ask it again,
14 some time has passed, but you must answer the question. If you
15 don't answer the question, then there are various sanctions that
16 might be imposed. I might have to strike all of the testimony.
17 So I just want you to keep that in mind.

18 Mr. Frederick, will you pose your question again, please?

19 MR. FREDERICK: Yeah.

20 BY MR. FREDERICK:

21 Q. Just so I can orient you, Mr. Welch, my question is
22 directing your attention to page 22, lines 21 through 23 of your
23 written direct examination. Do you have that before you, sir?

24 A. I do.

25 Q. The question asked of you was, "Did the member companies

1 ever send their internal scientific studies or research to the
2 TIA library?" Do you see that, sir?

3 A. I do.

4 Q. And the answer you gave is "Yes, from time to time they
5 would." Do you see that, sir?

6 A. I do.

7 Q. And my question to you, sir, to which I would like an
8 answer, is do you think it would have been a more honest
9 response to that question to state that the internal scientific
10 studies or research that the member companies were sending to
11 the TIA library were things like Ph.D. theses, not proprietary
12 internal company research, would that have been a more honest
13 answer to that question, sir?

14 MR. SPIEGEL: Objection, Your Honor. That's --

15 THE WITNESS: It might have been.

16 THE COURT: Excuse me just a moment, please. Go ahead.

17 MR. SPIEGEL: Objection. There are materials included in
18 Mr. Frederick's questions that he not previously asked about
19 which had not in any way been stated by the witness.

20 THE COURT: No, the objection's overruled. Mr. Welch,
21 will you please answer the question?

22 THE WITNESS: It might have been.

23 BY MR. FREDERICK:

24 Q. It may have been a more honest answer, is that your
25 testimony?

- 1 A. That is correct.
- 2 Q. All right, sir. And now, in terms of who drafted that
3 answer, was that you, the answer I'm talking about now is page
4 22, lines 23, at line 23 of your written direct testimony. Who
5 drafted that answer, was that you or Mr. Spiegel or somebody
6 else who drafted that answer?
- 7 A. To the best of my knowledge, it was Mr. Spiegel.
- 8 Q. And you didn't mean to imply by this answer that the
9 companies share proprietary company research with the Tobacco
10 Institute of Australia, did you sir?
- 11 A. Could you repeat that question?
- 12 Q. Yes, sir. You did not, you, John Welch, did not mean to
13 imply by adopting the answer at line 23 on page 22, you did not
14 mean to imply that the TIA member companies shared their
15 proprietary company research with the Tobacco Institute of
16 Australia, you did not mean to imply that, did you, sir?
- 17 A. I did not.
- 18 Q. Now, sir, let me go back to your direct testimony. If we
19 can turn to page 13, lines 13 to 20. And that's -- you got it
20 Jamey, tab 123. Thank you.
- 21 Let me know -- do you have your written testimony before
22 you, sir, at page 13?
- 23 A. I do.
- 24 Q. And at line 13 you were asked the question, "Do you know
25 whether or not the litigation, legislative and public affairs

1 concerns driving the Document Retention Policy were specific to
2 Australia International or both?"

3 And your answer is, "As the member companies, rather than
4 myself, were the ones determining what constituted a potentially
5 harmful document, I do not know what their bases for making
6 determinations were. My focus was on carrying out the directives
7 of the member companies, ensuring that those companies were
8 satisfied with the job being done in document retention.
9 Personally, I did not concern myself with the parent or affiliate
10 companies overseas."

11 Do you see that, sir?

12 A. I do.

13 Q. Now, sir, while you were the CEO at the Tobacco Institute
14 of Australia, you were ultimately in charge of carrying out the
15 TIA's Document Retention Policy, correct?

16 A. Correct.

17 Q. And your motivation, your personal motivation in relation
18 to that Document Retention Policy related entirely to domestic
19 Australian considerations, correct?

20 A. That's correct.

21 Q. And you didn't have any concern whatsoever regarding U.S.
22 litigation in connection with this policy, correct?

23 A. That's correct.

24 Q. Now, in your written testimony, you speculate about what
25 those concerns were of the member companies, do you recall that?

1 And let me help you out. Go to page 13 line 21 to page 14 line
2 4 and that's tab 127, Jamey. Do you have that testimony before
3 you, sir?

4 A. Yes, sir, I do.

5 Q. And you're asked the question at line 21 on page 13, "Do
6 you know whether or not the decisions made by the Australian
7 operating companies regarding which documents should or should
8 not be destroyed were motivated by concerns for their overseas
9 parent or affiliate companies?"

10 And you gave the answer, "No, I do not know."

11 And then you were asked the question: "Is it possible
12 that the member companies decisions on what documents to destroy
13 was motivated, at least in part, by a desire to protect their
14 parent and affiliate companies overseas?"

15 And you answered, "Yes."

16 Do you see that testimony, sir?

17 A. I do.

18 Q. Now, when you say here that while you don't know what
19 those concerns were, you state that it was, quote, possible,
20 unquote, that the member companies decisions were motivated, at
21 least in part, by a desire to protect their parent and affiliate
22 companies overseas, right?

23 A. It is possible, yes.

24 Q. Do you recall that Mr. Spiegel, during your deposition,
25 asked you whether you and the TIA member companies were

1 concerned with litigation outside Australia when it came to
2 Australian documents?

3 A. I do recall that.

4 Q. Well, let's go -- let's look at that, sir. Get your
5 deposition transcript. This is tab 129, Jamey. Let's look at
6 your deposition transcript at page 144 lines 12 to 17.

7 Actually, Jamey it's tab 130 -- I'm sorry, sir, go to page 144,
8 line 12, and it goes over to page 145, line 11. Let me know
9 when you've had a chance to read that.

10 A. Yes, I've read that.

11 Q. Now, sir, do you see the question Mr. Spiegel asked you,
12 was, "Are you aware whether or not any of the TIA member
13 companies that were playing a role in determining what should or
14 should not be destroyed had any concerns that related beyond
15 their own domestic concerns but to international affiliates or
16 ownership -- or parent companies?"

17 There's an objection, and then you -- you answered, "I
18 formed the view while I was at the TIA that the government and
19 public affairs officers, with whom I was dealing, were
20 principally involved in domestic issues. We -- if you recall, in
21 those days, tobacco was a pretty hot potato in Sydney, so the
22 guys who were government and public affairs officers had a pretty
23 full book without looking to other people."

24 And then Mr. Spiegel asked you another question, "So you
25 weren't made aware of any concerns about potential problems in

1 other parts of the world based upon any actions or documents in
2 Australia?"

3 And you answered, "We were made aware of litigation in
4 other parts of the world, but not -- but not in regard to
5 documents that were held in Australia."

6 Do you see that testimony you gave at your deposition,
7 sir?

8 MR. SPIEGEL: Objection, Your Honor.

9 THE WITNESS: I do.

10 MR. SPIEGEL: One moment, Mr. Welch. Objection. This is
11 improper impeachment. He's trying to here show the witness that
12 by the fact that he said previously that some concerns were not
13 related to the United States, that somehow that nullifies his
14 previous answer that it is possible that some concerns were
15 related to the United States. This simply doesn't go to the
16 point Mr. Frederick is trying to make in impeachment.

17 MR. FREDERICK: Your Honor --

18 THE COURT: That's for the fact finder to decide whether
19 impeachment has been established or not. He certainly can ask
20 the questions in that fashion. Whether I think it reaches a
21 logical conclusion that Mr. Frederick wants me to draw, is up to
22 me.

23 Go ahead, Mr. Frederick.

24 MR. FREDERICK: All right. Thank you, Your Honor.

25 BY MR. FREDERICK:

1 Q. Now, Mr. Welch, I suppose anything's possible, but given
2 your deposition testimony we just read, that doesn't at all
3 suggest, as you have testified in your written direct
4 examination submitted to this Court, that you believe that the
5 TIA member companies possibly destroyed documents due to their
6 desire to protect their parent and affiliate companies overseas,
7 does it?

8 A. No, it does not.

9 Q. Now, sir, by the way, again, if we go back to your answer
10 at page 13 -- I'm sorry, go to tab 127, Jamey. If we go back to
11 your testimony beginning at page -- I have to see where it
12 begins on the screen here, but we'll be at the bottom of page 13
13 top of page 14 of your testimony. And if you can scroll up to
14 show lines 1 thru 4 on 14, Jamey. That's what I'm looking for.

15 Now, going back to the question you answered in your
16 direct testimony, the question again is, "Is it possible that
17 member companies decisions on what documents to destroy was
18 motivated, at least in part, by a desire to protect their parent
19 and affiliate companies overseas?"

20 And you answered "Yes."

21 My question to you again, sir, who drafted that answer,
22 was that you or Mr. Spiegel?

23 A. Mr. Spiegel.

24 Q. Now, sir, let me go on to something else. Do you recall,
25 sir, that in your written direct examination submitted to this

1 Court that you gave testimony that appears to imply that you and
2 others at the Tobacco Institute of Australia were very concerned
3 with the destruction of scientific studies? Do you recall that
4 testimony, sir?

5 A. I do.

6 Q. And if we go to tab 131, Jamey, and Mr. Welch it's your
7 written direct testimony at page 11 line 15 through page 12 line
8 18. I'll just give you a moment to get there.

9 Do you see, sir, if you're there at page 11, lines 18 to
10 20, you identify scientific documents as, quote, the largest
11 class of documents destroyed under the policy, unquote? Do you
12 see that?

13 A. I do.

14 Q. But now, just so the record's clear, you have testified
15 here today, as you did at your deposition, that the member
16 companies did not share proprietary research with the Tobacco
17 Institute of Australia, correct?

18 MR. SPIEGEL: Objection, asked and answered.

19 THE WITNESS: That's my recollection.

20 BY MR. FREDERICK:

21 Q. And your job concerned mostly lobbying and public
22 affairs, correct?

23 A. That's correct.

24 Q. And so it wasn't particularly pertinent to your job to
25 master the scientific literature on smoking; is that a fair

1 statement?

2 A. That's a fair statement.

3 Q. And mostly you worked on issues concerning legislation
4 relating to sponsorship, correct?

5 A. That was a principal concern, yes.

6 Q. And sir, just so the record's clear, you personally
7 cannot identify a single scientific study that was destroyed
8 under the Document Retention Policy because it was harmful,
9 correct?

10 A. That's correct.

11 Q. And sir, you can't identify a single document that was
12 titled "read and destroy" either, can you?

13 A. I can't identify a particular document.

14 Q. And you can't tell us anything about the substance of any
15 document that had any such "read and destroy" notation on it,
16 correct?

17 A. Correct.

18 Q. Now, let me direct your attention -- tab 141, Jamey --
19 let me direct your attention to page 20, line 22, to page 21
20 line 4. Do you see there?

21 A. I'm on page 20.

22 Q. Okay. Page 20, line 22, do you see the question, "Do you
23 recall whether there was ever any discussion between member
24 companies at the monthly TIA meetings over which documents each
25 member should destroy?" Do you see that, sir.

- 1 A. I do.
- 2 Q. And then you gave the answer, "Yes. The only reason that
3 the TIA existed was so that there would be an industry voice and
4 industry cohesion on certain issues. It was not unusual for
5 someone at a meeting to sit down and say, "has anybody got such
6 and such a survey? Has anybody got such and such a document,
7 and if you've got it, we at this company didn't like it, and
8 we've gotten rid of it and we suggest you review it if you've
9 got it." Do you see that answer, sir?
- 10 A. I do.
- 11 Q. But here again, sir, you're not able to identify a single
12 survey or other document that was discussed in such a way when
13 Mr. Spiegel asked you that question at your deposition, right?
- 14 A. That's correct.
- 15 Q. And again, who drafted the answer here that begins at
16 line 24 of page 20 and goes over to line 4 of page 21, you or
17 Mr. Spiegel?
- 18 A. Mr. Spiegel.
- 19 Q. Now, sir, in your testimony you point out that your
20 public statements had to be reviewed and approved and that this
21 was often done by lawyers. Do you recall that testimony?
- 22 A. I do.
- 23 Q. And do you recall also that when you were -- that the TIA
24 was a defendant in the AFCO lawsuit at the time that you joined
25 it in January of 1991?

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- 1 A. I recall that.
- 2 Q. And just to orient the Court, this was a lawsuit that had
3 been brought several years before you came to the TIA by the
4 Australian Federation of Consumer Organizations or AFCO,
5 correct?
- 6 A. That's correct.
- 7 Q. And it was the TIA that was the defendant in the AFCO
8 litigation, not the TIA member companies, correct?
- 9 A. As I recall, that's correct.
- 10 Q. As a matter of fact, the AFCO decision, the ruling by the
11 trial court in the AFCO case, was handed down only a couple of
12 weeks after you joined the TIA; isn't that correct?
- 13 A. I recall that.
- 14 Q. And the TIA lost that case at the trial court level,
15 correct?
- 16 A. That's correct.
- 17 Q. And the decision received a lot of publicity in
18 Australia, correct?
- 19 A. It did.
- 20 Q. Now, that lawsuit, that decision, that AFCO ruling and
21 its after affects occupied a fair amount of time for you while
22 you were head of the TIA; is that fair to say?
- 23 A. That's fair to say.
- 24 Q. Now, the TIA's lawyers who appeared in that case were
25 from the Clayton -- is it Clayton Utz firm, is that correct?

- 1 A. They were the solicitors. They were the solicitors.
- 2 Q. Thank you. And that litigation, that AFCO litigation had
- 3 been very expensive for the TIA, correct?
- 4 A. That's correct.
- 5 Q. Now, do you recall that that lawsuit was based on an
- 6 advertisement that the TIA had taken out in July 1986,
- 7 approximately four and a half years before you arrived at the
- 8 TIA, in the Sydney Morning Harold Newspaper, do you recall that,
- 9 sir?
- 10 A. That's my recollection.
- 11 Q. And the Sydney Morning Harold is, obviously, an
- 12 Australian newspaper, correct, sir?
- 13 A. It is.
- 14 Q. And the advertisement that the TIA put in the paper was
- 15 challenged by AFCO before the Australian Trade Practices
- 16 Commission, correct?
- 17 A. I don't recall that.
- 18 Q. Well, do you recall that the principle challenge was to a
- 19 statement in the advertisement concerning the evidence that
- 20 proved scientifically that cigarette -- smoking causes disease
- 21 in nonsmokers?
- 22 MR. SPIEGEL: Objection to the scope.
- 23 THE WITNESS: I believe that's correct.
- 24 MR. SPIEGEL: Objection here based upon scope, although
- 25 the AFCO decision was mentioned in the written direct, this

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1 analysis of what the basis of the case was, and he's certainly
2 not a lawyer who dealt with the AFCO case, I think this is well
3 beyond the bounds.

4 THE COURT: Well, this question only was a summary, if you
5 will, of the subject matter of the case. I don't know where
6 you're going, Mr. Frederick, the witness answered the question.
7 I assume you're not going to go into an analysis of the case.

8 MR. FREDERICK: Absolutely not, I'll get to the point.

9 THE COURT: Let me hear the next question.

10 BY MR. FREDERICK:

11 Q. Okay. Now, sir, it's fair to say that as a result of the
12 AFCO decision, there was a fair amount of concern among the
13 member companies that you clear any statements you made publicly
14 beforehand with them, correct?

15 A. That's correct.

16 Q. Because in the AFCO case, Judge Morling had enjoined the
17 TIA from making certain kinds of statements about secondhand
18 cigarette smoke, correct?

19 A. That's correct.

20 Q. So that might explain why lawyers were involved in
21 clearing your statements, correct?

22 MR. SPIEGEL: Objection, Your Honor. This is completely
23 unrelated to what the AFCO case was introduced in relation to in
24 the direct examination.

25 THE COURT: Well, you may bring that out on redirect, but

1 it's again appropriate cross-examination.

2 BY MR. FREDERICK:

3 Q. Now, sir, let me refer you to U.S. exhibit -- Andrew, can
4 you hand the witness U.S. Exhibit 89396, which is included in
5 the written direct testimony?

6 MR. FREDERICK: I'm sorry, could I ask the Court, did I
7 get an answer to my prior question on the record?

8 THE COURT: You did not.

9 BY MR. FREDERICK:

10 Q. Mr. Welch, let me go back to the prior question. I asked
11 you --

12 MR. FREDERICK: I have to do a set-up here, Your Honor,
13 just to make it clear to the witness.

14 BY MR. FREDERICK:

15 Q. I asked you now, sir, it's fair to say that as a result
16 of the AFCO decision, there was a fair amount of concern among
17 the member companies that you clear any statements you made
18 publicly beforehand with them and you answered, "That's
19 correct." Do you recall that?

20 A. I do.

21 Q. And then I asked, because in the AFCO case, Judge
22 Morling, had enjoined the TIA from making certain kinds of
23 statements about secondhand cigarette smoke, correct?

24 A. That's correct.

25 Q. Now, sir, let me go back to U.S. Exhibit 89396. Do you

1 have that before you, sir? And that's tab 5, Jamey.

2 THE COURT: And at some point, Mr. Frederick, we're going
3 to have to take a brief recess.

4 MR. FREDERICK: I'm told I still failed to get an answer
5 to the question, Your Honor.

6 BY MR. FREDERICK:

7 Q. Mr. Welch, I'm sorry, I have to go to one more question
8 about AFCO before we go there, and that is, would the AFCO
9 injunction explain why lawyers were involved in clearing your
10 statements?

11 A. It could.

12 Q. All right. Now, if we can --

13 MR. FREDERICK: And Your Honor, you said something about
14 a --

15 THE COURT: Well, at some point we have to take a short
16 recess, the court reporter's been going the long time and so has
17 the witness.

18 MR. FREDERICK: I would say I have 15 more minutes, Your
19 Honor, so --

20 THE COURT: And then we have redirect, so this is probably
21 a good time to do it. Let's take -- Again, counsel, remind me,
22 do we have an absolute cutoff time or not? I know it's because
23 Mr. Welch's lawyer has to leave. Let's take just a ten-minute
24 recess then, everybody.

25 (Thereupon, a break was had from 4:05 p.m. until 4:17

1 p.m.)

2 THE COURT: Let me raise a preliminary matter, because I
3 do have to retreat on a promise I had made or a semi-promise I
4 had made.

5 For several reasons it's going to be impossible to get to
6 Dr. Levy's testimony this afternoon and to finish it up. I'm
7 sorry about that. I don't even see Mr. Webb here, but someone
8 will tell him, and tell her, we're not going to end until close
9 to 5:30.

10 There's something I'll talk to counsel about at the end of
11 the day. It's just not going to work out, everybody. Plus we
12 have court personnel. People have other obligations. This case,
13 even though it has become the major fulcrum of everybody's life,
14 is truly not the center of everybody's life.

15 So my apologies to Dr. Levy. I'm sorry, we just can't do
16 it.

17 All right, Mr. Frederick. Go ahead, please.

18 BY MR. FREDERICK:

19 Q. Welcome back, Mr. Welch. Do you have U.S. Exhibit 89396
20 before you, sir?

21 A. I do.

22 Q. And if you look at -- does Exhibit 89396 appear to be
23 possible Q and A's or questions and answers created in relation
24 to the appeal of the AFCO case?

25 A. That's correct.

1 Q. And if you turn to the fourth page of the document, which
2 is a fax cover sheet, it's dated February 28, 1992. Do you see
3 that, sir? The last page?

4 A. Yes, I do.

5 Q. And so was it -- is it your recollection that it was in
6 around February of 1992 when the AFCO case was argued on appeal
7 in Australia?

8 A. That's my recollection.

9 Q. And this exhibit contains Q and A's in the event of a win
10 or loss because at the time, you didn't know whether you would
11 win or lose, correct?

12 A. That's correct.

13 Q. But in fact, the injunction in that case was ultimately
14 lifted on appeal, correct?

15 A. I don't recall.

16 Q. Well, sir, it was certainly your personal opinion at the
17 time that you worked for the Tobacco Institute of Australia that
18 the science did not support the conclusion that ETS causes
19 disease; is that correct?

20 MR. SPIEGEL: Objection. Relevance.

21 THE WITNESS: I didn't have --

22 THE COURT: Excuse me a moment, Mr. Welch. You don't need
23 to answer that for the moment.

24 Why is his personal opinion relevant?

25 MR. FREDERICK: Well, Your Honor, the whole testimony is

1 about destruction of documents, including documents relating to
2 ETS and science, and I just want to make clear what this
3 witness's personal belief is.

4 THE COURT: No. The objection is sustained.

5 MR. FREDERICK: All right. Let's move on.

6 Andrew, can you hand the witness -- strike that. Let me
7 just move on.

8 Now, Andrew, if you could please hand the witness U.S.
9 Exhibit 89393.

10 And that's tab 2, Jamey.

11 BY MR. FREDERICK:

12 Q. Now, Mr. Welch, U.S. Exhibit 89393 is an April 16, 1991
13 memorandum to you and others regarding the impending release of
14 a report by the U.S. Environmental Protection Agency or EPA on
15 ETS. Do you see that?

16 A. I do.

17 Q. And you said in your written testimony submitted to the
18 Court today that you do not recall what the EPA report was,
19 correct?

20 A. Correct.

21 Q. Would it refresh your recollection at all if I told you
22 that the U.S. EPA was considering at this time whether to
23 classify ETS as a human carcinogen?

24 A. No, it would not.

25 Q. But in any event, you and the others to whom this

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1 memorandum was addressed were all associated with the Tobacco
2 Institute of Australia and/or Australian companies and law firms
3 representing those companies, correct?

4 A. That's correct.

5 Q. And if, as I suggested, that the EPA report referenced in
6 U.S. -- and I realize you don't know this, sir -- but if it were
7 true that the EPA report referenced in U.S. Exhibit 89393
8 pertained to an impending report on whether ETS should be
9 classified as a human carcinogen, isn't it fair to say that this
10 would have been of interest to you and the others copied on this
11 memo because of the impact it might have on litigation in
12 Australia, including the AFCO appeal?

13 THE COURT: Wait a minute.

14 MR. SPIEGEL: Objection.

15 THE COURT: Something just happened to our whole screen.

16 MR. FREDERICK: Mr. Welch? Mr. Welch?

17 We lost him.

18 THE COURT: Have we lost our technical people or have they
19 all gone to get help?

20 (Brief pause.)

21 MR. SPIEGEL: I don't know if we want to address the
22 objection that I just made in relation to the question.

23 THE COURT: I just want to make sure we're on our record.
24 And so therefore, yes, you may make your objection.

25 MR. SPIEGEL: I believe that --

1 THE COURT: How about relevance?

2 MR. SPIEGEL: And calls for speculation, actually. This
3 was a question that Mr. Frederick has brought forth that is
4 assuming that Mr. Welch knows that this is the EPA report.

5 THE COURT: It's just too farfetched.

6 MR. FREDERICK: Too farfetched, Your Honor?

7 THE COURT: Too farfetched. It's a new part of the
8 Federal Rules of Evidence.

9 MR. FREDERICK: Your Honor, I will accept that ruling.

10 THE COURT: Just trying to take into account all the
11 things that can go wrong and do go wrong.

12 Mr. Webb, have you already been told that we were not
13 going to get to Dr. Levy and, therefore, you've sent her on her
14 way for the day?

15 MR. WEBB: She's down the street. I can try to reach her
16 right now very quickly.

17 THE COURT: I would just put her now on standby in case
18 something happens.

19 MR. WEBB: It's done.

20 THE COURT: Thank you.

21 MR. SPIEGEL: It's attempting to be reconnected. We don't
22 know why it was disconnected.

23 THE COURT: My concerns are, when we reconnect, how long
24 does the government think it will have on redirect, if you can
25 say? I mean we're almost done with Mr. Frederick's cross.

1 MR. SPIEGEL: I'm not exactly sure. Maybe 40 minutes,
2 45 minutes.

3 THE COURT: Are you going to do your best to get it within
4 the 5:30 timeframe?

5 MR. SPIEGEL: Yes, I certainly will.

6 THE COURT: So we don't have to do this again.

7 MR. SPIEGEL: I think as long as we get this connection
8 done sometime in the near future, we'll be able to finish things
9 up today. I will make that my business.

10 THE COURT: And you have what, five minutes or so?

11 MR. FREDERICK: Five.

12 THE COURT: Okay.

13 (Brief pause.)

14 MR. SPIEGEL: Did you hear that, Your Honor?

15 THE COURT: No. I was doing other work, everybody.

16 MR. SPIEGEL: They believe it will be five minutes before
17 we reconnect.

18 THE COURT: Okay. It will be close, but all right.

19 (Pause from 4:28 p.m. until 4:34 p.m.)

20 THE COURT: In terms of Dr. Levy's testimony, how much
21 more do we have, everyone?

22 MS. EUBANKS: I think it's probably no more than
23 15 minutes.

24 THE COURT: All right. That's on the redirect?

25 MS. EUBANKS: Yes, Your Honor.

1 THE COURT: I think we better start talking now about the
2 worst possible scenario. Mr. Welch's counsel has to leave at
3 9:30, their time, Australian time. It seems to me that unless we
4 can be reconnected within 10 minutes, we're not going to be able
5 to finish Mr. Welch today. In part, that's up to the government
6 and they may have a real -- it may have a real Hobson's choice,
7 but there are a lot of those choices in this case.

8 MR. SPIEGEL: We might be able to. If it's 15 or 20, we
9 might be able to squeeze it in.

10 THE COURT: And Dr. Levy's about five minutes away; is
11 that right?

12 MR. WEBB: I would say five minutes, seven minutes. She's
13 at a building down the street.

14 THE COURT: All right. I wouldn't send for her yet.

15 MR. WEBB: We won't until you tell us to.

16 THE COURT: Okay.

17 MS. EUBANKS: Your Honor, I don't know if it's acceptable
18 to you, but I'm just informed that if you wanted to, we can
19 finish this on the telephone without a videoconference. You've
20 seen the witness. We wouldn't object. I don't know --

21 MR. FREDERICK: I don't have any objection, Your Honor, if
22 you want to do it that way, it's up to you.

23 MR. SPIEGEL: We'd like to finish the witness if at all
24 possible. And I think Mr. Spiegel can probably get through his
25 questions if Mr. Frederick --

1 THE COURT: I think that's perfectly all right. I've had
2 substantial time to observe Mr. Welch and assess his demeanor.
3 And since there's no objection, let's do that.

4 That call still has to be placed, though, right? And that
5 may not be so easy, either, although we may have just been
6 connected.

7 (Brief pause.)

8 THE COURT: All right. I think we're ready, everyone.

9 Mr. Welch, can you hear me?

10 Mr. Welch, can you hear me?

11 Can you hear me at all?

12 THE WITNESS: Yes, I can.

13 THE COURT: Oh, good, I think after that -- enough of a
14 delay, we're ready to go on.

15 Mr. Frederick, please.

16 MR. FREDERICK: Andrew, can you hand Mr. Welch U.S.
17 Exhibit 89395, please.

18 And for the record, this is going to be a November 4, 1991
19 letter from Samuel D. -- I think it's pronounced Chilcote,
20 C-H-I-L-C-O-T-E, Jr., to Mr. Welch, discussed in his direct
21 examination.

22 BY MR. FREDERICK:

23 Q. Do you have U.S. Exhibit 89395 before you, sir.

24 A. I do.

25 Q. And you stated in your direct examination that

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1 Mr. Chilcote was head of the U.S. Tobacco Institute at this
2 time, in November of 1991, correct?
3 A. That's correct.
4 Q. And by the way, sir, did the government provide you with
5 this and the other exhibits included in your direct examination
6 for the first time before or after your deposition on January
7 14th, 2005?
8 A. I believe it was after.
9 Q. Now, you state in your --
10 And I take it Mr. Spiegel made the decision to include
11 this letter in your direct testimony; is that true?
12 A. Correct.
13 Q. Now, you state in your testimony at page 4, lines 9 and
14 10 that you do not remember the topics addressed in this letter;
15 is that correct?
16 A. That's correct.
17 Q. But do you recall why Mr. Chilcote sent this letter to
18 you?
19 A. No.
20 Q. You don't recall that you asked for this information; is
21 that your testimony?
22 MR. SPIEGEL: Objection.
23 THE WITNESS: No.
24 MR. SPIEGEL: Asked and answered.
25 THE COURT: The objection's overruled and the witness has

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1 answered.

2 MR. FREDERICK: Andrew, give Mr. Welch what's been marked
3 as JD 054647.

4 That's tab 17, Jamey.

5 BY MR. FREDERICK:

6 Q. And, Mr. Welch, let me know when you've received -- all
7 right. Let me know when you've had a chance to review JD
8 054647.

9 A. I have that.

10 Q. Now, this is a November 11, 1991 fax from you to
11 Mr. Chilcote attaching a news clipping, correct?

12 A. That's correct.

13 Q. And your message on the first page reads -- there's a
14 line that reads "Subject" towards the bottom. It states, quote:
15 "Re: Following news clip: Could we have more information
16 urgently? Regards, John St. Vincent Welch."

17 Do you see that, sir?

18 A. I do.

19 Q. And now if we turn to the second page of the exhibit, you
20 appear to have starred a news report from the Sydney Morning
21 Herald entitled "Smoking Suit." Do you see that?

22 A. I do.

23 Q. And just briefly, it states: "Smoking Suit, New York:
24 Seven current and former flight attendants filed a class action
25 suit against a number of tobacco companies on Thursday claiming

1 they had contracted cancer, heart disease and respiratory
2 illnesses because they had been exposed to smoke from
3 passengers' cigarettes. The suit seeks an unspecified sum in
4 damages and 5 billion in punitive damages on behalf of 60,000
5 airline employees -- NYT."

6 Do you see that, sir?

7 A. I do.

8 Q. Now, if we go back --

9 And this is tab 4, Jamey.

10 If we go back to U.S. Exhibit 89395, Mr. Chilcote's
11 letter to you of the same date, Mr. Chilcote's letter is also
12 dated November 4, 1991, although I suppose by the time it
13 reached you, it would be the next day in Sydney; would that be
14 fair?

15 A. That would be fair.

16 Q. And it's pretty obvious from the context provided by JD
17 054647, your fax to him, that he appears to be responding to
18 your fax; is that true?

19 A. That's fair.

20 Q. And you don't recall Mr. Chilcote ever sending you
21 anything else while you were at the Tobacco Institute of
22 Australia; is that correct?

23 A. That's correct.

24 Q. Now, sir, just this -- the article about which you asked
25 for more information pertained to an ETS lawsuit in the United

1 States; is that true?

2 A. That would appear so, yes.

3 Q. And it's true that at this time, in November of 1991, you

4 as the head of the Tobacco Institute of Australia were very

5 interested in anything pertaining to ETS in light of the

6 situation with the AFCO case in Australia; is that fair to say?

7 A. That's fair to say.

8 Q. Now, sir, let me -- I just have a few more questions.

9 Sir, would you agree that when you joined the Tobacco

10 Institute of Australia in 1991, the tobacco industry was a

11 controversial industry in Australia?

12 A. That's a fair summation.

13 Q. And you found yourself in a challenging job, is that

14 fair?

15 A. That's correct.

16 Q. And in fact, you viewed the issues you were dealing with

17 as essentially difficult political issues, correct?

18 MR. SPIEGEL: Objection, relevance.

19 THE WITNESS: Correct.

20 MR. FREDERICK: I think it's relevant to his background,

21 given the testimony here today, Your Honor.

22 THE COURT: Well, you can have about two more questions on

23 that.

24 MR. FREDERICK: Well, then, I'll jump ahead a few.

25 BY MR. FREDERICK:

1 Q. Sir, you were always aboveboard and ethical in your
2 dealings on behalf of the TIA, weren't you?

3 A. I was.

4 Q. And when you had a difficult or controversial issue to
5 address, you tried to do it in what you thought was a forthright
6 manner?

7 A. Yes.

8 Q. And you never did anything you thought was wrong,
9 knowingly wrong, correct?

10 A. Knowingly wrong; that's correct.

11 Q. And you never did anything to knowingly further any
12 fraud, correct?

13 A. Correct.

14 Q. And you were proud of the way you conducted yourself as
15 the head of the Tobacco Institute of Australia, correct?

16 A. As far as I was concerned, I was.

17 MR. FREDERICK: Thank you. I have no further questions.

18 THE COURT: All right, Mr. Spiegel, please.

19 MR. SPIEGEL: Thank you.

20 REDIRECT EXAMINATION OF

21 JOHN BASIL WILLIAM ST. VINCENT WELCH

22 BY MR. SPIEGEL:

23 Q. Good morning, Mr. Welch.

24 A. Good morning, Mr. Spiegel.

25 Q. You recall, don't you, in the course of Mr. Frederick's

1 written direct -- excuse me -- of his cross-examination, that
2 there was some discussion of the preparation of your written
3 direct, correct?

4 A. Correct.

5 Q. There was a question earlier which related to whether or
6 not you and I met in Sydney on the day following your
7 deposition. Do you remember that question?

8 A. I do.

9 Q. Do you recall whether or not on the day after the
10 deposition in Sydney you and I met in the Blue Mountains to
11 discuss your written direct testimony?

12 A. That's correct.

13 Q. And do you recall that we spent several hours going over
14 various questions, that I was asking you questions and you were
15 providing me with answers to those questions?

16 A. That's correct.

17 Q. And that I was transcribing those answers that you were
18 giving me for use in your written direct examination; do you
19 recall that?

20 A. To the best of my knowledge, you were.

21 Q. In your written direct examination -- strike that.
22 Do you recall whether there were several drafts of your
23 written direct examination that were faxed back and forth
24 between us?

25 A. To the best of my knowledge, there were two.

1 Q. Would you -- are you certain that there wasn't more than
2 two versions that were faxed back and forth between us?

3 A. I'm not certain.

4 Q. I'd like to direct your attention to page 20 of your
5 written direct at line 22. There is the question: "Do you
6 recall whether there was ever any discussion between member
7 companies at the monthly TIA meetings over which documents each
8 member should destroy?"

9 And your answer is: "Yes. The only reason that the TIA
10 existed was so that there would be an industry voice and
11 industry cohesion on certain issues. It was not unusual for
12 someone at a meeting to sit down and say, quote, 'Has anybody
13 got such-and-such a survey? Has anybody got such-and-such a
14 document? And if you've got it, we at this company didn't like
15 it and we've got it and we suggest you review it if you've got
16 it'."

17 Do you recall whether that quotation -- that language
18 there is language that you yourself explicitly said to me during
19 our meetings the day after your deposition?

20 A. I believe it was.

21 Q. Going back to those questions that were being asked of
22 you by Mr. Frederick in your cross-examination, do you recall
23 when you were saying that -- Mr. Frederick was asking you
24 questions as to whether or not I had written -- drafted the
25 answers or whether you had drafted the answers, when you were

1 stating that I had drafted the answers, were you saying that I
2 had actually created those answers myself or were you saying
3 that I was the individual who actually typed in those answers?

4 A. The latter, I believe. And the document was prepared by
5 yourself; it was reviewed on a number of occasions by myself and
6 I was satisfied that it was a representation of what I had said.

7 Q. And did you have final say of what ultimately ended up in
8 your written direct examination?

9 A. Most definitely. Nobody else is my mouthpiece.

10 Q. And did you in fact make numerous changes to your written
11 direct examination from when I first sent it to you to the form
12 it is in now?

13 A. Yes. I had to Australianize (sic) it because we in
14 Australia speak English and write English a little differently
15 than Americans.

16 Q. Did your changes to your written direct go beyond written
17 changes to Australianize; was there actual changes to the
18 substance that you made to the written direct examination?

19 A. Yes.

20 Q. Do you recall during our discussions the day after your
21 deposition talking about what documents were destroyed under the
22 TIA's Document Retention Policy?

23 A. I recall but not specifics.

24 Q. Do you recall our discussing specifically what science
25 documents the Tobacco Institute of Australia had and what

1 documents were destroyed?

2 A. Not specifically.

3 Q. Do you recall discussing whether or not the Tobacco
4 Institute of Australia had documents which were the internal
5 documents of the member companies of the TIA or from their
6 parent companies?

7 A. The source -- there were many documents, and the sources
8 were many and varied.

9 Q. Were the sources of some of those documents the parent or
10 affiliate companies of the member companies of the Tobacco
11 Institute of Australia?

12 A. They were documents of that nature, yes.

13 Q. Do you recall whether or not there were internal
14 scientific documents of the member companies that were at
15 various points in times given to TIA for its library?

16 A. There were.

17 Q. And earlier there's been a discussion of whether or not
18 any of those documents were proprietary documents. What do you
19 understand to be meant by the term "proprietary documents"?

20 A. I have no idea.

21 Q. So, if I were to ask you whether or not any of those
22 documents were documents that were unreleased, unpublished
23 internal scientific documents of the member companies, do you
24 recall whether or not any of those types of documents were given
25 to the TIA?

1 A. Not specifically.

2 Q. If you can please return for a moment to Joint Defendant

3 Exhibit 054641.

4 A. That's a document dated the 4th of March 1992.

5 Q. And looking at that document, the first paragraph says

6 "The TIA proposes to formalize its policy in relation to

7 document retention in order to deal with the ever increasing

8 amount of written material which passes through its office." Do

9 you see anywhere in that sentence anything about the creation of

10 a Document Retention Policy?

11 A. No.

12 Q. Do you see anything in that sentence that would indicate

13 that there wasn't already in existence a Document Retention

14 Policy?

15 A. No.

16 Q. You were previously asked by Mr. Frederick whether or not

17 this document actually, in fact, is the Document Retention

18 Policy that you were referring to in your written direct

19 examination. Just to be clear, is this document the document

20 you were referring to when you were referring to a Document

21 Retention Policy in your written direct examination?

22 MR. FREDERICK: Object --

23 THE WITNESS: -- it's not --

24 MR. FREDERICK: Objection, asked and answered. We've been

25 through this before.

1 THE COURT: The objection's overruled.

2 BY MR. SPIEGEL:

3 Q. I'm sorry, what was your answer, Mr. Welch?

4 A. It's not.

5 Q. And are you quite certain about that?

6 MR. FREDERICK: Objection.

7 THE WITNESS: I'm quite certain about that.

8 BY MR. SPIEGEL:

9 Q. Have any of the documents that the defendants have

10 produced to you today -- strike that. Were any of the documents

11 produced to you today by the joint defendants the Document

12 Retention Policy that was in existence when you were at the

13 Tobacco Institute of Australia?

14 A. Not to the best of my knowledge.

15 Q. And there was a Document Retention Policy in effect

16 during your time period at the Tobacco Institute of Australia?

17 MR. FREDERICK: Objection, leading.

18 THE COURT: The objection is sustained.

19 THE WITNESS: That's my recollection --

20 MR. SPIEGEL: It's withdrawn.

21 THE COURT: Mr. Welch, just a moment, please. The

22 objection's sustained and the question is withdrawn.

23 BY MR. SPIEGEL:

24 Q. Do any of the documents provided to you today by the

25 defendants refresh your recollection as to what the Document

1 Retention Policy was during your time at the TIA?

2 A. No.

3 Q. Did any of the documents shown to you today relate to the

4 Document Retention Policy as you recall it when you were at the

5 TIA?

6 A. Not to the best of my knowledge.

7 Q. Mr. Highfield, could you please hand the witness U.S.

8 Exhibit 79027.

9 MR. KELLER: Would you just repeat that please? Would

10 you just repeat that. Repeat that number again, please.

11 MR. SPIEGEL: 79027. It is a two-page document.

12 THE WITNESS: I've got it now.

13 MR. FREDERICK: Excuse me, Your Honor. I just note for

14 the record, this witness is not copied anywhere on this document,

15 so I don't know what the question is going to be, but I suspect

16 I'm going to be jumping up with a foundation among other

17 objections in a moment.

18 THE COURT: Well, we'll see. Go ahead, please.

19 BY MR. SPIEGEL:

20 Q. Mr. Welch, have you seen this document before?

21 A. Not that I recall.

22 Q. What is the date on this document?

23 A. The 18th of September, 1991.

24 Q. And that is during your tenure at the TIA?

25 A. It was.

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1 Q. Who is this document addressed to?

2 A. Mr. G Simms.

3 Q. You've testified previously that G. Simms in your written
4 direct was the government and public affairs officer at WD & HO
5 Wills. Do you recall that?

6 A. I do.

7 Q. Do you know who that is from -- excuse me, who is this
8 letter from?

9 A. On the second page, it purports to be from a Dr. Sharon
10 Boyse.

11 Q. Do you know who Sharon Boyse is?

12 A. No.

13 MR. FREDERICK: I'm just going to object on relevance and
14 foundational grounds. I don't know where he's going.

15 THE COURT: Well, I haven't even heard a question, a
16 substantive question yet, so Mr. Spiegel may proceed.

17 MR. SPIEGEL: Thank you. It says that it is cc'd to whom?

18 THE WITNESS: N.B. Cannar.

19 BY MR. SPIEGEL:

20 Q. Are you familiar with an N.B. Cannar?

21 A. No.

22 Q. Please turn your attention to the first paragraph of the
23 document. The paragraph provides, "As you suspected, there are
24 a number of quite serious problems with the scientific content
25 of the TIA's response on the workplace document. I have

1 therefore tried to make my comments brief in order to get them
2 to you in sufficient time for you to make those changes. As you
3 can imagine, this document is not acceptable to BAT until those
4 changes are made." Do you recall the workplace document
5 referenced in this letter?

6 A. No, I don't.

7 Q. Were you generally involved in TIA's public responses to
8 various matters?

9 A. I was.

10 Q. Can you think of any situations where it would have been
11 a public response by the TIA that you would not have been
12 involved with?

13 A. Yes. We had -- I had a deputy and there were two other
14 government and public affairs officers.

15 Q. Were you aware of Ms. Boyse of BAT's role in reviewing
16 and requiring edits to TIA documents prior to their publication?

17 MR. FREDERICK: Objection, Your Honor. That assumes facts
18 not in evidence.

19 THE COURT: Sustained.

20 BY MR. SPIEGEL:

21 Q. It says in this document that the document is not
22 acceptable to BAT until those changes are made, correct?

23 A. Correct.

24 Q. This advice is not coming from anybody within the member
25 companies of the TIA, is it?

1 MR. FREDERICK: Your Honor, I'm going to object to the
2 examination of this witness on this document. He knows that the
3 name of one of the three people, but he's never seen the
4 document. I don't know where this is headed but it seems to me
5 we're pretty far afield with this witness.

6 THE COURT: And there's no foundation laid whatsoever. He
7 hasn't seen it.

8 MR. SPIEGEL: That's precisely that fact that I'm trying
9 to bring out, Your Honor, that this is a document that goes to
10 the giving of advice from abroad to member companies of the TIA
11 by their affiliates and defendants in this case.

12 THE COURT: But you can't do it through this document
13 which this gentleman has never seen before and which he's not
14 copied on, which wasn't sent to him. He doesn't know Sharon
15 Boyse.

16 MR. SPIEGEL: That's all I'm trying to establish with this
17 document, is precisely the fact that Mr. Welch never received
18 this document, is unfamiliar with the facts of this document.

19 THE COURT: Well, he's already testified he didn't receive
20 it.

21 MR. SPIEGEL: And that's he's not familiar with the facts
22 in the document.

23 THE COURT: You can ask him that sentence, but it's clear
24 he never received it.

25 BY MR. SPIEGEL:

1 Q. Are you familiar with the facts listed in this document,
2 that there was a vetting of a certain document by a nonmember
3 company of the TIA of a TIA document?

4 A. No, I'm not.

5 Q. Is it, therefore, possible that there was vetting of
6 various documents at the TIA going on by overseas companies with
7 which you weren't familiar?

8 MR. FREDERICK: Objection, calls for speculation.

9 THE COURT: Absolutely sustained.

10 BY MR. SPIEGEL:

11 Q. Could I please turn your attention to U.S. Exhibit 396 --
12 excuse me, U.S. Exhibit 89396.

13 A. It's questions and answers.

14 Q. Yes.

15 A. I have it.

16 Q. If you could please turn to the fourth and final page of
17 that document.

18 A. I have that.

19 Q. That is a fax cover sheet, correct?

20 A. That's correct.

21 Q. And listed on that fax cover sheet are individuals with
22 Rothmans International -- strike that question. Is this
23 document sent to individuals beyond the member companies of the
24 TIA?

25 MR. FREDERICK: Objection, Your Honor. We're simply

1 covering the direct now. This is in his direct testimony.

2 MR. SPIEGEL: This point was raised specifically on the
3 cross-examination, that this document was for purposes internal
4 to the TIA, and so I'm merely bringing out the fact that this
5 document was actually sent to entities outside of the TIA and
6 outside of the membership --

7 THE COURT: All right. You may proceed.

8 MR. SPIEGEL: Thank you.

9 THE COURT: Mr. Welch, you may answer the question if you
10 remember what it was.

11 THE WITNESS: I don't recall receiving the document, and
12 I'm not qualified to say who Mr. Eggleton sent it to, but I do
13 note on the cover sheet that it's recorded that a number of other
14 people were recipients. I didn't send it, so I don't know
15 whether it went or not.

16 BY MR. SPIEGEL:

17 Q. Was it unusual for Mr. Eggleton to copy individuals
18 outside of Australia on documents that he was sending?

19 MR. FREDERICK: Objection, foundation. I don't know
20 how --

21 THE WITNESS: You'll have to ask Mr. Eggleton --

22 THE COURT: Excuse me just one moment. The objection's
23 sustained. If you can lay a foundation, he may answer the
24 question.

25 BY MR. SPIEGEL:

1 Q. The foundation -- I was trying to avoid going over issues
2 that I raised in the questions asked on written direct, but I
3 will go back there if Mr. Frederick pleases. Who is this
4 document from?

5 A. Mr. Eggleton.

6 Q. Who is Mr. Eggleton?

7 A. He was a solicitor employed by Clayton Utz.

8 Q. Did you receive frequent correspondence from
9 Mr. Eggleton?

10 A. Yes.

11 Q. When you received documents from Mr. Eggleton, were they
12 cc'd, copied to individuals outside of Australia?

13 MR. FREDERICK: Objection, vague and ambiguous. I don't
14 know what documents, when, how many. It's --

15 THE COURT: No, I'll allow it.

16 MR. FREDERICK: It's entirely unclear.

17 THE COURT: This question may be answered. You may answer
18 this question, Mr. Welch.

19 THE WITNESS: I have no idea.

20 BY MR. SPIEGEL:

21 Q. If I could turn your attention to U.S. Exhibit 89397.

22 MR. KELLER: We don't have that.

23 THE WITNESS: What document is that?

24 MR. KELLER: Mr. Spiegel, is that one of the ones you
25 would like to give to Mr. Welch.

1 MR. SPIEGEL: Yes, could you please hand that,
2 Mr. Highfield, to Mr. Welch? Thank you.

3 THE WITNESS: That's the 7.30 report document.

4 BY MR. SPIEGEL:

5 Q. Yes.

6 A. I have it.

7 Q. Do you recall being asked a question -- whether you said
8 something in this document -- previously by Mr. Frederick?

9 A. I don't recall.

10 Q. Have you seen this document before?

11 A. I have.

12 Q. And could you tell me what it is?

13 A. It purports to be a narrative of an interview that I had
14 with Mr. Kerry O'Brien of the ABC in the 7.30 report.

15 Q. Okay. As you say, it purports to be a narrative. I
16 would like to go back over a few of the questions and responses
17 in this transcript to ask you whether or not these were, in
18 fact, the correct transcriptions of those questions and answers?

19 MR. FREDERICK: Your Honor, I have an objection to the
20 extent -- I don't know if this is rehabilitation of the witness
21 by prior consistent statement or what this is supposed to be, but
22 this is a transcript of an interview Mr. Welch gave, it's
23 hearsay, and I -- you know, I guess we can wait to hear the
24 question, but I do think I'll have to object at some point.

25 THE COURT: You didn't cover this interview in your

1 cross-examination?

2 MR. FREDERICK: I asked one minor question about this
3 interview, about what he said in this interview.

4 THE COURT: I'm sorry, refresh my recollection.

5 MR. FREDERICK: I have to refresh my own recollection.
6 Maybe Mr. Spiegel can.

7 MR. SPIEGEL: There was a question asked during the course
8 of the cross-examination specifically about whether or not a
9 question and answer in this transcript was answered that way by
10 Mr. Welch.

11 MR. FREDERICK: And I believe the witness conceded that it
12 was, so I'm not certain what this is going to in terms of a use
13 of a hearsay document, a prior statement of this witness.

14 MR. SPIEGEL: To the extent that Mr. Frederick was asking
15 him what his -- whether his question or response was the same,
16 I'm doing the exact same thing Mr. Frederick was doing.

17 MR. FREDERICK: Except it's not at all the same because
18 it's his witness and he's proffering and the only proper use of
19 this would be to rehabilitate the witness.

20 THE COURT: If it's simply a prior consistent statement,
21 it doesn't come in for that reason alone.

22 MR. SPIEGEL: It is to refresh his recollection regarding
23 certain things he's discussed during the course of this
24 deposition.

25 MR. FREDERICK: Well, Your Honor, could we see if his

1 recollection needs refreshing before he's offered the document?

2 THE COURT: You're going to have to ask. If that's the
3 purpose of using this --

4 MR. SPIEGEL: Yes.

5 THE COURT: -- you must first inquire as to his memory.

6 BY MR. SPIEGEL:

7 Q. What was the policy of document retention in the industry
8 when you were at the TIA?

9 A. The Document Retention Policy in brief was to destroy
10 documents that were no longer required or documents that
11 potentially were dangerous or ingenuous to the industry.

12 MR. FREDERICK: Your Honor, I'm going to move to strike
13 the last answer as having been asked and answered during the
14 direct. I don't know where we're going.

15 THE COURT: Oh, no, I think I know where we're going. The
16 objection's overruled. Go ahead, please.

17 BY MR. SPIEGEL:

18 Q. Who determined what documents should be destroyed under
19 the policy?

20 A. A number of officers of the TIA and the member companies.

21 MR. FREDERICK: I have an objection to foundation.

22 THE COURT: He was the head of the organization.
23 Objection's overruled.

24 MR. FREDERICK: Well, Your Honor, just TIA -- the question
25 was TIA and the member companies. This witness has already told

1 us he never saw a Document Retention Policy from any of the
2 member companies. I don't know that --

3 THE COURT: No, the question is who determined what
4 documents should be destroyed under the policy. That question, I
5 assume, Mr. Spiegel, applies only to TIA; is that correct?

6 MR. SPIEGEL: That is correct.

7 THE COURT: All right. Mr. Welch may answer the question
8 if he can.

9 BY MR. SPIEGEL:

10 A. Numerous people made those decisions starting with
11 myself, the deputy chief executive, Reinier Jessurun, the two
12 public affairs officers, the member company, government public
13 affairs officers; the librarian; and our lawyers.

14 Q. I would like to direct your attention to the second page
15 of the 7.30 report, U.S. Exhibit 89397.

16 MR. FREDERICK: Objection, Your Honor, objection. What
17 are we -- where is his recollection needing to be refreshed? I
18 haven't heard that yet.

19 THE COURT: No questions have been asked about what --
20 well, let me say this. The witness hasn't indicated that he
21 doesn't recollect anything so far.

22 MR. SPIEGEL: There are aspects of the answer that he --
23 that he hasn't -- that he has not recalled, and I'm seeking to
24 refresh his recollection as to what the complete response in that
25 respect would be.

1 THE COURT: What did he say he didn't recall?

2 MR. SPIEGEL: He simply is referring to here that there
3 was discussion with the member companies in relation to the
4 documents rather than -- he is not reflecting the fact that there
5 also were documents that were directly saying "read and destroy".

6 MR. FREDERICK: Well, Your Honor, I mean, all Mr. Spiegel
7 is trying to do is get this document from him so he can read the
8 document into the record. It's hearsay. He ought to ask him a
9 question.

10 THE COURT: The objection's sustained. Plus much of this
11 was covered in the direct examination in any event and it's in
12 the record.

13 BY MR. SPIEGEL:

14 Q. I'd like to go back to a question asked of you during the
15 cross-examination by Mr. Frederick as to whether or not
16 Mr. Keller was present during our discussions in relation to
17 your written -- the creation of your written direct testimony.
18 Do you recall those questions?

19 A. I did. I do.

20 Q. Do you recall whether or not there was previous
21 permission gained from Mr. Keller regarding your conversations
22 with me with respect to preparing your written direct
23 examination?

24 A. Mr. Keller was on leave.

25 Q. Do you recall whether prior to the time he was on leave

1 there were discussions with Mr. Keller as to whether or not it
2 would be all right for you to speak with me in terms of
3 preparing your written --

4 A. I do.

5 Q. And do you recall what he said --

6 A. I do.

7 Q. -- in relation to that? What did he say?

8 A. He said it was okay but be careful.

9 Q. There was discussion during your cross-examination with
10 Mr. Frederick regarding the document retention policies of the
11 member companies of the TIA. Do you recall that discussion?

12 A. I do.

13 Q. And you were asked several questions about whether or not
14 you've seen the document retention policies of the various
15 member companies. Do you recall those questions?

16 A. I do.

17 Q. Did you ever discuss the document retention policies of
18 the member companies with the government and public affairs
19 officers of those member companies?

20 A. The Document Retention Policy of the TIA was a constant
21 issue of discussion at regular meetings with the government and
22 public affairs officers, and from time to time one or more would
23 refer to the policies.

24 Q. So, does your knowledge of their document retention
25 policies come from discussions with them about what those

1 officers of the company said their document retention policies
2 were?

3 MR. FREDERICK: Objection, leading.

4 THE COURT: Well, I think there's some confusion as to
5 these last few questions.

6 Mr. Welch, when you gave your last answer, were you
7 referring to discussions with people from the other companies
8 about the TIA Document Retention Policy, or were you referring to
9 discussions with people from those other companies about their
10 own company's document retention policies?

11 THE WITNESS: Your Honor, it would have to be both. The
12 government and public affairs officers helped formulate the TIA
13 Document Retention Policy, and to the best of my recollection
14 during those discussions references were made to their own
15 in-house policies.

16 THE COURT: All right. Now, let me hear the next
17 question, please.

18 BY MR. SPIEGEL:

19 Q. And during the course of those discussions, was there any
20 talk of the similarities between the TIA policy and the policies
21 of the member companies?

22 A. Not specifically.

23 Q. What was the purpose of discussing the policies of the
24 member companies during the course of your discussions about the
25 TIA's Document Retention Policy?

1 MR. FREDERICK: I'm going to object insofar as he's -- the
2 purpose, his purpose, whose purpose? There's lack of foundation
3 for whose purpose we're talking about.

4 BY MR. SPIEGEL:

5 Q. What was the TIA's purpose in those discussions?

6 A. The TIA was an instrument of the member companies. We
7 did their bidding and we were instructed and directed by the
8 member companies.

9 Q. So, when you were -- so, what was your purpose personally
10 when you were discussing the Document Retention Policy of TIA
11 with -- strike that question. There was a question earlier
12 during the cross-examination with Mr. Frederick relating to your
13 vetting of public statements with lawyers at Clayton Utz prior
14 to your making prior statements. Do you recall that?

15 A. I do.

16 Q. At that time, Mr. Frederick asked you whether the reason
17 that questions were cleared was due to concerns over the AFCO
18 case. Do you recall that?

19 A. I do.

20 Q. Can you tell me whether all public statements, whether
21 related or unrelated to AFCO, were cleared by Clayton Utz before
22 you were able to make them?

23 A. Either Clayton Utz or Dunhill, Madden and Butler who had
24 Mr. Klotz seconded to the Tobacco Institute.

25 Q. One last point. You referred to the fact that your

1 primary concern was with local issues in Australia. Do you
2 recall saying that?

3 A. That was our reason for being and that was my primary
4 concern.

5 Q. Do you recall whether any of those local issues were
6 issues relating to litigation?

7 A. Naturally the AFCO case and the appeal of the AFCO
8 matter.

9 Q. Do you recall whether those litigation concerns related
10 to smoking and health issues?

11 A. They did.

12 Q. Do you know whether or not those smoking and health
13 concerns would be applicable to any nations outside of
14 Australia?

15 MR. FREDERICK: Objection, foundation.

16 THE COURT: Sustained.

17 BY MR. SPIEGEL:

18 Q. You testified that the issues you were concerned about
19 were local, but do you know whether or not those local issues
20 have any relevance outside of Australia as well?

21 MR. FREDERICK: Same objection.

22 THE COURT: Same ruling.

23 BY MR. SPIEGEL:

24 Q. Is it your understanding that human physiology is the
25 same in different nations of the world?

1 MR. FREDERICK: I'm going to object, Your Honor. I don't
2 know where we're going with this. Relevance.

3 MR. SPIEGEL: Your Honor, the issue here is I'm asking him
4 certain questions to determine whether or not the local concerns
5 were also concerns that were international as well. The only
6 foundation I could lay as to whether or not he was aware --

7 THE COURT: There is a whole record. We've been in trial
8 for more than 60 days.

9 MR. FREDERICK: Your Honor, he needs another witness.

10 MR. SPIEGEL: I understand that. My point, Your Honor, is
11 merely that the foundation has already been laid on this matter.

12 THE COURT: Not for this witness. Your last question was
13 is the physiology -- I may be paraphrasing it a little bit -- but
14 is the physiology of people in Australia similar to or the same
15 as the physiology of --

16 MR. SPIEGEL: -- I was --

17 THE COURT: -- in other parts of the world. That question
18 may not be asked.

19 MR. SPIEGEL: I withdraw that question.

20 BY MR. SPIEGEL:

21 Q. Do you know whether any of the concerns that were -- that
22 you were addressing in Australia were being addressed elsewhere
23 around the globe?

24 MR. FREDERICK: I'm going to object on local grounds,
25 foundation, relevance, vagueness and ambiguity. I don't know

1 what concerns we're talking about, where in the world we're
2 talking about it. We're just -- I think he's just trying to
3 stretch this witness a little too thin.

4 THE COURT: Mr. Welch may answer that. The question was
5 does he know.

6 MR. SPIEGEL: I'm establishing whether he has knowledge or
7 not.

8 THE COURT: I understand that. The objection's overruled.
9 You may answer, Mr. Welch.

10 THE WITNESS: I was aware that concerns relative to the
11 tobacco industry in Australia were concerns impacting other
12 countries of the world.

13 BY MR. SPIEGEL:

14 Q. Thank you very much for your time, Mr. Welch.

15 THE COURT: Well, we made it with two minutes to spare,
16 Mr. Welch. Thank you very much for participating. Your counsel
17 may be off to other appointments that I gather he has, and we
18 will disconnect at this point if somebody disconnects us.

19 (Video testimony concluded.)

20 THE COURT: 9:30 tomorrow morning, but at this point I
21 would like for a few minutes to see on the government's side Ms.
22 Eubanks and Mr. Brody and on the defense side Mr. Webb and
23 Mr. Redgrave, and I would like to meet, as I say, a few moments
24 in Judge Huvelle's jury room, please.

25 (Proceedings adjourned at 5:23 p.m.)

Scott L. Wallace, RDR, CRR
Official Court Reporter

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C E R T I F I C A T E

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

Scott L. Wallace, RDR, CRR
Official Court Reporter

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 I N D E X

2

3 Examinations

Page

4

5 CONTINUED CROSS-EXAMINATION OF CAROLYN LEVY, Ph.D. 12723
BY MR. WEBB

6

7 REDIRECT EXAMINATION OF CAROLYN LEVY, Ph.D. 12733
BY MR. WISE

8

9 DIRECT EXAMINATION OF 12750
JOHN BASIL WILLIAM ST. VINCENT WELCH
BY MR. SPIEGEL

10

11 CROSS-EXAMINATION OF 12752
JOHN BASIL WILLIAM ST. VINCENT WELCH
BY MR. FREDERICK

12

13 REDIRECT EXAMINATION OF 12825
JOHN BASIL WILLIAM ST. VINCENT WELCH
BY MR. SPIEGEL

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16 E X H I B I T S

17 Description

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