

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.
	.	May 4, 2005
	.	
Defendants.	.	
.	

VOLUME 100
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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

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1 MORNING SESSION, MAY 4, 2005

2 (9:33 a.m.)

3 THE COURT: Good morning, everybody. Well, I'm told today
4 is day 100, everyone. My expression says it all. All right.
5 This is United States versus Philip Morris, CA 99-2496.

6 Now, I promised late yesterday afternoon Mr. Minton that
7 we would take up -- just a minute, everybody. Not Dr. Viscusi; I
8 think it was Dr. Read, wasn't it?

9 MR. MINTON: It was Dr. Viscusi, and we'll start day 100
10 on an upbeat note, we've reached an agreement on all outstanding
11 issues.

12 THE COURT: That's a good way to start the day and you can
13 be excused if you want to.

14 MR. MINTON: We'll submit an agreed order.

15 THE COURT: Now, I do need to mention one or two
16 scheduling things and then we can move forward with our witness.
17 I know I told everybody, but I don't expect you to remember, I
18 have a 12:00 conference call. We're going to take a 10-minute
19 or less break at about quarter of 11 because it's too hard for
20 the court reporter to go from now until 12:00, and then we'll
21 break at just a couple of minutes before 12. Those calls have
22 been known to go an hour, everybody. Hopefully not, but
23 certainly it wouldn't be surprising, so we'll come back at -- I
24 need a few minutes, everybody -- 1:30. And we'll go to the
25 regular time today. We'll try to break at 4:30, which is when

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1 we're supposed to break. But certainly we will -- well no, we're
2 not going to finish this witness today. That was never
3 anticipated. All right. We are ready to proceed, please.

4 MR. WEBB: Your Honor, there are some -- we have some
5 fairly serious objections that we raised regarding --

6 THE COURT: There are.

7 MR. WEBB: -- and we actually were hoping to have an
8 opportunity to --

9 THE COURT: I'm very aware of the objections, and I'm
10 prepared to rule on two right now, and on the third, I'll tell
11 you how I'll proceed. I don't think they need to be argued,
12 everybody, do they? I've read everything.

13 MR. WEBB: That's fine, Your Honor.

14 THE COURT: All right. But let's have everybody identify
15 themselves for the record, for this witness, please.

16 MR. WISE: Leo Wise for the United States.

17 MR. WEBB: Your Honor, Dan Webb on behalf of Philip
18 Morris, and to the extent you want argument or have questions,
19 Mr. Frederick will address the questions.

20 MR. WISE: And to the extent you want argument on our
21 side, Ms. Cendalli will address the objections.

22 THE COURT: Joint defendants' first objection is that the
23 testimony is irrelevant because Dr. Bazerman's recommendations
24 are essentially illegal. Again, because his recommendations
25 would, in essence, give the power to determine all the details of

1 his recommended relief to people he calls monitors; I think
2 that's the term he used. Am I right, everybody?

3 MR. FREDERICK: That's correct, Your Honor.

4 THE COURT: The government's correct, I think, on this
5 one. First, we have to explore what he really means by that
6 term, and he's not a lawyer.

7 Second of all, there's a lot of case law on this issue. I
8 note in the government's opposition it quotes at great length
9 from some Law Review article. I think one of the quotes is from
10 Mr. Webb, as a matter of fact. There's a lot of work that's been
11 done on the issue by the Federal Judicial Center as well, but in
12 any event, we don't have to have that long discussion right now.

13 We need to get clear, through his testimony what he means,
14 what he means, what he is advocating, and what he's not
15 advocating, and then of course the Court will have to make a
16 legal judgment, even if I thought it appropriate to accept his
17 recommendations, as to whether they are permissible.

18 The third objection is that his testimony is a waste of
19 time and should be excluded under Federal Rule of Evidence 403.
20 Well, I'm going to summarily overrule that.

21 The second objection is essentially a Daubert objection.
22 I had ruled originally, as you all know, that I would make
23 Daubert determinations after hearing testimony, and in particular
24 after hearing -- based on information I would obtain from
25 cross-examination. All I'm going to say at this point is that

1 there are very serious Daubert issues about this witness and I'm
2 well aware of them, and therefore I will expect both sides to be
3 questioning this witness on whether he can meet the standards set
4 forth in Daubert and the case law in our jurisdiction, which I
5 know joint defendants have cited. I'm not sure they've cited
6 everything, but I don't mean that critically, we've had several
7 cases in this jurisdiction. They have -- maybe it's the
8 government that cited the main case from our circuit, but in any
9 event I just want to put everybody on notice. I've read the
10 testimony very carefully, and I think there are serious Daubert
11 problems, but I'm going to admit it conditionally, of course
12 subject to my final rulings on the Daubert issues.

13 I think, Mr. Webb, that deals with the essence of all your
14 objections.

15 MR. WEBB: It does, Your Honor.

16 MR. FREDERICK: It does, Your Honor. Could I just have
17 15 seconds? I just want to impress upon the Court the objection
18 to the monitor. It's very clear, the duties -- whether you call
19 him a monitor/special master, they cannot be imposed
20 nonconsensually under the Microsoft decision, the two Cobal
21 rulings by the D.C. Circuit. The duties which Dr. Bazerman's
22 testimony would assign to the monitors cannot be imposed on a
23 nonconsensual basis under the D.C. Circuit's rulings in Microsoft
24 in the two Cobal decisions, and I just want to impress upon the
25 Court that is the basis for the objection. If we consented,

1 monitors can do a lot of things. If we don't consent, they can
2 do very little other than supervise compliance, and that's very
3 clear under those three decisions of the D.C. Circuit. And every
4 single case the government cites in response involves a consent
5 decree. There's not a single case they can cite that assigns a
6 monitor, special master, trustee, whatever you call that
7 individual's duties beyond supervising compliance in any case.

8 MS. CENDALLI: Actually, Your Honor, I would like to
9 respond to that.

10 THE COURT: No, you don't have to at this point. I'm not
11 going to make that legal decision right now. I indicated that I
12 want his testimony, I want him to clarify things. I certainly am
13 well aware of the law. I've read those two long Cobal decisions,
14 although not in this context but just for general information. I
15 have myself used monitors. I don't think I've used special
16 masters in any other case, but in a very difficult Medicaid case
17 I have involving poor children in the District, I've had a
18 monitor for many years. Although, just so everybody knows, that
19 was interestingly the original order which went back years now,
20 was not a consent order, although the situation has certainly
21 evolved into a consent situation. And there's -- while the
22 orders are obviously public record, and this is a case called
23 Salazar versus the District of Columbia, the issue itself never
24 went up to the Court of Appeals, although certainly my original
25 very lengthy opinion and decision deciding to use a monitor in

1 that case is on record and cited in F. Supp.

2 MS. CENDALLI: Thank you.

3 THE COURT: Okay. Let's proceed, please.

4 MR. WISE: Your Honor, the United States calls Max

5 Bazerman.

6 THE COURT: All right.

7 (MAX H. BAZERMAN, Ph.D., GOVERNMENT'S WITNESS, SWORN)

8 DIRECT EXAMINATION OF MAX H. BAZERMAN, Ph.D.

9 BY MR. WISE:

10 Q. Good morning. Please introduce yourself to the Court.

11 A. I'm Max Hall Bazerman.

12 Q. Dr. Bazerman, what's your present occupation?

13 A. I'm a professor at the Harvard Business School,

14 specifically I'm the Jesse Isidor Straus Professor.

15 Q. Dr. Bazerman, what is your area of expertise?

16 A. Behavioral decision research.

17 MR. WISE: Your Honor, the government has placed a copy of

18 Dr. Bazerman's written direct on the stand.

19 BY MR. WISE:

20 Q. Dr. Bazerman, I ask that you take a moment to look at the

21 document that's been placed in front of you titled Written

22 Direct Examination of Max Bazerman. Are you familiar with that

23 document?

24 A. I am.

25 Q. And is there anything that you would like to change in

1 that document before you adopt it as your testimony?

2 A. Yes. I have one change that I brought with me on a

3 sticky pad. On page 47, on line 16, I see what I would call a

4 typo in there. I would like to correct that.

5 Q. And how would you like to correct it?

6 A. After the comma it reads, "but that avoided conduct was

7 not". What I intended to write there was that "avoiding

8 misconduct was not."

9 THE COURT: Wait, let me just make sure we're on page 47.

10 THE WITNESS: Page 47, line 16, Your Honor.

11 THE COURT: Line 16, okay. And it should read how?

12 THE WITNESS: "But that avoiding misconduct was not."

13 BY MR. WISE:

14 Q. Dr. Bazerman, subject to that change, do you adopt the

15 document entitled Written Direct Examination of Max Bazerman as

16 your testimony in this case?

17 A. I do.

18 MR. WISE: Your Honor, based on the submission of the

19 direct testimony, which Dr. Bazerman has adopted, I would ask

20 that the Court recognize Dr. Bazerman as an expert in behavioral

21 decision research.

22 MR. WEBB: Well, Your Honor, I would just ask to reserve

23 ruling on that until after cross-examination.

24 THE COURT: I am going to defer ruling on that issue. But

25 certainly, as I said just a few minutes ago, I'm going to admit

1 the testimony conditionally, of course subject to my ruling.

2 MR. WISE: Thank you, Your Honor. Your Honor, we'll now
3 begin the live presentation.

4 THE COURT: All right.

5 BY MR. WISE:

6 Q. Dr. Bazerman, have you prepared demonstrative exhibits
7 for your presentation this morning?

8 A. I have.

9 Q. Chris, can I have U.S. Exhibit 18241 on the screen.
10 Dr. Bazerman, do you recognize the demonstrative that's been
11 marked as U.S. Exhibit 18241 on the screen?

12 A. I do.

13 Q. And what does this demonstrative depict?

14 A. This is a demonstrative illustrating the incentives to
15 the tobacco industry as I understand them.

16 Q. And Dr. Bazerman, how do you understand these to be the
17 incentives to the tobacco industry?

18 A. Well, incentives are in two different categories. On the
19 right-hand side you see incentives for traditional financial
20 performance including "profits, market share, shareholder value,
21 bonuses and incentives, stock options," and on the left-hand
22 side of the scale, you see a variety of other incentives. "To
23 do the right thing, to be concerned about the threat of
24 lawsuits, to be concerned about watch dog groups overseeing the
25 industry, MSA enforcement." On the left-hand side we see -- you

1 can see incentives having to do with a variety of behaviors that
2 have been labelled misconduct by the U.S. government in the
3 case.

4 Q. Now, Dr. Bazerman, starting with the first group you
5 discussed, I think you referred to them as traditional
6 financial. I'm not sure if you said performance indicators. Do
7 executives in your experience in other industries experience
8 these same incentives?

9 A. Absolutely.

10 Q. Dr. Bazerman, is the tobacco industry different?

11 A. The tobacco industry is not different in valuing
12 financial incentives like other industries.

13 Q. Well, if they're not different in valuing financial
14 incentives, what about the other set of incentives you discussed
15 generally?

16 A. Well, as you --

17 MR. WEBB: I'm just going to object. This one hour is
18 supposed to be devoted to using demonstrative exhibits to explain
19 things to the Court. We're now just going into a general another
20 direct examination. This has nothing to do with the
21 demonstrative exhibit. He's just going off into an explanation
22 now about what other companies, compared to the tobacco industry,
23 as far as incentives.

24 THE COURT: No, overruled. It clearly relates to his
25 direct testimony and the theories upon which he bases his direct

1 testimony. You may continue.

2 THE WITNESS: Can I have your question again, please?

3 BY MR. WISE:

4 Q. Sure, Dr. Bazerman, I'll try to ask it again rather than
5 read it back.

6 Dr. Bazerman, in the second category of incentives I think
7 I asked is the tobacco industry different from other industries?

8 A. I believe that it is. Assuming that the U.S. government
9 has proved liability and misconduct continues to this day, the
10 reason that I've depicted this figure as I have, is that the
11 incentives for profit, market share, et cetera, are outweighing
12 the incentives to do the right thing and to follow the law.

13 Q. Chris, can I have U.S. Exhibit 18243 on the screen.

14 Dr. Bazerman, do you recognize this demonstrative exhibit
15 marked U.S. Exhibit 18243?

16 A. I do.

17 Q. And what does this depict?

18 A. This provides five structural remedies that I've
19 recommended that the court-appointed monitors would consider on
20 how to think about dealing with the misconduct that's occurred
21 in the past and how to avoid that misconduct from occurring in
22 the future. I certainly did not limit my recommendations for
23 the Court or the court-appointed monitors to only consider these
24 structural remedies, but I've outlined five structural remedies
25 that I see as specifically responding to the misconduct that the

1 U.S. government has identified as past behaviors. And again, my
2 testimony is based on the assumption that the U.S. government
3 has proved liability and misconduct continues to this day.

4 Q. Now, Dr. Bazerman, you mentioned court-appointed
5 monitors. I want to ask you, how do you use that term?

6 A. Very generically. When I use the term "court-appointed
7 monitors" I'm recommending that the Court consider, rather than
8 making a set of decisions about specific remedies, that the
9 Court creates a process whereby it can obtain additional
10 expertise beyond the legal expertise represented by the Court
11 itself so that it can obtain additional information to better
12 understand the various defendants and create a process to
13 identify the most appropriate package of remedies to prevent
14 misconduct from occurring in the future. So I'm not thinking of
15 one individual, I'm not thinking of a group of specifically four
16 individuals. I'm not even distinguishing between monitor or
17 special master or any other advisory role. I'm using "monitor"
18 to suggest that the Court identify a process where it can obtain
19 the expertise to make the wisest set of decisions possible.

20 Q. Now, Dr. Bazerman, among the recommendations, among the
21 categories of structural changes you recommend the Court
22 consider, what is an example of a remedy that addresses
23 incentives?

24 A. Well, I think you can see a number of possibilities.
25 I'll identify two. If you look at the first remedy,

1 "Eliminating economic incentives for defendants to sell
2 cigarettes to young people." Again, assuming the U.S.
3 government has made its case on liability and misconduct
4 continues to this day, what I'm arguing in the depiction earlier
5 where we saw the scale is that the incentives to maximize profit
6 are outweighing the incentives to avoid the misconduct of
7 targeting underage individuals in the defendant companies'
8 marketing efforts. So, we would want to identify remedies so
9 that that incentive to target potential youth smokers no longer
10 existed.

11 Similarly, if you look at the fifth structural remedy that
12 I see suggested "requiring the defendants to sell intact their
13 R & D -- their research and development current product
14 development activities and all other relevant material regarding
15 safer cigarettes so that safer cigarettes can be brought to the
16 marketplace," it's my understanding that the U.S. government has
17 argued that the defendants have specifically attempted to keep
18 safer cigarettes from reaching the marketplace to protect their
19 core brands. The idea of the fifth structural remedy, which
20 again I'm not recommending, I'm recommending that the Court in
21 its advisors consider the idea of the fifth structural remedy, is
22 very simply to create the safer cigarette line of product
23 independent of the core business of selling core brands so that
24 if the marketplace would, in fact, value safer cigarettes, that
25 those would be allowed to come to market.

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1 Q. Dr. Bazerman, in your written direct testimony, in
2 addition to incentives, you discuss systematic biases. What are
3 systematic biases -- and you can take a moment to pour your --

4 A. No problem, I was going to. Systematic biases refer to
5 distortions in human judgment away from rational thought.
6 What's important in understanding systematic bias is systematic
7 bias are distortions from rational thought that the individual
8 is typically not even aware of him or herself.

9 Q. Dr. Bazerman, what relevance, if any, do systematic
10 biases have for defendants' conduct in the future?

11 A. It's my testimony that as long as incentives provide
12 directional behavior in favor of financial indicators over
13 avoiding misconduct, that you'll have two different sets of
14 forces that increase the likelihood of misconduct. On the one
15 hand there may be intentional corruption, that is, defendants
16 who would decide that it makes sense to pursue profit
17 maximization rather than avoiding misconduct, and in fact, it's
18 my understanding -- or its my assumption that the U.S.
19 government alleges that that's occurred in the past, and that
20 that misconduct continues to this day. But the bias argument
21 argues that over and above any intentional misconduct, that when
22 individuals have a preference to see data in a particular way,
23 perhaps because they are rewarded for seeing data in a
24 particular way, that they will be biased in a variety of
25 systematic and predictable ways that will lead them to follow

1 those incentives.

2 Q. Chris, can I have U.S. Exhibit 18242 on the screen -- I'm
3 sorry, Chris, can we have it on the board. Just a moment,
4 Dr. Bazerman, I'm going to --

5 THE COURT: Which number are with he on, Mr. Wise?

6 MR. WISE: This is U.S. Exhibit 18242, Your Honor.

7 BY MR. WISE:

8 Q. Dr. Bazerman, do you recognize the demonstrative that's
9 been marked U.S. Exhibit 18242?

10 A. I do.

11 Q. And we're going to leave it on the board for you while
12 you continue in your presentation. What's depicted on this
13 demonstrative?

14 A. This is a summary of the biases that I see most evident
15 and most relevant to the tobacco industry regarding the issues
16 of misconduct in this case.

17 Q. Dr. Bazerman, have you prepared demonstrative exhibits
18 that help you explain each of these biases?

19 A. I have.

20 Q. Now, the first of the five biases you list on the chart
21 is self-serving bias. Dr. Bazerman, what is self-serving bias?

22 A. Self-serving bias refers to the behavior of seeing data
23 in a way that you would prefer to see it. So, in addition to
24 people intentionally distorting information in a self-serving
25 direction, we also know that individuals will also, without

1 their own awareness, further be biased as a result of the way
2 they perceive information as a result of incentives.

3 Q. Chris, can I have U.S. Exhibit 18245 on the screen.

4 Dr. Bazerman, do you recognize the demonstrative exhibit
5 marked U.S. 18245?

6 A. I do.

7 Q. And what does this demonstrative depict?

8 A. This is a first of a series of demonstratives from an
9 experiment that I've conducted, actually a series of experiments
10 where there's a buyer and a seller. And you'll notice,
11 unfortunately, they're both male, and that's a result of some
12 issues with the organization that created these slides. But I
13 should be clear at the outset that in all these slides you're
14 going to see male figures but the results apply to males and
15 females as well.

16 But this is from a study that I conducted on auditor
17 decision-making, and we start with a very simple situation of
18 there's a buyer and a seller. In this case they're talking
19 about the potential sale of a company. And one of the things
20 that we know from extensive research on self-serving biases is
21 that sellers typically find their house or their company to be
22 worth more than buyers think they are worth, so a common result
23 is that you get higher evaluation by sellers than you do of
24 buyers about the worth of the plant or the house.

25 Q. And you mention that you were studying auditors,

1 Dr. Bazerman, how do auditors figure into the experiment?

2 A. Well, if we could add the next slide that I prepared. In
3 this situation we had buyers and sellers about to negotiate the
4 price of this plant and they came up with their own estimate of
5 what the -- of what -- not a plant, a company. Before they
6 negotiated they assessed what the company was worth. They then
7 received some feedback from their own auditor. The seller
8 received some feedback from the seller's auditor, the buyer
9 received feedback from the buyer's auditor. And after that
10 advice process -- after that advice occurs, in this experiment
11 the buyer's auditors and the seller's auditors are basically
12 told your role in advising the buyer and the seller is over, but
13 we'd like you to do one more thing. We'd --

14 Q. I'm sorry, Dr. Bazerman.

15 A. We would like you to give us your honest best estimate of
16 what an independent assessor would see as the value of the firm.

17 Q. And what was the result that have second process asking
18 for an independent assessment?

19 A. It's important to note in that independent assessment,
20 what we're trying to do is get an assessment that has to do with
21 their honest beliefs rather than any intentional biases. All
22 the incentives are for accuracy now -- and if we add the next
23 piece of information and one more bar -- what we can see is
24 seller's auditors, simply by a brief association with the
25 seller, see the value of the company as worth almost twice as

1 much as the buyer's auditor do. This is when they're not
2 advising their client, they're simply trying to predict what a
3 neutral third party would predict as the value of the company.
4 And the reason that the auditors in this story are relevant is
5 that the auditors here have no intentional incentive to distort,
6 they simply have an unintentional bias that results from their
7 partisan affiliation.

8 Q. Dr. Bazerman, why were you specifically studying auditors
9 in this experiment?

10 A. Well, in 1997, with my coauthors George Loewenstein and
11 Kimberly Morgan, I wrote a paper called "The Impossibility of
12 Auditor Independence". And what we argued in that paper was
13 that as long as auditors wanted to be rehired by their clients,
14 as long as they wanted to sell consulting services to their
15 client, as long as auditors were allowed by law to take jobs
16 with their client firm, that auditors in the U.S. governance
17 system were not capable of independence. That is, that they
18 were not capable of the objectivity which was the cornerstone of
19 the reason for the existence of the auditing institution. In
20 our 1997 paper, we argued for clear structural changes in order
21 to restore independence to the auditing function.

22 Q. Now, Dr. Bazerman, in this experiment, you've said you've
23 used auditors, which I'll just refer to generically as business
24 people, in other experiments you've conducted. Have you
25 similarly used business people?

1 A. Yes. If many cases on many of the biases that have been
2 identified in the field of behavioral decision research, the
3 initial experiments, partially as a matter of convenience, have
4 often been conducted with student populations or volunteers that
5 are readily available in university communities.

6 As the literature has matured, what we've seen is that
7 many researchers have asked the question but do these biases
8 hold when people are actually playing the simulation for real
9 money? Do these biases hold when instead of using convenience
10 samples we use seasoned executives?

11 Q. And what's the result of that research?

12 A. Much like this study where we then replicated on senior
13 management and partners of a leading accounting firm, the
14 results of behavioral decision research have held up remarkably
15 well as the literature has been extended. In fact, I know of no
16 results in the behavioral decision research that disappears as
17 we move to the senior executive arena.

18 Q. Chris, if we could have U.S. Exhibit 18243 on the screen
19 again.

20 Now, Dr. Bazerman, again, among the recommendations --
21 among the structural changes you recommend the Court consider,
22 what's an example of a remedy that addresses self-serving bias?

23 A. Well, I would highlight two. The second one, "changing
24 compensation and promotion policy for managers and executives to
25 produce outcomes inconsistent with misconduct". As long as the

1 scale exists in the way I depicted it in my very first slide,
2 there will be self-serving biases to see the world consistent
3 with those incentives. Similarly, as long as the defendant
4 organizations are conducting their own research, we will see
5 potential for self -- for intentional corruption on the issue of
6 research, and we also are likely to see biases that further
7 exacerbate the intentionality in ways that lead the defendants
8 to honestly believe research that is, in fact, bias to be an
9 accurate portrayal.

10 Q. Dr. Bazerman, the next bias you list on your summary
11 chart is "escalation of commitment". Briefly, Dr. Bazerman,
12 what is escalation of commitment?

13 A. Escalation of commitment refers to the tendency of
14 individuals to make future decisions in order to justify prior
15 commitments. So, when individuals or executives are committed
16 to a particular position, whether it's a financial decision or a
17 human resource decision, or a political decision, they tend --
18 individuals will make future decisions consistent with that
19 earlier decision in order to justify it.

20 Q. Chris, can I have U.S. Exhibit 18246 on the screen.

21 Dr. Bazerman, do you recognize the demonstrative marked
22 U.S. Exhibit 18246?

23 A. I do.

24 Q. And what does this depict?

25 A. This is a depiction of an experiment first conducted by

1 Professor Barry Staw out at the University of California at
2 Berkley, but a study that's been replicated by many other
3 people, including myself. And what you see -- the experiment
4 starts with an individual serving as an executive, making a
5 decision between division A and division B, and they're given a
6 variety of information about division A and division B and
7 they're asked which should get a special allocation of R & D
8 funds.

9 Q. And do they make that decision?

10 A. They make a decision for A or B.

11 Q. And then what happens next?

12 A. Next slide, please. Regardless of whether they pick A or
13 B, they get negative feedback. Turns out that that allocation
14 decision does not work out in the simulation.

15 Q. And what happens next in the simulation?

16 A. In the next slide is where we see where we create two
17 different conditions. The question is, moving forward, who
18 makes the next decision regarding the division that received
19 their initial allocation of funds, is it the same long serving
20 executive who made the initial decision or is it a new executive
21 who now replaces the long serving executive.

22 Q. And Dr. Bazerman, what's the results for the long serving
23 executive?

24 A. If we turn to the next slide, what we see is the long
25 serving executive it turns out on average, they allocate 13.07,

1 if I remember correctly, but slightly over \$13 million out of
2 the \$20 million available to the division that received the
3 initial allocation of funds.

4 Q. And what decision does the -- I think you label him the
5 "new executive" decision, what decision does the new executive
6 make?

7 A. Next slide, please. If instead a different individual
8 makes the second decision, the amount allocated to the
9 previously chosen division is much less. The mean amount is in
10 the 9 to \$10 million range rather than \$13 million.

11 Q. So, Dr. Bazerman, to sum up, how does this experiment
12 that you said you and others have conducted demonstrate
13 escalation of commitment?

14 A. Well, this next slide is a nice summary that shows that
15 individuals who make -- who are committed to an initial position
16 are more likely to continue that initial position than other
17 individuals who are brought in who weren't committed to that
18 initial position to begin with.

19 Q. Dr. Bazerman, what relevance, if any, does escalation of
20 commitment have to the conduct of defendants' managers in the
21 future?

22 A. Well, again, as I said before, I'm assuming that the U.S.
23 government has proven liability and misconduct continues to this
24 day, and assuming that that's true, the literature would clearly
25 provide evidence that the existing managers are much more likely

1 to continue a pattern of misconduct, they would be new
2 executives who were not previously committed to that position.

3 Q. Chris, can I have 18243, U.S. Exhibit 18243 again on the
4 screen.

5 Dr. Bazerman, among the recommendations, among the
6 structural changes you recommend the Court consider, what's an
7 example of a remedy that addresses escalation of commitment?

8 A. Certainly the third structural remedy that you see, the
9 removal of senior management, I've recommended that the Court,
10 and any court-appointed advisors, should consider because the
11 existing senior management is much more likely to escalate their
12 commitment to previous behavior, including misconduct, than
13 would be replacements to the existing senior management.

14 Q. Dr. Bazerman, I'm going to represent to you that the
15 United States has taken the position that as a matter of law and
16 enforcement policy, removal is only available under certain
17 circumstances. Do your opinions go to the legal issue of under
18 what circumstances the Court should order removal?

19 A. They certainly do not. I defer to the Court to interpret
20 legal issues.

21 Q. Dr. Bazerman, the next bias you list on your chart is the
22 confirmation trap. What is the confirmation trap?

23 A. The confirmation trap is the tendency to seek out
24 information to confirm one's initial position, to look for new
25 data that would tell me that my initial position was accurate.

1 Q. Chris, can I have U.S. Exhibit 18247.

2 Dr. Bazerman, do you recognize the demonstrative that's
3 been marked U.S. Exhibit 18247?

4 A. I do.

5 Q. And what does this demonstrative depict?

6 A. This is a slide that I've used with dozens of executive
7 audiences, and it's based on a study decades ago by Professor
8 Wiesen at Princeton University, and it's a very simple task
9 where in a group of executives I'll ask for a volunteer. One
10 individual will raise their hand and be the first contestant,
11 essentially, in this very quick demonstration.

12 Q. And what happens in the demonstration, if you could
13 summarize it, Dr. Bazerman?

14 A. I assign the volunteer the task of trying to figure out
15 the rule, what's the rule that I'm thinking of in my mind. And
16 I explain to the executive that she can give me other sequences
17 of three numbers and after each sequence that she gives me I
18 will tell her whether or not her sequence is consistent with my
19 rule or not. And she can have as many sequences as she wants,
20 but she only gets one guess at the rule and I encourage her to
21 ask me as many sequences as she needs to provide the information
22 to get this task right.

23 Q. And what's the result in your experience?

24 A. Typically the first executive who volunteers will try,
25 for example, 10, 12, 14 and I'll say yes, and then she'll try 3,

1 5, 7 and I'll say yes, and she'll try 20, 22 and 24 and I'll say
2 yes. And after she gets a few yeses, she'll say I think I know
3 the rule, and I'll say what's the rule, and she'll say the
4 number is going up by two.

5 Q. I'm sorry, Doctor, is that the right answer?

6 A. It is not. I'll thank her for her participation, but
7 I'll move on to another executive. And I'll give the new
8 executive the same opportunity to tryout as many sequences as
9 she or he would like, but only one guess at the rule.

10 Q. And what, typically, is the result the second time
11 around?

12 A. It is most common second pattern I've observed is that
13 the second individual will try 10, 20, 30, and I'll say yes.
14 And then he will try 100, 200 and 300 and I'll say yes. And
15 then he'll try 1000, 2000, and 3000, and I'll say yes again.
16 And he'll say, I think I know the rule. And I'll say what's the
17 rule, and he will propose a rule as numbers going up by the same
18 amount and I'll say thank you for your participation, but that's
19 also incorrect.

20 Q. Dr. Bazerman, what is the rule?

21 A. The rule that I use in my executive classrooms is three
22 increasing whole numbers.

23 Q. And so we're clear, Dr. Bazerman, explain how that
24 demonstrates how the scenario you just described demonstrates
25 the confirmation trap?

1 A. I believe the amazing aspect of the executive behaviors
2 in my classroom is that they start with an initial position or
3 hypothesis. It's certainly very natural for people to think
4 going up by two when they look at this sequence. And what most
5 of us tend to do on a natural basis, even smart, successful
6 people, is that we look for information that we're right, rather
7 than seeking out information that might tell us that we're
8 wrong. So we try to confirm rather than disconfirm the position
9 that we hold, despite the fact that there's substantial evidence
10 that there's far more value to an executive in seeking out
11 disconfirming evidence than simply seeking out confirmatory
12 information.

13 Q. Dr. Bazerman, at the beginning of your description of
14 your use of this task, you said it was based on work done -- I
15 don't remember the name of the researcher. Have the empirical
16 results been consistent with the scenario you just laid out from
17 your executive seminars?

18 A. Absolutely.

19 Q. Dr. Bazerman, what relevance, if any, does the
20 confirmation trap have to the conduct of defendants' managers in
21 the future?

22 A. Well, if we could return to the remedy slide.

23 Q. Sure.

24 A. The slide with the five structural remedies.

25 Q. Could we have 18243.

1 A. I would argue that -- I would point to the third and
2 fourth items. Senior management who is already committed to a
3 particular position is more likely to seek confirming
4 information than new management who wasn't previously committed
5 to a particular position. Senior management committed to a
6 position has that initial basis that leads them to pursue a
7 confirmatory pattern of searching for new data consistent with
8 the positions they've taken in the past.

9 Similarly, in conducting research, one problem with much
10 research is that researchers may be seeking confirming
11 information rather than asking questions of whether or not their
12 initial position continues to be accurate.

13 Q. Dr. Bazerman, the next bias you list on your summary
14 chart is the statistical victim affect. What is the statistical
15 victim affect?

16 A. The statistical victim affect is the tendency to under
17 weight statistical rather than identifiable victims. So there
18 are many people who are victims in some way who remain
19 statistics, and there are other situations where people are very
20 identifiable, such as you might recall a number of years ago,
21 baby Jessica fell into a well and there was an outpouring of
22 support for baby Jessica because she was an identifiable victim.
23 In contrast, there are many other babies who are in some
24 distress situation that aren't identifiable, they're statistical
25 and they don't get the same level of attention.

1 Q. Chris, can I have U.S. Exhibit 18249 on the screen.
2 Dr. Bazerman, do you recognize the demonstrative marked
3 U.S. Exhibit 18249?
4 A. I do.
5 Q. And what does this depict?
6 A. This is a demonstration of the ideas from Jenni and
7 Loewenstein and it's connected to research by somebody by the
8 name of Joshua Greene on a fairly famous philosophy problem
9 called the trolley problem. And as you can see, the trolley is
10 heading down the track and the decision-maker, the person in red
11 there, has the unfortunate decision of needing to decide whether
12 or not the trolley will go to the right or to the left. And
13 unfortunately, if the trolley goes to the right, five statistical
14 victims will die as a result. If the trolley goes to the left,
15 only one statistical victim will die. And in this problem the
16 vast majority of individuals will choose that the trolley should
17 go to the left and not to the right.
18 Q. And is that the result that empirical work demonstrates
19 that the vast majority will choose the right over the left?
20 A. No, they'll choose the left over the right.
21 Q. Left over the right, sorry.
22 A. That is correct.
23 Q. Chris, could I have U.S. Exhibit 18251 on the screen.
24 Dr. Bazerman, do you recognize this demonstrative exhibit
25 marked --

- 1 A. I do.
- 2 Q. -- 18251.
- 3 A. I do.
- 4 Q. What does this depict?
- 5 A. You'll see a very identifiable gentleman up on the bridge
6 in a green shirt, and you'll see the same decision-maker in red
7 there. And this problem, since I'm in a Court of law I should
8 mention, there's no legal implications here, but the decision
9 that the decision-maker confronts is, should you push the
10 gentleman in the green shirt off the bridge to stop the trolly
11 to save the other five people.
- 12 Q. And what's the result that the empirical work typically
13 shows people make?
- 14 A. Decision-makers do not want to push that person off the
15 bridge, even though it would only cost one individual rather
16 than the five who will die otherwise.
- 17 Q. And how do the two slides we've just seen demonstrate the
18 statistical victim effect?
- 19 A. Well, in these two slides in both cases the choice is
20 should one person die or should five. However, in the second
21 slide, the one is very identifiable, and when there's an
22 identifiable victim, we weight that individual very strongly in
23 comparison to the unidentifiable victims that are lying on the
24 track below.
- 25 Q. Dr. Bazerman, what relevance, if any, does the

1 statistical victim -- statistical victim affect have to the
2 conduct of defendants' managers in the future?

3 A. Again, I would request going back to the remedies slide.

4 Q. Sure.

5 A. And when I think about structural remedy of eliminating
6 economic incentives for defendants to sell cigarettes to young
7 people, one question is, how would incentives work to value
8 financial profit over the future health and lives of many
9 individuals who are currently simply teenagers? And I would
10 argue that one of the things that tilts the weight to the right
11 in the scale diagram that I depicted first, is that the
12 teenagers are simply future statistical victims. They're not
13 individuals that we're thinking of on an individual basis,
14 they're not the teenager next door, rather they're simply
15 statistics.

16 Q. Dr. Bazerman, the final bias you have on your summary
17 chart is framing. What is framing?

18 A. Framing refers to fundamentally changing people's
19 decisions based on information that should have no logical
20 bearing on the decision that they make. So, by changing words
21 in a fairly subtle way, we can systematically predict how
22 individuals will change their behavior.

23 Q. Chris, can I have U.S. Exhibit 18252 on the screen.

24 Dr. Bazerman, do you recognize the demonstrative marked
25 U.S. Exhibit 18252?

- 1 A. I do.
- 2 Q. And what is this depict?
- 3 A. This is one-half of the most famous problem in the social
4 sciences over the last 50 years. This is often called the Asian
5 Disease Problem, and it was created by Professor Daniel
6 Kahneman, now at Princeton University, and Professor Tversky,
7 who is no longer alive. And in this half of the problem, they
8 ask people to imagine that the United States is preparing for
9 the outbreak of an unusual Asian disease that's expected to kill
10 600 people. Two alternative programs to combat the disease have
11 been proposed. Assume that the exact scientific estimates of
12 the consequences of the programs are as follows: If program A
13 is adopted, 200 people will be saved, if program B is adopted
14 there's a one-third probability that 600 people will be saved,
15 and a two-thirds probability that no individuals will be saved.
16 Which of the two programs would you favor? Again, this is
17 one-half of this demonstration.
- 18 Q. And Dr. Bazerman, you mentioned this is a problem
19 developed by Drs. Kahneman and Tversky, was empirical work also
20 done on this using this problem?
- 21 A. Yes, and it's been replicated, I would estimate, in
22 hundreds of studies.
- 23 Q. And what is the results for this first choice?
- 24 A. The vast majority, typically between 70 and 80 percent,
25 and it is between 70 and 80 percent in their original empirical

1 investigation, pick program A over program B.

2 Q. And why is that?

3 A. The reason that Kahneman and Tversky identify is that we

4 have a very strong tendency to be risk adverse when we're

5 thinking about gains. So, this problem asks, in terms of the

6 options that are listed, how many people can be saved? And we

7 take the sure 200 over a one-third probability of saving 600.

8 Similarly, most people will take \$10,000 for sure over a flip of

9 a coin on whether they get 20,000 or nothing.

10 Q. And Dr. Bazerman, you mention this is one-half of this

11 experiment. Can we have the next slide.

12 Do you recognize this panel, Dr. Bazerman?

13 A. Yes, I do.

14 Q. And what does this depict?

15 A. Well, first of all, I'll point out that the paragraph is

16 identical on top. The only thing that's been changed is in the

17 set of program A and program B listed, we have program C and

18 program D listed. Program C reads, "if program C is adopted,

19 400 people will die, whereas the alternative is, if program D is

20 adopted, there's a one-third probability that no one will die

21 and a two-thirds probably that 600 people will die." What I

22 would point out to the Court is that program C is objectively

23 identical to program A. If 200 people were being saved, 400

24 would be dying, similarly if only 400 are dying the other 200

25 are being saved. And similarly program B and D are also

1 identical from an objective standpoint. They're not identical
2 in terms of the words that are used. Programs C and D are
3 presented in terms of losses, how many people will die.

4 And if we turn to the next slide, what you'll see -- I
5 mentioned earlier that the vast majority of individuals take
6 program A over program B, the vast -- the vast majority -- excuse
7 me, of individuals choose program D over program C, okay. And
8 the reason is that in the domain of losses, we have a very strong
9 tendency to go with the riskier option rather than the sure
10 option that's represented in program C. And what you'll notice
11 is that that doesn't logically make sense. If one prefers the
12 option that guarantees the sure thing in program A, one should
13 also prefer the sure thing with program C since they're
14 objectively identical.

15 Q. Dr. Bazerman, what relevance, if any, does framing have
16 to the conduct of defendants' managers in the future?

17 A. Well, assuming that the Court finds liability and that
18 there are some set of remedies that are to be put in place, my
19 conclusion is that the defendants will perceive that context as
20 in the domain of losses. How is the world going to change from
21 the current state in ways that will result in losses of sales or
22 profit?

23 One of the ideas that I've read about in the work that
24 I've conducted as part of my work as an expert, is there's an
25 idea that shouldn't injunctions provide a sufficient remedy?

1 And I would suggest that a set of injunctions creates an
2 environment of a risk context where the defendants could, in
3 fact, follow the injunctions and take the sure loss created by
4 those injunctions, or they can pursue a riskier strategy and
5 under ambiguity make decisions against those injunctions
6 realizing that there's only some probability that they will, in
7 fact, be enjoined from that behavior through eventual Court
8 decisions.

9 Q. Dr. Bazerman, how do the structural changes you recommend
10 the Court consider compare to the system of injunctions you've
11 just alluded to?

12 A. So, my concern is that injunctions alone -- so I'm not
13 against thinking about injunctions at all, but injunctions alone
14 are likely to lead the defendants to continue misconduct because
15 they're more likely to take risks under simply a set of
16 injunctions with that being an incremental change from the way
17 business is currently conducted. And I would argue -- and
18 again, this is based on the assumption that misconduct continues
19 to this day, that there were injunctions or that parallel to
20 injunctions created by the MSA. And in fact, if misconduct is
21 continued to this day, that would be consistent with the idea
22 that the defendant firms, in fact, have chosen the riskier
23 strategy of not following through on following the injunctions
24 as provided. And I would predict that similar behavior can be
25 anticipated in the future with injunctions alone.

1 Injunctions are certainly a remedy for the Court to
2 consider from my view, but I would argue that they will not be
3 sufficient to stopping the misconduct that the U.S. government
4 has alleged has occurred in the past. Rather, I would argue that
5 if you want to move from a business model that maximizes profit
6 while allowing misconduct to take place to a fundamentally
7 different business model that asks how can we maximize profit
8 while fully obeying the laws, that we need to do more than make
9 some incremental change that injunctions would allow us to
10 create; rather we need significant change to the way
11 organizations operate. We need to think about the organizational
12 architecture of these firms. We need to think about the people,
13 the competencies, the tasks, the values, the structures, the
14 incentives that are in place and identify the appropriate package
15 of remedies to move this industry from a business model that
16 allows misconduct to a fundamentally different way of doing
17 business in the future.

18 Q. Thank you Dr. Bazerman.

19 MR. WISE: That concludes the live presentation, Your
20 Honor, and I'll tender the witness.

21 THE COURT: All right. Mr. Webb, maybe for the flow of
22 your presentation, it might be best to take an early 10-minute
23 break now and we'll go until 12:00.

24 MR. WEBB: That would be fine.

25 THE COURT: Or five of, actually. All right, just

1 10 minutes, everyone, please.

2 (Thereupon, a break was had from 10:28 a.m. until
3 10:40 a.m.)

4 MR. WEBB: I'm ready, Your Honor.

5 THE COURT: All right, Mr. Webb, please.

6 CROSS-EXAMINATION OF MAX H. BAZERMAN, Ph.D.

7 BY MR. WEBB:

8 Q. Dr. Bazerman, my name is Dan Webb. I represent Philip
9 Morris in this proceeding, and I'm going to ask you some
10 questions about your written direct examination, as well as the
11 oral direct examination that you gave this morning. Let me
12 start with some preliminaries, Doctor. As I understand it, the
13 first day that you actually began to work as an expert witness
14 on this case was March 10, 2005; is that correct?

15 A. It is.

16 Q. And you had not done any work on this case prior to
17 March 10, 2005; is that correct?

18 A. I did not do any work that I was paid to do prior to
19 March 10. When Mr. Wise started trying to contact me, we were
20 playing telephone tag, and I do recall being in an academic
21 conference that wasn't completely holding my attention. And I
22 remember I was in a wireless room and I recall surfing the web
23 to learn about this case.

24 Q. So, prior to March 10th, you had a phone a conversation
25 with Mr. Wise when he did not have your full attention, is that

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1 what you're telling us?

2 A. No. I think I was surfing the web based on some
3 telephone messages I had from Mr. Wise telling me he would like
4 to talk to me about the DOJ case and tobacco.

5 Q. But you had not done -- actually, you had not done any
6 work on this case prior to March 10th; is that correct?

7 A. I'm just trying to be careful about what the word "work"
8 is. I wasn't being paid for nor directed to do any work prior
9 to March 10th.

10 Q. Do we have his deposition, Pat? Can we show it? Let me
11 show you your deposition in the Department of Justice case.
12 Todd, it's tab 2 and I'm going to call your attention to page
13 206. And if you go to page 206 -- and by the way, just so you
14 know how I'll do this, I'll put things up on the screen, but
15 you'll always have that deposition if you want to go to it to
16 put things into context, Doctor.

17 A. Thank you very much.

18 Q. The question I'm going to ask, do you recall being asked
19 this question in your deposition?

20 "Question: Yeah. And what -- just so the record's
21 clear, you said March 10th's the first day you billed time. Did
22 you have any -- did you actually work any time before that date
23 on this case?"

24 And your answer was: "No."

25 Do you recall being asked that question and giving that

1 answer?

2 A. I accept that.

3 Q. Thank you. Now, just to put things into perspective, you
4 signed your expert report in this case on March 21st, 2005; is
5 that correct? Can you give him his expert report? Let me give
6 the witness JD055179. It's tab 3, Todd.

7 Do you recognize that as your expert report filed in this
8 case on March 21, 2005?

9 A. I do.

10 Q. And just so the record is clear, as I understand it, when
11 you started working on this case on March 10th as an expert, I
12 take it you started work on March 10th with an open mind as to
13 what, if any, structural remedies would be necessary based on
14 whatever facts you came to learn about this case; is that
15 correct?

16 MR. WISE: Your Honor, I'm just going to object. We
17 seemed to switch in the middle of that question. That was
18 improper impeachment. Dr. Bazerman, I think on the same page in
19 his deposition, tells the same story he tried to tell, which is
20 he had done a little bit of web research.

21 THE COURT: I don't think it was impeachment.

22 MR. WEBB: Pardon me?

23 THE COURT: I don't think it was impeachment, so let's
24 move on everybody.

25 MR. WISE: So I don't know what it was then.

1 THE COURT: Well, it's not clear, but it doesn't really
2 matter. Let's move forward.

3 BY MR. WEBB:

4 Q. Do you recall my question?

5 A. I do not.

6 Q. When you started work on this case as an expert witness
7 on March 10th, did you start your work with an open mind as an
8 unbiased expert in which you were going to determine what, if
9 any, structural remedies would need to be recommended by you
10 based on what you learned as you did your work?

11 A. I believe I did.

12 Q. Okay. And I take it, before you actually reviewed any
13 case material about this case, you had not prejudged or
14 predetermined what, if any, structural remedies you would
15 eventually recommend to be in your testimony; is that correct?

16 A. That is correct.

17 Q. And when you started work on March 10th, 2005, you did
18 not promise the government in advance as to what your expert
19 testimony would be on what remedies might ultimately be in your
20 expert testimony; is that correct?

21 A. I certainly did not.

22 Q. Now, am I correct, sir, on March 10th -- as I understand
23 it, on March 10th you did approximately two hours of work; is
24 that correct?

25 A. I can believe that that would be the correct number. I

1 don't have my records in front of me.

2 Q. That's fine. Let me just show you your deposition, then,
3 to help refresh your memory. If you go to your deposition --
4 it's tab 1, Jamey, it's page 203 of his deposition, and if we
5 could call out what I called out there.

6 "Question: I just want to ask you some questions briefly
7 about your retention in this case. I think earlier you
8 mentioned the date of March 10th. Was that the date that you
9 were first contacted?"

10 "I think March 10th was the first day. I wrote down in
11 the back of my book that I worked a couple of hours."

12 So does that help refresh your memory that you probably
13 worked a couple of hours on March 10th?

14 A. I accept that.

15 Q. That's fine. Now, when you -- did you have any materials
16 relating to this case that you looked at on March 10th or did
17 you get those materials later from the government?

18 A. I honestly do not recall whether I was looking at
19 material or whether March 10th was the date I met Mr. Wise, but
20 it would have been March 10th or very, very soon after that I
21 would have first started reading documents.

22 Q. Okay. And if you look at your expert report, there's
23 actually a section called appendix A. Do you have your expert
24 report in front of you there? If you go to -- that's your
25 deposition. I'm sorry, Doctor. Your expert report, do you have

1 that in front of you now?

2 A. I do.

3 Q. I don't think there's a page number, but there's an
4 appendix A that sets forth the material that you reviewed in
5 order to reach your expert opinions.

6 Do you recall that?

7 A. I could use a little bit of help finding --

8 Q. Can I approach the witness and I can just show him real
9 quickly. Let me get my copy of your expert report just for a
10 second. Okay.

11 In your expert report, doctor, I'm just going to show you
12 where appendix A is so you can see where I am right now.

13 A. I do.

14 Q. And if you notice, there's about five pages of case-
15 related materials that you say you relied upon in reaching your
16 expert opinions in this case; is that correct?

17 A. That is correct.

18 Q. And now, those five pages of materials that you looked
19 at, that's what you relied upon to reach your final opinions
20 that are set forth in this report; is that correct?

21 A. I relied -- pardon me to take a moment to just make sure
22 I understand.

23 I relied on these five pages of material, plus all of the
24 other material on my reliance list, much of which I read as part
25 of my normal job prior to March 10th.

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1 Q. Well, let me make sure. Appendix A says "Lists of
2 documents considered."
3 Do you see that?
4 A. Um-hmm.
5 Q. Does that mean this is a list of documents that you
6 considered in reaching the opinions that are set forth in this
7 report?
8 A. I'm looking and seeing. I -- there's also page 6, 7, 8,
9 9, 10, 11, 12, 13, 14, 15, which has primarily academic articles
10 listed, and I relied on those pieces of writing as well.
11 Q. Let me make sure I make the record clear. What appendix
12 A says is: "List of documents considered." The first five
13 pages appear to have materials that would be related to this
14 case; is that correct?
15 A. I do see the first five pages as related to this case,
16 and I also see many articles on pages 6 to 15.
17 Q. I'm going to that, I just -- just so the court is clear,
18 let me just break it down and we'll go through the whole thing.
19 The first five pages of this appendix A called "List of
20 documents considered" appear to be case-related materials
21 related to this case; is that correct?
22 A. The first five pages of material are case-related
23 materials. They are not the only materials that I considered.
24 Q. I understand that. So then what's next in your list of
25 what you considered are a listing of -- under the heading

- 1 "Academic Articles and Publications."
- 2 Do you see that?
- 3 A. I do.
- 4 Q. And you listed those and they run on for a number of
- 5 pages; is that correct?
- 6 A. That is correct.
- 7 Q. Now, as far as the case-related materials, the
- 8 case-related materials that you had in your possession and you
- 9 relied upon in reaching your expert opinions regarding
- 10 structural remedies, they're listed on the first five pages; is
- 11 that correct?
- 12 A. I think I'm not agreeing to that assertion. From my
- 13 perspective, as I hear "case-related," I would argue that many
- 14 of the articles on pages 6 to 15 are also related to the case.
- 15 They weren't created for the case, but the ideas in them are
- 16 ideas that I draw on that are related to the case.
- 17 Q. I'm not trying to quarrel with that. The first five
- 18 pages relate to materials that appear to be case-related
- 19 materials in this case that you were provided by the government;
- 20 is that correct?
- 21 A. That is correct. As well as the first item on page 6.
- 22 Q. Okay. Fair enough. Now, and so it's clear, you actually
- 23 reached your final opinions as to what the remedies you would
- 24 have in your testimony in this expert report; is that correct?
- 25 A. Can I have the question again, please?

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- 1 Q. Yes. This expert report actually sets forth your final
2 opinions about what remedies you would include in your
3 testimony; is that correct?
- 4 A. That is correct.
- 5 Q. Because if we look at, for example, page 11 of your -- of
6 this expert report dated March 21st, we see the same identical
7 five remedies that you told the Court this morning and that you
8 put in your written direct that you recommend be considered; is
9 that correct?
- 10 A. That is correct.
- 11 Q. Now, as far as -- I take it that you did quite a bit of
12 work between March 10th and March 21st to review materials
13 before you reached your final opinions; is that correct?
- 14 A. That is correct.
- 15 Q. And I assume that at some point -- well, let me ask: At
16 some point before March 21st when you signed your expert report,
17 did you advise the government that you had reached your final
18 opinions as to what you were going to recommend in your
19 testimony?
- 20 A. I'm not sure I understand your question.
- 21 Q. Well, maybe -- when did you -- let's take -- by March
22 21st, we know you reached your final opinions because they're
23 written down in that report; is that correct?
- 24 A. That is correct.
- 25 Q. Can you tell the Court on what date or day, as you now

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1 recall, when did you reach your final opinions?

2 A. On the 20th or 21st.

3 Q. That's fair. That's all I'm asking. So at some point
4 before you filed your report, did you tell Mr. Wise or someone
5 in the government that you reviewed enough material and that you
6 had now reached your opinions on what you were going to
7 recommend?

8 A. To be as honest as I can with you, I read as much
9 material as I could fully consume in that 11-day period, okay.
10 And what I would -- what I would emphasize is, there are many
11 reasons why, rather than recommending -- rather than advocating
12 specific remedies, I advocated a process for the Court to obtain
13 the expertise through a generic monitoring process so that they
14 can make the best judgment possible.

15 My goal in creating that set of opinions was to provide
16 my best understanding of how my expertise on behavioral decision
17 research in a managerial context could help inform thinking
18 through what logical remedies would look like. But the fact
19 that there were 11 days between March 10th and March 21st,
20 that's one of many reasons, not the only reason, why I thought a
21 process recommendation made sense. In addition to the fact that
22 I was assuming liability rather than assuming a specific set of
23 liabilities had been proven.

24 Q. I take it you spent quite a few hours between March 10th
25 and March 21st trying to review as much material as you could so

1 you could learn about the case so you could form or arrive at
2 the opinions that you arrived at on March 20th or March 21st; is
3 that correct?

4 A. That is correct.

5 Q. I notice in your deposition, you mention that for the
6 month of March you billed out or had put down 67 hours. Would
7 most of those work between March 10th and March 21st?

8 A. I would recall -- and I can certainly verify, but I would
9 recall that the majority would have occurred between the 10th
10 and the 21st.

11 Q. Let me take the one remedy, for example, the structural
12 remedy of removing senior management that you put in your expert
13 report on March 21st and have presented to the Court here in
14 your written direct and in your oral testimony here today; is
15 that correct?

16 A. I want to be very careful. I did not recommend a remedy.
17 I recommended a process, and identified some remedies that I saw
18 as consistent with the information that I had available as of
19 March 21st. So nowhere in my opinion have I recommended that
20 senior management be removed. I have recommended that the Court
21 and its advisors consider senior management removal as one
22 remedy, that follows logically from the testimony. But before I
23 would recommend that remedy, I would need much more information.
24 I would need much more legal knowledge than I had on March 21st
25 or that I have as I sit here today.

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1 Q. My only question is: That remedy that you put in your
2 testimony, that you're at least recommending that some people
3 consider, that remedy, did you reach -- did you reach that
4 remedy after reading over all this material that was given to
5 you somehow, right before March 21st?

6 A. I finalized my expert report certainly on the 20th and
7 21st. Exactly what time on the 20th or 21st, I don't know. And
8 I'm sure in the days building up to it, I started to write the
9 report. When various pieces of these ideas entered my working
10 draft, to be honest, Mr. Frederick -- Mr. Webb, I do not know
11 the answer to that.

12 Q. That's fine, but as I understand it, am I correct, so the
13 record is clear -- you're the witness in this proceeding, and as
14 I understand it you are the one who came up with the idea of at
15 least putting in your testimony this major structural change of
16 removing senior management; is that correct?

17 A. I'm the one who listed senior management removal as one
18 idea for consideration by the Court and its advisors.

19 Q. But it was your idea and not the government's idea, is
20 that your testimony?

21 A. That is correct.

22 Q. When did you first --

23 THE COURT: And is it also your testimony that you are not
24 actually recommending that particular action at this point, but
25 rather you are simply including that action as a possible option

1 for the Court and/or its advisors to consider?

2 Is that a fair summary?

3 THE WITNESS: That's an excellent summary, Your Honor.

4 And I would add to what you're saying that I don't have the

5 illusion that I have the knowledge of this case that you have,

6 nor the legal expertise, nor the ability in those 11 days to tap

7 into other expertise that I would hope that you would be able to

8 tap into.

9 BY MR. WEBB:

10 Q. This idea that you came up with about putting in your

11 testimony the removal of senior management, when did you first

12 tell the government that you had come up with that idea?

13 A. I do not recall.

14 Q. Was it shortly before March 21st?

15 A. I would -- my best estimate, as I sit here today, is that

16 most of the ideas that you would find in remedies would have

17 been formulated in the few days closest to the 21st, because the

18 majority of the time on the front end of that 11 or 12-day

19 period, depending on how it's counted, certainly would have been

20 devoted more toward reading and understanding than to reaching

21 conclusions.

22 Q. Well, in fact, Dr. Bazerman, is it not true that by

23 March 10th of 2005, when you had probably done about two hours

24 of work on this case, you told the government that you already

25 had decided to include in your remedy testimony the removal of

1 senior management; is that true?

2 A. As I sit here today, I don't believe that that's true.

3 Q. Let me show you -- could I have tab 9, JD 055180 and ask
4 you to look at it. And I put up on the screen -- this is a
5 document that was filed in this courtroom by the government on
6 the date of March 11th, 2005.

7 Do you see that sir?

8 A. I do.

9 Q. If you go to the second page. This sets forth -- if you
10 go to the third page, which sets forth what you're going to
11 testify to in this proceeding, it says: "Dr. Bazerman, a
12 professor of Business Administration at Harvard Business School,
13 will offer expert testimony concerning the need for
14 court-ordered structural changes to defendants' businesses,
15 including, but not limited to, the removal of senior
16 management."

17 Do you see that, sir?

18 A. I do see it.

19 Q. Does that now tell you that at the time that you had done
20 probably no more than two hours of work, you had already
21 communicated to the government that you were going to tell this
22 Court that you were going to put in your testimony the removal
23 of senior management?

24 A. No, it doesn't.

25 Q. Well, you just told this Court that you came up with the

1 idea; is that correct, to remove senior management, it was not
2 the government's idea; is that correct?

3 A. That is correct.

4 Q. And yet the government knew to put in this pleading on
5 March 11th that that's what you were going to testify to.

6 Do you see that?

7 A. I do see that.

8 Q. And yet you did not tell the government by March 10th
9 that you were going to recommend or put in your testimony the
10 removal of senior management? Is that your testimony?

11 A. That is my testimony, that I did not reach any conclusion
12 nor tell the government this information. So, from my
13 perspective, you'd have to -- you will need to ask whoever
14 created this document the basis for what they wrote.

15 As I read it, I don't see a final set of conclusions that
16 I'm going to reach, but I did not tell the government by
17 March 11th that I was going to recommend that senior management
18 removal occur, or that it should be considered by the Court and
19 its advisors.

20 Q. So if you didn't tell the government that's what you were
21 going to testify to, how did the government know that's what you
22 were going to testify to?

23 A. You would need to ask the government.

24 Q. Thank you. Let me ask you this: Is it possible that you
25 actually made up your mind before you looked at any material

1 that you were going to recommend that remedy, because you have
2 evidenced in your writings a strong bias against the tobacco
3 companies?

4 A. Can I have that question again?

5 Q. You will. Sir, do you think it's possible that before
6 you reviewed any materials, before you prejudged the matter and
7 told the government that you were going to recommend removal of
8 senior management because at the time that you began to work on
9 the case, you already had a strong bias against the tobacco
10 companies?

11 A. I'd like to break that into two questions and answer two
12 different parts to that.

13 Q. I'll break it down then. At the time you began to work
14 on this case --

15 A. Yes.

16 Q. -- did you have a strong bias against the tobacco
17 companies?

18 A. In my previous writings, which you can find, at least in
19 a book I wrote called "You Can't Enlarge the Pie," with John
20 Baron and Katy Shonk, as well as a book I wrote with Michael
21 Watkins called "Predictable Surprises," you will find
22 significant writing arguing that the tobacco industry, like the
23 mining industry, and like the timber industry and like German
24 union workers, had a disproportionate influence on government
25 policy for their lobbying methods. And I've written extensively

1 on that, and I certainly believe that the tobacco industry has
2 had disproportionate influence on legislation of the United
3 States government. So, do I have that view on that part of the
4 tobacco industry activity? Yes I do.

5 Q. Is the answer to my question yes?

6 A. I would need the question again.

7 Q. I'm going to ask it again, then. I would like to you try
8 to answer it with a straight yes or no. Is it true that when
9 you began -- before you began to work on this case, you already
10 had built up a strong bias against the tobacco companies, before
11 you began to work on this case, as evidenced in your writings?

12 MR. WISE: Your Honor, I'm going to object. The question
13 is far too long and involved for a simple yes or no. He said
14 evidenced in your writings. Dr. Bazerman pointed out numerous
15 writings, he could be referring to. I mean, this isn't --

16 THE COURT: The objection is sustained on a different
17 ground, though. The question isn't too long and complicated.
18 The witness has answered it in a fulsome way, and that word
19 "bias" which is the core of the question, can be interpreted
20 differently.

21 He's told us what his views were and on what he had views
22 about the tobacco industry. You may certainly follow up with
23 that, Mr. Webb, but in terms of a yes or no answer, I will
24 sustain the objection.

25 BY MR. WEBB:

1 Q. Okay. Well, let me ask this: Doctor, do you agree that
2 your writings, things you had written prior to working on the
3 case, reflect a bias you have against the tobacco companies?

4 A. I have a clear view of tobacco behaviors regarding a
5 certain set of activities connected to lobbying efforts.

6 Q. But my question, and if you can't answer it, I'll move
7 on. As you sit here now, do you believe that those writings
8 actually show a bias you had against the tobacco companies?

9 MR. WISE: Your Honor, I'm going to object. I think
10 that's the same question that you sustained the objection on.

11 MR. WEBB: I'm asking whether it's in his writings or not,
12 Your Honor, and I'm going to go to his writings.

13 MR. WISE: But, again, it's the bias that's the problem.

14 THE COURT: If the witness can answer, he may.

15 THE WITNESS: I have a clear view regarding a set of
16 behaviors regarding the tobacco industry, which I've tried to be
17 clear to you in this testimony and which I hope is very clear in
18 my writing as well. I do not believe that it is biased, my
19 testimony, regarding other behaviors of the tobacco industry.

20 BY MR. WEBB:

21 Q. And I didn't ask you whether -- I didn't ask you that
22 question. All -- I'll move on. Let me just show you --

23 A. I'm giving you my best answer, as fully as I can.

24 Q. Well, let me just show you some of your writings and
25 we'll move on.

- 1 A. Sure.
- 2 Q. Can I show him tab 12, JD 055155, Pat? I believe this is
3 a publication entitled: "You Can't Enlarge the Pie" that you
4 authored; is that correct?
- 5 A. That is correct.
- 6 Q. I believe it was originally published in 2001; is that
7 correct?
- 8 A. That is correct.
- 9 Q. And I want to direct your attention to page 120 of this
10 document, to a portion I called out on the screen, where in your
11 book here, you state: "The cases of tobacco, timber and mining
12 are just three examples of the ways in which money, once it
13 touches the political system, has the power to corrupt everyone
14 it touches."
- 15 Do you see that?
- 16 A. I do see it. I don't believe you read it exactly
17 correct.
- 18 Q. I apologize. I'll read it again. I didn't mean to
19 misread it and if I did.
- 20 "The cases of tobacco, timber, and mining are just three
21 examples of the ways in which money, once it enters the
22 political system, has the power to corrupt everyone it touches."
- 23 Did I read that correctly?
- 24 A. You did, as far as I can tell.
- 25 Q. And as far as your judgment that tobacco money, once it

1 enters the political system has the power to corrupt everyone it
2 touches, that's an opinion that you had about the tobacco
3 companies before you began to work on this case; is that
4 correct, sir?

5 A. Yes, it is. I had that opinion by, probably, 2000 when
6 the book was submitted to the publisher.

7 Q. And in fact, is it also your opinion that the tobacco
8 companies engage in conduct that persuades elected officials to
9 make bad decisions and squander resources?

10 Is that your view?

11 A. Can I have the question again?

12 Q. You can. At the same time you wrote this book, were you
13 also of the opinion that the tobacco industry engages in conduct
14 that persuades elected officials to make bad decisions and
15 squander resources?

16 Did you actually state that in this publication?

17 A. Um, I would believe that that could come from this text.

18 Q. Let me show you page 101. It's tab 13, Todd. If you go
19 to page 101, page 13, I think you'll see a statement to that
20 effect.

21 I'll call it out on the screen where you state "In this
22 chapter, we examine certain groups, such as the tobacco
23 industry, that persuade elected officials to make bad decisions
24 and squander resources.

25 Do you see that?

1 A. I do.

2 Q. And that was an opinion that you had of the tobacco
3 companies before you agreed to become an expert witness in this
4 case; is that correct?

5 A. That is correct.

6 Q. Now, sir, have you also, before -- am I correct, before
7 you knew any facts about this particular case, did you ever
8 write in a book that, without noticing any facts, it was your
9 view that the tobacco companies had engaged in deceptive and
10 illegal conduct?

11 A. I do not recall writing that.

12 Q. Okay. Could I show him Exhibit JD 55154? This will be
13 tab 14. I believe this is a book entitled: "Predictable
14 Surprises." I'm handing you this book now.

15 Do you recall this book?

16 A. I do.

17 Q. And it's a book that you authored; is that correct?

18 A. It is.

19 Q. It's called "Predictable Surprises," and it's authored in
20 the year -- I believe published in the year 2004; is that
21 correct?

22 A. That is correct.

23 Q. And if I could go to tab 14, which is, I believe, at the
24 bottom of page 140, and at the top of page 141, we'll see the
25 following -- can I put those two together, Todd? Thanks.

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1 You state in this book that you authored, "In recent
2 years, members of Congress and President Clinton fought several
3 battles to hold the tobacco industry accountable for deceptively
4 and illegally promoting and profiting from its deadly products."

5 Do you see that?

6 A. I do.

7 Q. Just so I know, had you already concluded by 2004 that
8 the tobacco companies had engaged in deceptive and illegal
9 practices?

10 A. I did not.

11 Q. Okay. Now, did you also -- let me ask you this: Because
12 of your feelings or beliefs about the tobacco companies, did
13 that cause you, in another publication, to falsely accuse the
14 current President of the United States, President Bush, of
15 quietly settling this lawsuit in return for money, campaign
16 contributions?

17 A. I don't think it was quite that explicit, but somewhere
18 around the same page we've been on, there is a paragraph where I
19 reach a -- I write something that I now learn to be false. I
20 wrote -- and it was based on my reading of a book by Mark Green,
21 and I'm not blaming him, I misinterpreted what he wrote.

22 In this publication, I wrote that soon after President
23 Bush came to office, that he settled this lawsuit. Obviously
24 that's incorrect or we wouldn't be here.

25 Q. Settled the lawsuit for money, campaign contributions; is

1 that correct?

2 A. If I could, I would like to see exactly what I wrote.

3 Q. That's fair. If we go to tab 15, it's in the same
4 publication.

5 A. Yeah, within the same section of this chapter.

6 Q. And this is tab 15, Todd. Let me call this out on the
7 screen.

8 You wrote in this book that you authored, in 1999,
9 "President Clinton filed a \$20 billion civil suit against the
10 tobacco industry to recoup federal healthcare funds spent
11 treating veterans, federal employees and Medicare patients
12 afflicted with tobacco-related diseases. In a 215 to 183 vote,
13 a rare defeat for the tobacco industry, the House of
14 Representatives agreed to fund the suit. The 183 dissenting
15 members received seven times more hard money from tobacco
16 interests than those who voted for the bill," and you have some
17 amounts there. Do you see that?

18 A. I do.

19 Q. And then you say, when George W. Bush took office the
20 following year, he infuriated antismoking groups by quietly
21 settling the suit with the tobacco industry. And you go on to
22 say "Bush had received \$6.5 million in soft money and PAC
23 contributions from tobacco interests during his presidential" --
24 is that the next word, "campaign"?

25 Do you see that?

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1 A. I do, and I don't see the word campaign, but I accept
2 that.

3 Q. It's on the next page.

4 A. I believe you.

5 Q. So if I understand you, you're acknowledging to the Court
6 that there's two things that are false about that statement; is
7 that correct?

8 A. No, I'm acknowledging one thing is false about what we
9 wrote, and when I say "we," I don't mean to refuse
10 responsibility, I take responsibility for a book that has my
11 name on it.

12 In the sentence, it reads "By quietly settling the suit
13 with the tobacco industry." What Mark Green, the former
14 candidate for the Mayor of New York, wrote in his book was that
15 President Bush took steps to settle the lawsuit.

16 I incorrectly interpreted his sentence to assume that he
17 had settled this lawsuit, as I put together the material for
18 this chapter, so that is -- I want to be very clear that that
19 lawsuit was not settled, so that means that I made a mistake in
20 writing this chapter, in that sentence.

21 Q. I know, but the next mistake is the worse one, isn't it?

22 MR. WISE: Objection, Your Honor.

23 MR. WEBB: Strike the question.

24 BY MR. WEBB:

25 Q. The next mistake you made is that you, you put in your

1 book that George Bush's campaign had received this money.

2 Do you see that?

3 A. I do see that he received the money.

4 Q. Yes, and if you look at Mr. Green's book, he made it
5 clear that it was not George Bush's campaign, it was the
6 Republican party that had received that money; is that correct?

7 A. I do not have that recollection.

8 Q. Well, let's look at Mr. Green's book. Let me ask you,
9 Doctor, with your expertise on all the biases you've set forth
10 in your written direct examination, if you -- when you come into
11 this situation believing what you believed about the tobacco
12 companies, is that what caused you to make this error and accuse
13 President Bush of settling this lawsuit in connection with
14 receiving campaign money?

15 MR. WISE: Objection, Your Honor, I think this is
16 argumentative to say that he accuses President Bush. I think --

17 THE COURT: The objection's overruled.

18 THE WITNESS: As I wrote in my written testimony, I would
19 never represent myself to the Court or to anybody else as a
20 completely unbiased individual. As a professional who studies
21 how people are biased, I do my best to keep my biases in check,
22 and I think that a full reading of this book, rather than looking
23 at this particular group of sentences, would not lead you to that
24 conclusion. In fact, if you asked me, what individual would be
25 most offended by this book, I think it would be Al Gore, who is

1 criticized far more than George Bush is, in this very book that
2 we're talking.

3 BY MR. WEBB:

4 Q. My question doesn't really go to George Bush so much as
5 my question asks: Doctor, based on your expertise on biases
6 that you have set forth in your written direct examination, and
7 in your testimony here today, do you believe that your biases,
8 or preconceived beliefs about tobacco companies, is what caused
9 you to make the error that's in this book?

10 A. I do not believe that that's the case. At the same time
11 I'm acknowledging to the Court that I believe that all of us are
12 biased in systematic ways. I think I do an excellent job of
13 taking a variety of steps to reduce the likelihood that I'm
14 affected by bias. But I don't believe that the bias affected my
15 false interpretation of at least one sentence by Mark Green.
16 But I would never conclude that I'm immune from being affected
17 by bias. The whole point of the bias discussion is that these
18 are systematic and predictable biases that affect human beings,
19 and I'm a human being, so, it's conceivable, I doubt it in this
20 case.

21 Q. Are you still saying to this Court -- by the way, the
22 allegation that Bush, meaning George W. Bush, current President
23 Bush, when you said that he had -- his campaign had received
24 \$6.5 million, are you still insisting that that's what Mr. Green
25 stated in his book, that you use as your source?

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1 A. I'm -- I haven't insisted that and I do not insist that.
2 I would like to see what Mr. Green wrote.
3 Q. Fair enough, fair enough. Can we show him what Mr. Green
4 wrote, JD 55154, tab 16. No, that's wrong. I'm sorry, that's
5 my mistake. You've got the book? Pat's got the book. It's JD
6 55156. It's tab 17. The bibliography put up on the screen,
7 Green is your source; is that correct?
8 A. It's possible that I read other material as well, but
9 certainly Green was a significant source for the section of my
10 book that we're referring to.
11 Q. Well, we just saw on the screen, footnote 79, after the
12 word campaign; is that correct?
13 A. I accept that.
14 Q. So you cite Green in selling out for his source for
15 President Bush.
16 A. Right. But I think if we look at other related
17 footnotes, it tells you other sources that I looked at. So,
18 just very simply, I also see under 78, without looking at what's
19 under 77 or 76, "Open Secrets," which is a website that I
20 understand includes -- as I recall -- that includes excellent
21 information about campaign contributions.
22 Q. I'll move on. But I thought you were telling the Court
23 that it was your misinterpretation of the book by Mr. Green that
24 led you to these mistakes.
25 MR. WISE: I'm going to object to that. I think --

1 THE COURT: The objection's overruled.

2 THE WITNESS: I believe I very clearly said that I made a
3 mistake regarding the sentence that says that this lawsuit was
4 settled. And I attributed that to my misreading, not the
5 miswriting, but my misreading of Mr. Green's book.

6 BY MR. WEBB:

7 Q. Thank you. I'm going to look for Mr. Green's book.

8 A. But I do want to clarify.

9 Q. I think he's answered the question.

10 THE COURT: You have. You've answered so far. If there
11 are further questions, of course you'll be allowed a full
12 opportunity to answer.

13 THE WITNESS: Thank you, Your Honor.

14 BY MR. WEBB:

15 Q. Let's look at Mr. Green's book. It's JD 55154 -- no,
16 that's wrong. I'm sorry. It's JD 55156, tab 17, and I have --
17 do you have in front of you, sir?

18 A. I have the book, I don't have --

19 Q. I just want to make sure you have the book and then I'll
20 move on. You have the book, correct?

21 A. I do.

22 Q. Let me show you, if I can go to tab 17, it's page 177 of
23 Mr. Green's book. I think we'll see the portions that I have
24 called out. You can read any portion that you want. Can I call
25 both of those out, Todd?

1 What Mr. Green said in his book, that you cite, "In 1999
2 President Clinton filed legal action against the industry to win
3 back \$20 billion in federal healthcare costs to veterans,
4 federal employees, and Medicare patients, declaring the civil
5 suit top priority for the Justice Department."

6 Do you see that?

7 A. I do.

8 Q. Okay. And you misread that to state that President
9 Bush -- let me go to the next quote. "By the following year,
10 President Clinton had been replaced by George W. Bush." Since
11 Bush's party -- do you see where it says "Bush's party"?

12 A. I do.

13 Q. That's the Republican party, to the best of your
14 knowledge?

15 A. It is.

16 Q. "Had accepted 6.5 million in soft and PAC money from big
17 tobacco during his campaign. It was no surprise when the new
18 president took steps to settle the suit against the industry."

19 Do you see that?

20 A. I do.

21 Q. Okay. Now, you read that to put in your book that
22 President Bush had infuriated the tobacco lobby by settling this
23 lawsuit; is that correct?

24 A. I would like to -- can we have both my quote and this
25 quote up at the same time?

1 THE COURT: Wait, wait, wait, everybody. I think you
2 misspoke, Mr. Webb, look back.

3 MR. WEBB: I said the tobacco lobby.

4 THE COURT: You did.

5 MR. WEBB: I did. I made a mistake. Thank you.

6 THE WITNESS: Thanks for your help, Your Honor.

7 BY MR. WEBB:

8 Q. Let me -- you want to go back to your book? Is that what
9 you want to do?

10 A. Yes. You're inferring I made a mistake beyond the one
11 that I've already clarified that I did make, and I'm asking
12 for -- I would like to see the two quotes next to each other, if
13 that's easy for us to do on a technical basis.

14 Q. I'll do that for you, I don't know that I can do both,
15 but just bear with me for a minute, okay? Just so you're not
16 confused. Go ahead and look at your quote, okay, and it's on
17 page 142.

18 A. Thank you.

19 Q. And at the bottom of page 142 and just so -- I'll read it
20 off so it's clear in the record. Your quote was "When George W.
21 Bush took office the following year, he infuriated antismoking
22 groups by quietly settling the suit with the tobacco industry."

23 That's what you said; is that correct?

24 A. Correct.

25 Q. Okay. That statement by you that he had infuriated

1 antismoking groups by -- no, actually, I would like to come back
2 to where we were.

3 When you said that he had infuriated antismoking groups
4 by quietly settling the suit, you somehow read that into this
5 paragraph from Mr. Green's book that's on the screen; is that
6 correct?

7 A. The settling the lawsuit certainly came from my
8 misinterpretation of Mr. Green. The infuriated anti-tobacco
9 groups, I may well have read other sources that contributed to
10 the way I presented that sentence.

11 Q. Do you know who that is? You don't cite to them.

12 A. Again, there are -- if we look at my expert report in
13 this case, there are a limited number of citations. There are
14 many other things I read and relied on as background
15 information.

16 Q. The second statement --

17 A. Yes.

18 Q. -- deals with -- you interpreted Mr. Green's statement,
19 Mr. Green said that Bush's party had accepted these campaign
20 funds.

21 Do you see that?

22 A. Yes.

23 Q. You interpreted that in your book, and I'll now read it,
24 you said "Bush had received 6.5 million in soft money and PAC
25 contributions from tobacco interests during his presidential

1 campaign."

2 Do you see that?

3 A. I do.

4 Q. And that Mr. Green did not say that, did he?

5 A. No, and I guess I would clarify. If you take my sentence

6 literally, which I would not recommend, it would imply that

7 Mr. Bush, in fact, took \$6.5 million and put it in his pocket

8 and that certainly isn't what I meant in any way whatsoever.

9 With the clarity that you're providing, if I could go back and

10 rewrite this more precisely, I would certainly do that.

11 Q. Well, as far as your biases, though, let me ask you this:

12 Have you taken -- what steps -- when did you discover you made

13 this false accusation regarding this lawsuit?

14 A. As I was reviewing material as part of my work as an

15 expert witness. So I -- I did not notice anything inaccurate

16 before March 10th, certainly, and I don't remember the specific

17 date, but it was before the deposition. Because as you might

18 know, I, in fact, volunteered information about my inaccuracy at

19 the deposition, because I had discovered it in just reviewing

20 what I had remembered that I did write about tobacco lobbying

21 efforts.

22 Q. Have you notified your publisher to do anything about

23 this accusation against President Bush that's in your book?

24 A. I have not.

25 Q. Thank you. Let me go to a different topic. Let me go to

1 what I think is at the core of your testimony to this Court,
2 which is your recommendation that the Court appoint various
3 monitors as part of the remedy in the case. And so let me start
4 by showing you your written direct exam.

5 Do you have your written direct exam in front of you,
6 sir?

7 A. I believe I do.

8 Q. It's tab 92, Todd. It's on page 2. And I'm going to put
9 up on the screen what I want to call to your attention. But
10 just so we make very clear here, the question was:

11 "Dr. Bazerman, are you recommending specific structural changes
12 to the defendants' businesses?"

13 And this goes to the question that the Court just asked
14 you and I'm just going to make sure it's very clear. You made
15 it clear that, no, meaning that you are not recommending any --
16 any of your structural changes, you're not recommending any of
17 those to this Court?

18 A. I'm recommending all of them for consideration by the
19 Court.

20 Q. Well, the question was: "Dr. Bazerman, are you
21 recommending specific structural changes to defendants'
22 businesses?"

23 "No, I recommend the Court appoint monitors who will have
24 the authority, with the utilization of outside experts as
25 needed, to review all aspects of defendants' businesses and make

1 particularized and specific recommendations for structural
2 changes, or with a mandate from the Court to implement
3 structural changes, such as those that I have identified that
4 address the incentives and biases that in my opinion will likely
5 cause misconduct to continue."

6 I read that to mean that you actually are not making any
7 specific recommendations to the Court, you're making the
8 recommendations to the Court monitors.

9 A. That's not my intention. My intention is to recommend --
10 all of my advice -- I think it's useful to put this into
11 context. All of my advice is for the Court to have the decision
12 power of how to create and implement this process. And when I
13 talk about court-appointed monitors, I certainly mean the Court
14 and any advisors that the Court would decide to use under the
15 processes that the Court would determine to be most appropriate
16 after knowing what liabilities have been found.

17 Q. Well, as I understood the testimony this morning in your
18 oral direct, you want the monitors that the Court appoints to
19 actually consider these recommended structural remedies; is that
20 correct?

21 A. Well, I want to be -- I want to try to be as clear as I
22 can in answering your question about what it is that I'm
23 recommending.

24 What I'm recommending is that the Court should make the
25 wisest decisions possible about how to avoid misconduct in the

1 future. And in doing so, my recommendations are to create a
2 process that helps best serve the Court in making the best
3 possible decisions. At the same time, since I have expertise in
4 how people make decisions, particularly how people make
5 decisions in an organizational context, I used my expertise to
6 look at the data available in this case, to identify remedies
7 that I saw as consistent with the data that I had available to
8 me, which I assume is a limited set of data. I assume that I've
9 read thousands of pages out of the millions of pages available,
10 and I also lack legal expertise. So --

11 Q. I just want to make sure it's clear because --

12 MR. WISE: Your Honor, Mr. --

13 MR. WEBB: His answer did not respond.

14 THE COURT: One at a time everybody.

15 MR. WISE: I think it's appropriate to let him finish and
16 then Mr. Webb can ask --

17 THE COURT: It's a pretty long answer and it's not totally
18 responsive to the question asked. So go ahead, please.

19 BY MR. WEBB:

20 Q. Maybe I'll just go ahead and make it clear, because I am
21 now confused. The statement here, Dr. Bazerman, "Are you
22 recommending specific structural changes to defendants'
23 businesses" when you said "no," I take it that you're not
24 recommending specific structural changes to defendants'
25 businesses; is that correct?

1 A. It is correct that I'm not recommending specific
2 structural changes. I'm recommending specific structural
3 changes be considered by the Court and its advisors.

4 Q. And -- I understand that. So you're not actually
5 recommending structural changes, you're recommending structural
6 changes be considered; is that correct?

7 A. And -- and --

8 MR. WISE: I think that's precisely the question that was
9 answered.

10 THE COURT: Well, it was answered. Now we're having
11 another question.

12 MR. WISE: I think Mr. Webb has asked the same question
13 again and gotten -- I think the question has been asked and
14 answered.

15 THE COURT: Well, it was just answered, so now I'll listen
16 to the next question.

17 BY MR. WEBB:

18 Q. The statement here, "I recommend the Court appoint
19 monitors." That testimony, just so I'm clear, and I'm going to
20 move on, are you recommending to the Court that the Court
21 appoint monitors with the authority that you set forth in that
22 answer?

23 A. When I talk about --

24 Q. Can you answer that yes or no? I'm just asking?

25 A. I don't think yes or no would give you the clearest

1 answer to your question, so I would prefer to be clear.

2 MR. WEBB: Your Honor, this witness is not answering my
3 questions and I just respectfully ask an instruction. This is a
4 very simple question based on specific testimony I have on the
5 screen and he doesn't want to answer that, he wants to give an
6 explanation.

7 MR. WISE: Your Honor, if I may?

8 THE COURT: Excuse me. You may answer yes or no and then
9 you may explain your answer. But based upon lines 22, page 2
10 through lines 3 of page 3.

11 THE WITNESS: Can I have the question again?

12 BY MR. WEBB:

13 Q. All I asked you was: Am I correct that you are
14 recommending that the Court appoint monitors who have certain
15 authority as you set forth in that answer? Is that correct?

16 A. Yes, and I want to clarify that I make that
17 recommendation with the clear assumption that these monitors are
18 serving as advisors to the Court or are given discretion to make
19 independent decisions only as decided by the Court.

20 Q. Okay. Now, the monitors that you say you want the Court
21 to appoint, those monitors do not exist today; is that correct,
22 to the best of your knowledge?

23 A. Do the people exist or do the -- or have they been
24 appointed?

25 Q. Have they been appointed, to your knowledge?

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1 A. Certainly not.

2 Q. So the people that you're primarily communicating with,
3 that you want to consider these remedies, are people that don't
4 exist yet?

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

6 THE COURT: That's sustained.

7 BY MR. WEBB:

8 Q. Doctor, as I understand it, once the monitors are
9 appointed, you want the monitors to have the authority, among
10 other things as you set forth on line 23, to review all aspects
11 of defendants' businesses and then make particularized and
12 specific recommendations for structural changes; is that
13 correct?

14 A. That is correct.

15 Q. Now, in connection with that, if I understand your
16 testimony, as the monitors review all aspects of defendants'
17 businesses, you want the monitors to go out and hire their own
18 experts who will work with the monitors; is that correct?

19 A. That is not correct. I have not specified the details of
20 this monitoring system, I view that as a decision that the Court
21 would decide based on far more information than I have
22 available, based on liability found in other information that's
23 been presented in this case that I have not had access to.

24 Q. Well, do you state here -- I'm just reading what you
25 said -- that you recommend the Court appoint monitors who will

1 have the authority, with the utilization of outside experts as
2 needed, to review all aspects of defendants' businesses?

3 A. Yes, but I view -- I view it as a responsibility of the
4 Court to decide exactly how that process unfolds. So, we could
5 imagine many alternative processes. I would be happy to outline
6 some possibilities if that's what you would like, but in all
7 cases my intention is to describe a process under Court
8 supervision to identify the expertise needed for the Court to
9 make the final decisions about how best to stop misconduct in
10 the future. That's been my -- that was the intent as I wrote it
11 in my expert report on March 21st and that's my intent as I sit
12 here today.

13 Q. Well, let's make sure we know what your intent is. Go to
14 page 181 of your written direct, tab 96, please.

15 A. 181.

16 Q. That's -- I'm sorry, that's your deposition. Do you have
17 your deposition? You can look at the screen. This is your
18 deposition at page 181, and we'll -- there are a lot of exhibits
19 there, we'll help you there, Doctor.

20 MR. WISE: Your Honor, this is improper impeachment to use
21 a deposition in this way. I think we -- if Mr. Webb has
22 questions about his intent, but to -- without presenting -- I
23 mean, without presenting what the contradiction would be, to jump
24 to the deposition, I think is just improper impeachment.

25 MR. WEBB: Your Honor, I'm just trying to bring out what

1 his position is. I have a right to bring out what is position
2 is.

3 THE COURT: Objection's overruled.

4 BY MR. WEBB:

5 Q. Doctor, what I want to make sure is clear is that what
6 you envision is you want these monitors to go out and actually
7 do their own independent factual investigation; is that correct?

8 A. Can I see what you're referring to in the deposition?

9 Q. Yes. Let me start with the question and answer, and then
10 you can -- do you have the deposition in front of you?

11 A. I do have the deposition in front of me.

12 Q. Are you on page 181?

13 A. I see page 181.

14 Q. Do I have the right -- on line 10 through 18 you were
15 asked this question: "Just so the record's clear, what is the
16 basis for your recommendation that the Court appoint monitors --
17 well, let me back up so the record's clear. As I understand
18 proposal for the recommendation, the monitors would go in,
19 investigate the facts and develop the group of remedies to
20 propose to the Court that should be imposed," and you answered,
21 "yes". Were you asked that question and did you give that
22 answer?

23 A. This dialogue did occur in my deposition.

24 Q. Now, this factual investigation that you envision that
25 the monitors conduct, as I understand other parts of your

1 testimony, you want the monitors, as they do their own fact
2 investigation, you want them to include a cost-benefit analysis
3 in the work they do; is that correct?

4 A. I think that a cost-benefit analysis would be one
5 appropriate tool to consider on how to best identify how to
6 avoid misconduct while limiting any other affects that avoiding
7 misconduct might have on defendants' business.

8 Q. So let me go to your written direct examination at page
9 66. It's tab 97. As far as you wanting the monitors to do
10 their own cost-benefit analysis, this is what you say on page
11 66, line 8 to 13. "How should monitors choose among the various
12 alternatives you have suggested?"

13 "Answer: There are a number of variables that the
14 monitors will consider. First, and perhaps most important, they
15 will want to consider the Court's finding on liability. Second,
16 the monitors could conduct various analyses, including a
17 cost-benefit analysis of contemplated changes, and determine the
18 most efficient ones from the standpoint of addressing the
19 misconduct while minimizing the impact on other stake holders,
20 including employees and share holders".

21 That's your testimony; is that correct?

22 A. It is my testimony.

23 Q. Now, as far as what you're envisioning, if I understand
24 this, at least you're envisioning that the monitors, as they do
25 their work, they're going to kind of do a balancing test where

1 they're going to weigh remedies that could be based on the
2 Court's finding on liability, but then try to decide which
3 remedies would be the most efficient by minimizing the impact on
4 certain stake holders; is that correct?

5 A. That is correct. If I could elaborate a bit.

6 MR. WEBB: Your Honor, I think he's answered my question.

7 THE COURT: He has. Next question.

8 BY MR. WEBB:

9 Q. Now, as I understand it, as these monitors do this
10 factual investigation, do this cost-benefit analysis, you want
11 them to interact with and interview company executives so that
12 the monitors will understand how the companies function and get
13 a sense of the company's culture; is that correct?

14 A. Can I see the part of my testimony you're referring to?

15 Q. You can. Do you recall -- that's fair. The answer to
16 your question is yes. You can ask me questions and I'll try to
17 answer them if they're fair questions.

18 A. Thank you very much.

19 Q. Go to page 45 of your written direct, tab 98. This is
20 line 1 through 6 in which you tell the Court, "What are the
21 cultures at defendant firms?"

22 "When I consult with companies, I get a sense of culture
23 from talking with employees, and I think the monitors will
24 similarly get such a sense of culture from interacting with
25 employees at the different companies" --

1 THE COURT: At the defendant companies.

2 MR. WEBB: I'm sorry, at the defendant companies.

3 BY MR. WEBB:

4 Q. Let me read that again so it's clear. "When I consult
5 with companies, I get a sense of the culture from talking with
6 employees, and I think the monitors will similarly get such a
7 sense of culture from interacting with employees at the
8 defendant companies. The one broad conclusion I can reach,
9 given my assumptions, is that the existing culture at defendant
10 companies encourages and rewards misconduct."

11 What you envision the monitors to do is, as they go out
12 and do this factual investigation, as they do this cost-benefit
13 analysis, you actually envision that they will interact, talk to
14 the employees, the executives at the companies; is that correct?

15 A. I envision that they will do what the Court asks them to
16 do and that seems like a sensible task for them to be engaged
17 in, yes.

18 Q. Okay. Now, as the monitors are carrying out this wide-
19 ranging factual investigation, do you envision that they should
20 be given access to relevant company documents they need to see
21 in formulating their remedy recommendations to the Court?

22 A. Again, they should be following the directions of the
23 Court in deciding the level of detail that they pursue, but I
24 can certainly imagine that reading and analyzing corporate
25 documents could well be part of that task.

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1 Q. Well, I take it, in light of what you envision, some
2 factual investigation being conducted by these monitors outside
3 the presence of the Court in which they will do a cost-benefit
4 analysis, a factual investigation, interview employees. If they
5 think they need documents to make a proper recommendation to the
6 Court, do you envision that they would be given access to the
7 documents?

8 A. The reason I answered the way I did to your previous
9 question "under the direction to have the Court," there may be
10 legal issues involved that I'm not an expert about. I certainly
11 wouldn't recommend that they look at documents that they're not
12 legally allowed to look at. They should -- my goal is for the
13 monitors to do more than -- the Judge, I'm sure, is a brilliant
14 individual who knows a tremendous amount about the law, but I
15 don't expect her to know everything about corporations and
16 corporate governance, and I see the monitors as advisors and
17 collectors of information to help the Court make the very best
18 decision possible.

19 Q. As those monitors gather that information and do that
20 factual investigation, do you envision that those monitors will
21 be limited to only looking at information that was introduced
22 into evidence during the course of this trial?

23 A. Again, if there's a legal aspect I would defer to the
24 Court; if it's not a legal issue you're addressing, then I would
25 hope they have access to other information that would be

1 relevant.

2 Q. Well, I mean, since -- the way you envision it, these
3 monitors are supposed to go out and do a factual investigation
4 and then craft remedies that are efficient for the Court to
5 implement. If they're going to do that, they're not going to be
6 limited by evidence in this case, are they?

7 A. Once again, if there's a legal issue, I'm quoting no
8 legal expertise. If there are legal issues, what they're
9 allowed to look at or not allowed to look at, I'm not
10 recommending any process that would violate existing law. But
11 if there aren't legal issues involved, would I like the monitors
12 who might have more corporate expertise than experts in this
13 case might have, would I like them to have the opportunity to
14 learn the information that they thought that they needed in
15 order to best help the Court make wise decisions, I would hope
16 that they would have access.

17 Q. Right now, at least as -- based on -- I know you're
18 setting aside legal issues; is that correct?

19 A. Well, I'm saying, I don't want to give you any conclusion
20 that might have a legal component to it that is outside of my
21 expertise to give you.

22 Q. And I'm not asking you to do that, but you're the one
23 here in this courtroom making recommendations as to what we
24 should consider. So I'm trying to find out, based on what you
25 are envisioning so we have a record of this. You, at least

1 right now, absent some legal issue, are envisioning that the
2 monitors would clearly have access to information that's not in
3 evidence in this proceeding; is that correct?

4 A. I'm trying to advise the Court about how to seek the best
5 advice possible from the assistance that they choose to use, and
6 if you're asking me do I want to limit them to one set of
7 information if they determine that some other information is
8 useful and the Court agrees, I would be happy for them to have
9 access to this other set of information as well.

10 Q. Well, in fact, Doctor, your entire -- your testimony
11 would be meaningless if it's determined that under the law that
12 these monitors just cannot go out and willy-nilly do their own
13 factual investigation, do their own interview of witnesses,
14 examine documents and then craft remedies, if they're limit to
15 what's in evidence in this case, there'd be no reason for the
16 monitor, would there?

17 MR. WISE: Objection, Your Honor, this is argumentative.
18 It's also vague, "willy-nilly" and "meaningless," I mean, these
19 are --

20 THE COURT: No, the objection's overruled. This is
21 cross-examination.

22 THE WITNESS: I do not believe that my recommendations
23 would be meaningless at all limited to the information that's in
24 the case. I'm assuming that you're thinking of something that I
25 would have no access to based on law. If the monitors were

1 limited to information in this case, I could still imagine that
2 the Judge, while brilliant and knowledgeable about the law, might
3 be well served by having advisors who could help her think
4 through a variety of business issues.

5 BY MR. WEBB:

6 Q. Well --

7 THE COURT: But let me focus on what I think is Mr. Webb's
8 question, and that is as follows: Does your testimony envision
9 that so long as it was not precluded by legal considerations, the
10 monitors appointed by the Court would be allowed to investigate
11 and look into evidence that was not part of the official Court
12 proceedings leading -- well, the official court proceedings?

13 THE WITNESS: Your Honor, to the extent that it was legal
14 for them to have access to other information, I would recommend
15 that they should have access to other information. If for some
16 reason it was illegal, then I still think that you might be well
17 served by obtaining expertise that could help you think through
18 the parts of this case that require specialized expertise outside
19 of the law.

20 THE COURT: All right. Go ahead, Mr. Webb.

21 BY MR. WEBB:

22 Q. And that's where I want to go to, because that --
23 assuming that the monitors, because of the law, would be limited
24 to actual evidence that's been introduced in this proceeding
25 subject to the truth finding process of cross-examination, if

1 you make that assumption, then you have already determined that
2 Judge Kessler, based on your assessment right now, is not likely
3 to have developed the knowledge she needs to make a decision on
4 remedies; is that correct?

5 A. It's my testimony that the Judge may well be served by,
6 at her discretion, seeking additional information that helps her
7 think through issues that have been developed in this case where
8 other experts might help her develop her final decisions.

9 Q. That's not my question. Did you testify in your
10 deposition, Doctor, that you had already, based on what you
11 reviewed in the case, you had come to the assessment that Judge
12 Kessler is not likely to have the ability, based on the record
13 before her, to decide what the proper remedies should be in this
14 case? Did you testify to that in your deposition?

15 A. If you want to point me to my deposition I'd be happy to
16 read that testimony.

17 Q. I will. Go to page 181 of your deposition. It's tab 99.
18 I'll get it up on the screen or you can look at page 181, if you
19 want. It's page 181 and over at the top. Can we put 182 up
20 there also, Todd. Is that possible to get both of them there
21 and then I'll start reading it. So it's the bottom of 181, the
22 top of 182 up to line 5.

23 Do you recall being asked this question and giving this
24 answer in your Department of Justice deposition in this case:
25 "Why do you recommend that the task be delegated to monitors as

1 opposed to having the Court itself do it?"

2 Your answer: "It's my judgment -- and I should say that
3 I've never met the Judge in this case, but it would be my
4 assessment that the Judge is unlikely to have all of the
5 expertise needed at the time of making her decision to allow the
6 optimal specification of the remedies. So the question is, how
7 do we identify a process that allows the Court to obtain the best
8 information and to come up with the wisest set of remedies"?

9 Were you asked that question and did you give that answer?

10 A. Yes, I did.

11 Q. Now, as far as the statement in the deposition that the
12 Judge is not likely to have all the expertise needed to make the
13 remedy determination in this case, did you base that testimony
14 on your review of the thousands of pages of evidence that have
15 been presented during the course of this trial?

16 A. With all due respect to the Judge, who I'm very confident
17 in her abilities or she wouldn't be in the seat that she's in
18 right now, I don't think that it would be reasonable for any
19 person with legal training without extensive business training,
20 without access to other expertise, to think through the issues
21 of organizational architecture to move from one business model
22 to another business model, taking into considerations the
23 multitude of ideas that organizational consultants would spend a
24 great amount of time integrating to reach a wisest conclusion
25 about how would we -- how would we move a company, let alone an

1 industry, from one business model to another.

2 MR. WEBB: Your Honor, we're going to be a here a long
3 time. I make a motion to strike that answer. I asked him very
4 simply whether or not he made that assessment about you based on
5 reviewing all of the thousands of pages of transcripts. He
6 didn't answer that at all. He didn't give me a single word that
7 answered that question.

8 MR. WISE: Your Honor, the answer went to the question,
9 the question was unartfully phrased.

10 THE COURT: The motion to strike is denied. Next
11 question.

12 BY MR. WEBB:

13 Q. Does the assessment regarding Judge Kessler's ability to
14 find the proper remedy in this case, did you base that
15 assessment upon reviewing all of the transcript and testimony
16 and evidence in this case?

17 A. I did review all of the testimony, but it's based on
18 other considerations, such as understanding what information is
19 necessary to identify the appropriate remedies to move to a new
20 business model. That certainly includes information beyond what
21 you listed in your question, sir.

22 Q. I want to make sure I get an answer and then I'll move
23 on. Have you reviewed all of the testimony from all of the
24 witnesses in this case?

25 A. No.

1 Q. Okay. That's all. Have you reviewed only a few of the
2 witnesses?

3 A. I've reviewed all of the material that's in my reliance
4 list, sir.

5 Q. Right. And you recognize that there's a vast amount of
6 material you have not reviewed; is that correct?

7 A. Absolutely.

8 Q. Okay. Now, so the assessment -- so what I would like to
9 do now, I want you to specify, I want you to give me with the
10 detail you can, as to what evidence has not been presented to
11 Judge Kessler that she needs to find a proper remedy in this
12 case? Just detail the evidence for us.

13 MR. WISE: Your Honor, I'm going to object. The evidence
14 that the Judge needs? I think this is calling for a legal
15 conclusion. If Mr. Webb wants to ask about Dr. Bazerman's
16 reference management experience and what goes on with management
17 consultants, I think if Mr. Webb wants to ask about what is
18 needed to arrive at conclusions that go to organizational change
19 in the business world I think that's something Dr. Bazerman can
20 discuss, but I don't think asking about evidence the that Judge
21 needs quite the way Mr. Webb phrased it is an appropriate
22 question.

23 MR. WEBB: Your Honor, that's unfair. They've put this
24 witness on the stand who is reaching conclusions as to what this
25 Court should do and he's giving testimony that we're now in one

1 remedy trial and he basically wants us to have another remedy
2 trial when this case is over with. And I want to find out,
3 whatever he's done, I want to get in the record what you don't
4 have, because he has said that you don't have the expertise,
5 based on what is in the record right now, to render the proper
6 remedies. I have a right to find out if he has anything specific
7 that he wants to put in the record. If not, I'll move on.

8 MR. WISE: Your Honor, I also object --

9 THE COURT: The objection's overruled, you may ask the
10 question.

11 BY MR. WEBB:

12 Q. Would you please detail with as much specificity as you
13 can, Doctor, what evidence has the government not presented to
14 the Court that you believe the Court needs in order to determine
15 the proper remedies in this case?

16 MR. WISE: Your Honor, this time I'm going to object,
17 there is no foundation that Dr. Bazerman knows the
18 government's -- the evidence the government has put in in this
19 case. I think, again, liability has closed, Dr. Bazerman has not
20 represented himself as an expert on all of the evidence that the
21 government put in and to ask him to draw conclusions based on all
22 the evidence that the government has put in about what else you
23 need using evidence as the rubric I think is inappropriate.

24 MR. WEBB: Your Honor, they are the ones who put him on
25 the stand to come up with this advice that you are supposed to

1 appoint these monitors because you don't have the expertise. If
2 he doesn't have a foundation for that I have a right to establish
3 it. All I'm trying to find out is what he thinks is not here.
4 And I have a right to make a record of that.

5 THE COURT: If he hasn't read all the evidence, though,
6 which he has indicated he has not read, then he's not even in a
7 position to answer your question, Mr. Webb.

8 MR. WEBB: Well, then I can at least get that -- I'll
9 rephrase the question.

10 BY MR. WEBB:

11 Q. In light of the Court's comment, do you agree with me,
12 Doctor, that logic and commonsense tells you that since you've
13 only looked at a small amount of evidence in this case and that
14 you've acknowledged that there's an overwhelming amount of
15 information you don't know, do you agree that you don't have any
16 way of knowing whether or not the government and the defendants
17 have presented evidence to the Court upon which the Court itself
18 could render an appropriate remedy in this case? You don't know
19 the answer to that; is that correct?

20 A. I need the whole question again.

21 Q. Fine, I'll give it to you again. Based on the fact that
22 you have not looked at the entire trial evidence in this case,
23 do you agree that you don't know what evidence the Court may be
24 missing in coming to the -- in being able to properly evaluate
25 remedies?

1 A. I apologize. I know you just repeated it, but I do need
2 it again. I'm trying to answer you as clearly as I can.

3 Q. In light of the testimony that you just gave the Court
4 that you don't know a lot of the evidence that's been presented
5 in this case, do you agree, therefore, you're not in a position
6 to tell the Court what evidence you believe is missing which the
7 Court needs to render proper remedies in this case?

8 A. It's my testimony that I do not know the exact set of
9 information that the Court would need to make the best possible
10 decisions. It's also my testimony that my best estimate is
11 somebody who is brilliant with excellent legal training may well
12 be served by having advisors to represent expertise --

13 Q. And you --

14 A. -- in crafting the appropriate remedies.

15 Q. And do you know why -- whoever these human beings are
16 called these advisors, do you know why they would not be
17 presented to the Court as part of the government's remedy case
18 as sworn testimony subject to cross-examination?

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

20 THE COURT: Sustained on that point. I think --

21 MR. WEBB: Let's stop.

22 THE COURT: Is there another question or two you need
23 related to this particular area?

24 MR. WEBB: There's one or two, but I don't want to hold
25 you up from the phone call. I can do it after lunch.

1 THE COURT: All right. We'll come back, everybody, at
2 1:30.

3 Dr. Bazerman, these are your instructions, you're not
4 allowed to discuss your testimony with anyone. You're not
5 allowed to go back and look over your direct or any of your
6 reliance materials or anything else at all. I said your direct,
7 I mean your written direct that you submitted. And you're not
8 allowed to look at the testimony or talk about the testimony of
9 any other witnesses.

10 THE WITNESS: Thank you very much.

11 THE COURT: 1:30, everybody.

12 (Thereupon, a luncheon recess was had beginning at 11:57
13 a.m.)

14 C E R T I F I C A T E

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

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18 Scott L. Wallace, RDR, CRR
19 Official Court Reporter
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Scott L. Wallace, RDR, CRR
Official Court Reporter

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I N D E X

Examinations

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Description

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	May 4, 2005
Plaintiff,	:	
	:	1:32 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 100
AFTERNOON 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: All right. Mr. Webb, please.

3 MR. WEBB: Thank you, Your Honor.

4 MAX H. BAZERMAN, Ph.D., Government's witness, RESUMES

5 CROSS-EXAMINATION (Cont'd.)

6 BY MR. WEBB:

7 Q. Now, Doctor, I want to pick up where we left off --

8 MR. WEBB: And I don't think my mike is on.

9 THE COURT: I don't know that you need a microphone,
10 Mr. Webb, but anyway, use it.

11 MR. WEBB: I'll use it. I think it may be better for
12 the court reporter.

13 THE COURT: I think so.

14 BY MR. WEBB:

15 Q. Excuse me, Doctor. So picking up where we left off right as
16 the court took our luncheon recess. I had on the screen what
17 you said in your deposition regarding your view, at least, that
18 it was your assessment that the Judge is unlikely to have all
19 the expertise needed at the time of making her decision to allow
20 the optimal specification of the remedies.

21 I want to focus on the next part of your answer in your
22 deposition where you said, and I quote, "So the question is how
23 do we identify a process that allows the court to obtain the
24 best information and to come up with the wisest set of
25 remedies."

1 Now, when you provided that testimony -- strike that.

2 Is it fair to say, Doctor, that your entire testimony
3 is based on a process you are recommending to the court that you
4 believe will allow the court to obtain the best information to
5 come up with the wisest set of remedies; is that correct?

6 A. Can I have the question again?

7 I see the material on the screen, but I want to make
8 sure I understand your question.

9 Q. Absolutely. My question is: What you've done in your
10 testimony is that you've come up with a process that you're
11 recommending to the court that at least you believe in your
12 expert knowledge and opinion is in fact what you at least
13 believe to be a process that allows the court to obtain the best
14 information to come up with the wisest list of remedies.

15 Is that correct?

16 A. I would describe it as a basic outline of a process. There
17 are many ways of detailing that process.

18 I've tried to outline for the court a basic structure
19 to begin to recommend that she identifies the best ways to fill
20 in the pieces to develop the process, obtain the information and
21 judgment necessary to identify the wisest set of remedies.

22 Q. Okay. And that process, that at least you set forth in your
23 pages of your written direct, is what we can call the monitor
24 process. Is that correct?

25 A. I would describe it as a process that the court makes

1 decisions with the assistance of monitors, monitors generically
2 defined.

3 Q. Now, I just want to make sure. I'm going to move on now.

4 Obviously, as an expert in this case, you made a
5 decision, or a determination, that at least where we are in the
6 case right now, the court did not already have a process that
7 allows the court to obtain the best information. Is that
8 correct?

9 A. I would say that I am admitting very clearly that I don't
10 think that I am in a position to decide the optimal set of
11 remedies. Whether or not there's other information coming that
12 would solve that problem or not, I don't mean to question other
13 expertise.

14 But it's my assessment that the Judge is likely to be
15 able to use expertise in coming up with the wisest set of
16 remedies.

17 Q. And that expertise -- you don't believe that expertise has
18 been presented to the court thus far in this trial. Is that
19 correct?

20 A. I think it's unlikely.

21 Q. Okay.

22 A. Again, once again, as the court noted earlier, I've read a
23 small portion of the material available in this case.

24 Q. But based on what you've read, you think it's unlikely that
25 so far during the trial the process has been followed that would

1 lead to the best information?

2 A. To the fullest information. The information that's been
3 obtained may in fact be wonderful, but I cannot imagine that it
4 is complete.

5 Q. Now, the reason that it's not complete, has it been your
6 determination is because the parties have not presented the
7 proper testimony to the court?

8 MR. WISE: Your Honor, I'm going to object. I think
9 this is the same problem we had before where he's asking
10 Dr. Bazerman to look at the whole record on liability and say
11 whether the parties have put in enough information or not,
12 whether the government's evidence is substantial.

13 THE COURT: Sustained as to this question.

14 BY MR. WEBB:

15 Q. Well, let me ask you this. I take it -- do you agree with
16 me what -- you just talked a moment ago on that answer. You
17 said "We need to fill in the pieces." You just said that a
18 moment ago in your answer. Do you recall that?

19 A. If you're representing that, I'll accept that.

20 Q. You just said it a minute and a half --

21 A. I accept that.

22 Q. Just so I know, when you say "fill in the pieces," I want to
23 know for the record can you tell me what pieces are missing that
24 need to be filled in?

25 A. Certainly when I thought about the recommendation of

1 recommending a process to the court of providing the court
2 with -- recommending to the court that the court decide to
3 identify experts to help with deciding the wisest set of
4 remedies, I was certainly thinking about a wide set of knowledge
5 that might exist within an individual, such as consulting firms,
6 perhaps independent lawyers who have the interests of just the
7 court in mind but who might know a lot about governance
8 procedures because I don't know exactly what the Judge does or
9 does not know about governance procedures; information that
10 business school professors might have, information that other
11 monitors who have worked in other situations where, after some
12 accusation of misconduct, that organizations have tried to move
13 from one business model to another business model.

14 There's a great deal of information out there that I
15 believe might be useful to the court, and I was recommending an
16 outline of a process that I thought would be most useful to the
17 court to tap into that knowledge. And I did my best in my
18 testimony to provide the court with the guidance that I felt
19 comfortable providing. And I certainly defer to the court to
20 decide what additional pieces of expertise would be useful to
21 her at the end of the case.

22 Q. But then the judgment you reached that this court did not
23 have before it testimony from consulting firms, independent
24 lawyers, and business school professor, how did you reach that
25 determination?

1 MR. WISE: Your Honor, I object. I think we are
2 consistently misrepresenting -- or Mr. Webb is consistently
3 misrepresenting the testimony in this case.

4 Dr. Bazerman is talking about information that would be
5 used to make decisions about changing these organizations that
6 go to his remedies, things like changing how they pay people
7 and --

8 MR. WEBB: Counsel is making an argument. I object to
9 arguing in front of this witness.

10 MR. WISE: Mr. Webb keeps --

11 MR. WEBB: What's the objection?

12 MR. WISE: -- Dr. Bazerman is arguing --

13 THE COURT: Counsel, the objection is overruled. There
14 has not been a misstatement of what the testimony is and
15 Mr. Webb is trying to explore the basis on which this witness
16 made certain recommendations.

17 Go ahead, Mr. Webb.

18 BY MR. WEBB:

19 Q. Do you recall my question?

20 A. I do not.

21 Q. I'm going to read it back to you if I can get to a screen
22 here. I can do without.

23 The pieces that are missing as far as this court not
24 having testimony from consulting firms, independent lawyers and
25 business school professors, on what did you base your

1 determination that that information was missing from this trial?

2 A. I believe I've covered it, but I'll do my best.

3 Again, I'm not arguing that those specific experts are
4 missing. I -- my best assessment is that when the case is
5 completed and the court makes a decision on liability, if the
6 defendants are found liable, my -- my assessment is that the
7 court may well want to seek additional information at the
8 court's discretion rather than information that would be
9 provided by the defendants or the plaintiffs in this case.

10 Q. But my question was: The determination you made that
11 there's missing pieces from people like consulting firms,
12 independent lawyers, and business school professors, just so I
13 know and I'll move on, do you have any particular basis in this
14 court record that led you to conclude that such information is
15 missing from the court record at this point?

16 A. I do not know if it's missing or not.

17 Q. Thank you.

18 Now, as far as -- by the way, would you at least
19 concede this? If it turns out that the court determines that
20 the parties -- strike that question.

21 By the way, based on your last answer, are you at least
22 generally aware that you are a witness for the government in
23 what we're calling the remedies phase of this case. Are you at
24 least aware of that generally?

25 A. Yes.

1 Q. So you recognize you are a remedies witness; is that
2 correct?

3 A. I am.

4 Q. I take it, while you're not a lawyer, you generally
5 understand that the way we try cases is that the parties decide
6 what evidence they need to meet their burdens of proof and the
7 evidence they want to present, they make choices, they present
8 that evidence to the court of law, and that evidence gets
9 cross-examined.

10 Are you at least generally aware of that process?

11 A. I accept that representation.

12 Q. And whether that -- is it your view that that process has --
13 at least, based on what you've seen -- in order for you to make
14 this recommendation that you've decided to come up with a
15 different process, is it your view that the process we've been
16 using has somehow broken down during this trial?

17 MR. WISE: I'm going to object, Your Honor. Again, to
18 ask Dr. Bazerman to determine if the process we've used has
19 broken down in this trial I think is misrepresenting his
20 testimony.

21 THE COURT: The objection is overruled.

22 A. I do not have -- I do not claim the expertise to assess
23 whether or not the appropriate processes are in place in this
24 court for the Judge to have the optimal set of information that
25 she would like.

1 I also want to point out, I'm not -- I'm not telling --
2 I'm not recommending to the court how specifically she should
3 implement this process. And if the -- certainly, if the court
4 decides that the court has all the information that it needs and
5 that additional advisers would not be useful to her, I would
6 respect that decision.

7 Q. Actually, that was my next question, so I think I can move
8 on.

9 I take it, using just your common sense and your field
10 of expertise, if it turns out that the court decides that the
11 process that has been followed in this trial has provided the
12 court the best information to come up with the wisest set of
13 remedies, if the court determines that, there would be no need
14 for this monitor remedy that you set forth in your testimony; is
15 that correct?

16 A. If the court believed that no useful information would be
17 obtained through the monitoring the process, I -- it's simply
18 logical that it makes cents for the court not to use such a
19 monitoring process.

20 Q. And if it turned out that the court decided that the rule by
21 which we govern proceedings requires that evidence be admitted,
22 witnesses testify, cross-examination occur, and that monitors
23 are not allowed to go out and just do their own fact finding; if
24 the court should determine that, you would then recognize why,
25 following your process, it would not be appropriate. Is that

1 fair to say?

2 MR. WISE: Your Honor, I'm going to object again. If
3 the court were to determine on legal bases that monitors weren't
4 appropriate, that's where we are going now with these questions?

5 THE COURT: I think you do have to clarify whether that
6 determination is made as a matter of law or as a matter of fact
7 in this case.

8 BY MR. WEBB:

9 Q. If the court -- just bear with me and then I'm going to move
10 away from this.

11 Do you agree with me that this monitoring process that
12 you outline in some detail in your written direct and that you
13 talked about this morning during the course of Mr. Wise's
14 examination, do you agree with me that monitoring process would
15 not be appropriate if the court determines as a matter of law
16 that in order for the parties to be treated fairly under our
17 laws, evidence needs to be presented in a court of law,
18 witnesses have to testify in a court of law, they have to be
19 cross-examined, and that monitors going out and doing their own
20 fact investigations would not be appropriate, then your monitor
21 recommendation would not make any sense, would it?

22 MR. WISE: I'm going to object, Your Honor. Again, the
23 questions assumes the whole answer and then asks the witness to
24 draw a legal conclusion.

25 MR. WEBB: I asked him to assume something, Your Honor.

1 THE COURT: Overruled.

2 A. I'm happy to respond to follow-ups by you, Mr. Webb, or by
3 the Judge.

4 But as I understood your question, you were asking me
5 to conduct a balancing act involving legal issues, so I would
6 defer to the court to answer that question.

7 I don't -- I don't have anything that I believe that
8 would help the court conduct an assessment, given the complexity
9 of the question you asked.

10 Q. You don't believe you can answer my last question?

11 A. I do not believe that I have all the expertise needed to
12 answer your question.

13 Q. I'll move on.

14 Now, as far as this process -- Todd, you can take that
15 down. Thank you.

16 As far as this process that you're recommending in your
17 written direct, as far as the experts that the monitors get to
18 hire, would the monitors -- the way you envision it, would they
19 have the right to consult with those experts they hire and rely
20 upon those experts' opinions and developing the remedies that
21 the monitor would recommend to the court?

22 A. Can I have that question again? I lost track of the people
23 in the question.

24 Q. Let me try to make it simple.

25 You do recall your testimony where you set forth that

1 the monitors should have the right to hire their own experts if
2 they feel it's necessary?

3 A. Under the court's supervision.

4 Q. Okay. When the monitor goes out and hires an expert, does
5 the monitor have a right to consult with that expert that he or
6 she hires and rely upon that expert's opinions in developing the
7 remedies that the monitor will recommend to the court?

8 A. No. It would depend on how the court decided to implement
9 this advice-obtaining procedure. So, I have not specified a
10 detailed process because I didn't believe it was appropriate to
11 at the time I wrote my expert report. So I do not have a
12 specific opinion on the level of detail as to how much authority
13 should be allocated to the monitors that the court might appoint
14 or to the advisers to the monitors. I leave all -- all details
15 to the court.

16 If there's any specific questions that you have related
17 to how different monitoring processes might impact biases or
18 anything else I've testified, I'm happy to answer that.

19 But I, honestly, as I sit here today, have -- do not
20 have strong opinions about the details of authority that should
21 be granted in the monitoring process. And the reason that I
22 don't is that I lack a great deal of legal expertise that I
23 would want to include in thinking through that process might
24 look like.

25 If we were in a very different case, if we were -- if

1 the case had nothing to do with the law and it had nothing to do
2 with misconduct, and an organization wanted to talk to me about
3 questions about how do we change our fundamental business model
4 from one legal business model to another, and I knew much more
5 about those companies than I know about the defendant firms, it
6 would be much more comfortable starting to become more specific
7 about that process, but that's all the information I don't have.

8 Q. No one forced you to come into this court and to make the
9 recommendations you made, did they?

10 A. Well, once again, I think that the recommendations that I've
11 made is that it's my best assessment that the court is likely to
12 be well advised by having access to experts to help think
13 through remedies.

14 Most of the other details that flow, flow out of the
15 nature of the conversation of the question and answers that I've
16 been asked and I've tried to do my best to fill in logical
17 details. But at no point do I believe that I've endorsed a
18 specific process.

19 And when I've talked about specific processes, it was
20 often in response to giving my best honest answer to questions
21 from defendant lawyers about assuming this or assuming that,
22 what would that imply about monitors and I've tried to answer
23 those questions.

24 Q. Because you -- apparently, you did make a choice that you
25 have the expertise to make the recommendations you made; is that

1 fair to say?

2 A. I've made a recommendation that the court is likely to
3 benefit from the use of outside experts.

4 Q. No. My question was, when you made the -- when you gave
5 your expert opinions and made your expert recommendations, did
6 you believe you had the expertise to do that?

7 A. I am comfortable with my expertise to overall the opinions
8 that I've provided the court.

9 Q. So then if we tried to test what you're offering -- for
10 example, you recognize you're an expert witness in this
11 proceeding, do you not?

12 A. I do.

13 Q. And did you file an expert report before you testified so
14 the parties knew what you were going to testify about?

15 A. I did.

16 Q. And just so I know what you envision. As the architect of
17 this recommendation to the court, do you envision that these
18 experts that these monitors go out and retain and rely upon and
19 making recommendations to the court, will those experts also
20 have to complete written reports like you did? You envision
21 that?

22 A. We need to step back.

23 Q. Can you answer my question?

24 A. I cannot, given some assumptions that you've put in the
25 question that I don't even agree with. But I am happy to

1 respond to your question.

2 Q. I'll try to make no assumptions.

3 Do you envision that the experts that the monitors hire
4 will have to file expert opinion reports so that the parties and
5 the court see in writing what the monitor is relying on?

6 A. I have not thought through the details of that process, and
7 I defer to the court, not only because the court is likely to
8 have more information but, in addition, because I would infer
9 from your question that there's a legal component that I
10 wouldn't even claim the expertise to include in identifying the
11 appropriate response to your question.

12 Q. Let me ask you this. Let's go to the end of the game.

13 After these monitors have done all the factual
14 investigations they want to do for as long as they want to do
15 it, after they've done all the analysis that they want to do,
16 after the monitors have consulted with all the experts they want
17 to consult with, after the monitors have developed what they
18 believe is the most appropriate set of recommended remedies to
19 recommend to the court, at the end of that process you expect
20 those monitors to submit remedy recommendations to the court.
21 Is that correct?

22 A. Or to be working with the court in a more interactive way
23 than the details of the process that you just specified. So,
24 this is exactly how we got some of the details on the process,
25 is that I was responding to a variety of assumptions.

1 If you tell me that the court has asked the monitors to
2 come with a very specific set of remedies, then we can go down
3 that path, but I haven't even identified that as the way that
4 the court should implement this monitoring process.

5 That is one viable strategy, is to send the monitors
6 away and bring me back a set of recommendations. But I could
7 imagine far more interactive processes, and I think it will be
8 up to the Judge to identify the right way to detail that process
9 to comply with the law, and certainly she has much more
10 expertise than I will ever have, and she will specify the
11 process if she follows my core recommendation in a way that
12 allows -- that helps her reach the wisest set of remedies
13 possible.

14 Q. Did you state in your written direct, sir, that what you
15 wanted the court to do was you wanted to recommend that the
16 court appoint monitors who then will review all aspects of
17 defendants' businesses and make particularized and specific
18 recommendation for structural changes? Is that what you want?

19 A. Can you direct me to my testimony?

20 Q. Page 2.

21 Todd, can I get page 2 called up from his written
22 direct? I don't know what the tab number is. I can read it.
23 Down at the bottom of the page, line 20 to 23.

24 Your answer to this question was: "Dr. Bazerman, are
25 you recommending specific structural changes to the defendants'

1 businesses?

2 "Answer: No, I recommend that the court appoint
3 monitors who will have the authority, with the utilization of
4 outside experts as needed to review all aspects of defendants'
5 businesses and make" -- Todd, can I go to the next page -- "and
6 make particularized and specific recommendations for structural
7 changes."

8 Do you see that?

9 A. I do.

10 Q. Now, just --

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

12 The very next part of that sentence is, "or with a
13 mandate from the court to implement structural changes." I
14 object to Mr. Webb as misrepresenting the entirety of that
15 answer.

16 BY MR. WEBB:

17 Q. Doctor, can you read your entire answer? Have you read it?

18 A. I have read -- I'll read it again.

19 Q. Read it so you understand it.

20 A. (Pause) I read it.

21 Q. If the court follows your process, appoints monitors, and
22 the monitors then review all aspects of the defendants'
23 businesses and then they make particularized and specific
24 recommendations for structural changes. Do you see that?

25 A. I do.

1 Q. If the monitors do that, do you envision that then this
2 court will hold another remedies trial in order to litigate
3 whether those are the proper remedies?

4 MR. WISE: Your Honor, I'm going to object. Hold
5 another remedies trial to litigate. Again, this calls for a
6 legal conclusion. Dr. Bazerman has made it excruciatingly clear
7 he's not offering legal opinion.

8 THE COURT: It doesn't call for a legal conclusion. It
9 does ask him what he actually envisions as a practical matter in
10 this process that he is recommending. And the objection is
11 overruled.

12 BY MR. WEBB:

13 Q. Can you answer my question?

14 A. So I do not have a specific recommendation about what would
15 happen at that stage. I defer that to the court to identify how
16 this information would be used.

17 Q. Well, let me ask you this based on your common sense, and
18 since you're the architect of this recommendation.

19 If monitors go out and conduct their own factual
20 investigation, do their own analysis, come up with their own
21 balancing test as to the proper set of remedies and then
22 recommend that to the court, would you envision that, for
23 example, the defendants and the companies they -- the defendant
24 companies should have some rights under your process to interact
25 with that evidence and to possibly challenge it in a court of

1 law before the court imposes remedies?

2 A. I -- I perceive that you're asking for a legal conclusion.

3 So I would not advise the court on how to create the legal
4 institutions to protect the defendants' rights. Let me try to
5 be as clear --

6 Q. Doctor, you answered my question. Let me ask this then and
7 I'll move on.

8 If I understand what you're telling the court is that
9 you don't have the legal -- strike that.

10 Your lack of legal knowledge interferes with your
11 expertise in telling us what the ramifications of your
12 recommendation is; is that correct?

13 A. I don't agree with that.

14 Q. Now, by the way, each one -- every single one of your five
15 major structural remedies that you at least recommend the court
16 consider will require its own unique factual investigation by
17 the monitors; is that correct?

18 A. That's -- what you're saying is not obvious to me.

19 Q. Let's look at your remedies. Go to page 2. Tab 100, Todd.
20 Page 2, line 11 to 19, you set forth your five structural
21 remedies. Is that correct?

22 A. Yes, it is.

23 Q. I'll try to get that on the screen for the court. It's tab
24 100.

25 And you set forth your five structural remedies; is

1 that correct?

2 A. It is.

3 Q. If we actually look at those five remedies. In order for
4 the monitor to come back to the court and recommend any one of
5 those five or all five of them, each one of them will require a
6 unique factual investigation by the monitor, will it not?

7 A. Making decisions about what set of remedies wisest for
8 avoiding misconduct in the future requires a combination of
9 facts and expertise about how to use that, those facts.

10 It's my assumption when this trial would end the court
11 would have access to some or all of the facts and some of the
12 expertise that would be needed to make the wisest set of
13 determinations.

14 The whole point of the advisory process that I
15 recommended is to help the court make wise decisions about which
16 set of structural changes makes the most sense to avoid the
17 misconducts that have been alleged to have occurred in the past.

18 Q. I don't think you answered my question. Let's just take --
19 take the remedy, remedy C, called "removing senior management."
20 That's one of the remedies that you at least are recommending
21 that the monitors consider; is that right?

22 A. That I'm recommending the court and the monitors consider,
23 correct.

24 Q. And that the monitors out there doing -- strike that.

25 Based on what you envision as the architect of this

1 plan, would a monitor want to develop a factual basis upon which
2 to make a recommendation to remove senior management before the
3 monitor made the recommendation?

4 A. The monitor, if authorized by the court, would want to
5 understand the appropriate set of facts.

6 I am not offering an opinion on the degree to which
7 those facts will have already been established in this court or
8 whether additional interaction with the firms will be necessary
9 to make the wisest determination of whether senior management
10 removal is part of the wisest set of remedies that the monitors
11 might recommend to the court, assuming the court asks the
12 monitors for those recommendations.

13 Q. Based on that answer, if -- if -- the monitor is only
14 allowed to consider evidence presented during this trial in
15 order to determine if a particular member of senior management
16 of one of the defendants should be removed, or recommended to be
17 removed, we would not need a monitor to do that, would we?
18 What's wrong with the court doing that?

19 A. It may be the case that the court would decide that she
20 would be well served by being assisted by other individuals that
21 provided extra expertise to the court.

22 And I'm very comfortable that the monitoring process is
23 a very simple process; that the court decides to add on to her
24 expertise whatever expertise that she feels is missing to work
25 through the data that's already been presented in this court or

1 that the monitors used, if allowed by law, to obtain additional
2 information that has not been presented in this court.

3 Q. I want to stick with the senior management removal
4 recommendation right now.

5 So, right now, I take it from reading over your written
6 direct, you at least agree that the monitor -- in order to
7 recommend removal to the court of a member of senior management,
8 the monitor would have to determine that that executive
9 personally participated in the fraudulent conduct proven during
10 the trial; is that correct?

11 A. No, that's not correct.

12 Q. Did you say that in your written direct?

13 A. Can I --

14 Q. Let's go to page -- could I have -- I'd like to have -- I
15 don't think I have it tabbed, Todd. Page 57 of his written
16 direct. Go to page 57, sir.

17 A. Thank you.

18 Q. Line 14 to 19 is what I'm going to call up on the screen.

19 The question to you by the government in your written
20 direct, "Under what circumstances do you think it would be
21 advisable to remove senior management?"

22 "I would certainly recommend that removal should be
23 based on whether those individuals were involved in any
24 misconduct in the past having to do with misrepresentation,
25 obfuscation or acting in a way inconsistent with the public

1 commitments and obligations the defendant firms had made."

2 Do you see that?

3 A. I do.

4 Q. And I take it you put that in your testimony because that's
5 what you thought should be the proper standard?

6 A. It is.

7 Q. Okay. And, therefore, my question is, when the monitor has
8 to determine whether or not senior management were involved, for
9 example, in misconduct in the past having to do with any
10 misrepresentation, et cetera, do you envision that that monitor
11 would be limited to only considering evidence that was presented
12 during this trial?

13 A. Again, I would assume -- I would expect that the monitors
14 would consider information that was presented in this trial, and
15 I'm open on whether there's a legal issue associated with
16 whether or not they should obtain additional information.

17 Q. But assuming just for a moment that they -- we just can't
18 let them do that because the evidence would not be properly
19 cross-examined and properly presented in a truth-finding
20 process; if that's the case, there would be no reason for a
21 monitor because Judge Kessler could look at the evidence and
22 make a judgment as to whether a senior executive was connected
23 to misconduct. Is that correct?

24 A. The Judge could make that assessment. It may also be the
25 Judge's decision that she would be -- that her ability to make

1 the wisest set of decisions would be improved by talking to
2 experts on the topic of leadership in corporate governance, and
3 my suggestion for the use of monitors allows for that
4 possibility.

5 Q. Okay. So, at least you envision, what your vision is that
6 the only reason -- strike that.

7 Is it your vision is that these monitors would be given
8 the ability to do a fact finding mission as to whether the
9 officers or executives were connected to wrongdoing that goes
10 beyond the evidence presented in this case?

11 A. I'm open on this question, and I'm deferring to the court
12 because I infer from many of your questions that there is a
13 legal issue associated with whether or not additional
14 information is allowed to be obtained.

15 If you want me to assume one set of legal
16 understandings or another, I will work from that, but I'm
17 uncomfortable reaching conclusions with uncertainty on the legal
18 question that I have never claimed expertise on.

19 Q. Let's move on, then.

20 Could I go back to page 2, Todd, of his written direct?

21 One of the other structural remedies that you
22 recommend -- actually, Todd, go to -- I'm sorry, tab 107. Go to
23 tab 107.

24 This, Doctor, is page 58, line 17 of your written
25 direct, and I've got it on the screen if you want to look at the

1 screen. But go to page 58, do you see this structural remedy
2 that you're recommending?

3 A. I do.

4 Q. This is the structural remedy you called divestiture of less
5 hazardous cigarette operations.

6 A. Correct.

7 Q. Now, what you say here is that:

8 "Question: The next structural change is requiring
9 defendants to sell intact their research and development,
10 current product development activities, and all other relevant
11 material regarding safer cigarettes so that safer cigarettes can
12 be brought to the marketplace. Please explain why this
13 structural remedy may be necessary to prevent defendants'
14 misconduct from continuing.

15 "Answer: I have assumed the defendants have the
16 technical knowledge and know how to make safer cigarettes, and
17 have delayed bringing them to market. Thus, the safer cigarette
18 research and development should be sold to companies outside of
19 defendants' core business. That way, if it is handled by
20 companies that have no interest in defendants' core business,
21 the misconduct related to this structural remedy will not occur.

22 "Question: How would this remedy be implemented?

23 "In this process, the court-appointed monitors would
24 determine what company assets relate to defendants' activities
25 concerning less hazardous cigarette products. The monitors

1 would then arrange for the sale of those assets to companies
2 outside of defendants' core business."

3 Do you see that?

4 A. I do.

5 Q. So under your monitoring recommendation to the court, these
6 court-appointed monitors would, first of all, determine what
7 company assets relate to the defendants' activities concerning
8 less hazardous cigarette products. That would be step 1
9 according to what you say here.

10 A. There may be other steps that get us to there, but that
11 would be a step.

12 Q. It's the only step you put forth in your written direct?

13 A. Again I think there are many steps starting on page 2 that I
14 would call steps that get us there.

15 Q. Well, in any event, at some point the court-appointed
16 monitors are supposed to make some factual determination as to
17 what company assets are related to the defendants' activities
18 concerning less hazardous cigarette products; is that correct?

19 A. Yes, but again, this is assuming that we're already multiple
20 steps into the process, that the court decides to use monitors,
21 the court decides to send monitors off with a fairly independent
22 task; that the monitors have come back with their recommendation
23 that their remedies should include divestiture of less hazardous
24 cigarette operations.

25 The court has -- the court has then asked the monitors

1 to help in the process of this divestiture process. There are
2 many steps that would have to have occurred for us to get to
3 this step in the process.

4 Q. But would those steps take somewhere between two and
5 five years to occur, roughly, under your envisionment of this
6 process?

7 A. I have never been involved in divesting a company. I have
8 advised companies on the negotiations involving divestiture, but
9 I have never been intimately involved with the details of the
10 process. So, I would hope it would be a more efficient process,
11 but I do not know that.

12 Q. Well, forget -- let's forget what it takes to actually sell
13 the company -- or sell the assets. All the steps that you just
14 enumerated that have to be gone through before we even get to
15 this step here where the monitors then arrange the sale of the
16 assets; all the steps up to that, how long are those going to
17 take under your process?

18 A. I do not know the answer. I would be optimistic that it
19 would be shorter than the time span that you provided. But I
20 cannot sit here telling you that I know how long that process
21 will take. I do not know enough about how the court would
22 interact with that process.

23 Q. I want to make sure we know what your vision is, though,
24 because under your vision as you walk through all of those steps
25 that you say have to occur, I take it during that process -- are

1 you assuming -- well, let me ask you this.

2 Let's just take the process where the monitor is doing
3 his or her factual investigation to determine if they want to
4 recommend to the court the divestiture of a less hazardous
5 cigarette product, or project. Are you with me?

6 A. I am.

7 Q. During that fact investigation by the monitor, the monitor
8 is going to have to determine whether or not each individual
9 less hazardous cigarette project had been fraudulently delayed;
10 is that correct?

11 A. Not necessarily. If I can go back --

12 Q. No. I want to stick with this.

13 A. Not necessarily.

14 Q. All right. If we're going to determine -- somebody is going
15 to have to determine -- strike the question.

16 Let's just take R.J. Reynolds. If R.J. Reynolds has
17 four less hazardous cigarette projects ongoing when the monitor
18 starts looking at it, the monitor is going to have to look at
19 each one of them individually to determine factually whether any
20 one of them is being fraudulently delayed; is that correct?

21 A. I hear that as your assertion, not my testimony.

22 Q. I asked you. You don't envision that fact finding process
23 taking place?

24 A. I envision that that's one possibility. I can give you
25 other possibilities.

1 Q. Well, with that possibility, when the fact finder evaluates
2 each of Reynolds four ongoing less hazardous cigarette projects
3 today, when the fact finder is trying to determine if one or all
4 of them are being fraudulently delayed, will the fact finder be
5 limited to testimony that's been presented in this trial?

6 A. Mr. Webb, I need to go back and clarify my vision.

7 Q. Can you answer my question?

8 A. I cannot --

9 Q. If you can't answer my question --

10 A. -- given the many parts that you've added as assertions
11 about what my testimony is, which I don't agree with.

12 Q. Fine. Just tell me you can't answer my question and I'll
13 move on.

14 A. Well, I want to be clear about the reason why I can't answer
15 that.

16 Q. I didn't ask you the reason. Can you answer my question?

17 A. You would have to ask it again.

18 Q. Doctor, if Reynolds has these four less hazardous cigarette
19 projects going on --

20 A. Uh-huh.

21 Q. -- and the monitor has to determine factually whether any
22 one of them is being fraudulently delayed, will the monitor, in
23 making that fact determination the way you envision it, be
24 limited to the evidence that's been presented during this trial?

25 MR. WISE: I'm going to object, Your Honor. That's the

1 problem. It's that the way you envision it.

2 Mr. Webb is representing one scenario that Dr. Bazerman
3 has very clearly said is one scenario that he has not endorsed,
4 that is not part of his vision, as Mr. Webb keeps saying, and
5 then Mr. Webb says, "As you envision it based on everything I've
6 just represented what's the answer?"

7 THE COURT: That's incorrect. The witness has
8 testified that, while this is not the only thing he envisions,
9 this is one possibility, given the process he has outlined in
10 his testimony. And, therefore, he can be questioned about one
11 of the options that he sees as a real possibility under the
12 process that he is recommending to the court in his testimony.

13 Go ahead, please.

14 BY MR. WEBB:

15 Q. Can you answer my question this time?

16 A. Can you repeat it?

17 Q. Yes. In this hypothetical I've given you where R.J.
18 Reynolds currently has four ongoing less hazardous cigarette
19 projects and the monitor is doing a factual investigation to
20 determine whether one or all of those projects are being
21 fraudulently delayed; in doing that fact finding determination,
22 do you envision that the monitor would be limited to the
23 evidence that's been presented during this trial?

24 A. One -- the court would have had to make about a half a dozen
25 decisions to get us to the point where we are working on your

1 question. And once we get there, I am not offering a legal
2 opinion on whether the monitors should be limited to the
3 evidence presented in this case or not.

4 Q. So what you envision is the possibility that the monitor
5 would be able to go out and consider additional evidence that
6 was not presented during the trial and making that factual
7 determination; is that correct?

8 A. I'm deferring to the court to decide whether or not the
9 monitors have access to additional information.

10 Q. By the way, in your review of this record that you've
11 reviewed, whatever you've reviewed, did you at least see any
12 evidence that the government has offered as of today as to
13 whether Reynolds is delaying any of its ongoing safer cigarette
14 projects as of now? Did you see such evidence?

15 MR. WISE: Your Honor, I'm going to object just to the
16 extent that we make it clear that Dr. Bazerman has relied on a
17 series of assumptions about liability. And if these are
18 questions about the remedy, I think that's one thing, but to the
19 extent that this asks for Dr. Bazerman to reach a decision about
20 whether Reynolds has, in fact, delayed introduction of these
21 products, I think that goes to liability. We've asked
22 Dr. Bazerman to assume that, given the fact that our case is
23 closed on liability.

24 MR. WEBB: I didn't ask him that. I asked him whether
25 he's seen the evidence. I'm not asking to make a judgment about

1 it.

2 THE COURT: That's correct. That was the question.

3 The objection is overruled.

4 A. I read a great deal of information that's part of the
5 record. I've been asked to assume that misconduct on that issue
6 has been -- has been found to take place. I've also not been
7 asked to disaggregate information on a company-by-company basis.

8 Q. My question is very simple. If we're going to deal with
9 Reynolds' current -- strike the question.

10 All the evidence you've seen, which I know is not
11 everything you told us; is that correct?

12 A. I'm sure that that's correct.

13 Q. You told us earlier that you believe there's a vast amount
14 you've not seen; is that correct?

15 A. I accept that.

16 Q. But based on what you have seen, have you seen any evidence,
17 just can you pinpoint any witness's testimony that the
18 government asked you to read or look at that shows that there's
19 even any evidence before the court as to whether any of
20 Reynolds' ongoing less hazardous cigarette projects are being
21 fraudulently delayed as of now?

22 A. Once again, I've been asked to make an assumption, and
23 within that assumption I've done a variety of background
24 reading.

25 I do recall reading evidence associated with the

1 argument that the defendants have taken strong steps to keep
2 safer products from coming to market.

3 As I sit here today, I do not have a clear memory of
4 either that information or whether that information was
5 associated with Reynolds specifically.

6 Q. Okay. So I'll move on.

7 Based on what you've -- at least based on what you
8 personally can remember, you can't pinpoint for the court any
9 witness whose testimony you've read that offered any testimony
10 on that issue as far as whether any of Reynolds' ongoing safer
11 cigarette projects are being fraudulently delayed as of now?

12 A. I have a -- I have -- I can recall reading information on
13 that topic. I cannot pinpoint the evidence that I'm thinking of
14 that led to my recollection.

15 Q. Actually, but just to identify for me one ongoing R.J.
16 Reynolds' safer cigarette projects that you saw some testimony
17 about that the government has offered regarding that project
18 being fraudulently delayed as of now.

19 A. Again, I've assumed that. I've read about such products in
20 the aggregate, and I do not remember the specific evidence.

21 Q. How about Philip Morris? I saw in some testimony -- you
22 remember evidence about the Accord project, the electrical-
23 heated cigarette; is that correct?

24 A. Again, I have some recollection of that. And I'm also
25 thinking Score as another product. But again, I'm not confident

1 in my memory of aligning products to firms.

2 Q. So I'm going to take -- you do recall the Accord project as
3 being an electrical-heated cigarette project; is that correct?

4 A. I do.

5 Q. And as far as -- do you generally recall that that is a
6 safer cigarette project that's been carried out by Philip
7 Morris? If you remember.

8 A. I'm pretty confident that that's accurate.

9 Q. Okay. Now, do you envision that this monitor -- if the
10 monitor is going to recommend to the court that the entire
11 Accord project be sold to a third party, do you envision that
12 the monitor in making that determination will consider evidence
13 that has been presented during the trial as to whether that
14 product has been fraudulently delayed?

15 MR. WISE: Your Honor, I'm going to object. This whole
16 line was asked and answered with Reynolds --

17 THE COURT: Sustained.

18 MR. WEBB: I'll move on.

19 BY MR. WEBB:

20 Q. Let me ask you this, Doctor. As far as -- in the work that
21 you did -- strike the question.

22 I take it before you recommended these remedies to the
23 court you gave some consideration to the practical aspect of
24 whether these remedies are doable?

25 A. On the front part of your question, I recommended these

1 remedies as consideration for the court-appointed monitors.

2 I've recommended a process rather than recommending a set of
3 remedies.

4 Q. Did you do any research on whether or not you could identify
5 any independent research entity in the world that does cigarette
6 product development work that would be interested in buying
7 safer cigarette products from the tobacco companies?

8 A. I did not.

9 And, more broadly, what I would say is that my -- the
10 job that -- the task that I attempted to provide information on
11 is to identify the remedies of logically --

12 Q. I think your mike just went out or something. Did you hit a
13 button, Doctor?

14 A. Yeah, I think I did. Thank you very much.

15 My attempt was to provide a set of remedies that
16 logically would reduce misconduct, given the assumptions that I
17 was making. And part of the reason that I recommended a
18 process, in addition to my lack of knowledge on many issues that
19 we've already covered, is that I would hope that the court, with
20 the assistance of monitors, to do a better job of taking into
21 consideration the costs and benefits of these different remedies
22 because my goal -- as I thought about it and trying to respond
23 to your question -- was to stop misconduct in the future with
24 the minimal affect possible on employees and other stakeholders.

25 Q. I think -- I want to make sure I got an answer to my

1 question and then I'm going to move on.

2 Before you made this recommendation to the court, did
3 you do any research to try and identify whether there's any
4 independent company in the world that is engaged in the business
5 of developing cigarette products outside of the tobacco
6 industry?

7 A. I think I meant to answer you by saying no, I did not do
8 that.

9 Q. That's all I need.

10 Now, Doctor, let me go to another -- I noticed that
11 even beyond these five structural remedies, you also recommend
12 some other structural changes that you call interventions; is
13 that correct.

14 A. Correct.

15 Q. Could I have tab 113, which is page 3, line 4 to 15, Doctor,
16 of your direct examination. I called it out on the screen.

17 But you list here, I guess several, what you call
18 interventions that you believe would affect the incentives and
19 biases that the defendants' managers experienced. Do you see
20 that?

21 A. Yes. If I could go back and make a minor correction.

22 I think in your prior comment or question you used the
23 word "structure" to refer to these. Most of these I do not view
24 as structures. These are other court interventions that I
25 recommend for consideration.

1 Q. I'll call them "interventions." Is that fair?

2 A. Sure.

3 Q. As far as those intervention remedies -- let me just ask you
4 about a couple of them.

5 The intervention you reference that you state would
6 require -- require the discontinuance of or change to
7 advertising and promotional campaigns or practices. Do you see
8 that?

9 A. I do.

10 Q. That's E. Is that E?

11 A. I see it as E.

12 Q. Requiring the discontinuance of or change to advertising and
13 promotional campaigns or practices.

14 Now, let's take Lorillard as an example. Do you
15 envision that the monitor would have the power to conduct a
16 factual investigation of Lorillard's current advertising
17 practices and make a factual determination as to whether any of
18 Lorillard's current practices are fraudulent?

19 A. Once again -- and it's going to -- my answers are going to
20 sound similar, as I provided before. But I'm not even assuming
21 that the monitors would be charged with the task.

22 I could easily imagine that the Judge makes a variety
23 of determinations and the monitors help with the implementation
24 of the determination that the court decides.

25 So you're identifying one possible process, and if they

1 did that -- and if the monitors were working on helping with the
2 discontinuance of or change to advertising and promotional
3 campaigns, I could easily imagine that they could work with the
4 information that's been presented in the court, or if it's legal
5 and so charged by the court, they would seek other additional
6 information as well.

7 Q. For example, the way I read this, and E, you would actually
8 envision that the monitors would actually have the judicial
9 power to discontinue one of Lorillard's advertising campaigns?

10 MR. WISE: I'm going to object, under the judicial
11 power to discontinued Lorillard's.

12 Again, I just think over and over again we're asking
13 Dr. Bazerman for legal conclusions and he's been very clear
14 about this.

15 MR. WEBB: Your Honor, I'm looking at what's on the
16 screen. I'm asking what's on the screen.

17 MR. WISE: You used the word "judicial." You said
18 "judicial conclusions."

19 MR. WEBB: I'm asking him whether or not he views this
20 as a delegation of judicial power to monitors.

21 MR. WISE: How on earth, after the witness has said
22 he's not making legal conclusion, how can --

23 THE COURT: Let me sustain that objection. I think you
24 can get at what you want with a different type of question.

25 BY MR. WEBB:

1 Q. Well, do you envision the monitors actually having the power
2 to make the final decision that Lorillard has to discontinue one
3 of their current advertising campaigns because its fraudulent?

4 A. Only if the Judge provided that mandate to the monitors.
5 And that's one possible process that I'm sure that the court
6 would only decide on with a variety of other information that I
7 do not have access to, including her substantial legal
8 expertise.

9 Q. Let me direct your attention. One of the other
10 interventions that you talk about there is the intervention of
11 changing oversight and reporting arrangements. Do you see that?

12 A. I do.

13 Q. That's C. Intervention C on that page.

14 A. I see it as such.

15 Q. Let -- could I have tab 113B, which is page 61, Doctor, of
16 your written direct examination?

17 What you set forth here is that changing oversight and
18 reporting arrangements.

19 "Question: Please explain how changing oversight and
20 reporting arrangements would support the structural changes you
21 recommend the court consider?"

22 And you say: "Currently, the companies are overseen by
23 compliance boards that have operated in the same incentive-based
24 environment where misconduct occurred. Through the process
25 established by the court, monitors would investigate each

1 defendant's present day corporate policies and practices and set
2 up the appropriate oversight and reporting arrangements so that
3 the biased environment that led to the misconduct can be
4 eliminated."

5 That's your testimony; is that correct?

6 A. It is my testimony.

7 Q. So what you envision, according to this right here in your
8 written direct, is that the monitors will conduct a factual
9 investigation of each of the defendant's present day corporate
10 policies and practices and then the monitors will set up the
11 appropriate oversight and reporting arrangement. Is that
12 correct?

13 A. No.

14 Q. Is that what it says?

15 A. No.

16 Q. Did I read that incorrectly?

17 A. You did.

18 Q. Now, during the fact finding process where the monitors
19 would investigate each the defendant's present day corporate
20 policies and practices, now would you envision that process
21 where the monitor would be limited to the evidence that's been
22 presented during this trial?

23 A. Once again, you've specified a process that I do not see in
24 my writing.

25 Q. You don't envision -- this statement here says, "through the

1 process established by the court, monitors would investigate
2 each defendant's present day corporate policies and practices."

3 Do you see that?

4 A. I do.

5 Q. When the monitors conduct their investigation that you have
6 set forth there, would the monitors be limited to reviewing
7 evidence that's been presented during this trial?

8 A. Like I said on so many other of the remedies that I've
9 advised the court and court appointed monitors to consider, I
10 defer to the Judge on the appropriateness of considering
11 information just that's been presented to the court or also
12 using information that would be conducted as you call it in a
13 fact finding investigation into the policies moving forward.

14 Q. Let me go to a different topic.

15 This whole process called this monitor process that you
16 recommend in your report, during your career can you identify
17 for the court any other proceeding in which you have presented
18 testimony to a court in which you have recommended monitors be
19 appointed to carry out the type of activities that you set forth
20 in your written direct?

21 A. No. As my testimony provides, I've been an expert in
22 two cases prior and they wouldn't remotely fit this kind of
23 domain.

24 Q. Based on your expertise in the field that you're an expert
25 in, the behavioral decision research regarding what?

1 Organizations?

2 A. I accept that.

3 Q. Are you aware of anyone else in your field ever going before
4 a court and identifying for a court a monitor remedy where the
5 monitors would have the type -- engage in the type of activities
6 that you have recommended in your written direct?

7 A. I am aware of the Tyco -- the Tyco story where monitors were
8 appointed by the board of directors under threat of legal action
9 but not that had been appointed by the court specifically.

10 But there are many, many cases in which the individuals
11 who are most interested in helping organizations move from one
12 business model to another business model, use outside experts or
13 monitors to help them with that process.

14 Q. I need to get an answer to my question, so I'll have to go
15 back and ask it and again and I'll move on.

16 A. I'll do my best answer.

17 Q. Based on your expertise in this field called behavioral
18 decision research in the area of organizations, can you identify
19 for the court any other expert in that field who's ever
20 testified in a court of law and recommended the type of monitor
21 remedy that you set forth in your testimony?

22 A. No.

23 Q. Thank you.

24 Now, based on your field of expertise in behavioral
25 decision research, would you please identify for the court any

1 scientific study that has been done in your field of research
2 regarding the efficacy of monitors in developing remedies for
3 courts?

4 A. Behavioral decision research in the law is not my expertise,
5 so I have not been in this situation before. And there may be
6 literature on that topic, but I do not know it.

7 Q. Okay. I think I got an answer.

8 But this field that you've identified yourself as an
9 expert in, I take it you're familiar with the literature in the
10 field that you're an expert in; is that correct?

11 A. I think I'm very familiar with the literature on behavioral
12 decision research and even more familiar with behavioral
13 decision research relevant to management decision making.

14 I know the detailed literature on behavioral decision
15 research in the law as practiced by professors, such as
16 Sonnenstein and Joels, far less well than I know information
17 about behavioral decision research in business context.

18 Q. In the areas that you consider yourself to be an expert and
19 where you're familiar with the literature, can you identify for
20 the court any behavioral decision research involving a
21 scientific study that's been done regarding the efficacy of
22 monitors in developing remedies for courts?

23 A. Again, because of the "for courts," the answer is no.

24 Q. You actually do make reference, as you just pointed out to
25 the court, you make some references throughout your written

1 direct to examples of people who have come into existing
2 organization and made organizational changes; is that correct?

3 A. I believe I did.

4 Q. And if we can go through each one of them. Not one of the
5 examples you cite in your written direct involved a court
6 appointing a monitor to carry out the type of activities that
7 you have set forth in your written direct. Is that correct?

8 A. I accept that.

9 Q. And just so it's clear -- no, I don't have to. I accept.
10 I'll move on. Now, let me go to another topic.

11 Dr. Bazerman, I want to ask you some questions about
12 certain portions of your testimony that are directed at the
13 issue of whether your suggested structural remedies and
14 interventions are designed to remedy intentional or
15 unintentional conduct.

16 Do you recall that testimony?

17 A. I do.

18 Q. Let me show you -- could I have tab 43, Todd? Which will be
19 page 24, Doctor, of your written direct examination, line 18 to
20 23, where you state here:

21 "Question: If partisan preference is unintentional,
22 how can it be remedied?

23 "Answer: All of the interventions that I recommend the
24 court consider address incentives and the intentional conduct
25 produced by incentives, as well as the unintentional conduct

1 caused by systematic bias." Do you see that?

2 A. I do.

3 Q. Just so it's clear. Does that mean that all of the
4 interventions and all of the structural remedies that you
5 recommend to the court are designed to remedy both intentional
6 and unintentional conduct?

7 A. Yes.

8 Q. Now, you go on to state.

9 Todd, can I call up the next, it's line 22. You may
10 have to just go -- thanks. And then the rest of the answer is
11 on the next page.

12 A. Uh-huh.

13 Q. "Question: Why is it important to consider unintentional
14 conduct in fashioning a remedy?"

15 Your answer: "My conclusion is that, in order to be
16 effective, any remedy has to take into account both incentives
17 that produce intentional conduct and systematic biases that
18 produce unintentional errors in decision making."

19 Do you see that?

20 A. I do.

21 Q. Now, the reason you said that is because in the area that
22 you are an expert in, in this area of behavioral decision
23 research, your research shows you that the vast majority of
24 conduct you're concerned about is unintentional.

25 Is that what you've written?

1 A. I believe I've written that there is far more unintentional,
2 unethical behavior than there is intentional, unethical behavior
3 in corporations broadly defined.

4 Q. Fair enough. I accept that.

5 Can I have tab 43A, Todd, which is page 2, again,
6 Doctor, line 11 to 19 where you set forth your five structural
7 remedies.

8 Those five structural remedies, which I have on the
9 screen now, is there any of those remedies listed that is
10 designed to only remedy intentional misconduct?

11 A. I see -- I see intentional and unintentional implications of
12 all five of these structures.

13 Q. Thank you.

14 Now, in fact, if I understand your testimony, were you
15 instructed by the Department of Justice to assume that the
16 United States has been basing its fraud case on both intentional
17 and unintentional misconduct?

18 A. No.

19 Q. Well, could I have -- could I have tab 45, Todd? This is
20 your deposition. If you want to go to your DOJ deposition on
21 page 161. I'm sorry, your deposition. Do you have that there?

22 A. I do.

23 Q. And Todd, this is tab 45, page 161. Could you cull both
24 those out? Thanks. I can see that, Todd. I'm on line 18.

25 Doctor, do you see where I am? It's on the screen but

1 just so you can follow me.

2 "Question: Have you in any way tried to analyze what
3 proportion of the conduct involved in the sale of cigarettes to
4 young people is intentional versus unintentional by the
5 defendants?

6 "I have not.

7 "And with respect to B, changing the compensation and
8 promotion policies for managers and executives to produce
9 outcomes inconsistent with misconduct, have you attempted to
10 analyze to what extent the conduct of these managers and
11 executives was intentional versus unintentional?"

12 Your answer: "So let me go back -- I'm sorry, let me
13 go back and let me respond to A and B collectively. So if
14 you're asking for a segmentation between the two categories, I
15 have not done that and I don't think I have the information to
16 do a precise job of doing that. Assuming that the United States
17 has succeeded in proving liability and that this misconduct
18 continues to this day, I would have the clear opinion that both
19 intentional and unintentional processes both played key poles in
20 both A and B."

21 Do you see that?

22 A. I do.

23 Q. What I was reading is that what you were saying is that
24 you're assuming that issues such as, for example, the youth
25 smoking -- the youth smoking issue involves intentional and

1 unintentional conduct on behalf of the tobacco companies. Is
2 that correct?

3 A. That is correct.

4 Q. And at any time did the Department of Justice lawyers ever
5 tell you that the only thing that you should recommend a remedy
6 for is intentional, fraudulent misconduct?

7 A. They did not.

8 Q. And because they didn't tell you that, you followed your
9 instincts from your profession and came up with remedies that
10 remedied both; is that correct?

11 A. I understood my task to be that liability had been proven,
12 and I certainly assumed that if the liability to be proven, that
13 would imply that intentional misconduct occurred in the past.

14 As I thought to the future in identifying remedies for
15 consideration by the court in court-appointed monitors, I was
16 certainly trying to address -- to identify remedies that
17 logically would prevent misconduct that would occur for
18 unintentional and for intentional reasons.

19 Q. And did the government at any time tell you that
20 constructing remedies that would affect future conduct, that you
21 should narrowly construct your remedies only to address
22 intentional fraudulent conduct?

23 A. No. I think that -- I was under the assumption that I was
24 asked to assume that past misconduct occurred based on
25 intentionality. But in terms of the future they certainly did

1 not ask me to limit my testimony in the way that you're
2 describing.

3 Q. Doctor, based on your field of research in an area that you
4 said you're an expert in, if you had been instructed by the
5 government to design remedies that for the future only remedied
6 intentional fraudulent misconduct, could you have structured
7 such remedies?

8 A. Yes.

9 Q. And they would be different than the remedies that are in
10 your testimony; is that correct?

11 A. I think that they would overlap with the remedies in my
12 testimony to a very significant extent.

13 If I spent the additional 50 hours to rethink the
14 process that I used to get to this point in my testimony, is it
15 possible that there would have been -- there would be a slight
16 change in the remedies listed or on the emphasis listed? That
17 is possible.

18 Q. You haven't done that work?

19 A. I have not done that work.

20 Q. Thank you. Let me go to a different topic.

21 As far as the expertise that you bring to this
22 courtroom -- could I have, Todd, tab 30? I want to direct your
23 attention to page 4 of your written direct.

24 And the question was asked: "Within the broader field,
25 what is your particular area of expertise?"

1 Do you see that question?

2 A. I do.

3 Q. And you told the court, "My specific expertise is in the
4 area of behavioral decision research in
5 managerial/organizational contexts. Specifically, I extensively
6 study misconduct and unethical behavior in
7 managerial/organizational contexts."

8 Now that's your specific area of expertise?

9 A. Correct.

10 Q. Strike the question. Does that accurately set forth your
11 specific area of expertise?

12 A. It does.

13 Q. Now, tell the court when did you first become an expert in
14 that specific area of expertise?

15 A. There's two parts that I see there. Can I break it into
16 those two parts.

17 Q. Absolutely.

18 A. So the first part says my specific expertise is in the area
19 of behavioral decision research and managerial/organizational
20 contexts.

21 In 1986, I published a first edition of Judgment in
22 Managerial Decisionmaking, which I probably wrote between 1982
23 to 1985, and that book has become the leading text specifically
24 on behavioral decision research in a managerial/organizational
25 context.

1 So, I've been writing about the topic for quite a
2 while. I've been teaching executives on that topic for quite a
3 while.

4 It would be in the last -- it would be since 1996 that
5 my research has focused more extensively on studying misconduct
6 and unethical behavior and managerial/organizational contexts,
7 and that would date back to a very well-cited paper that I wrote
8 with David Messick in 1996 and it would also connect to my
9 extensive writing on the auditor independence issue which we've
10 alluded to earlier day.

11 Q. The reason I ask this question, when you told the court here
12 that this is your specific expertise is in that area, when you
13 had been hired in other cases and had to testify under oath,
14 have you identified a different area of specific expertise
15 different than the one that's on the screen?

16 A. Yes.

17 Q. And so, for example, have you testified under oath that your
18 specific area of expertise is in the area of negotiations?

19 A. That sounds familiar. I'm thinking of the FTC case.

20 Q. The pharmaceutical case; is that correct?

21 A. Correct.

22 Q. And so you had a different area, in that case you told the
23 court -- strike that.

24 In that case you told the FTC that you had a different
25 area of expertise, specific area of expertise; is that correct?

1 A. I wouldn't calling it different. So one of the -- sort of
2 the managerial/organizational contexts where I have most
3 commonly conducted my empirical work on behavioral decision
4 research is the organizational context of negotiations. And in
5 that case I was hired as an opposite to my excellent colleague,
6 Professor Robert Mnookin, who had testified on the topic of
7 negotiation dispute resolution.

8 Q. Let me ask you this. As far as this expertise on the
9 screen, in the area of behavioral decision research and
10 organizational context, am I correct, other than one summer job
11 that you held between your freshman and sophomore year of
12 college, you have never held a full-time business position with
13 any organization. Is that correct?

14 A. I believe that that's the case. As you will see, I've
15 consulted to many of the finest organizations in the world, but
16 I've done so from the position of being a Professor and serving
17 as a consultant.

18 Q. But as far as real world experience with a real
19 organization, you've never held a full-time position with any
20 real organization like business, government; is that correct?

21 MR. WISE: Your Honor, I object. This is
22 argumentative. Real world experience.

23 MR. WEBB: I'll strike the question. Fair enough.

24 Fair objection. I just want --

25 BY MR. WEBB:

1 Q. As far as your expertise in organizational contexts --

2 A. Yes, sir.

3 Q. -- you have never held a full-time business position with
4 any company, corporation, or organization of any kind other than
5 one summer job between your freshman and sophomore year; is that
6 correct?

7 A. I'm not trying to split hairs on words, but universities are
8 organizations and I've held many jobs in full-time positions in
9 universities.

10 Q. Fair enough. Set aside universities, what's the answer to
11 my question?

12 A. Then I have not held any other full-time positions in
13 organizations since that summer job that you alluded to a long
14 time ago.

15 Q. Thank you.

16 Now, as far as your remedy opinions. Todd, can I have
17 tab 46. This will be page 3 of your direct examination.

18 And I've culled out lines 16 to 22 where the question
19 was: "On what do you base your opinions?"

20 "Answer: I base my opinions on the assumption that the
21 United States has proven liability in this case and that
22 misconduct continues to this day, and on the application of
23 theory from behavioral decision research."

24 Is that correct?

25 A. That's what I wrote.

1 Q. Okay. Now, I want to talk about the theory of behavioral
2 decision research that you're basing your entire testimony on in
3 this case.

4 If I understand what I've learned in preparing to talk
5 to you here today, this whole field of behavioral decision
6 research has resulted from certain tightly-controlled laboratory
7 experiments; is that correct?

8 A. Not exclusively, but I would describe experiments as a core
9 methodology.

10 Q. And you describe it actually in your written direct as the
11 core methodology -- strike that.

12 Can I have tab 47A? Go to page 5 of your written
13 direct. It's tab 47A.

14 "Question: What is the primary research method used by
15 behavioral decision researchers?

16 "Answer: The core, but not only, method of behavioral
17 decision research has been the use of tightly-controlled,
18 laboratory experiments."

19 And then, "Question: When you say laboratory
20 experiments, what do you mean?"

21 And then you go on to describe the laboratory
22 experiments; is that correct?

23 A. Yes, it is.

24 Q. And if I understand it, if we go to page -- could I also go
25 to page 7? Go to page 7 of your written direct. It's tab 47B,

1 Todd. Where you emphasize how important these laboratory
2 experiments are to the theory that underlies this area.

3 "Question: How has the use of laboratory experiments
4 affected behavioral decision researchers' ability to reach
5 scientific conclusions?

6 "Answer: This methodology has dominated the field both
7 to identify how certain variables affect decision making and to
8 allow irrefutable causal inferences."

9 Is that correct?

10 A. Yes.

11 Q. So because those tightly-controlled laboratory experiments
12 seem to be so important and at the core of what you call
13 behavioral decision research, do you agree that it's important
14 for the court to examine those laboratory experiments because
15 you're trying to extrapolate from those experiments to the real
16 business world with these tobacco companies? Is that correct?

17 A. Yes, and I would say that that's largely what I do for a
18 living.

19 I both conduct these basic laboratory experiments and
20 I'm the person who has spent the most amount of time doing
21 exactly that, extrapolating from laboratory contexts to
22 important real world circumstances like the auditor example.

23 Q. And I want to talk about that for just a little bit.

24 A. Sure.

25 Q. This is your field now, Doctor. This is your arena and you

1 know more than I about it, and I really only have one issue I
2 want to talk about, which is the use of students in research.
3 Do you understand that issue?

4 A. I do.

5 Q. And let's go -- can I have tab 47C?

6 Doctor, this would be page 6 of your written direct,
7 tab 47C, where you are asked by the government to give the court
8 an example of one such line of experimentation relevant to this
9 lawsuit. Do you see that?

10 A. I do.

11 Q. Okay. Todd, can I cull up the answer then or the first part
12 of the answer?

13 I'm not going to read this whole answer. The court has
14 it before the court. But you made a choice -- when you were
15 asked to cite an example, you cited this example from Doctors
16 Babcock and Loewenstein's research. Is that correct?

17 A. That is correct.

18 Q. And they are leading researchers in this field. Is that
19 fair to say?

20 A. They are both leading researchers in this field.

21 Q. And the laboratory experiment that you discuss here in this
22 paragraph is student research; is that correct?

23 A. I'm sure that multiple studies in this paradigm have used
24 student samples.

25 I'm also pretty confident, but I can't say with a

1 hundred percent assurance, that this particular study has been
2 replicated with executives, but I'm 90 percent sure that it has.

3 Q. Let's just -- first of all, do you know -- answer my
4 question and then I'll move on.

5 A. Sure.

6 Q. The experiment that you're talking about in that paragraph
7 that Babcock and Loewenstein, the one you describe in that
8 paragraph, was that conducted with students?

9 A. With students.

10 Q. Thank you.

11 A. I just want to be a little bit careful.

12 It's possible, without going to the method section of
13 that study, it's possible that it was student subjects as well
14 as other volunteers that showed up in the university laboratory
15 from the community.

16 But I would -- my best recollection is that it's either
17 only student or students dominated in the sample.

18 Q. Then I guess in light of that, let's be certain so we have a
19 record. Could I show the witness tab 46A? JD 55178.

20 No. I believe I located the Babcock and Loewenstein
21 research you're referring to in that paragraph, but I'll bow to
22 your knowledge and tell me if I'm correct. Is that the right
23 research?

24 A. Well, the paper that I've been handed, a paper that I think
25 very highly of in the Journal of Economic Perspectives, is a

1 paper where Babcock and Loewenstein review multiple studies that
2 they conducted in this domain of self-serving biases. And it's
3 my best recollection -- and if I read it -- if I reread it I
4 could be more clear -- I believe that they do overview multiple
5 studies that use the same -- the same car-motorcycle accident
6 story, and that's what I was referring to earlier.

7 It's my recollection that one of their studies -- and
8 whether it was done by '97 or not, I'm not sure -- I believe
9 that one of their studies did use more senior executive samples,
10 but I don't recall the details.

11 Q. Let's go to page 111 and 112.

12 A. Yes.

13 Q. And it says, "An experimental investigation: A Texas tort
14 case." And it describes the experiment. Do you see that?

15 A. Yes.

16 Q. Is that the experiment that you're talking about in your
17 written direct examination?

18 A. Well, I'm not trying to split hairs. I'm trying to avoid
19 giving you an incorrect answer.

20 Q. The example you gave the court in your written direct, did
21 you know where it came from?

22 A. Yes, and I've read all of the empirical studies that they've
23 done and I've read this paper. The clarification I'm trying to
24 help with is that if you look to the top of page 113 in that
25 same document --

1 Q. Go on.

2 A. -- what you will see is right there, there's at least three
3 different studies which all used the same materials.

4 So that as I read on page 111 and 112, I'm reading
5 about the methods that is used across multiple studies where
6 different variations of the studies are done.

7 And I'm virtually sure that the first study that they
8 did, which again, I think was Loewenstein, Issacharoff, Camerer
9 and Babcock as I sit here today, I'm pretty sure that that was
10 student samples, and I'm less confident about the next two
11 papers, whether they are also student samples or not.

12 Q. Let's go to page 113, the page you referenced. And all I
13 could do is, this says here -- describes the subjects that were
14 used in the research. Is that correct?

15 A. Yes. As I read it, and I'm quickly matching up based on, I
16 see the number 80, so I'm assuming that they are referencing in
17 that first paragraph that first of those three studies you see
18 listed in Table 1.

19 Q. This at least says they were all students?

20 A. In that study, that's correct. That was my recollection.

21 Q. Now, as far as this -- this issue about whether research
22 with students could ever be extrapolated to the real world
23 business environment, you've actually written on that topic; is
24 that correct?

25 A. Yes, I have. I've written about it at various points in

1 time over the last 15 years.

2 Q. In fact, as recent as this year, in 2005, you still have
3 raised doubts as to whether or not legitimately you can
4 extrapolate from students to the real world environment; is that
5 correct?

6 A. I don't -- I honestly, as I sit here today, do not recall
7 what 2005 writing you might be referring to.

8 Q. Well, let me ask you this. Let's go through some of your
9 writings and show the court what you said. Okay?

10 A. Sure.

11 Q. Let's start with -- could I show the witness tab 48, which
12 is JD 55167. This is a book that I believe you authored
13 entitled, "Cognition and Rationality in Negotiation." Is that
14 correct?

15 A. It is, yes.

16 Q. And that's your book?

17 A. Yes.

18 Q. And if you go to page 81 and 82 of that book, that's tab 48.

19 If we can cull out what you say on those two pages.

20 A. I'm sorry. The pages again?

21 Q. Page 81 and 82. I'll wait until you find it.

22 A. I'm there.

23 Q. Have you found it?

24 A. I am.

25 Q. I'll just read off portions that I've highlighted here.

1 You wrote, "Much of the research on judgmental biases."

2 Do you see that?

3 A. I do.

4 Q. Those are the biases that you're talking about in your
5 written direct examination; is that correct?

6 A. Well, I'm writing about them at the period of time about
7 1989, 1990, when I was crafting this book, yes.

8 Q. But the biases you talk about in your written direct are
9 judgmental biases; is that correct?

10 A. That's correct. I'm avoiding saying that they are the same
11 biases.

12 For example, much of the work on self-serving biases
13 occurred later, the statistical victim effect, I believe was
14 first empirically demonstrated in the Jenni and Loewenstein
15 paper that I've cited in my testimony.

16 So the biases from the field of behavioral decision
17 research is what I'm referring to there and in my testimony, but
18 it's not a 1-to-1 mapping between what those biases were at
19 different points in time.

20 Q. But all the biases in your written direct are what you
21 called judgmental biases; is that correct?

22 A. That's correct.

23 Q. Thank you.

24 You write, "Much of the research on judgmental biases
25 identified in earlier chapters relied upon student subjects in

1 laboratory settings negotiating or making decisions in task
2 domains with which they were unfamiliar. Further, these
3 subjects were not rewarded for accurate performance nor did they
4 typically incur costs for making poor decisions. Hogarth, 1981,
5 has suggested that dismissing the research on cognitive
6 heuristics" -- is that the right way to pronounce that?

7 A. Heuristics, yes. Good job.

8 Q. "Because of its laboratory origins would be naive. However,
9 he also cautions that decision making researchers have not paid
10 sufficient attention to the continuous adoptive nature of the
11 judgmental processes used to cope with a complex, changing
12 environment."

13 Next paragraph. "Experts or experienced decision
14 makers responsible for important decisions in their area of
15 expertise or experience may not be accurately characterized by
16 this stream of research (i.e., they may not be subject to the
17 systematic errors of cognitive biases). Clearly, it may be the
18 case that susceptibility to judgmental biases disappears as
19 experience accumulates and familiarity with the task domain
20 increases. That raises an important question. Is obtaining
21 experience and expertise a key to more effective decision
22 making?"

23 And you go on to discuss that issue. Do you see that?

24 A. I do.

25 Q. That same issue of concern --

1 THE COURT: Is there much doubt about the fact that
2 obtaining experience and expertise is a key to more effective
3 decision making? That's a serious question. We are spending
4 hours on this testimony.

5 Is there any doubt about that proposition?

6 THE WITNESS: There's no doubt the way you described
7 it, Your Honor.

8 There is substantial doubt about whether or not the
9 biases -- well, there was substantial doubt about whether the
10 biases would live when the participants were, in fact, senior
11 executives.

12 THE COURT: I thought you testified earlier that you
13 don't think anybody ever loses all of their biases.

14 THE WITNESS: Yes. And the distinction I would make is
15 this is my writing 15 years ago. In the last 15 years, we have
16 established a wealth of evidence that, in fact, that people with
17 experience continue to be biased; that when we look at very
18 senior executive people are biased when people are rewarded for
19 their decisions, they are not able to eliminate their biases
20 even close to entirely.

21 THE COURT: And so perhaps in the last 15 years you've
22 obtained enough experience and expertise to have more effective
23 decision making. Could that be?

24 Let's take a 15-minute break, everybody.

25 (Recess began at 3:00 p.m.)

1 (Recess ended at 3:18 p.m.)

2 THE COURT: Mr. Bernick.

3 MR. BERNICK: We just wanted to make a very brief
4 status report to the court on where we are with our witnesses
5 because we know of both the government and the court's
6 concern --

7 THE COURT: Right. Yesterday was to be the famous
8 letter.

9 MR. BERNICK: We sent out the famous later. We sent it
10 out by 9:30. But before we get into it, it seems that based
11 upon the estimates of who is going to ask questions of the
12 witness, we may get done with the witness today, and I certainly
13 don't want to --

14 THE COURT: I was certainly going to suggest strongly
15 to Mr. Webb that he manage to finish his cross today.

16 MR. WEBB: I'll be finished in 15, 20 minutes. And I
17 just polled the codefendants, and the decision has been made
18 there will be no other cross-examination, so we should -- if the
19 estimate is correct of an hour or so, we should be able to
20 finish today for the redirect.

21 THE COURT: We will finish. If need be, we can stay a
22 little bit late so Dr. Bazerman can get out of here once and for
23 all.

24 Ms. Eubanks, what's your estimate? I guess I should
25 ask Mr. Wise.

1 MS. EUBANKS: You should ask Mr. Wise the question!

2

3 MR. WISE: Your Honor, I thought I'd probably have an
4 hour on redirect. I can certainly, taking your cues --

5 THE COURT: Well, think about it.

6 MR. BERNICK: But I would propose that maybe we let
7 that take place, recognizing that it always seems if we take
8 these things up at the very end the day it's probably the worst
9 time.

10 THE COURT: I think that's correct. I concluded that
11 when I left the bench at five after 5:00 last night just a
12 little bit more aggravated than usual. So when do you want to
13 take it up?

14 MR. BERNICK: I would suggest we just try to get done,
15 also in deference to Dr. Bazerman, and then we will try to keep
16 it very short at the end of the day and -- well --

17 MS. EUBANKS: We're talking about the end of today?

18 MR. BERNICK: Yes.

19 MS. EUBANKS: That's fine, but I don't think that it's
20 going to get resolved at the end of today, because much as
21 defendants did, we think given the timing and everything that we
22 need to put some significant issues to the court about some of
23 the discovery that, in the letter that we got we've been told is
24 off the table.

25 THE COURT: How about passing me a copy of this letter

1 in the meantime, if it's in any kind of legible form or
2 appropriate form, so that at least I know what the universe is?

3 MR. BERNICK: Again, our intent, Your Honor, was just
4 to make our own short reports so that you would have at least
5 our sense of where things were. We're not anticipating having
6 substantial argument on the outstanding issues.

7 I agreed -- I'm sorry, I would agree with counsel for
8 the government that we're not going to account for that this
9 afternoon.

10 THE COURT: Well, we don't have a witness for tomorrow,
11 right?

12 MS. EUBANKS: That's correct, Your Honor.

13 I just wanted you to be aware that we have some
14 significant issues. We believe we could benefit from a
15 discussion with the court, go through those issues. And we
16 prefer to get Dr. Bazerman's testimony concluded. If we're
17 going to have some time with the court, then I think we could do
18 that tomorrow and --

19 THE COURT: Let's see how the afternoon goes,
20 everybody. All right. Mr. Webb.

21 MR. WEBB: Thank you, Your Honor.

22 BY MR. WEBB:

23 Q. Dr. Bazerman, where I left off is this issue that we've been
24 talking about in your book that you were talking about in which
25 the problem of student subjects in these laboratory tests not

1 having the same experience and motives as real world business
2 people and whether the results can be extrapolated to the real
3 world, I think you pointed out this is something you wrote about
4 a number of years ago in 1991.

5 A. It was published in 1991.

6 Q. But this same issue, the same identical problem you have
7 written about several times since then as recently as this year;
8 is that correct?

9 A. To be -- as I sit here today, I honestly do not know what
10 you're referring to in terms of this year, so I could use a
11 refresher on that.

12 Q. I'll try and go through it quickly. Let me start with --
13 let's at least move it up to 2002.

14 Can I show the witness JD 55166? It's tab 49.

15 This is an article that you authored, I believe, but
16 I'm going to give you a copy of it so you can tell us if -- do
17 you recall this article that you authored?

18 A. I do.

19 Q. You're smiling. So you recall it; is that correct?

20 A. That is correct.

21 Q. And if I could go to page 93. I'm going to cull out
22 something that you wrote.

23 This is in the year 2002, is that correct, the article?

24 A. It is correct.

25 Q. You say, "We acknowledge that decision making by a student

1 sample may not always reflect the actual decision making of
2 managers and public policymakers, who may suffer personal
3 consequences from cooperating, or failing to do so, in a social
4 dilemma. Even though student decision makers need to manage
5 ongoing relationships with class mates and work together on
6 group projects and future class simulations, these relationships
7 are often more transitory than those experienced by managers and
8 administrators charged with making decisions in the context of
9 social dilemmas."

10 You wrote that in 2002; is that correct?

11 A. I'm a co-author of a paper that includes those words, that's
12 correct.

13 Q. Let me go then to a book I think you're sole author of.
14 Could I show him tab 49A, which is JD 55029, which is, I
15 believe, a book that you have authored called, "Judgment and
16 Managerial Decision Making" and the one I handed you is the
17 fifth edition; is that correct?

18 A. That's correct.

19 Q. And the fifth edition was in the year -- published in the
20 year 2002; is that correct?

21 A. Yes.

22 Q. Let's go, if I could, this is tab 49A. If I could go to page
23 152. I'll cull it out on the screen. What I culled out on the
24 screen -- strike that.

25 You're the sole author of this book; is that correct?

1 A. That is correct. I take full responsibility for this book.

2 Q. And in this book in 2002 you stated, "many of the biases
3 examined in this book were identified among student participants
4 who were not rewarded for accurate performance and who were
5 making decisions in task domains unfamiliar to them. Thus, one
6 optimistic possibility is that experts or experienced decision
7 makers facing important real-world decisions might be far less
8 affected by biases than most test subjects. Does this book
9 unfairly distort the prevalence of judgment biases? This is
10 certainly an important question, since experience and expertise
11 might be useful tools for improving decision making."

12 You wrote that in the year 2002; is that correct?

13 A. Yes, it is.

14 Q. And then, if I understand it, I've gone to your publisher.
15 You've now updated this with the sixth edition this year; is
16 that correct?

17 A. That is correct.

18 Q. And I'm going to show that to you.

19 Could I show him tab 140, which is JD 55202, which I
20 believe you will see is the sixth edition of your book that was
21 published in March of this year. Is that correct?

22 A. That sounds approximately right. I accept that.

23 Q. And if you look at this, you see -- you used -- this year
24 you've used the same identical language to describe the issue of
25 the problem; is that correct? I'll read it if you want.

1 A. I'm think I'm not looking -- oh, I'm sorry, I'm just turning
2 to it.

3 Q. I have it on the screen.

4 A. It looks identical to me.

5 Q. It's identical?

6 A. I'll be happy to add to this.

7 Q. You don't have.

8 A. Okay.

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

10 As far as the remedies that you have formulated that
11 you are at least asking the court to consider and the monitor to
12 consider -- let me go back -- actually, could I have tab 119?

13 Go back to page 2 of your written direct where you set
14 forth the structural remedy changes that you're recommending.
15 I'm back to what you were telling the court you were
16 recommending the court to consider. Do you see that?

17 A. I am. Yes.

18 Q. Okay. In formulating those structural change remedies that
19 are now on the screen, were you trying to design those
20 structural change remedies so that they would correct or remedy
21 harm that you were assuming occurred in the past because of
22 fraudulent conduct?

23 A. I was creating these structural remedies to avoid misconduct
24 in the future, that it results from both intentional and
25 unintentional distortion, but I was responding to misconduct

1 from the past that I assumed had been proven to exist for
2 intentional reasons.

3 Q. I'm not sure you answered my question, but listen to my
4 question and see if you can answer it.

5 A. I'll do my best.

6 Q. In formulating your structural change remedies that are now
7 on the screen on page 2 of your written direct, were you trying
8 to design these structural change remedies so that they would
9 correct or remedy harm that you were assuming occurred in the
10 past because of past fraudulent conduct?

11 A. No, that was not my intent.

12 My intent was to design remedies that would prevent
13 misconduct from occurring in the future.

14 Q. Are all of these remedies, remedies that you have designed
15 that would prevent fraudulent conduct that you were assuming had
16 occurred in the past from occurring in the future?

17 A. All of the remedies that I've recommended to the court to
18 consider have the property of assuming -- being based on
19 fraudulent behavior occurring in the past and avoiding
20 intentional or unintentional misconduct in the future.

21 Q. Now, when you formulated those structural changes to remedy
22 what had occurred in the past, were you operating on the
23 assumption that you needed to narrowly tailor the remedies so
24 that they would be no broader than was necessary to prevent the
25 fraudulent conduct from occurring in the future?

1 A. Mr. Webb, I really want to answer your question, but you
2 started with a premise in that question that I don't think I
3 agree with.

4 Q. What premise is that?

5 A. If I recall your question correctly, it starts with an
6 assumption that I'm trying to remedy the past, and I have no
7 plan -- I do not think that I've tried to address remedying the
8 past.

9 My task, as I understood it, as given to me by the U.S.
10 Government, was to assume past behavior and offer remedies that
11 would avoid misconduct in the future, not in the past.

12 Q. I want to make sure. You were assuming past misconduct --
13 let's break it down.

14 A. I'm assuming that the court has proven liability -- that the
15 U.S. has proven liability and the misconduct continues to this
16 day.

17 Q. I'm going to break it down.

18 You were making an assumption that fraudulent conduct
19 by the tobacco companies had occurred in the past; is that
20 correct?

21 A. That misconduct had occurred in the past.

22 Q. Fraudulent misconduct?

23 A. I understand that fraud would be -- would result from the
24 misconducts that are listed under the seven pillars provided by
25 the U.S. Government.

1 Q. Well, when you started, did you at least understand that
2 this was a RICO fraud case?

3 A. I did.

4 Q. Did you understand that?

5 A. Yes.

6 Q. Did you understand that fraud involves making material
7 misrepresentations about facts? Did you know that?

8 A. Yes.

9 Q. And so I just want to make sure I know what you were
10 assuming. You were assuming that fraudulent conduct had
11 occurred in the past; is that correct?

12 A. What I'm -- I am assuming that fraudulent conduct had
13 occurred in the past, yes.

14 Q. Thank you.

15 Now, number two, after you assumed that fraudulent
16 conduct had occurred in the past, were you structuring your
17 remedies in such a way so that what you were assuming had
18 occurred in the past would not occur in the future?

19 A. I was -- I was structuring my remedies so that the
20 misconduct that had occurred in the past would not occur --
21 would not occur in the future, that's correct.

22 Q. Okay. Now, when you did that, when you structured those
23 remedies, did you operate on the assumption that you needed to
24 tailor the remedies so that they would be no broader than was
25 necessary to prevent the fraudulent conduct you were assuming

1 from taking place in the future?

2 A. I recommended a process specifically so that that could be
3 optimally done so that the appropriate set of remedies could be
4 put together by the court to stop misconduct in the future with
5 minimal effect on other parties, such as employees and
6 shareholders.

7 So if that's what you mean by narrowly tailored, I had
8 that in mind when I was recommending this process.

9 Q. Well, if I understand what you're saying is, you're saying
10 that you recommended structural remedies that you want other
11 people then to do the analysis of the narrow construction. Is
12 that correct?

13 A. Yes.

14 Q. Okay. Thank you.

15 Because if you just look at what you're recommending,
16 you recognize -- strike the question.

17 You were never instructed by the government that you
18 needed to structure or formulate your remedies by narrowly
19 tailoring them so they would be no broader than was necessary to
20 prevent the fraudulent conduct from occurring in the future?

21 A. I do not recall if that occurred in conversation or not, but
22 it would be my desire to help the court identify appropriate
23 remedies that would serve that purpose.

24 Q. Well, but you -- but then it's other people, the monitors of
25 the court, that are going to do the analysis as far as narrowly

1 construing your recommended remedies; is that correct?

2 A. Again, you're using the term "narrowly construed" or
3 "narrowly tailored" in ways that I'm concerned has legal
4 implications that I don't understand.

5 What I'm saying from a perspective of a social
6 scientist and a management professor is that I would want to
7 help avoid misconduct in ways that had the least negative effect
8 on other third parties.

9 Q. Well, in your deposition do you recall testifying that you
10 did not -- strike the question.

11 Am I correct you did not do a cost/benefit analysis of
12 the effect of your remedies on innocent stakeholders, did you?

13 A. That is correct, I did not do that.

14 Q. And you expect the monitor to do that. Is that what you've
15 testified to in your written direct; is that correct?

16 A. If you're asking me about my specific words, I'd like to see
17 what I said in the written direct. But I -- but I don't have
18 any reason to disagree with that.

19 Q. Okay. Well, as far as -- so you haven't done a cost/benefit
20 analysis regarding innocent stakeholders or, for example, adult
21 smokers; is that correct?

22 A. That is correct.

23 Q. Now, I was interested in one part of your oral direct
24 examination this morning.

25 Do you recall this morning during Mr. Wise's oral

1 direct that you went on for some time explaining to the court
2 your view about why injunctive relief might not be good enough
3 because the defendants would then take risk and continue
4 misconduct.

5 Do you recall that testimony this morning?

6 A. I do.

7 Q. Now, that expertise that you've developed as far as court-
8 ordered injunctions and their ability to prevent future
9 misconduct, is that a newly-acquired expertise that you've
10 acquired?

11 A. The information on risk taking is very old expertise.

12 Q. Okay.

13 A. Combining that with the question of injunctions really
14 occurred -- that combination -- the first I recall thinking
15 about that combination occurred in the deposition when
16 Mr. Frederick was asking me questions about injunctions.

17 Q. Let's look at what you said in your deposition.

18 Could I have tab 141? If you go to your deposition, it
19 would be on page 306. I'll call out on the screen the
20 testimony. You can look at it. You were asked this question.

21 "Okay. Have you -- can you point us to any analysis
22 that you made of the extent to which a court-ordered injunction
23 would prevent future misconduct?"

24 There was an objection, and your answer was: "You're
25 asking a question outside my expertise."

1 When you gave -- were you asked that question and did
2 you give that answer?

3 A. Yes.

4 Q. And when you answered the question that you were asked a
5 question outside my expertise, was that an honest answer?

6 A. Yes. The part that was asking about, can you point to a
7 place where I've done that analysis? I never did that analysis
8 before unless you're referring to earlier in this exact same
9 deposition when Mr. Frederick was asking me questions about the
10 same topic.

11 Q. All I'm saying, is this a truthful answer?

12 A. I believe it is.

13 Q. You went on -- Mr. Frederick went on to say, "Okay, can you
14 point us to any analysis you've made of the extent to which
15 court-ordered injunctions would impact decision making by
16 tobacco executives?"

17 And your answer was, "You're again outside my
18 expertise."

19 Do you see the question and the answer?

20 A. I do. At this point I believe it wasn't Mr. Frederick any
21 longer, but I do see the question and answer.

22 Q. Was that an honest answer?

23 A. Yes.

24 Q. Now, this morning when you told the court that -- when did
25 you develop this expertise that led you to tell the court this

1 morning that you did not think injunctions would be a good
2 enough remedy in this case because it would not discourage
3 future misconduct by the defendants?

4 A. I had the expertise to do that analysis more than a decade
5 ago, but I made that combination between risk aversion, risk
6 seeking behavior framing and the injunctive process as I was
7 thinking in response to Mr. Frederick's question, questions
8 earlier in this exact same deposition. It's possible I thought
9 about it in passing in prior days before the deposition, but I
10 honestly don't recall that.

11 Q. But in your deposition you said you had not done any
12 analysis. Do you see that?

13 A. Right. What I would describe that -- that I was doing in
14 response to Mr. Frederick, to the best of my ability, and what I
15 provided to Mr. Wise, which I think was quite compatible with
16 what I said to Mr. Frederick is --

17 Q. I'm not asking for Mr. Frederick. I'm talking about this
18 testimony on the screen.

19 Did you do some analysis after you gave this testimony
20 that allowed you to answer Mr. Wise's questions this morning?

21 MR. WISE: Your Honor, I'm going to object. I think
22 Dr. Bazerman was trying -- I think there's a confusion here
23 about the fact that there were two lines of questions about
24 injunctions.

25 There was a whole earlier line by Mr. Frederick where

1 Dr. Bazerman was --

2 MR. WEBB: Your Honor, I object to arguing in front of
3 the witness.

4 THE COURT: That objection is sustained. This is
5 continued argument right in front of the witness. It is
6 substantive argument, not procedural argument.

7 Do you want to clarify that your question refers to
8 analysis done after the deposition?

9 MR. WEBB: Yes, I'll make it clear.

10 THE COURT: All right.

11 BY MR. WEBB:

12 Q. I'm looking at your deposition. Do you see what I have on
13 the screen?

14 A. I do.

15 Q. And you told the court -- I'm sorry. You said in your
16 deposition you had not done any analysis of the extent to which
17 a court-ordered injunction would prevent future misconduct. You
18 said, "You're asking a question outside my expertise." Do you
19 see that?

20 A. I do.

21 Q. My question is, did you then do some analysis of the extent
22 to which a court-ordered injunction would or would not prevent
23 future misconduct after the deposition?

24 A. And again, I'm trying to answer you as clearly as I can --

25 Q. Can you answer yes or no?

1 A. It depends on what you mean by analysis. The analysis that
2 I did was the analysis that I provided in the deposition to
3 Mr. Frederick earlier in this exact same deposition, and it's
4 the logic that I provided to Mr. Frederick which then reappeared
5 in my oral direct earlier today.

6 Q. The analysis that you say on the screen -- do you see the
7 word "analysis" in the question?

8 A. I do.

9 Q. And you said "that's beyond my expertise?" Do you see that?

10 A. I do.

11 Q. Is that analysis in that question still beyond your
12 expertise?

13 A. I'm reading, can you point us to any analysis that you've
14 made? And I was certainly assuming -- I believe it's
15 Mr. Sheffler -- and I apologize if I'm mispronouncing the
16 name -- I was assuming that he was asking, can I point to any
17 written analysis?

18 The only analysis that I had ever conducted on this
19 combination of risk taking behavior and injunction was the
20 logical analysis from the risk taking literature to the specific
21 topic of injunction as I was trying to answer Mr. Frederick as
22 clearly as I could.

23 Q. I'm sorry. Just so I understand what you're saying.

24 When Mr. Sheffler asked you this question, do you see
25 the word "written" anywhere in that question?

1 A. I do not.

2 Q. Thank you.

3 MR. WEBB: I have no more questions.

4 THE COURT: All right. Mr. Wise.

5 REDIRECT EXAMINATION

6 BY MR. WISE:

7 Q. Good afternoon, Dr. Bazerman.

8 A. Good afternoon.

9 Q. Just to address the issue we left off with.

10 At various points you tried to answer questions
11 referring to a discussion you had with Mr. Frederick about
12 injunctions, and I just want to ask you. What do you recall --
13 or what is your testimony on the -- I don't want to use the word
14 "analysis" since we've been going back and forth about it -- but
15 what is your testimony on the effectiveness of injunctions
16 applying the framing systematic bias that you've testified about
17 in your written direct and in your live presentation this
18 morning?

19 A. My testimony is that under remedial action, after a finding
20 of liability, that the parties would be in the domain of what
21 would be thinking about losses, and risk seeking behavior would
22 be a likely course of -- a likely course of action.

23 Q. And when was this research on framing -- when did this
24 research on framing first emerge?

25 A. I believe 1979 was the first published paper by Kahneman and

1 Tversky, and they're in perhaps the most famous paper in social
2 sciences in the last 50 years on prospect theory.

3 Q. Have you done other work either as an academic or as a
4 consultant or as an expert witness where you have applied
5 prospect theory to the behaviors of organizations like
6 businesses?

7 A. I have. I've conducted multiple empirical studies. It's
8 appeared in multiple books that I've written. And it was a
9 significant basis of the testimony that I provided in the FTC
10 case regarding Shearing Plough and Upshire-Smith.

11 Q. Just so the record is clear when you say "it," what do you
12 mean, Dr. Bazerman?

13 A. I'm combining risk aversion versus risk seeking behavior to
14 the conduct of firms under the -- under risky situations.

15 Q. Now, Dr. Bazerman, in response to questions from Mr. Webb
16 you talked about the work you do, your employment and you
17 testified that you're a full-time Professor at the Harvard
18 Business School.

19 And you also in your written direct testimony,
20 Dr. Bazerman, talk about the fact that you do consulting work.

21 Dr. Bazerman, I may be able to short-circuit this.

22 Chris, could we have page 12 of the written direct?
23 Can I fly out lines 6 through 15?

24 Dr. Bazerman, have you listed on page 12 of your
25 written direct a list of the corporations with which you do

1 consulting work?

2 A. This is a partial list of my client list which I'm very
3 proud of.

4 Q. And how long have you been doing consulting work with
5 corporations such as these?

6 A. Over the last -- last 25 years, and I would say that I
7 particularly have done a lot of consulting, in most of these
8 firms I've consulted with over the last 20 years, and I normally
9 spend, up until this year, 15 to 35 days a year working with
10 senior executive groups in the firms that you see listed.

11 Q. And you say "until this year." What makes -- is there
12 something different about this year?

13 A. Yes, there is.

14 Q. And what's that?

15 A. I've been working for the -- I was hired to work on this
16 case, and I've also been working with the most senior executive
17 team from British Petroleum and they've been a very
18 time-consuming client as well.

19 Q. Now, Dr. Bazerman, you have just testified you've been
20 consulting with the most senior team, I think you said at
21 British Petroleum.

22 Do you use the laboratory work you do, do you apply
23 that in your consulting -- and let's stick with British
24 Petroleum, the senior team at British Petroleum, do you use that
25 laboratory work in your consulting with the executives of

1 British Petroleum?

2 A. I do.

3 Q. And have those executives raised concerns with your advice
4 because your laboratory experiments involved student subjects?

5 A. Just the opposite. When I'm working with my executive
6 clients I will typically demonstrate the exact same effects on
7 executive groups.

8 So, what we're calling student experiments, which I
9 think is a fair depiction, may replicate shockingly well on a
10 reliable basis. So I can have a new client with a hundred
11 executives in the room, and if I give the positively framed AB
12 version of the Asian disease problem to one-half and give CD to
13 the other half, I can -- I have complete confidence that I'm
14 going to provide a replication of that effect with a new
15 executive audience that I've never even met before.

16 These results are -- have shown to be remarkably robust
17 for classroom demonstrations with senior executives, remarkably
18 robust when subject populations are given incentives and
19 remarkably robust when formal experimentation is done with
20 senior executives.

21 Q. Dr. Bazerman, when you're working with the senior team at
22 British Petroleum, has anyone raised concerns with the fact
23 that, as Mr. Webb pointed out, you've been a full-time academic
24 for the length of your career?

25 A. No. Based on my list of clients, people assume that I have

1 significant real world experience.

2 Q. And, Dr. Bazerman, we will just use British Petroleum again
3 as an example. Who hired you for your consulting position with
4 British Petroleum?

5 A. Lord John Brown, the CEO, was the ultimate decision maker.
6 The Senior Vice President Patti Bellinger was the person who I
7 worked most closely with on the project I'm working with them
8 on.

9 Q. Dr. Bazerman, you've testified both in your written direct,
10 and we alluded to it this morning, that you have done a great
11 deal of work studying the accounting industry.

12 Do you recall giving that testimony?

13 A. I do.

14 Q. And, Dr. Bazerman, you made -- just to sort of speed things
15 along -- you made specific recommendations to the SEC about
16 restructuring in the accounting industry; isn't that right?

17 A. Yes.

18 Q. And what were those recommendations, Dr. Bazerman?

19 A. My recommendations to the SEC in 2000 were very similar to
20 my writing in 1997; that in order to restore auditor
21 independence in this nation, that auditors should be hired on a
22 rotating basis; that is, when the contract ends, the contract
23 should rotate. That auditors should only audit, they shouldn't
24 provide any other services, and the auditors should not be
25 allowed to go to work for their clients.

1 Q. Dr. Bazerman, when you gave your testimony to the SEC were
2 there concerns raised about the fact that your research uses
3 student subjects?

4 A. I don't recall any, but once again, many of my experiments
5 don't just use student subjects, but there were no concerns
6 raised.

7 Q. And specifically, Dr. Bazerman, the work you've done on
8 auditors, have those involved student subjects or other
9 populations?

10 A. Only -- they involve student subjects prior to 2001 I gave
11 the testimony. Subsequent to that testimony, as auditor
12 independence became a fundamental issue confronting the SEC, my
13 colleagues and I then did switch to using senior managers and
14 partners from accounting firms to document how well the effects
15 would generalize as we moved from student samples to the
16 appropriate senior executives. And that was demonstrated with
17 the data that we put up earlier.

18 Q. Dr. Bazerman, staying with the topic of the application of
19 your work in the real world.

20 Among the five structural changes you recommend the
21 court consider, in your experience are any of those changes
22 uncommon when an organization, a business moves from one
23 business model to another?

24 A. Just the opposite. If organizations want incremental
25 change, these would be uncommon remedies, but to the extent that

1 organizations honestly want to move from one business model to a
2 fundamentally different business model, the kinds of remedies
3 that I'm recommending would be quite common in organizations.

4 Q. And just to sort of play that out a little bit,
5 Dr. Bazerman, if we could focus on one in particular.

6 The issue of removal of executives, you refer to it in
7 your testimony as leadership succession. Is leadership
8 succession uncommon as organizations move from one dominant
9 business model to another?

10 A. Again, if they are making incremental change, it would be
11 uncommon. If we're talking about a fundamental change in the
12 business model that they are using, it's quite common to see
13 leadership change.

14 Q. And with the companies you have consulted with, have you
15 worked with organizations that have undergone these kinds of
16 changes, changes from one dominant business model to another?

17 A. I have worked with organizations that have gone through
18 change in their business -- significant change in their business
19 model where significant changes have been made to senior
20 management.

21 Q. And have these changes, in addition to the changes to senior
22 management, have some of the other categories of changes you've
23 recommended, have you seen those kind of changes as well in your
24 consulting work?

25 A. Well, some of them would be relevant in my other consulting

1 work, like changing compensation practices. Other aspects, like
2 divestiture of safer cigarette products obviously would not be
3 relevant in those other context.

4 Q. Now, Dr. Bazerman, you were asked a lot of questions about
5 monitors, and you testified this morning that you used that term
6 generically.

7 I want to ask you, putting aside the questions of
8 whether you know if it was a court or enforcement agency or some
9 arrangement, putting aside those legal issues, are you familiar
10 with circumstances in which monitors used generically -- to use
11 your word -- were involved in corporate restructurings?

12 A. Yes.

13 Q. Can you give us an example?

14 A. Yes. Tyco is an example that went through fundamental
15 restructuring with monitors, where 290 of the 300 top leaders of
16 the organization were, in fact, removed.

17 Q. And how did you acquire knowledge about Tyco?

18 MR. WEBB: Your Honor, I'm going to object. This is
19 absolute repeat. This is in his written direct examination.
20 He's repeating exactly what's in his written direct and it's
21 improper redirect examination.

22 MR. WISE: Your Honor, if I could, I think the next
23 question -- I was laying a foundation, I think the next
24 question --

25 THE COURT: The next question is not covered in the

1 direct, as I remember, but certainly the last few have been.

2 Go ahead, please.

3 BY MR. WISE:

4 Q. Do you need the question again, Dr. Bazerman?

5 A. I do.

6 Q. I asked you, how did you learn about Tyco? What did you do
7 to inform yourself about Tyco?

8 A. I -- at some point I did some reading on Tyco, but I learned
9 more about Tyco in the context of preparing for this case and,
10 in fact, had a I would estimate hour telephone conversation with
11 Professor Michael Yaseem. And you were, in fact, involved. You
12 were in the room at the time when I had that conversation with
13 Professor Yaseem. Professor Yaseem served as one of the
14 monitors in the Tyco situation.

15 Q. And, Dr. Bazerman, are there other examples where you have
16 talked to people or learned about other cases where
17 restructurings were undertaken with the kind of, using the term
18 as you use it, monitors were involved?

19 MR. WEBB: Your Honor, I'm going to object. He talks
20 about this in his written direct, other examples where he lists
21 several other examples in his written direct, examples where
22 there's been reorganization, and that's just a mere repeat.

23 THE COURT: Sustained. That is all in the redirect,
24 and I've read it carefully.

25 BY MR. WISE:

1 Q. Dr. Bazerman does the fact that the court would order the
2 changes change your recommendation?

3 I'm sorry. Let me rephrase. Strike that.

4 Does the issue of whether the court would order the
5 changes or they were the result of some other interaction with
6 the legal process, does that change your recommendations about
7 the kinds of changes that should be considered or the need for
8 reorganization?

9 A. No. If -- if the board of directors of one of the defendant
10 organizations approached me and said, We want to move from one
11 business model to a fundamentally different business model, and
12 we had the same set of facts, my suggestions for consideration
13 by a group of individuals with more expertise than I alone could
14 provide would be exactly the same.

15 Q. And, Dr. Bazerman, is that -- what you just described -- is
16 that how you saw your task in this case?

17 A. Yes. I understood my task to be to offer the best advice
18 that I could to the court based on my expertise and the
19 assumptions that I was given about how to -- how to think
20 through the process of a set of remedies that would avoid
21 misconduct in the future.

22 Q. And specifically, Dr. Bazerman, when you say "remedies" --
23 just so we are clear -- you're thinking in terms of the
24 structural remedies you're recommending the court consider and
25 the other interventions, but the things outlined in your

1 testimony in your report?

2 MR. WEBB: Your Honor, this is about as leading as you
3 can get. This is redirect examination. That was an incredibly
4 leading question.

5 MR. WISE: I can rephrase.

6 BY MR. WISE:

7 Q. Dr. Bazerman, when you use the word "remedy," what do you
8 have in mind?

9 A. I have in mind the 12 items that I've listed, but I also
10 have in mind giving advice to the court on how I think through
11 the process of matching remedies to stopping misconduct based on
12 the incentives that have been created in this industry.

13 Q. Dr. Bazerman, how do you understand your task to relate to
14 the specific monitoring mechanism that is used by the court?

15 A. To simply help advise the court on how to think through the
16 creation of a process that allows the court to make the wisest
17 decisions possible with the most complete information allowed by
18 law.

19 Q. And are you an expert in legal institutions, specifically in
20 court monitoring arrangements?

21 A. No.

22 Q. Dr. Bazerman, if I could -- just a moment.

23 (Pause)

24 When you talked earlier about the kind of expertise you
25 thought the process could bring to bear, what did you have in

1 mind? What did you have in mind when you used the word
2 "expertise"?

3 A. The assortment of competencies and skills that are necessary
4 for identifying the optimal set of remedies.

5 Q. And can you give just a couple of examples of -- when you
6 think about reorganization, what kind of expertise do you think
7 about?

8 A. Well, there's certainly legal knowledge, and if the court
9 feels that the court has the requisite legal knowledge in this
10 specific domain, I certainly defer to the court.

11 Expertise on corporate governance processes. Expertise
12 on organizational architecture. Expertise on organizational
13 culture to change the way organizations behave in a fundamental
14 way.

15 Those are the kinds of pieces of expertise that I think
16 are useful for identifying the most appropriate set of remedies
17 to move from one business model to a fundamentally different
18 business model.

19 Q. And when you talked about -- I think Mr. Webb used the word
20 "evidence" -- but when you talked about information that you
21 thought -- in your written direct, information that you thought
22 bore on this issue, were you thinking about implementing the
23 recommendations you listed?

24 A. I was thinking about expertise, competencies that monitors
25 could bring to the problem to help think through the facts that

1 existed and, if allowed by law, what other facts would be -- it
2 would be desired to acquire.

3 The remedies that I propose were meant to be remedies
4 that I could infer would respond to the misconduct that I
5 assumed to have existed in the past.

6 Q. And in addition to inferring that it responded to the
7 misconduct you assumed occurred, from your expertise and
8 behavioral decision research, are these remedies that typically
9 respond to misconduct in business circumstances?

10 MR. WEBB: Your Honor, I'm going to object. That's
11 leading.

12 THE COURT: Sustained.

13 BY MR. WISE:

14 Q. Dr. Bazerman, what other bases did you rely on to arrive at
15 this list of structural changes for the court to consider in
16 addition to the assumptions you've made about liability?

17 A. Knowledge about the kinds of changes that organizations make
18 when they want to move from one business model to another model,
19 to a fundamentally different model, knowledge about the way
20 individuals think, the knowledge about the way individuals
21 intentionally respond to incentives.

22 These, in combination, were the ingredients that led to
23 the identification of remedies for the court and court-appointed
24 monitors to consider.

25 Q. Dr. Bazerman, in your written direct testimony you testified

1 that you're a Professor at the Harvard Business School but that
2 you also hold appointments at the Kennedy School at the
3 Psychology Department.

4 Is that -- Dr. Bazerman, where in universities do
5 behavioral decision researchers work?

6 MR. WEBB: Your Honor, objection. I didn't
7 cross-examine on anything related to this at all.

8 THE COURT: I'll allow a question or two on it. Go
9 ahead.

10 BY MR. WISE:

11 Q. Do you need the question again?

12 A. I do. Thank you.

13 Q. I can read it back to you.

14 Dr. Bazerman, in your written direct testimony you
15 testified that you're a Professor at the Harvard Business School
16 but that you also hold appointments at the Kennedy School at the
17 psychology department. Is that -- Dr. Bazerman, where in
18 universities do behavioral decision researchers work?

19 A. Fifteen years ago most behavioral decision research would
20 have occurred in Psychology Departments, but in the last decade,
21 decade and a half, we've seen a dramatic diffusion as virtually
22 all professional schools have become interested in the topic of
23 behavioral decision research. So at this point virtually all
24 top business schools would have experts on behavioral decision
25 research.

1 We see this expertise now being of interest to law
2 schools, medical schools hire experts in the area of behavioral
3 decision research. Government schools hire people with
4 expertise in behavioral decision research.

5 Q. Dr. Bazerman, I want to focus on the ways in which you apply
6 behavioral decision research in your work and specifically in
7 the work you did in this case.

8 Dr. Bazerman, what are the tools from behavioral
9 decision research that you apply to arrive at your conclusions
10 in this case?

11 MR. WEBB: Your Honor, this is a repeat of the direct.
12 This is what he testified to in his written direct examination.
13 He explained this.

14 MR. WISE: Your Honor, this goes to the Daubert issue.
15 I have a series of questions that I think will address Daubert
16 concerns, and given Your Honor's comments at the beginning of
17 the day today, I had intended to go through. That is just the
18 first and there will be others that are more specifically
19 tailored I think to perhaps your concerns about Daubert.

20 But if there are specific issues that Your Honor had
21 that you would like raised at this point, I'm happy to do that.
22 But that's where I'm going with this. It's in response to Your
23 Honor's comments.

24 MR. WEBB: Your Honor, they should have done that
25 during their direct examination. This is not the right time to

1 go back and do a new direct examination. I did nothing on the
2 scope of my cross that would open this up. And there's also,
3 from what I can tell, it's a repeat of what's in the direct
4 examination.

5 MR. WISE: Your Honor, certainly Mr. Webb went to the
6 issue of behavioral decision research as a field.

7 THE COURT: He did. There's no question about that.
8 The issue was opened up. There was a lot of discussion about
9 empirical research, and certain questions weren't asked, but
10 hopefully you will address them.

11 You may proceed. Go ahead.

12 BY MR. WISE:

13 Q. Dr. Bazerman, do you need the question again?

14 A. I do.

15 Q. I think we lost it off the screen. I'll try to remember it.

16 Dr. Bazerman, what are the tools from behavioral
17 decision research that you apply to arrive at your conclusions
18 in your testimony?

19 A. Much like when I would start working with a new client or
20 with an existing client on a new situation. In my mind I'm
21 aware of many systematic biases that affect human judgment on a
22 predictable and systematic basis, and that's really the subject
23 of my book, "Judgment in Managerial Decision Making." I prefer
24 the new edition to the old one.

25 But what I tried to do is to identify what specific

1 elements of this field. Tell me about the likely behavior of
2 individuals in this specific context. So it's not a random
3 connection of biases to executive behavior, it's looking at the
4 context to identify which biases are most relevant that led to a
5 focus on five very specific predictable and systematic effects
6 that I believe have a tremendous influence on the likely future
7 behavior of the defendants in this case.

8 Q. And, Dr. Bazerman, you testify in your written direct that
9 you reviewed a great deal of material, including testimonies of
10 senior executives and others.

11 What among that collection of facts did you rely on as
12 a bases for your conclusions in this case?

13 A. The bases for my conclusion from the information in the case
14 is the assumptions that I was asked to make.

15 I was asked to assume that the U.S. Government had
16 proven liability and misconduct continues to this day, and based
17 on that, combining that with my knowledge of behavioral decision
18 research, I created the suggestion regarding -- suggestions
19 regarding remedies that I put forward in my testimony.

20 I then also did read a substantial amount of
21 information provided by you, Mr. Wise, that was very compatible
22 with the assumptions that I was making.

23 Q. And, Dr. Bazerman, just so we are clear. In terms of the
24 five structural remedies you've recommended, what, if any,
25 material did you review that went to those specific remedies?

1 Just generally speaking. I can rephrase if I'm not
2 being clear.

3 A. I apologize, but I would appreciate a rephrasing.

4 Q. I'll take one as an example. When you recommend that the
5 court consider changing compensation policies and promotion
6 policies of the defendant firms, what -- from the material you
7 reviewed, what bases do you have for making that recommendation?

8 MR. WEBB: Your Honor, I'm going to object.

9 The basis for that recommendation and the testimony
10 relied upon he set forth in his written direct examination. The
11 testimony of different executives. This is repeat of the direct
12 examination.

13 THE COURT: I thought you were moving to Daubert
14 issues.

15 MR. WISE: I was addressing Daubert issues. But I can
16 certainly short-circuit what -- but I'm trying to get a sense of
17 what Your Honor would like me to cover in terms of Daubert
18 issues.

19 THE COURT: Wait a minute. Daubert is a Supreme Court
20 case. It's been on the books for quite a number of years. We
21 have some case law in our circuit.

22 You have to make your own record, Mr. Wise.

23 MR. WISE: I think, Your Honor, what I can do then is I
24 can continue with some questions that I hope will address these
25 issues and I'll move on from this particular question.

1 THE COURT: Go ahead, please.

2 BY MR. WISE:

3 Q. Dr. Bazerman, earlier I had asked you for the tools that you
4 had used in behavioral decision research to apply -- to arrive
5 at your conclusions.

6 Are these standards that your peers in the field would
7 apply in approaching this same problem?

8 A. I believe they are.

9 Q. And, Dr. Bazerman, can the theories -- can the tools you've
10 discussed and the theories you've discussed be tested?

11 A. Not only can they, I believe that the tools that I'm using
12 have been tested extensively and the results of that work has
13 appeared in the very best journals in both Psychology Economics
14 and a variety of applied fields.

15 Q. How have those been tested, just so we are clear?

16 A. Again, the core methodology was laboratory experiments, but
17 in the last 15 years as researchers have wanted to clarify, that
18 the effects do generalize to contexts that match the real world,
19 a variety of other methodologies have been used, including
20 archival analysis and survey methodologies, so that these
21 effects could be documented in real world contexts.

22 Q. And, Dr. Bazerman, you mentioned publication in journals.

23 Has the result of these experiments been published in
24 peer-reviewed journals and other peer-reviewed publications?

25 A. The vast majority of empirical studies in the field of

1 behavioral decision research have appeared in peer-reviewed
2 journals. In most cases in the very best peer-reviewed journals
3 in psychology and economics.

4 Q. And do peer-reviewed articles that address the tools in the
5 theories that you've applied in this case, do they appear on the
6 curriculum vitae you submitted with your expert report?

7 A. They do. I believe I've published over 80 papers in peer-
8 review journals, including very best peer-review journals in the
9 fields that I publish.

10 Q. Do you cite in your written direct testimony some of the
11 peer-reviewed work you've referenced?

12 A. I do.

13 Q. Dr. Bazerman, how did you draw upon your expertise and prior
14 experiences and, just generally speaking, Dr. Bazerman, to
15 arrive at the conclusions you reached here today?

16 MR. WEBB: Your Honor, this is in his direct
17 examination.

18 THE COURT: Sustained.

19 BY MR. WISE:

20 Q. Dr. Bazerman, do your expert opinions grow naturally out of
21 the research you've done prior to this case?

22 A. They grow naturally out of the research that I've done and
23 then connected to the contextual features that I understand in
24 this particular case.

25 Q. Dr. Bazerman, how does your education and experience compare

1 to others in the field of behavioral decision research apply to
2 business context?

3 A. There are many fantastic researchers in the field of
4 behavioral decision research, two of them have won the Nobel
5 Prize in Economics and award outside their own field. So there
6 are many excellent scholars.

7 My expert -- I think that I'm recognized as the
8 individual most responsible for bringing the field of behavioral
9 decision research to managerial and organizational contexts.

10 MR. WISE: One moment, Your Honor.

11 THE COURT: That's all right.

12 (Pause)

13 MR. WISE: Your Honor, I think we're done. I think
14 that concludes it.

15 THE COURT: All right. Let me ask one or two closing
16 questions.

17 EXAMINATION BY THE COURT

18 BY THE COURT:

19 Q. Is it correct that you have not been recognized by any
20 court -- you have not been accepted by any court as an expert
21 witness in the field of behavioral decisional research? Is that
22 correct?

23 A. To be honest, I do remember I was hired in the FTC case that
24 was mentioned for my expertise in negotiation which I view as an
25 application area of behavioral decision research.

1 Q. But you were hired for your expertise in negotiations; is
2 that correct?

3 A. That is correct.

4 Q. Did an Administrative Law Judge accept you as an expert in
5 the field of negotiations?

6 A. Yes.

7 Q. Have you been accepted as an expert in any other area, other
8 than in the FTC case?

9 A. The only other time I've been an expert witness, Your Honor,
10 was in 1982 in a case regarding Polaroid. And, to be honest, if
11 you asked me what I was certified as an expert in, if anything,
12 I do not remember.

13 Q. Was that an antitrust case?

14 A. No, it was not. It was a discrimination in a layoff
15 situation.

16 Q. Based on your testimony today, would it refresh your
17 recollection if I suggested that perhaps you were accepted as an
18 expert in the area of bias or -- well, let me leave it at that.

19 Or do you just not remember?

20 A. I honestly don't remember. And I certainly don't want to
21 misrepresent -- I can tell you what I was hired to do. I can't
22 tell you what I was certified as an expert in. And if the
23 former would be helpful, I'm more than happy to do that.

24 THE COURT: Anything further for the government?

25 MR. WISE: No, Your Honor.

1 THE COURT: All right. Thank you, you may step down.

2 THE WITNESS: Thank you very much.

3 THE COURT: Counsel, it's 4:15. I know that counsel
4 want to discuss some procedural issues. My sense is they are
5 going to take more than 15 minutes.

6 I agree for once with Mr. Bernick that at the end of
7 the day is not the most productive time to discuss them and I
8 don't want to feel rushed by it. Clearly, we can take care of
9 them in the morning.

10 Mr. Webb, was there something else you wanted to raise
11 this afternoon?

12 MR. WEBB: All I want to do for the record, Your Honor,
13 I think in light of the testimony today, I just want to move
14 again to strike this witness's testimony on the grounds that you
15 reserved on this morning.

16 You reserved on points 1 and 2 of our objection brief.
17 Point 1 being that his recommendations violate Article 3,
18 essentially, and you reserved on that.

19 And number 2, the Daubert issues. I don't need to
20 reargue those. But the fact is, Your Honor, we do have coming
21 up in this case literally three experts and seven fact witnesses
22 that are going to be addressing this remedy testimony that this
23 witness has presented.

24 And all I would respectfully urge your court is to look
25 at this issue, because if Your Honor, on what you reserved on,

1 if you make the decision to strike his testimony, we're talking
2 about a significant amount of testimony that we will not
3 present.

4 MS. CENDALI: Your Honor, Allison Cendali on behalf of
5 the United States.

6 If I could address briefly the points that the
7 defendants have made regarding the Daubert issues. I believe
8 that Dr. Bazerman has provided enough evidence to the court
9 today to pass the Daubert test.

10 He has testified that the core of the behavioral
11 decision research is based on tightly-controlled laboratory
12 experiments, which he discussed, and that these experiments
13 produced data from which irrefutable causal inferences are
14 drawn. And he has taken that research and applied it to many
15 business contexts in the real world where he has been hired by
16 very prestigious corporations where he has gone in and actually
17 put the behavioral decision research to the test in the real
18 world.

19 His technique has been subjected to peer review in
20 publication. Dr. Bazerman has a long list of publications in
21 very -- in very prestigious peer-reviewed journals of economics,
22 psychology and management.

23 And I believe that the laboratory tests actually speak
24 to the third factor of Daubert, with the design of the
25 experiments in the methodology of the field. And the general

1 acceptance in the relevant scientific community, I think
2 Dr. Bazerman has provided the court with testimony that the
3 leading universities in this country have behavioral decision
4 researchers on their faculty, and those include the faculty in
5 economics, psychology departments, and professional schools
6 including management, finance and law.

7 There are two Nobel Prizes that have been given to
8 researchers in the field of behavioral decision research. And
9 most recently one has come in 2002 and the earliest one was in
10 1978, which I believe is part of Dr. Bazerman's written direct
11 testimony.

12 And in defendants' objections to Dr. Bazerman on the
13 grounds of Daubert, defendants cited to an unreported opinion
14 from the Northern District of California, and I believe that the
15 responses that we provided to the court actually set forth the
16 Ambrosini decision and walked the court through all of the
17 different factors that Dr. Bazerman's testimony speaks to.

18 In addition, the second prong of the Daubert test is
19 one of relevancy --

20 MR. WEBB: Could I interrupt for one second?

21 My only suggestion was going to be -- I wasn't going to
22 argue this today. A lot happened today with testimony. I was
23 going to ask for leave to file a short brief so we could focus
24 Your Honor's attention on these issues because we are talking
25 about a substantial amount of evidence that's about to come.

1 And I didn't -- to go back and reargue -- I'd like to at least
2 have the time to reconstruct what happened today, put it in the
3 form of a brief. The government can respond to it, and Your
4 Honor would have a chance to rule on it. I wasn't expecting a
5 ruling today.

6 THE COURT: I wouldn't --

7 MR. WEBB: I wouldn't expect you to, but I would ask
8 leave to file a brief.

9 MS. EUBANKS: Your Honor, we had exactly the situation
10 when Dr. Bradley offered his testimony.

11 THE COURT: Doctor?

12 MS. EUBANKS: Dr. Bradley, a statistician for
13 defendants. And we had a long discussion on Daubert and put
14 before the court a Daubert motion which had been incorporated in
15 the parties' briefing beforehand.

16 We have a sufficient record here. The court clearly
17 understands the Daubert issues. It's fresh from the testimony.
18 But to file another brief when certainly after Dr. Bradley
19 testified we went through exactly the same procedure, where
20 counsel made their arguments, reinforced what was set forth in
21 the briefing already.

22 Defendants raised it in their brief filed on Friday.
23 On Saturday when we responded we put in our legal arguments.

24 The witness has been examined. It's ripe for a
25 decision by the court. And certainly if there's going to be

1 briefing we're going to have to go back through the record and
2 talk about those times where the United States raised issues,
3 how those were resolved, especially the issue with respect to
4 Dr. Bradley, and how we went through the Daubert determinations
5 from Rule 702.

6 But another brief to make that determination, we
7 believe on this record, is actually going to be a waste of time,
8 given the court's familiarity with Daubert and its
9 applicability.

10 THE COURT: I'm not going to make this decision by
11 either second-guessing myself or by going back and looking at
12 how I decided it for other witnesses.

13 And indeed, I don't mind admitting that, again because
14 this is a bench trial and because the record is so full, that I
15 certainly lean towards a -- I don't know if the word is
16 "liberal" or "conservative" -- application of Daubert, i.e., I
17 lean -- if it was questionable in my mind, I lean towards
18 admitting the testimony and then in my final opinion, naturally,
19 I would have to weigh the testimony.

20 In the case of this witness, who I hope is not present,
21 only on personal grounds, I have many, many more concerns about
22 whether he can pass the Daubert test. Many more concerns. As
23 to whether I actually need a brief or not --

24 MR. WEBB: Can I just be heard on that briefly?

25 THE COURT: All right.

1 MR. WEBB: I haven't asked to file that many briefs. A
2 lot of information came across the transom today. Okay? It's
3 an important issue because there is 10 witnesses. Now, we may
4 not call -- there are three -- I know for certain we are calling
5 those three experts.

6 THE COURT: I don't want you to emphasize that too
7 much, Mr. Webb, for the simple reason that I don't want to be
8 affected by that in any way, and I don't think -- I don't want
9 the world to think I was affected by that in any way.

10 MR. WEBB: I didn't mean it that way. There's
11 issues -- I would respectfully ask that we file a short brief.
12 We only need a couple of days. We're not talking about delaying
13 this.

14 I just want to pull together -- I was working on my
15 feet, Your Honor. I got a lot of information. I need to
16 reconstruct it. And I think if I put it into a brief, I think
17 it would be helpful to Your Honor on an important issue.

18 THE COURT: I think it would be, too. I know the
19 government doesn't want to submit a brief. A, the government
20 doesn't have to, and B, perhaps more practically, certainly what
21 the government was presenting as its closing argument this
22 afternoon, and they were cut off, and I know you were cut off,
23 but in terms of being low on resources, that argument that you
24 were preparing this afternoon and presenting can certainly
25 easily be turned into a closing argument.

1 I'm not asking that you go back through the transcript.
2 I remember it clearly. I have the transcript. But it is an
3 important issue. And I wouldn't be alerting everybody to it if
4 I didn't think that it was very important vis-a-vis this
5 witness.

6 I think that's all I want to say at this point. I just
7 found his testimony very troubling on many grounds.

8 MR. WEBB: We will file -- can we have two days?

9 THE COURT: How much?

10 MR. WEBB: Two days.

11 THE COURT: Yes. That's fine.

12 MS. CENDALI: Your Honor, can I get a clarification?
13 If defendants are filing a brief on just the Daubert issue or
14 the other issue?

15 THE COURT: No, just the Daubert issue. I ruled on the
16 other issues already. That's all I'm interested in.

17 MR. WEBB: Thank you.

18 MS. EUBANKS: Your Honor --

19 THE COURT: Since you're going to get two days, which
20 will put you at Friday, the government should get its brief in
21 certainly no later than Monday at 5:00, no later than.

22 It would be -- if you can get it in earlier in the day,
23 since we're not in trial, that would be helpful, but Monday at
24 5:00.

25 Tomorrow, everyone we do have to start at 10:00. I

1 will do my best everyone not to be a few minutes late, but
2 occasionally I have doctor's appointments I can't control now.

3 MS. EUBANKS: Your Honor, I know that we handed up
4 defendant's letter, and yesterday when I offered to hand up the
5 United States' letters, I would like you to have that in context
6 and I'll get that to your clerk this afternoon as well.

7 MR. BERNICK: I was actually going to request, really
8 purely for personal reasons, if we could start at 11:00 o'clock
9 tomorrow instead of 10:00, if that's all right with the court
10 and all right with the government.

11 MS. EUBANKS: I would prefer to start at 10:00 o'clock
12 for personal reasons as well, to get my day started. Already
13 we've got a couple of briefs due on Monday and there goes
14 Mother's Day weekend. So I would really like to get started
15 earlier in the day.

16 THE COURT: I thought you would want to get out of
17 here, Mr. Bernick.

18 MR. BERNICK: Yes, I am. I have to be in Chicago
19 tonight, but if this matter is going to be taken up tomorrow, I
20 will come back for it, and I will be back by 11:00 o'clock
21 tomorrow morning. There's nothing more that I can really do.

22 THE COURT: Someone else can't speak for you tomorrow
23 morning? I don't want to arrange the defendants' schedules,
24 but --

25 MR. BERNICK: I would hope so, except that when it

1 comes to who is being called for what purpose is something I've
2 been centrally involved in, I'd like to be able to address the
3 court. So my only request is that we start at 11:00 o'clock.

4 THE COURT: All right.

5 MS. EUBANKS: Your Honor, we would really like to get
6 started at 10:00 so we have at least an extra hour to work on
7 some of the matters that have developed over this week.

8 THE COURT: Well, I'm going to do it at 11:00 because
9 of the flying-in schedules. We're certainly going to get done
10 by lunchtime. We're going to get done before 12:30. I would
11 hope before 12:00 o'clock.

12 But, quite frankly, it's better to address these issues
13 when it's not at the end of a long day of testimony. I will
14 read the government's letter, which should be submitted --

15 MS. EUBANKS: It's two letters.

16 THE COURT: -- this afternoon, please.

17 11:00 tomorrow, please.

18 (Proceedings concluded at 4:24 p.m.)

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11 CERTIFICATE

12 I, EDWARD N. HAWKINS, Official Court Reporter, certify

13 that the foregoing pages are a correct transcript from the

14 record of proceedings in the above-entitled matter.

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17 Edward N. Hawkins, RMR

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