

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 12, 2005
	.	
Defendants.	.	
.	

VOLUME 103
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 MORNING SESSION, MAY 12, 2005

2 (9:31 a.m.)

3 THE COURT: Good morning, everybody.

4 MS. EUBANKS: Good morning, Your Honor.

5 THE COURT: This is United States versus Philip Morris,
6 CA 99-2496.

7 Now, let me raise a real problem, and it is an unusual
8 problem in this case. I know that an important issue to at
9 least be discussed, and maybe resolved, is issues relating to
10 Mr. Myers and his testimony and discovery, et cetera.

11 I don't know what happened to the joint defendants. As I
12 say, it is certainly unusual, but their objections, which I was
13 looking for, of course, were due at 5:00 last evening. They
14 were not hand delivered to chambers, and that's the procedure
15 we've been following, until literally 9 or 9:01 this morning.
16 We kept checking and checking and checking ECF. This morning
17 our ECF showed that the objections were not put on line until
18 6:45. There is a short time lag, I don't recall know how long,
19 between the filing of matters and when it shows up on our ECF,
20 but I will tell you, Ms. Soneji was here until about 7 or 7:15
21 last night, maybe a little later, and it still hadn't shown up
22 on our ECF, although as of this morning it indicated that the
23 objections had been filed, as I mentioned at 6:45. The bottom
24 line is that I've only gotten halfway through the objections,
25 that's the bottom line, everybody, and they're very long.

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1 MR. BERNICK: I apologize, Your Honor, that's our office's
2 problem, and I had thought they had been filed, but I'll check
3 and find out what happened, but we apologize.

4 THE COURT: It's unusual. I have not had trouble with
5 filings from either side. People have really kept to all of the
6 deadlines, but it always happens with something that I'm looking
7 for in order to address an issue. So, certainly by the end of
8 lunch I will have had a chance to read it, and when -- I always
9 forget everybody, when is the government's -- when are the
10 government's responses due?

11 MS. EUBANKS: Our responses are due 24 hours after the
12 objections are filed. We'll try to get them in by 5:00 today.
13 They're due today.

14 THE COURT: Right. Okay. And therefore, without any
15 question, we can take this matter up first thing tomorrow
16 morning. I will -- well, the government probably knows it's a
17 long filing for objections, it's over 20 pages.

18 MS. EUBANKS: Yes, and there are two other motions pending
19 with respect to the testimony of Matthew Myers and we discussed
20 --

21 THE COURT: The motion in limine to exclude it.

22 MS. EUBANKS: And that's one that we discussed getting our
23 response in no later than Saturday, but we're trying to get it in
24 on Friday. And then there was a motion for additional discovery
25 and a re deposition of Mr. Myers, and our response to that is due

1 today.

2 THE COURT: I don't think I ruled on that.

3 MR. BERNICK: You did not. It has not been before you yet

4 because the government's response wasn't due.

5 THE COURT: Okay. All right. So we're ready, everybody.

6 Now, I gather that Dr. Healton's counsel is here?

7 MS. EUBANKS: That's correct, Your Honor.

8 THE COURT: And wishes to be closer to the witness?

9 MS. EUBANKS: Yes. Mr. Payton.

10 THE COURT: I assume there's no objection from counsel on

11 the other side?

12 MR. WEBB: No.

13 THE COURT: All right. Fine. Would the government call

14 the witness, please?

15 MS. EUBANKS: We call Dr. Cheryl Healton.

16 THE COURT: And let's have Mr. Payton identify himself for

17 the record, please.

18 MR. PAYTON: John Payton, Wilmer, Cutler, Pickering, Hale

19 and Dorr for the witness, Cheryl Healton.

20 (CHERYL G. HEALTON, Ph.D., GOVERNMENT'S WITNESS, SWORN)

21 DIRECT EXAMINATION OF CHERYL G. HEALTON, Ph.D.

22 BY MS. EUBANKS:

23 Q. Good morning, Dr. Healton.

24 MS. EUBANKS: Your Honor, may I approach the witness?

25 THE COURT: Yes, you may.

1 BY MS. EUBANKS:

2 Q. Dr. Healton, I've just handed you a document that is
3 United States Written Direct Examination of Dr. Cheryl G.
4 Healton, submitted pursuant to Order 471. Do you recognize this
5 document?

6 A. Yes, I do.

7 Q. Are there any changes that you need to make in this
8 document before adopting it as your testimony in this case?

9 A. Yes, there's a typo on page 60 and on page 70.

10 THE COURT: Dr. Healton, let me give you advice now.

11 Either you're not plugged in or your mic's not on.

12 THE WITNESS: Can you hear me now?

13 THE COURT: That's a lot better.

14 Now, what page is the typo, please?

15 THE WITNESS: Page 60. It says "quite" instead of "quit"
16 and on page 70 --

17 BY MS. EUBANKS:

18 Q. Just a second, if you will. It's line 14, and if you
19 would find that and confirm whether it's line 14 on page 60?

20 A. Okay. Hold on one second. Yes, it's line 14. It says
21 "quite" smoking instead of "quit".

22 Q. All right. So that should be "quit"?

23 THE COURT: What line was that again?

24 MS. EUBANKS: It's line 14.

25 BY MS. EUBANKS:

1 Q. And was there another change?

2 A. Yes, on 70, line 4 it said "have you sent this letter"

3 and it should be "have I seen the letter."

4 Q. And so "sent" should be "seen" on page 4 at line 70?

5 A. Yes.

6 Q. Now, Dr. Healton, before we move forward with the formal

7 adoption, I notice on page 16 of your examination, and I'd like

8 you to turn to page 16. There is a question at line 10, "have

9 you brought examples of any of the truth ads". Do you see that?

10 A. Yes.

11 Q. And you'll see at line 14 that the question is "we would

12 like to show these ads". So moving forward, what I'd like to

13 display now is U.S. Exhibit 89449, and then ask you to adopt

14 your testimony.

15 MR. WEBB: Your Honor, this is a fact witness. There's no

16 oral direct -- these are in the record, okay. There's no need to

17 play the exhibits to the Court.

18 MS. EUBANKS: Well, actually Your Honor.

19 THE COURT: Actually, I didn't have them, I asked my law

20 clerk about them and I didn't have them and she didn't have them.

21 I didn't know if they were pictures or films. How long is this

22 going to take?

23 MS. EUBANKS: How many seconds is each one, 30 or 60.

24 THE WITNESS: About three minutes.

25 THE COURT: How long?

1 MS. EUBANKS: About three minutes.
 2 THE WITNESS: Maybe less.
 3 THE COURT: Well, you may proceed.
 4 BY MS. EUBANKS:
 5 Q. What's this ad?
 6 A. Body Bags.
 7 (Video played.)
 8 Q. What is this "truth" ad called?
 9 A. Baby Invasion.
 10 (Videotape played.)
 11 Q. And this "truth" ad?
 12 A. Replacement Smoker.
 13 (Videotape played.)
 14 Q. And this one, what's it called?
 15 A. Lie Detector.
 16 (Videotape played.)
 17 Q. And this one?
 18 A. Congress.
 19 (Videotape played.)
 20 Q. And finally what is this one called?
 21 A. Project SCUM.
 22 (Video played.)
 23 BY MS. EUBANKS:
 24 Q. Dr. Healton, do you adopt the United States' Written
 25 Direct Examination of Dr. Cheryl Healton as your testimony in

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1 this case?

2 A. Yes, I do.

3 MS. EUBANKS: Nothing further at this time, Your Honor.

4 THE COURT: All right. Mr. Webb, you're doing it?

5 MR. WEBB: Thank you, Your Honor.

6 CROSS-EXAMINATION OF CHERYL G. HEALTON, Ph.D.

7 BY MR. WEBB:

8 Q. Dr. Healton, I don't think we met. My name is Dan Webb.

9 I represent Philip Morris and I'm going to ask you some
10 questions about some of the areas of your testimony.

11 Why don't we start with -- in fact, Jamey, it's tab 1.
12 Go to -- Dr. Healton, go to page 34 of your written direct to
13 line 3-16. I want to talk about -- in your direct examination
14 you make it clear to the Court.

15 A. Excuse me, which line?

16 Q. I'm sorry, it's line -- I have it on the screen there,
17 too. It's line 13 to 16 of your written direct.

18 A. Yes.

19 Q. Have you found that?

20 A. Yes.

21 Q. Where you tell the Court here that the Foundation is
22 facing what can only be called a financial crisis. Do you see
23 that testimony?

24 A. Yes, I do.

25 Q. Now, as far as that financial crisis is concerned, let me

1 show you the Foundation's financial statements. It's tab 4,
2 Jamey. I'm going to hand you JD 055210 and ask you to examine
3 that and tell me is that a current financial statement of the
4 American Legacy Foundation?
5 A. I believe it is, yes.
6 Q. Okay. And as far as the current financial condition of
7 the company's concern, if you go to page 17 --
8 A. Of the Foundation?
9 Q. I'm sorry?
10 A. Of the --
11 Q. I'm sorry. What was your question to me?
12 A. No, you said of the company; you mean of the public
13 charity?
14 Q. I do.
15 A. Okay, great.
16 Q. Let's just establish, American Legacy Foundation is a
17 501(c) charitable corporation; is that correct?
18 A. Yes, it is.
19 Q. And this is the consolidated financial statements and
20 report of independent certified public accountants for the
21 American Legacy Foundation; is that correct?
22 A. Yes, it is.
23 Q. And if you go to page 17, we can see the current
24 financial condition of the American Legacy Foundation; is that
25 correct?

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1 A. Well, current as of this statement.

2 Q. As of that statement; is that correct?

3 A. I mean, there's been a change, obviously, since -- to be

4 fully accurate, since this statement was made.

5 Q. I take it the financial statement was accurate at the

6 time it was prepared; is that correct?

7 A. Yes, it was.

8 Q. Okay. I'm going to slow down a little bit to make sure

9 you understand my questions and then I'm just going to politely

10 ask you, why don't you wait until I finish my question because

11 it makes it easier for the court reporter. There's a tendency

12 we all have to talk over each other, in every day conversation

13 that's not a problem. It becomes a bigger problem when you have

14 a court reporter who is trying to keep track of what you and I

15 are talking about.

16 A. I understand.

17 Q. As far as looking at the past current financial

18 condition, the Court -- what I've highlighted on the screen,

19 Doctor, is that total current assets is \$1,083,733,000; is that

20 correct?

21 A. As of this statement. That's no longer accurate, but

22 yes.

23 Q. What is the -- tell me what the total current assets are

24 as of today?

25 A. Well, I believe that this statement included the

1 operating budget for the year that has just now ended, or just
2 is about to end June 30th. And that entire operating budget has
3 been expended which would be approximately 150 million, and
4 there has been a decapitalization of the reserve fund, so I
5 would say it's certainly below a billion.

6 Q. Well, I'll just take this as -- is this -- is there
7 another consolidated financial statement that the Foundation
8 has?

9 A. No, it's just about to come out, yeah.

10 Q. I'll work off the one I have here, then. You see the
11 document in front of you reflects assets of \$1,083,000,000, do
12 you see that?

13 THE COURT: And I don't think the record is clear on this,
14 but this statement is as of June 30th, 2004, would that be
15 correct?

16 THE WITNESS: Yes, I believe so.

17 BY MR. WEBB:

18 Q. And as of June 30th, 2004, the American Legacy Foundation
19 total current assets is \$1,083,000,000; is that correct?

20 A. Yes.

21 Q. And if we look at the nature of the assets that the
22 American Legacy Foundation had as of June 30th, 2004, and as far
23 as being in a financial crisis, it appears that you have cash of
24 over \$177 million, and you have investment at market at over
25 \$871 million; is that correct?

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- 1 A. As of 2004, yes.
- 2 Q. Now, am I correct, with that amount of what I'll call a
3 capital stock pile, am I correct that ALF could exist
4 indefinitely and based on a five or six percent annual return
5 would have about 50 or \$60 million each year to engage in youth
6 smoking prevention activities; is that correct?
- 7 A. Not exactly, no.
- 8 Q. Well, let me ask you this: As far as -- well, as far as
9 ALF's funding is concerned, ALF is entitled to receive certain
10 funding as set forth in the Master Settlement Agreement; is that
11 correct?
- 12 A. Is and was.
- 13 Q. And in your written direct examination, I believe you
14 state, in fact, why don't you go to page 3 just to make it
15 easier, go to page 3, tab 5, Jamey, line 1 to 9. Am I correct,
16 what you're trying to make clear to the Court --
- 17 A. I'm sorry, we're on page 3? So it's just where the
18 Foundation's being described? That what you --
- 19 Q. Your question says "what is the American Legacy
20 Foundation". Have you found that page?
- 21 A. Yes, I have.
- 22 Q. And you describe there what the American Legacy
23 Foundation is, and then you make the statement to the Court that
24 "the MSA is quite clear that the Foundation was created at the
25 behest of the states and not the tobacco companies." Do you see

1 that?

2 A. Yes.

3 Q. In fact, if we go up a couple sentences, what you state
4 beginning at line 3 is the "the states obtained as part of that
5 settlement agreement for the creation of a foundation to combat
6 youth smoking and other forms of youth substance abuse, to
7 educate the public broadly about the hazards of tobacco use and
8 to study and support programs to counter act the diseases
9 associated with tobacco use. The states were so committed to
10 the creation of the Foundation, that they allocated part of
11 their recovery to fund it."

12 And so I take it that the states themselves, they made
13 the decision to create ALF and they made the decision as to how
14 they wanted ALF funded; is that correct?

15 MS. EUBANKS: Objection, Your Honor. To the extent that
16 he's asking the question -- it's not clear. To the extent he's
17 asking the question based upon this witness's interpretation of
18 the MSA that's one thing, but the question I heard wasn't limited
19 to her interpretation of the MSA, he's asking more broadly about
20 the creation. So I think it should be clear.

21 MR. WEBB: Well, Your Honor, I could ask the question
22 again of the witness. I object to the speaking objections also,
23 Your Honor. If there's an objection, counsel should state it
24 instead of trying to coach the witness right here in the
25 courtroom.

1 THE COURT: The objection is sustained, but you do have to
2 clarify -- not but. You have to clarify the basis on which you
3 are asking the question.

4 BY MR. WEBB:

5 Q. Well, let me just ask the question: Doctor, is it clear
6 to you that, based on what you stated here, that the states were
7 the organizations that decided to create ALF?

8 A. It is my understanding that this is something the states
9 wanted in the MSA.

10 Q. That's what you state right here in your written direct;
11 is that correct?

12 A. Is it correct that the states wanted there to be a
13 foundation?

14 Q. Yes.

15 A. Yes, but the terms, of course, were negotiated.

16 Q. I understand. The states signed the MSA; is that
17 correct?

18 A. Yes, they did based on information they had at hand at
19 the time.

20 Q. And the states -- the MSA sets forth what the states
21 agreed that ALF should be funded with; is that correct?

22 A. That is correct, yes.

23 Q. Okay. And under the terms of the MSA, the way -- based
24 on what the states had agreed to, ALF has been very fortunate
25 since 1999 to receive approximately \$1.6 billion from the

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1 tobacco companies in the form of funding for ALF; is that
2 correct?

3 A. We have received those funds on behalf of the settling
4 states, correct.

5 Q. And the amount is approximately \$1.6 billion; is that
6 correct?

7 A. I believe so, yes.

8 Q. Now, when the states created ALF and agreed to give part
9 of their settlement money to ALF, the way the ALF funding was
10 set up under the MSA and that the states agreed to, is that ALF
11 was going to receive a large amount of guaranteed funding but
12 for a limited number of years; is that correct?

13 A. Actually, I don't believe that is correct.

14 Q. Okay. Well, could we go to -- let me go to your written
15 direct examination on page 34. It's tab 9, Jamey, it will be
16 page 34. And have you found your way to page 34, Doctor?

17 A. Yes, I have.

18 Q. And I'm on -- I'm going to start by looking at -- on line
19 16. Can you see on the screen where I am?

20 A. Yes.

21 Q. As far as how the states structured this, you set forth
22 the way it's done in your written direct, which you've stated,
23 "the Master Settlement Agreement provided for financial payments
24 to come to the Foundation through three separate funding
25 streams. First are the base fund payments which would provide

- 1 the Foundation with a total of \$250 million over ten years, 25
2 million per year through 2008. Second are the National Public
3 Education Fund payments, which were guaranteed only for five
4 years," so let's just stop there. I take it that that's a
5 truthful statement that the National Public Education Fund
6 payment, under the terms that the states agreed to, were only
7 guaranteed for five years; is that correct?
- 8 A. That would be correct, but that's different than the
9 question you asked me earlier, just for the record.
- 10 Q. I'm just --
- 11 A. Okay.
- 12 Q. I'm not trying to argue with you.
- 13 A. That's why I said I don't believe so. I just want to be
14 clear.
- 15 Q. That's fine. But the statement I now just called to your
16 attention, that the states had agreed that ALF would be funded
17 from this one fund called the National Public Education Fund,
18 those payments were guaranteed only for five years as you set
19 forth in your testimony here; is that correct?
- 20 A. And thereafter based on market share, yes.
- 21 Q. Well, let's -- I'm sorry, it says here "second are the
22 national public education payments which were guaranteed only
23 for five years". Do you see that on the screen?
- 24 A. I do. It's somewhat out of context to the whole answer.
- 25 Q. I'm going to go through the whole answer.

- 1 A. Okay.
- 2 Q. I'm not trying to take you -- I just want to make sure
- 3 that's a truthful statement.
- 4 A. That they were only guaranteed for five years?
- 5 Q. Yes.
- 6 A. That is truthful, yes.
- 7 Q. Thank you. And that was for the five years from 1998 to
- 8 2003; is that correct?
- 9 A. Yes.
- 10 Q. And according to what you've said here, these payments
- 11 began with an initial payment of \$250 million. When you say
- 12 "these payments", you're referring to the payments under the
- 13 National Public Education Fund; is that correct?
- 14 A. Yes.
- 15 Q. And then you go on to say the subsequent four years
- 16 averaged around \$270 million per year. Do you see that?
- 17 A. Yes.
- 18 Q. The total payments, meaning the total payments under the
- 19 National Public Education Fund, were about \$1.3 billion; is that
- 20 correct?
- 21 A. Yes.
- 22 Q. Now, you go on to set forth here that after 2003, these
- 23 payments stopped because of a stipulation in the Master
- 24 Settlement Agreement that deals with market share; is that
- 25 correct?

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1 A. Yes.

2 Q. And you go on to state that "it is my understanding that
3 the participating manufacturers market share is currently well
4 below the threshold. We do not expect the 99.05 percent
5 threshold to ever be met, and as a result we do not expect to
6 receive further payments to the national Public Educational Fund
7 under the MSA as things now" -- what's the next word, "stand", I
8 think. Is that correct?

9 A. Yes.

10 Q. Okay. Now, as far as the decision the states made to
11 only guarantee ALF funding of that -- in those large amounts for
12 five years, it was your -- strike the question.

13 As far as ALF's -- strike the question.

14 As far as the states' decision to structure the funding
15 in such a way, was it your understanding that it was the states'
16 expectations that ALF, like any other charitable organization,
17 would be expected to use good management and sound investment
18 policies and become self sustaining?

19 A. No.

20 Q. Well, let me ask you this: Well, as far as this
21 so-called financial crisis caused by the problem of the
22 guarantee running out. ALF knew the guarantee would only last
23 for five years and there'd be no more from the time of the
24 inception of ALF; is that correct?

25 A. That's not factual at all.

1 Q. Okay. Could I show the witness tab 11, Jamey, JD 055206.
2 This is a press release -- I'll hand it to you so you have a
3 hard copy in front of you, Doctor. What I put up on the screen
4 is a press release from the American Legacy Foundation; is that
5 correct?

6 A. Yes.

7 Q. Is it dated April 14th, 2003?

8 A. Yes, it is.

9 Q. And are you familiar with this press statement?

10 A. Yes, generally.

11 Q. Okay. And you can look at it. I'm going to call your
12 attention to one statement that I've yellow highlighted, in
13 which the American Legacy Foundation states on that date "the
14 Foundation realized several years ago that the approximately
15 \$300 million in annual payments from the settling states to the
16 NPEF" -- that's the National Public Education Fund; is that
17 correct?

18 A. Yes.

19 Q. "Would likely come to an end on March 31, 2003." Do you
20 see that statement?

21 A. Yes, and that's different than the question you asked me.

22 Q. My only question is is that a truthful statement?

23 A. That's a truthful statement.

24 Q. Thank you. Now, if I understand from looking at
25 documents, what's been going on inside of ALF, your

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- 1 organization, over the last several years, is that because you
2 knew for years that your National Public Education Fund money
3 would expire in 2003, ALF began a plan to find a way to leverage
4 its ability to get involved in tobacco litigation and thereby
5 obtain money; is that correct?
- 6 A. Could you restate the question?
- 7 Q. I will.
- 8 A. I'm sorry.
- 9 Q. That's all right. Am I correct that when we examine
10 ALF's documents, what we see is that when ALF realized that its
11 funding, the guaranteed funding, would dry up in 2003, ALF tried
12 to develop a strategy to leverage ALF's way into litigation and
13 use that as a way to get more money from tobacco companies; is
14 that correct?
- 15 A. I don't think that ALF was the generator of that strategy
16 at all.
- 17 Q. Well, let me -- could I show the witness JD -- Jamey,
18 it's going to be tab 12 -- JD 055205, and I'll hand you the
19 document. And the document is dated March of 2004, and it's on
20 American Legacy Foundation letterhead, and it says "dear
21 colleagues". Do you see that?
- 22 A. Yes, I do.
- 23 Q. And are you familiar with this letter?
- 24 A. Yes, I am.
- 25 Q. And if you go to the last page, you signed this letter;

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 is that correct, on page 4?
- 2 A. I did, yes, I did.
- 3 Q. Okay. Now, if we look at what you said to your
4 colleagues, go over to page 2, and you're laying out some steps
5 to deal with the -- we can read it off. You set forth the
6 funding problem. Do you see that? Go to the page?
- 7 A. Yes, yes.
- 8 Q. Do you see that?
- 9 A. Yes.
- 10 Q. And then after you set forth the funding problem, you
11 state "we at the Foundation, and others, are taking four steps
12 to work to address this issue." Do you see that?
- 13 A. Yes, I do.
- 14 Q. And the second step that you set forth that the
15 Foundation is taking, is working with litigators to identify
16 standing in suits against the tobacco industry?
- 17 A. I did not say that the Foundation was taking those steps.
18 That was the one item in this list that is being undertaken by
19 others.
- 20 Q. Well, so the statement here "we at the Foundation, and
21 others, are taking four steps" then you're telling me that the
22 second step is not being taken by ALF?
- 23 A. No, it's being taken by others.
- 24 Q. Well, if that's the case --
- 25 A. And "standing" was in error, as you know from my earlier

1 comments. I didn't know what it meant. I do now.

2 Q. Well, if that's the case -- I take it then -- just so I
3 understand what you're telling the Court, ALF does not have a
4 strategy to try to work its way into litigation so that you can
5 get money from the tobacco companies?

6 A. No.

7 Q. However, let's take this case, then, as an example, since
8 this is where you're testifying. Am I correct, ALF has for some
9 time been trying to find a way to angle its way into this case
10 and convince Judge Kessler to give ALF money as a result of this
11 specific litigation; is that correct?

12 A. No, that is not accurate.

13 Q. Is it true that an organization that ALF almost
14 completely funds filed a court pleading in this case before
15 Judge Kessler just a few months ago trying to convince Judge
16 Kessler to give ALF large sums of money as a result of this
17 particular case?

18 A. I became aware of that after it was filed, yes.

19 Q. Okay.

20 A. However --

21 Q. Let me --

22 A. We know the source of money is not the Foundation.

23 Q. Well, we'll go through this, then. Let's show Judge
24 Kessler, as far as whether ALF has been angling to get itself
25 into this case to get money, let me show you -- Jamey, it's tab

1 13. I'll show you JD 055209, which I believe when I hand it to
2 you, and I'll give you a chance to examine it, this is entitled:
3 Motion for Leave to appear as amicus curiae in support of the
4 position of plaintiff United States of America. And if you turn
5 the page and just go to the next page on page 2, are you on page
6 2, Doctor?

7 A. Yes, I am.

8 Q. We see here, as far as what the Court has had presented
9 to it, it says here "the Citizens Commission to Protect the
10 Truth" -- that Commission, a nonprofit organization --
11 "respectfully requests that this Court grant it leave to appear
12 as an amicus curiae in support of the government's motion". Do
13 you see that?

14 A. Yes, I do.

15 Q. And then -- now, that organization -- well, let's go to
16 the next page. Go to page 3, and let's see what this
17 organization is telling the Court it wants the Court to do.

18 According to the Commission -- or according to this
19 organization that is called the Citizens Commission to Protect
20 the Truth, it says "second, the Commission supports the
21 government's position that the recent Circuit Court decision" --
22 and then they give the name of the case -- "does not preclude
23 this Court from fashioning an equitable remedy that obligates
24 defendants to fund a public education and youth smoking
25 prevention campaign. The Commission urges that the American

1 Legacy Foundation's "truth" campaign should be the organization
2 so funded". Do you see that?

3 A. I do, yes.

4 Q. And I take it that is your foundation?

5 A. Yes, it is.

6 Q. Okay. Now --

7 A. It's the state's foundation.

8 Q. It's the Foundation you work for, we're talking about the
9 American Legacy Foundation, that's correct?

10 A. Yes, American Legacy Foundation.

11 Q. And as far as what this pleading told the Court to do, if
12 you go further into the document, go to page 11, --

13 A. Bear with me, I've not read this document, so it's --

14 MS. EUBANKS: Your Honor, I'm going to object. This is a
15 legal document, and now Mr. Webb is about to ask a question about
16 what this pleading told the Court to do and the witness has
17 stated that she hasn't even read it.

18 THE COURT: The objection is overruled. She may be
19 questioned about it. If she needs time to look at it she can
20 take time to look at it. It's certainly relevant to the line of
21 questioning and to the direct examination.

22 BY MR. WEBB:

23 Q. If we go a little bit further in the pleading, have you
24 found page 11 that I now have on the screen?

25 A. Yes.

1 Q. And what this Commission -- take a moment to look at it.
2 What you'll see is this Commission goes into some detail to
3 explain to Judge Kessler what the American Legacy Foundation is
4 and why this Court should give that organization a lot of money.
5 Why don't you read that and see if you agree with me?
6 A. You just want me to read the first paragraph?
7 Q. Try the first paragraph. I want to make sure you're
8 acclimated to what I'm asking you about. I can't expect you to
9 answer questions until you understand what it says.
10 A. I read it, I understand it.
11 Q. The first paragraph sets forth, essentially, what
12 Legacy's goals are as an organization; is that correct?
13 A. Well, it sets forth that it's effective, I think that's
14 the primary message in that paragraph.
15 Q. Okay. That's fine. And then it goes on to explain at
16 the bottom of page 11 "Legacy was built under the leadership of
17 national experts in the tobacco field, Dr. Cheryl Heulton, the
18 current President, Chief Executive Officer, Founding Board?
19 Chair", and then there's a footnote and it goes into some
20 details. Do you see that?
21 A. Just so I understand what's being said in this, is it
22 saying that I'm the founding board chair?
23 Q. I'm just reading -- all I'm doing is reading.
24 A. Founding Board Chair Chris Gregoir -- I'm sorry. What
25 did you want me to answer?

1 Q. I want to make sure you see your name is used in the
2 brief, do you see that?

3 A. Yes, I do.

4 Q. And if you go to the next page on page 12, we see that
5 this Commission advises the Court that "under Dr. Healton's
6 leadership, Legacy conducts its work in collaboration with
7 agencies at the national and local level. Legacy has worked
8 with numerous state, federal and local organizations to build
9 the most effective campaigns possible for prevention of tobacco
10 use. Most notable has been its groundbreaking truth antismoking
11 campaign". And then you can see that the Commission goes on to
12 advise the Court about some of the details of the "truth"
13 campaign. Do you see that?

14 A. Yes.

15 Q. And if you go on to -- go to the last page, page 15 of
16 this particular pleading, the conclusion section, we see that
17 this Commission tells this Court "for the reasons set forth
18 above this Court should grant plaintiff's request for non
19 disgorgement remedies from defendants, and order defendants to
20 fund Legacy's "truth" campaign pursuant to 18 U.S. S C 1964(a)".
21 Do you see that?

22 A. Yes, I do.

23 Q. Let's tell the Court what this organization is that filed
24 this brief asking for money to be given to Legacy, to that
25 organization?

- 1 A. Are you asking me to answer?
- 2 Q. No, I'll ask you a question. The organization called the
3 Citizens Commission to Protect the Truth, the organization that
4 filed the pleading we just went through, that organization is
5 almost completely funded by ALF; is that correct?
- 6 A. The organization was formed long before NAAG provided
7 funding to us for it.
- 8 Q. I'll ask the question again and tell me if you can answer
9 it. The organization that filed this pleading before the Court
10 that asked this Court to give all this money to ALF, that
11 organization is almost completely funded by ALF; is that
12 correct?
- 13 A. Are you talking about Protect the Truth, the Commission,
14 or are you talking about Casa?
- 15 Q. That's fair.
- 16 A. Because I'm not even sure -- they must be a 5013(c) the
17 document says it, but I'm not even aware of it. The Foundation
18 does provide funding to Casa and those monies, as you know,
19 derive from NAAG.
- 20 Q. Let me -- I'm going to take it one question at a time so
21 we have a clear record, Doctor, and then we'll keep moving on.
- 22 A. Okay.
- 23 Q. The organization that's called Citizens Commission to
24 Protect the Truth, you're familiar with that organization; is
25 that correct?

1 A. Yes, I am, it existed before the name existed, but go
2 ahead.

3 Q. That's the organization that we just saw filed this
4 pleading with this Court; is that correct?

5 A. All the health leaders of the nation, right.

6 Q. I'm sorry, did you answer my question "yes"?

7 A. I said yes, all the health leaders of the nation. That's
8 who signed the brief.

9 Q. My question was, the organization we're talking about,
10 Citizens Commission to Protect the Truth, you recognize that as
11 being the organization that filed this pleading with the Court;
12 is that correct?

13 A. Yes, I do.

14 Q. That organization that filed this pleading that we have
15 on the screen is almost completely funded by ALF; is that
16 correct?

17 A. It depends on what you mean by "funded". We cut the
18 check, but all of the money came from the Attorneys General.
19 They had a special meeting about this and were very concerned
20 about the fiscal situation of the Foundation. As you know
21 they've been trying to address the 99.05 issue, and because of
22 that concern, they gave us two options. Option one was they
23 would immediately make 1.5 million available to us to support
24 these efforts or if we felt we could wait six months, that
25 Mr. Califano would come with other members of the Commission and

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 talk with them at their upcoming meeting and they would fund
2 them directly. Frankly, in the interest of time and because
3 NAAG doesn't really make grants and oversee grants, Bill Sorrell
4 and I agreed that we would take the measure directly from NAAG
5 and give it all over the course of three years or so as needed
6 expended to the Commission, yes.

7 Q. Is the answer --

8 A. You're making it sound like it's our money, it's our
9 money simply because NAAG gave it to us for this purpose, so I
10 just want to make the record clear, it is the Attorneys General
11 who are deeply concerned about the funding cliff of the
12 Foundation as well, not just -- you know, not just me as a
13 public health person.

14 Q. Well, actually my questions go to whether some
15 organization that you are funding is the organization that came
16 in here as an advocate asking for money. That's what I'm trying
17 to get at. So I'll leave this alone. So all the checks, all
18 the checks that are written to this organization to fund it are
19 written by ALF; is that correct?

20 A. Right, but they don't fund this because this is a pro
21 bono brief, is my understanding.

22 Q. Well, can I show you -- show the witness tab 14 -- Jamey,
23 JD 055208 -- tab 14. Jamey, what I've handed you I believe is
24 from the Legacy Website, do you see that?

25 A. Yes.

- 1 Q. And do you recognize this as being from the Legacy
2 Website?
- 3 A. Yes, I do.
- 4 Q. And just so we have a record, there's a question here,
5 what is the Citizens Commission to Protect the Truth, and
6 there's an answer set forth; is that correct?
- 7 A. Yes.
- 8 Q. And that's the -- go back up, Jamey to -- that Commission
9 is the Commission that filed the brief we just looked at in this
10 Court; is that correct?
- 11 A. Yes.
- 12 Q. And if we go down to the question "how is the Commission
13 funded?" Do you see at a question?
- 14 A. Yes, I do.
- 15 Q. I'm going to read off the answer and find out if this is
16 a truthful statement. The answer that ALF gave on its Website
17 "the Commission is principally funded through a total
18 \$1.5 million multi-year pass-through grant using funds provided
19 by the National Association of Attorneys General to the American
20 Legacy Foundation. Foundation board member and Vermont Attorney
21 General William Sorrell was directly involved in seeking NAAG
22 funding for this important project after the Commission was
23 fully formed." Is that a truthful statement?
- 24 A. Yes, it is.
- 25 Q. So as of today, all of the funding that is received from

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Official Court Reporter

1 this organization comes from checks written by ALF; is that
2 correct?

3 A. Well, not all of the funding, as I said. Drew Valentine
4 was pro bono and other services are pro bono. For example, none
5 of the heads of the CDC, heads of HHS or former Surgeon
6 Generals, and you know all of them are part of this Commission,
7 have received anything.

8 Q. I didn't ask you what they received.

9 A. You said all of the funding and all of the funding is all
10 of the effort and costs associated with this effort and what I'm
11 being clear about is it is my understanding, you know, once I
12 knew this brief existed, that it was done on a pro bono basis by
13 Drew Valentine, so it took time and effort to do this but.

14 Q. I'm sorry, when I used the word "funding", you did not
15 take that to mean cash funding; is that correct?

16 A. It's cash and in-kind and I don't know what something
17 like this costs, but we weren't charged for it.

18 Q. Let me ask you, then -- that's fine. Let's take -- as
19 far as the cash funding for this organization --

20 A. Right.

21 Q. -- is all of the cash funding for this organization, is
22 it from checks written by ALF?

23 A. I can't -- I can't swear to that because I know that Joe
24 put a lot of time -- a lot of staff, probably put a lot of time
25 into this effort that is not reflected in their budget. So, I

1 can't swear to that. He cares deeply about the few urbanized
2 list before there was any possibility of funding. He, in fact,
3 went to NAAG, went to Bill Sorrell and said, you know, what are
4 we going to do to fix this problem? And Bill agreed with him it
5 needed to be fixed, and he went to NAAG and said we really
6 should do something about this because of the 99.05 loophole.

7 Q. Well, the statement here that the Commission is
8 principally -- do you see the statement here "principally
9 funded"?

10 A. Yes.

11 Q. That's a correct statement?

12 A. Yeah, as opposed to "totally funded".

13 Q. Okay. Don't get angry.

14 A. I'm not angry, no, no, no, I keep using my glasses and
15 putting them down.

16 Q. That's fine. Now --

17 THE COURT: Did you read that motion before it was filed?

18 THE WITNESS: No, I did not. But I knew when it was filed
19 because, you know, I saw stuff on e-mail about it.

20 BY MR. WEBB:

21 Q. And if Judge Kessler should do what the Commission asked
22 it to do and provide -- strike the question. Are you aware --
23 strike that question.

24 Are you aware that the Department of Justice has told
25 Judge Kessler that they want this Court to grant a specific

1 remedy that would require the tobacco companies to fund a long
2 term and sustained youth smoking prevention campaign? Are you
3 generally aware that that's a remedy that's being requested
4 here?

5 A. Yes, I'm generally aware of that.

6 Q. And as far as that general remedy in this case which you
7 are now testifying, if Judge Kessler should decide to provide
8 such a remedy in this case on behalf of ALF, do you want Judge
9 Kessler to consider ALF as an organization to receive a large
10 amount of that money for that program?

11 A. The American Legacy Foundation is presently the only
12 organization in the United States of America that is providing
13 paid advertising public education for young people. We will not
14 be able to continue to do that. If that were a decision of this
15 Court, that would obviously be a very good thing from the public
16 health standpoint. If you're implying that's why I'm here,
17 that's absolutely false.

18 Q. Well, actually, the Court will decide why you're here,
19 all I'm going to do is ask you factual questions. You didn't
20 answer any question, so I'm going to answer it again.

21 A. I actually did answer.

22 Q. Was the answer to any question "yes"?

23 A. Restate the question.

24 Q. I will. If Judge Kessler should decide to provide such a
25 remedy in this case on behalf of ALF, do you want Judge Kessler

1 to consider ALF as the organization to receive a large sum of
2 money to fund youth smoking prevention?

3 A. I think continuing the "truth" campaign is important from
4 a public health standpoint. If she were to do so, that would be
5 terrific. That's -- I can't say no to that because one of the
6 main focuses of my job is to be certain that we can continue to
7 stop young people from smoking.

8 Q. I listened to your whole explanation, is the answer to my
9 question "yes"?

10 A. Would I like her to do that?

11 Q. Yes.

12 A. Yes, of course.

13 Q. Now, let's go back to the states for a minute. As far as
14 the so-called financial crisis that ALF faces, we now know -- am
15 I correct, the states have now, the states themselves have now
16 had about six years to evaluate whether ALF has been successful
17 or unsuccessful in its youth smoking prevention activities; is
18 that correct?

19 A. That's a difficult question to answer because it took a
20 number of years for us to determine whether it was or wasn't
21 effective. I mean, you don't find that out in the first six
22 months.

23 Q. ALF's been operating about six years; is that correct?

24 A. Right, and just six months ago came out -- was the first
25 behavioral data on the foundation's efficacy.

1 Q. So, I take it you do recognize the states have the right
2 to carefully evaluate and review exactly what ALF has done and
3 not done and to do an objective evaluation of that; is that
4 correct?

5 A. Absolutely. I mean, they don't generally do it, they
6 rely on Research Triangle's evaluation work.

7 Q. Pardon me?

8 A. I mean, I'm just trying to accurately answer your
9 question. To my knowledge, there is not a systematic effort
10 underway by the states to evaluate us in the technical sense of
11 "to evaluate". I just want to make the record clear about that.

12 Q. Well, as far as whether the states approve of what ALF is
13 doing and want to come in and give ALF money for funding, you
14 are aware that as of today the states each year continue to get
15 billions and billions of dollars every year from the tobacco
16 companies; is that correct?

17 A. From the settlement, yes.

18 Q. Okay. For example, I take it you're generally aware that
19 the expected MSA payment for 2006 is going to be in excess of
20 \$6 billion. Is that your general understanding?

21 A. I actually don't keep track of that information.

22 Q. You understand it's multiples of billions?

23 A. Yes.

24 Q. Okay. And are you generally aware that while ALF has
25 been in existence that the states have received over \$60 billion

- 1 from the tobacco companies?
- 2 A. I know that they've received a great deal of money. I
- 3 didn't know the exact amount.
- 4 Q. And you're aware that the states totally control how they
- 5 spend the billions of dollars they receive from the tobacco
- 6 companies; is that correct?
- 7 A. I guess the simple answer is yes.
- 8 Q. And if the states believe that ALF has actually done a
- 9 good job and has made accomplishments in the area of youth
- 10 smoking prevention, there's plenty of tobacco money for the
- 11 states to give ALF to continue its activities; is that correct ?
- 12 A. Well, there's plenty of money going there, but as you
- 13 know, most states are facing deficits, so --
- 14 Q. Well, let me ask you this: We saw from the press
- 15 release, we saw a minute ago, ALF has known for several years
- 16 that the funding would end up simply being guaranteed for five
- 17 years and would highly likely expire in 2003; is that correct?
- 18 A. I think it took about a year for the board to grapple
- 19 with that, but yes, they knew that it was unlikely. I told them
- 20 it was unlikely and eventually others on the board came to
- 21 believe it was unlikely.
- 22 Q. So, during the last several years, with that knowledge,
- 23 how many states has ALF arranged to receive additional funding
- 24 from as of now?
- 25 A. None. It's been the opposite. We fund the states.

1 Q. So, as of now no state has agreed to give ALF anymore
2 funding, is that the current status today?

3 A. We have not asked the states to give us more funding. Up
4 to now we've been providing substantial support to prop up,
5 states whose programs have been slashed, most of them
6 post-9-1-1.

7 Q. Just so I understand, as ALF has faced this financial
8 crisis you're telling the Court about, has ALF done anything to
9 try to arrange the states to give ALF more money of this
10 billions of dollars they get each year from the tobacco
11 companies?

12 A. We've had a series of meetings and we have more coming up
13 about organizing a private public sector effort to have a
14 national cessation effort, and in that context, yes, we indeed
15 asked the states to attempt to pool some of their marketing
16 dollars so that can be done on a national basis because it saves
17 40 percent to do the ad campaigns on a national basis. And our
18 understanding is that at least one large state intends to do
19 that and we'll be speaking at another to follow-up. It takes a
20 the lot of budget cycles to build that in. But to my knowledge
21 that's the only request we have made, other than our major
22 grants, to states that they match our dollars because the board
23 was very concerned that the states were not sending their MSA
24 dollars on tobacco. That's a major public policy issue that I
25 think you're probably very aware of.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 Q. I am and I don't intend to take up a lot of time on it,
2 but right now ALF has -- ALF has measures under way to try to
3 get the states to give out some more tobacco money to fund your
4 activities; is that correct?

5 A. To fund a national cessation program to promote 1-800
6 Quit Now.

7 Q. As far as your testimony that ALF is in financial crisis,
8 if ALF was in financial crisis would ALF make a decision to give
9 you a personal mortgage loan of about a million dollars?

10 A. Actually I don't think that's how it worked, but if you'd
11 like me to explain it I'd be happy to.

12 Q. Well, let me -- can I show the witness tab 2, Jamey, JD
13 055210. And I'll hand this to you. You've already got it
14 there. It's the financial statement.

15 A. Yes --

16 Q. Well -- you can look at the screen too, if you would
17 like. I'm going to go to page 13.

18 A. All right.

19 Q. And we see on page 13 --

20 A. Yes.

21 Q. -- of the financial statement, there's what's described
22 as a related party transaction?

23 A. Yes.

24 Q. And it says "loan to officer. In September 2002, the
25 Foundation provided a \$967,500 mortgage loan to the president

1 slash CEO secured through a note to the D.C. property purchased,
2 as well as other personal assets". So that's a mortgage, a
3 personal mortgage loan to you by ALF of just a little less than
4 a million dollars; is that correct?

5 A. It's actually a separate loan that the Foundation
6 obtained, so it is not -- the money that was utilized was not
7 ALF's dollars, it was a loan.

8 Q. Well -- did you get the \$967,000?

9 A. Right, but it was a loan that was obtained.

10 Q. And so -- but you did get the \$967,000?

11 A. Yes, I did.

12 Q. Okay. And that money that you got from ALF allowed you
13 to buy a home in which you had to make virtually no down payment
14 on; is that correct?

15 A. Well, I hadn't sold my house in New York, that's right.

16 Q. Is the answer to my question "yes"?

17 A. Yes.

18 Q. And if ALF were in a financial crisis -- strike that
19 question. You've told us earlier, ALF is a charitable
20 foundation; is that correct?

21 A. Right.

22 Q. And as a charitable -- at the time -- I take it at the
23 time that you asked ALF to give you this money, you were aware
24 that ALF was in a financial crisis; is that correct?

25 A. But this was not -- this was not money that was in ALF's

1 assets, it was a loan that Legacy obtained. So it did not
2 affect their assets at all, and as you see the rate that was
3 paid was at the time the market rate. It created no taxable
4 income to me and so actually the -- you know, the bank that made
5 that loan is earning, you know, almost 5 percent on the money so
6 it was not using any of the Foundation's assets.

7 Q. At the time that you asked ALF to enter into this
8 transaction, did you believe ALF to be into financial crisis?

9 A. I didn't ask them this, they asked me what further
10 benefits they could provide me and I gave a list of about 10
11 possibilities. I had a similar loan when I was at Columbia
12 University.

13 THE COURT: If you defaulted on the loan would ALF have to
14 pay the money to the bank?

15 THE WITNESS: No, it's fully secured. It's fully
16 secured --

17 THE COURT: It's fully secured?

18 THE WITNESS: It's more than fully secured. They have the
19 title at my house at the Cape as well as the D.C. property, and
20 the two combined are probably double what that figure is, but
21 certainly considerably more than that.

22 BY MR. WEBB:

23 Q. At the time this transaction was entered into --

24 A. Yes.

25 Q. -- it was your belief that ALF was in financial crisis;

1 is that correct?

2 A. It was my belief that the Foundation had very important
3 financial issues, but this doesn't bear on them at all. The
4 funds do not derive from the Foundation's assets, it's a
5 separate lone.

6 Q. Is the answer to my question "yes"?

7 A. Yes, there was a crisis and this does not bear on it.

8 Q. Now, Dr. Healton, let me go to a little different topic.

9 THE COURT: I'm sorry, I have to ask another question.

10 MR. WEBB: Go ahead.

11 THE COURT: The third sentence in that paragraph is "the
12 mortgage loan is funded through an unsecured direct bank loan to
13 the Foundation with the same terms."

14 THE WITNESS: And -- but my agreement with the Foundation,
15 which is a separate agreement, very clearly spells out I'd fully
16 secured by the D.C. property and a home I own elsewhere that I
17 fully own.

18 THE COURT: All right, Mr. Webb, it's your cross.

19 BY MR. WEBB:

20 Q. Dr. Healton, let me turn to a little different topic.
21 Could I hand the witness tab 120, JD 065578 which this is the
22 June 2008 article which you talk about in your written direct
23 examination. I'll hand it to you. Do you recognize that
24 publication, that article?

25 A. Yes, I do.

1 Q. And you reference that in your written direct
2 examination; is that correct?

3 A. Yes, I do.

4 Q. And Jamey, could I have tab 121 called up. If we go to
5 page 45 of your written direct examination, line 9 to 14, you
6 are asked this question about that study.

7 "Question: What did the Foundation's study show about
8 the effect of the "Think. Don't Smoke" campaign". Now, "Think.
9 Don't Smoke", that's a Philip Morris youth smoking prevention
10 advertising campaign; is that correct?

11 A. Was.

12 Q. And you say here "among other findings, the study showed
13 that exposure to "Think. Don't Smoke" advertisements was
14 associated with a 23 percent increase in the odds of reporting
15 an intent to smoke in the next year. It is noteworthy that
16 subsequent unpublished analysis were conducted have confirmed
17 this effect." Now, the 23 percent increase that you referred to
18 there, the article itself that you derive that figure from, you
19 are the coauthor of that article; is that correct?

20 A. Yes, I am.

21 Q. And the article itself, I think the lead author was
22 Dr. Farrelly; is that correct?

23 A. Farrelly.

24 Q. Farrelly, I'm sorry. And if we go into the as far as who
25 did what on this article, if you go to the page numbered 906 --

- 1 Jamey, it's tab 122 -- if you go to page numbered 906 of this
2 article, we can see under contributions it sets forth who did
3 what. Do you see that?
- 4 A. Yes.
- 5 Q. And it describes that Mr. Farrelly -- is it Dr. Farrelly?
- 6 A. Yes, it is.
- 7 Q. He designed the survey questionnaire and methodology, he
8 directed the data analysis and he prepared the original draft
9 man you script and you, Dr. Healton, participated in the
10 preparation of the final draft; is that accurate?
- 11 A. Yes, it is.
- 12 Q. Okay. Now, if we -- all of the research and all the work
13 that went into developing and implementing this study -- strike
14 the question. Tell the Court who Dr. Farrelly is or Farrelly?
- 15 A. He's with Research Triangle. He's an economist who is, I
16 believe, the lead person on our contract with Research Triangle,
17 Inc., which was a competitive bidding process. So he leads a
18 fairly large team of people in North Carolina.
- 19 Q. And this organization called Research Triangle, Inc., is
20 that a consultant to ALF?
- 21 A. Well, it's a contractor.
- 22 Q. It's a what?
- 23 A. It's a contractor.
- 24 Q. Is it a contractor that ALF has business with?
- 25 A. Oh, yes. I mean, we pay them to undertake our evaluation

1 work.

2 Q. I just couldn't hear you.

3 A. Yes, they are paid to assist us in our evaluation.

4 Q. I think you said in your deposition that you paid them,
5 you think, probably upwards of \$16 million in recent years for
6 work they've done; is that correct?

7 A. Um, I'm not certain of that figure. I don't recall. I
8 actually recall \$21 million, I think, in my direct testimony.

9 Q. Okay. That's fine. You paid them about \$21 million in
10 recent years; is that correct?

11 A. Right, to evaluate a broad range of programs.

12 Q. Your voice is trailing off.

13 A. To evaluate a broad range of programs, yes.

14 Q. That's fine. So this contractor, you contracted with
15 them to do this study that we have on the screen; is that
16 correct?

17 A. We contracted with them to collaborate with us on the
18 work, yes.

19 Q. And you paid them for that; is that correct?

20 A. Yes. Yes. Is this mic on?

21 Q. I think your voice just trails off.

22 A. I feel like I'm talking loudly. I apologize.

23 Q. So, there's no question that this study that we're going
24 to talk about with the Court where you reach this conclusion
25 about Philip Morris advertisements, ALF was paying people to do

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 a study of ALF's own advertisements; is that correct?
- 2 A. That's correct, yes.
- 3 Q. And you were paying ALF -- strike that. You were paying
- 4 Research Triangle to do research that compared ALF's ads to
- 5 Philip Morris's ads; is that correct?
- 6 A. That's how it worked out. I think it began as a control
- 7 variable and when they saw the results, they realized there was
- 8 a real issue.
- 9 Q. So is the answer to my question "yes"?
- 10 A. Yes, that's standard practice, that is what we do and
- 11 that's what others do.
- 12 Q. And are you the person who made the decision on behalf of
- 13 ALF that when the article was published, there would be no
- 14 disclosure in the acknowledgment section that ALF had funded the
- 15 entire study?
- 16 A. No, I didn't make that and I'd be surprised if it doesn't
- 17 say that.
- 18 Q. Well, let's look at -- I have acknowledgment section on
- 19 the screen. Do you see that?
- 20 A. Um-hmm. You know, that surprises me, and no, I
- 21 absolutely did not make such a decision. I'm surprised it
- 22 doesn't because normally it does say what the source of funding
- 23 is, so that's news to me.
- 24 Q. Well, you're the author --
- 25 A. I'm the author, I'm one of the authors, I read it

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 carefully, I didn't notice that. I mean, I will say that in
2 terms of the people who generally read this journal, the fact
3 that RTI is the evaluator. A lot of Legacy's work is widely
4 known, but it should have been there, absolutely.

5 Q. But when you read -- I'm sorry when you read this over as
6 the author, you did not in any way recognize that the article
7 itself contains no indication that ALF is paying somebody to
8 actually evaluate your ads versus somebody else's ads who is not
9 paying for the study?

10 A. It doesn't say that there, but of course when it talks
11 about the authors it says where we all are and I think people
12 know you don't get this huge amount -- no one does this huge
13 acknowledge of work for nothing. It's extremely expensive.

14 Q. So we are to think that Philip Morris paid for this add?

15 A. Pardon?

16 Q. A reader would know someone else paid for it either ALF
17 or Philip Morris?

18 A. No, I think it's a fair criticism, it could have been
19 NIH. It could have been a variety of sources, so I believe the
20 article should have indicated, absolutely.

21 Q. Well, particularly --

22 A. I'm surprised it doesn't.

23 Q. Well, because this organization -- the organization that
24 did the research clearly had a strong bias in favor of ALF
25 because you had already paid that organization \$21 million; is

1 that correct?

2 A. No, at this time when this was being written, they had
3 had nowhere near that amount. This was -- this is a long while
4 ago.

5 Q. But, the people doing the work, Research Triangle, were,
6 as you just told us a moment ago, a contractor that did many
7 projects for ALF and got paid; is that correct?

8 A. Yes, but I have to respectfully disagree with your
9 assertion that we were paying them to somehow please us. What
10 pleases me is to know what's really working. Nothing would make
11 me happier than to believe I didn't have to spend a hundred
12 million dollars a year to reach adolescents in the United
13 States, that there was a less expensive way to go about it. So
14 --

15 Q. But I take it -- we can end this. You agree that readers
16 were entitled to know in the acknowledgment section that ALF,
17 whose ads were being evaluated, was paying for the study; is
18 that correct?

19 MS. EUBANKS: Asked and answered, Your Honor.

20 THE COURT: Overruled, not answered.

21 THE WITNESS: "Entitled" I think is -- it is standard
22 practice and it should have happened, so, that would be a yes. I
23 think they should know, I think virtually all of them that care
24 about this work do know, but yes, they should have known. And
25 I'm surprised it's not there.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 BY MR. WEBB:

2 Q. Now, by the way, are you aware that the journal -- that
3 the journal, the American Journal of Public Health, they have a
4 stated policy that you as an author of this article were
5 required to disclose all financial support? Are you aware of
6 that?

7 A. I am, and that's why I'm very surprised it's not there.
8 Because let me be clear. Normally it would have been raised by
9 the editorial staff in the process. If you leave something out
10 they -- you know, they do have a separate form and I don't know
11 if it says "publicly", but we had to fill out a separate form of
12 conflict of interest and every author has to fill out a form and
13 say what is the source of the dollars. So that's probably on
14 file with them. That happens with every journal, so --

15 Q. So my question is, you are aware?

16 A. Could you read the policy again?

17 Q. I'll show you the policy.

18 A. Okay.

19 Q. I'll make it easier for you.

20 A. Because I don't know if it's a policy you disclose to
21 them or policy that it's put in the article, but I've already
22 said that it should have been in the article.

23 Q. Could I show the witness tab 124, it's JD 055212. This
24 is from the American Journal of Public Health's Website entitled
25 Instruction for Authors. Have you had a chance -- do you see

1 that?

2 A. Yes.

3 Q. And if you go to page 4 --

4 A. Yes.

5 Q. Do you see where I've highlighted the acknowledgment?

6 A. Yes, we did all that. I'm sure they have that on file,
7 because I remember signing it.

8 Q. I'm sorry, where it says "acknowledgements" it says
9 "disclosure of all financial and material support is required.
10 Upon acceptance, the first author will be asked to certify that
11 all persons who have contributed substantially to the work, but
12 who do not fulfill authorship criteria, have been listed and the
13 information for listing them has been obtained." Are you
14 telling me that was done?

15 A. Yes, just to be clear what they're talking about here is
16 what you're required to file with the journal before they
17 publish it. In other words, the reviewers need to be aware. To
18 provide a disclosure form, and I'm 99 percent certain that
19 happened because I know their process.

20 Q. Do you have that form somewhere?

21 A. I don't, but they would. I mean, we may have retained
22 it, but certainly they would and we could obtain it.

23 Q. Let me ask you this, Doctor. Am I the first person that
24 pointed out to you that this article that compared my client's
25 ads to your ads had no disclosure that ALF was paying for the

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 study? Am I the first person to point that out to you?

2 A. You are the first person and I'm frankly kind of ready to

3 fall off the chair because I'm very surprised it's not here.

4 Q. Let's talk about the --

5 A. I mean we're credited all over the place for research, we

6 funneled an enormous amount of research in this country.

7 Q. Beyond that issue, Doctor, before this article was ever

8 published, you became aware of some major problems with the

9 study's methodology that called into question the accuracy of

10 the results; is that correct?

11 A. That's not accurate.

12 Q. Well, let's start with this. Am I correct, the survey,

13 the way the survey got structured is that somebody made a

14 decision as to how to limit the age of kids that would be

15 surveyed; is that correct?

16 A. I'm sorry, could you repeat the question?

17 Q. Yes. In order to do the survey, somebody had to decide

18 who to limit the age group that would be part of the survey of

19 the kids surveyed; is that correct?

20 A. Well, the age group -- the target of the "truth" campaign

21 is age 12- to 17-year-olds.

22 Q. That's right. That's your ads, correct?

23 A. Yes.

24 Q. So, we know that the "truth" campaign had a target

25 audience of kids 12 to 17 years old; is that correct?

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 A. Yes.

2 Q. And someone decided that that would be the target
3 audience that would be surveyed for this particular study; is
4 that correct?

5 A. Yes.

6 Q. And in fact, if we go to --

7 A. Actually, we survey up to age 24, just for the record.

8 Q. Well --

9 A. I think it's 12 to 24.

10 Q. But the only thing you actually considered in the
11 surveyed results was kids 12 to 17 years old; is that correct?

12 A. That's correct.

13 Q. That's forthright on the face of the article; is that
14 correct?

15 A. Yes, it is.

16 Q. Now, you were comparing the "truth" ads to Philip
17 Morris's ads, so I take it you must have asked yourself, I
18 wonder what the target audience is for Philip Morris's ads; is
19 that fair to say? Did someone consider that?

20 A. Um, I was not at the Foundation when the survey was
21 designed. It ran for the first time, I think, in 1999 for
22 baseline data, so I have a hard time answering specific
23 questions about what went into the thinking. It's a very
24 excellent survey. I know -- so I have no problems with the
25 research methodology that was applied here.

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 Q. Well, we're going to find that out because we're going to
2 go through it and find out if there are any problems. So we'll
3 start with the first issue, is that -- when did you first become
4 involved in this project?
- 5 A. In which project?
- 6 Q. In the study that is reflected in that article.
- 7 A. The moment I arrived at the Foundation, so that would
8 have been late December '99.
- 9 Q. And at some point did you -- when you came on board, did
10 you come to realize that you structured this thing to only study
11 the target audience for the "truth" campaign and that you
12 ignored the target audience for Philip Morris's campaign, did
13 you learn that?
- 14 A. The first time I heard about Philip Morris's target
15 audience for their campaign was in some documents related, I
16 believe, to this case. That actually was news to me that they
17 considered their target to be 9- to 11-year-olds because there's
18 no systematic data collection for 9- to 11-year-olds from any
19 major government agency that would ever allow them to evaluate
20 the impact of the campaign.
- 21 Q. Well, let's find out what you learned -- strike the
22 question. You learned before the article was published of a
23 major problem because you surveyed the wrong target audience; is
24 that correct?
- 25 A. No, there was no major problem and there was no wrong

1 target audience. The target audience for a youth smoking
2 campaign, a youth antismoking campaign, particularly one that's
3 structured to reach those young people when they're making these
4 decisions, would naturally be 12- to 17-year-olds.

5 Q. Well, let's see what you learned before the article was
6 published. Could I show the witness tab 126, JD 055088, and I'm
7 going to hand this to you, and I'll give you a chance to look at
8 that for a moment. I have it on the screen.

9 This is a letter sent to you -- sent to Dr. Haviland?

10 A. That's correct. Yes.

11 Q. Dr. Haviland was Executive Vice President of the American
12 Legacy Foundation; is that correct?

13 A. Yes.

14 Q. She was number two in charge of the Foundation?

15 A. Not at this point, but eventually, yes.

16 Q. Okay. And Dr. Haviland is someone that you worked
17 closely with at the Foundation?

18 A. Yes.

19 Q. She's one of the coauthors on this article; is that
20 correct?

21 A. Yes.

22 Q. And this is dated -- go back, February 21, 2002; is that
23 correct?

24 A. Yes.

25 Q. This is several months before the study was published; is

- 1 that correct?
- 2 A. Yes.
- 3 Q. And if we go down to see what Philip Morris told you in a
4 very professional way, it says "we want you to know that we are
5 concerned that certain aspects of ALF's data collection
6 methodology may have biased the results ALF obtained on the
7 Philip Morris USA YSP advertisements. Some examples: Number
8 one, Philip Morris USA's YSP intended audience is kids aged 10
9 to 14. ALF interviewed kids aged 12 to 17. As a result, ALF
10 missed 40 percent of Philip Morris USA's YSP's audience." Do
11 you see that?
- 12 A. I do see that and now I recall in seeing the memo, I
13 recall them making this -- you know, making this statement.
- 14 Q. And when this statement was made to you, at that time did
15 you plan on being a coauthor of this article?
- 16 A. I was involved in a lot of discussions about how we were
17 pursuing the research and I assumed that I thought of myself as
18 a participant and an author. I can't directly remember, but I
19 would assume I did.
- 20 Q. And did Dr. Haviland know she was going to be an author
21 at that time of this article?
- 22 A. I would think she would know, yes.
- 23 Q. And I take it Dr. Haviland shared with you the content of
24 this letter; is that correct?
- 25 A. Yes, but there's a problem, of course, with the age

1 range, but I won't get into that. So -- I mean, there was a
2 credibility issue here because that age range covers an age
3 range that would require two separate campaigns because 9- and
4 10- and 11-year-olds are in one social developmental phase, and
5 those who are older than that are in a very different one, so --

6 Q. Just so I understand, when Philip Morris told you that
7 their target audience is kids age 10 to 14, did you believe that
8 was a false statement by Philip Morris?

9 A. No, I'm just looking at it now and I'm thinking what
10 would be the implications in terms of the results. In my view
11 it would be very limited.

12 Q. When Philip Morris told you what their target audience
13 was, did you go out and verify it so you could be certain of
14 what Philip Morris told you was true?

15 A. No.

16 Q. Did you accept it as true?

17 A. Since I didn't even remember that they said it in this
18 memo it's hard for me to recollect every thought that went
19 through my mind when I read the litany of complaints that Philip
20 Morris had then and continue to have about our work. But in
21 this particular instance, you know, the first time I remember
22 really being aware of their assertion about their age range was
23 fairly recently. But obviously they said it then and I don't
24 have before me our answer, but I could review our answer. My
25 assumption is we addressed it in some way, but we address all

1 their issues when they write to us.

2 Q. That's what I want to find out. When Philip Morris told
3 you that, several months before the article was published, did
4 you do something to change the survey so that it would fairly
5 compare Philip Morris's target audience and not exclude
6 40 percent of Philip Morris's target audience from the survey?
7 Did you do something about that?

8 A. Well, I would expect that we looked at it and we thought
9 to ourselves, okay, we've missed 10-year-olds, but since we're
10 surveying, you know, 8th grade and up we probably have people
11 who are about to turn 12, because really the survey was grade
12 based. So my sense is we probably did not go back out and try
13 to talk to people who -- 10 and 11 or 10 I would say because we
14 do have some 11-year-olds in the sample. If we did it would be
15 completely out of sync when all the various ads were running, so
16 it would be very difficult to retrospectively address that.

17 Q. Okay, so --

18 A. And I don't think it would have any impact on the data,
19 certainly not the data for how their campaign resonates with
20 12-, 13- and 14-year-olds because they obviously were in the
21 sample and those were the years of onset of smoking.

22 Q. I want to make sure the Court understands what you are
23 saying. When you found out that you were considering
24 publishing -- could I have that back on the screen --
25 considering publishing a survey in an article in a journal and

1 you were told that the ads, that the comparison that you were
2 making between your ads and Philip Morris's ads had excluded
3 40 percent of Philip Morris's audience, did you make the
4 decision to ignore that and change nothing in the survey?

5 A. Just to be clear, the survey was, the data collection was
6 over. You can't go back after the fact and fill things in. The
7 only way to fix it, if we chose to fix it, would be moving
8 forward, and I do not believe we changed the age range because
9 we frankly think it's very difficult to have that kind of
10 conversation with a 10- and 11-year-old.

11 Q. So, just so the record is clear, obviously the way to fix
12 it would be to do a new survey including all of Philip Morris's
13 target audience and all of your target audience. That's one
14 solution to fix it; is that correct?

15 A. Going forward, right. I don't think it would have any
16 impact on the results that we can discuss later, but certainly
17 not the results for 12-, 13- and 14-year-olds.

18 Q. And we know from the article that you didn't fix it
19 because the article on its face sets forth the target audience
20 of people included in the survey to reach the results of being
21 people 12 to 17; is that correct?

22 A. That is correct, yes.

23 Q. Now, am I correct that you then became aware of even a
24 bigger problem in your methodology; is that correct?

25 A. I'm -- we've had hundreds of discussions about

1 methodology for all of our work, so you'll have to be a little
2 more specific.

3 Q. Well, I'll leave the same letter on the screen.

4 A. Okay.

5 Q. Again, this is the letter from Dr. Levy several months
6 before your article published; is that correct? Satisfy,
7 yourself with that.

8 A. Um-hum.

9 Q. I'm sorry. The letter is dated February 21st?

10 A. I have two letters here, the 21st -- I have three
11 different first pages, I see what the problem is. It's a
12 two-page letter.

13 Q. I'm sorry, are you there?

14 A. I'm there. Is this on the first page?

15 Q. Is the date of the letter February 21st?

16 A. Yes, it is.

17 Q. Okay. And the article -- could I go back -- Jamey, could
18 I just go back to the date of the letter. February 21st, 2002
19 is several months before this article was actually published in
20 June 2002; is that correct?

21 A. Yes. It probably was already accepted. I don't really
22 remember whether it was accepted or in the review process.

23 Q. It did not get published until June 2002?

24 A. It takes a long time for it to come out, but yes, it was
25 a long time for it to come out.

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 Q. And if we go back to what Dr. Levy told you, after she
2 explained the problem with the target audience she goes on to
3 tell you all at ALF, Dr. Haviland, that during the fall, that
4 during the fall -- by the way, let me come back to the age range
5 issue before I leave it. After Philip Morris explained this age
6 range problem to you that you had excluded 40 percent of their
7 age range, did you and Dr. Haviland, at least, have a discussion
8 that you could at least disclose that disparity in the article
9 to make it more fair to readers?
- 10 A. No, we did not, to my recollection, but bear in mind what
11 we reported was the responses for young people in that age
12 range. So while we didn't have 10-year-olds in the sample, we
13 were only reporting on responses to the campaign from those 12,
14 13, 14, and above. So, I just want to be clear that --
- 15 Q. I want to come back because I do want an answer to my
16 question and then I'll move on.
- 17 A. I think I have answered it.
- 18 Q. Was the answer "yes" or "no"?
- 19 A. I said I don't believe we had a conversation. I do not
20 remember whether we had a specific conversation about whether
21 this was something that ought to be disclosed.
- 22 Q. Well, think about it for a minute, Doctor. If this was
23 your ads, that 40 percent of the target audience was excluded
24 from the survey, would you expect the other person publishing
25 the article to at least footnote that in fairness to readers?

1 MS. EUBANKS: Objection, that's argumentative, Your Honor,
2 she answered his question.

3 THE COURT: Overruled. You may answer.

4 THE WITNESS: I'm sorry, could you restate the question?

5 BY MR. WEBB:

6 Q. Yes, Doctor. If there was some other survey conducted by
7 somebody else involving your "truth" ads which came out negative
8 to your campaign, and that other author or authors had excluded
9 40 percent of your target audience from their survey, would you
10 expect, in fairness, those authors to at least disclose that
11 disparity at least in a footnote so readers would at least
12 understand that issue?

13 A. I could concede that point but it would not change the
14 results for 12 to 14 and just, I would hasten to ad, that we
15 didn't enter this analysis expecting to find what we found with
16 "Think. Don't Smoke". "Think. Don't Smoke" was involved in
17 this study, as were all the state campaigns, to control for
18 their influences. We didn't have any operori views about
19 whether they would be negative or positive, we simply wanted to
20 control for them and we were very startled by the results we
21 found, and I just want to be clear about that.

22 Q. Then in hindsight , Doctor, as you look at this article
23 now where there's no such disclosure, do you believe you should
24 have made such a disclosure?

25 A. I think you could take either approach because --

1 Q. What approach are you going to take here in this
2 courtroom?

3 A. Well, basically the article discusses 12- to 14-year-olds
4 and so whether it included all of your group or not is actually
5 not relevant to 12- to 14-year-olds. That's when young people
6 start to smoke and the study was about the impact of media on
7 those who are about to smoke. So I think you could argue either
8 way. If there was a footnote, I think it would have to be very
9 clear that the footnote -- that not doing 9- and 10- and some
10 11-year-olds did not change the final results of the study, that
11 it would not change the impact of your campaign on those who are
12 making that decision to smoke in real time, 12, 13, 14.

13 Q. Today as you sit in this courtroom under oath, do you
14 believe in hindsight that such a disclosure should have been put
15 into this article as one of the authors?

16 A. I actually don't because I don't think it affects the
17 results at all, but if it did affect the results, then I would
18 agree with you.

19 Q. And the reason -- and so your testimony is you're certain
20 that excluding 40 percent of Philip Morris's target audience,
21 10- and 11-year-olds, had no impact at all on the survey
22 results?

23 A. What I'm saying is that the results were on the impact of
24 the two campaigns and those were 12 and older. So we were only
25 reporting the impact of the campaign on those age ranges. As

1 you know, I think you know, I've asked tens and tens of times
2 for outcome evaluation information from Philip Morris.
3 Obviously, if they had delivered data that actually demonstrated
4 efficacy for the campaign or anything that ran counter to this,
5 and they have repeatedly declined to do that. So absent any
6 proof from them that the campaign works, I'm not going to sit
7 here and apologize for publishing a paper demonstrating this
8 associated with increased intentions to smoke.

9 Q. Well, I take it, although when you are the coauthor of an
10 article in the area of public health, do you think full
11 disclosure is a good policy?

12 A. Yes, full disclosure -- on any article that you write,
13 you could literally append 10 pages of disclosures. You have to
14 make judgment calls.

15 Q. Let's go --

16 A. I have to tell you I don't even remember this being
17 discussed as an issue, so --

18 Q. Let's go to the next issue and see if you remember this
19 being discussed. Did you, in this letter that Dr. Levy sent
20 you, here's what she said to you, the second issue, she says,
21 "during the fall of 2000, Philip Morris USA YSP was running nine
22 different youth smoking prevention advertisements. From ALF
23 questionnaires, it appears that ALF asked respondents only about
24 two of the ads we were running. In addition, ALF appears to
25 have asked respondents about two of our ads that were not

1 running during the fall. As a result, ALF appears to have
2 missed 62 percent of the ads, percentage based on our
3 allocations, that Philip Morris USA YSP was running during the
4 fall of 2000."

5 Now, the issue that ALF had missed 62 percent of the ads
6 Philip Morris was running at the time of the survey, is that
7 something you remember being called to your attention before the
8 article was published?

9 A. Yes, I do.

10 Q. Okay. And as far as that issue is concerned, you were
11 aware the methodology -- because of the way you structured this
12 study to compare ALF's ads to Philip Morris's ads, the designers
13 of the study designed it so that it would include all of ALF's
14 "truth" ads and all of Philip Morris's ads; is that correct?

15 A. No, it isn't. It was designed to include, as the paper
16 states, all the ads that were running as of six weeks before
17 they went into the field because they had to write and design
18 the survey and that's pretty standard. Remember, we do this
19 survey basically every six to nine months and we're on the 10th
20 wave now. We did ask about four ads. We obtained those four
21 ads from the video monitoring services -- service which is the,
22 I think, sort of the official go to place to find out what's
23 running. So those were the four ads that were asked about. But
24 I hasten to add, as you know, that there is an open-ended
25 question in which we say have you seen any other ads, the theme

1 of which relates to smoking, and then if they say, oh, yes, I
2 saw another one, we ask them to think of just anything from it,
3 just one tiny thing. And if they say it we do more probes with
4 them and that's how they get a confirmed awareness level, and I
5 do want to fully answer this question.

6 Q. What question do you think you're answering, Doctor?

7 A. I'm answering your question.

8 Q. Which question?

9 A. You asked me whether --

10 Q. I asked you if --

11 A. About nine ads and to our knowledge there were only four
12 running based on video monitoring.

13 Q. I asked you did you become aware of this problem before
14 the article was published is my only question?

15 A. In this case I became aware of your assertion.

16 Q. Okay.

17 A. And I have absolutely no proof whatsoever. The video
18 monitoring service said there were four ads running at the time,
19 and when I asked Mr. Willard in a meeting when we met with all
20 the methodologists about these issues, I said to him, Howard,
21 are you talking about a local buy or a national buy and he did
22 not answer my question. So that may be one of the issues. If
23 Philip Morris was buying in three or four cities additional ads,
24 that is not picked up by the monitoring service and that would
25 not belong in a national survey in any event.

1 Q. Let's make sure the Court understands the problem.
2 A. It is complex to give a fair and complete answer.
3 Q. You can be as complex as you want, but we're not going to
4 stop until we get the story out.
5 A. That's fine.
6 Q. My question is, was the study actually designed so that
7 it would include all of ALF's advertisements and all of Philip
8 Morris's advertisements within six weeks of the survey start?
9 A. Yes.
10 Q. And that's set forth right on the face of the study; is
11 that correct?
12 A. It's in the methods, yes.
13 Q. Okay. And in fact, let's just show that to the Court.
14 Could I have tab 127 A, which will be page 902 of the study
15 itself. I called it out on the screen where it clearly states
16 here "questions pertaining to the various advertisements were
17 presented in random order in order to control for order effects
18 and included all advertisements from both campaigns aired within
19 six weeks of the survey's start". So there's no question that
20 in order to have a fair comparison, it was decided that all
21 advertisements from both campaigns aired within six weeks of the
22 survey needed to be included in the survey; is that correct?
23 A. That's correct.
24 THE COURT: And excuse me, to follow up on one thing and
25 then we're going to take a morning break.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 MR. WEBB: Yes.

2 THE COURT: The term "all advertisements", did that
3 include what you just referred to as "local buys and national
4 buys"?

5 THE WITNESS: It would only include national buys because
6 the video monitoring service, that's what they download and both
7 of these campaigns are national campaigns. So we -- you know, it
8 just -- it's a national evaluation of national ad campaigns, not
9 ones that are -- if there were ads running locally, the only way
10 you could deal with that would be to have a separate study of
11 local marketing, and then you'd have to do over-sampling in those
12 regions, I guess would be the solution to it.

13 MR. WEBB: I'll stop now.

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

15 (Thereupon, a break was had from 11:05 a.m. until
16 11:20 a.m.)

17 THE COURT: Mr. Webb, please.

18 MR. WEBB: Jamey, could I have back up -- I wanted to pick
19 up where we left off.

20 BY MR. WEBB:

21 Q. By the way, Doctor, one of my co-counsel saw you in the
22 hallway in somewhat of an animated conversation with your
23 lawyer. Did you have any -- did you have any discussion over
24 the break with anyone about anything to do with your testimony?

25 A. No.

1 Q. I want to pick up where we left off here on the screen.
2 I want to walk through with the Court why -- there was a reason
3 why it was important for the methodology that was used for this
4 survey to include all advertisements from both campaigns; is
5 that correct?

6 A. We wanted to do so and we made every effort to do so,
7 yes.

8 Q. And the reason you made every effort to do so is because
9 the way this study was structured and the way results were
10 recorded was based on something in the article that you called
11 "confirmed awareness"; is that correct?

12 A. "Confirmed awareness" is a standard term, right, yes.

13 Q. That wasn't my question. I didn't ask you if it was
14 standard term. Did you understand my question?

15 A. I do. And just to be clear, if we had decided to use a
16 sample of both ads, sets of ads, that would have also have been
17 scientifically acceptable, so I don't want to get too confused
18 here about it. We chose to do it the way we did it for the
19 completeness, so --

20 Q. We know, if we look at the questionnaire -- and we're
21 going to get to it in a minute, we know that ALF was careful;
22 you included every one of your ads, all 18 of them -- is that
23 correct? -- that ran during that six-week period?

24 A. I don't know that all respondents were asked about all
25 18, whether it was rotated. It probably was rotated, but --

1 I'll take your word for it. I haven't looked at the
2 questionnaire in some time.

3 Q. Well, we're going to come to that later.

4 A. Okay.

5 Q. You tried to include all of ALF's ads; is that correct?
6 Just like it says here on the screen?

7 A. Yes. All of Legacy's ads, yes.

8 Q. Okay. Now, as far as what is "confirmed awareness," if
9 you go to page 902 of your study, of the article --
10 Do you have the article there?
11 Tab 127-B, Jamey.

12 A. Yes, I have it.

13 Q. You have the article there?

14 A. Yes, I do.

15 Q. If you go to page 902 --
16 Actually, Jamey, I need to go to the beginning of that
17 paragraph where it says "the LTMS contained."
18 This is important so I'm going to walk through this with
19 the Court with you.

20 As far as what "confirmed awareness" is and how this
21 survey was conducted, what you set forth on page 902 is that
22 LMTS -- what does "LMTS" stand for?

23 A. Legacy Media Tracking Survey.

24 Q. -- "contained questions to measure awareness of elevation
25 advertisements from 'truth' and 'Think. Don't Smoke'."

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 "Truth" is your campaign; "Think. Don't Smoke" is Philip
2 Morris's; is that correct?
3 A. Yes, it is.
4 Q. "First respondents were asked in an open-ended question
5 to report any anti-smoking or anti-tobacco campaigns of which
6 they were aware. This measure of unaided recall allowed us to
7 track which campaigns are most prominent in the minds of youths
8 over time."
9 A. "Of youths," right.
10 Q. "Of youths over time"; is that correct?
11 A. Yes. I'm sorry. I thought you said "use." Forgive me.
12 Q. "We then queried youths about their awareness of specific
13 campaign advertisements by asking them whether they had recently
14 seen an anti-smoking, anti-tobacco ad on TV and that" --
15 And then you have a blank line. Do you see that?
16 A. Right.
17 Q. If we look at the survey, just so the Court understands,
18 what ALF did is that you would ask the people whether they had
19 recently seen an anti-smoking or anti-tobacco ad on TV that --
20 and then you followed it by a brief description to jog their
21 memory; is that correct?
22 A. That's my understanding, yes.
23 Q. Okay.
24 A. Only when our ads were in a series where they differed.
25 We used that methodology that I think you're about to discuss,

1 you know, when they're all the same.

2 Q. I'm reading -- this is what you said in your article; is

3 that correct?

4 A. Yes, it is.

5 Q. And is it truthful?

6 A. It is when the ads that are being asked about differ

7 enough to be able to tell something about them so that you will

8 distinguish between two different ads with it.

9 Q. But what's being done here is that you're going to show

10 all the Philip Morris ads and as you showed one at a time --

11 one, two, three, four -- you're going to give a brief

12 description of each one to try to jog the person's memory; is

13 that correct?

14 A. If there's something in the ad to jog their memory with

15 and if it distinguishes that ad from the others.

16 Q. That was the plan; is that correct?

17 A. And we've had ads where we've not been able -- our own

18 ads where we can't distinguish something so we have to have them

19 say what the "it" is. You know the unaided awareness of "Think.

20 Don't Smoke" was extremely low, so --

21 Q. I just want to make sure I understand. The way I'm

22 reading on the screen what you told the readers that read your

23 article is that this was what you were going to do; is that

24 correct?

25 A. Right.

- 1 Q. And it was then followed by a brief description of the
2 beginning of the advertisement. "Questions were crafted to
3 provide respondents with enough information to recognize the
4 advertisement in question, but not enough for them to fake
5 awareness of it."
- 6 Do you see that?
- 7 A. Yes.
- 8 Q. And that's how you designed the study; is that correct?
- 9 A. Yes. That's how it was designed.
- 10 Q. Pardon me?
- 11 A. I didn't personally design it, but yes, that's how --
- 12 Q. The study you put your name on as an author -- that's how
13 it was designed; is that correct?
- 14 A. Yes. Yes, that's my understanding.
- 15 Q. "A respondent who indicated recognition was then asked to
16 report further ad details to confirm awareness."
- 17 Do you see that?
- 18 A. Yes.
- 19 Q. "Confirmed awareness of one or more advertisements
20 indicated campaign awareness or exposure."
- 21 Do you see that?
- 22 A. Yes.
- 23 Q. And so that's -- and then it's the next sentence that
24 tells us that you included all the advertisements from both
25 campaigns; is that correct?

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 A. That were aired within six weeks of the survey start.
- 2 Q. "All advertisements from both campaigns aired within
3 six weeks were included in the survey to be fair to both sides
4 being compared"; is that correct?
- 5 A. Of the survey's start, yes.
- 6 Q. Okay. Now, if I could come back to -- look at Carolyn
7 Levy's letter again. It's tab 128; it's JD 055088. It's a
8 letter I just showed you a moment ago and I have it on the
9 screen again.
- 10 Now, what we know is that several months before your
11 survey was published, you were told by Philip Morris that you
12 missed 62 percent of Philip Morris ads. Do you see that?
- 13 At least that's what Dr. Levy said to you; is that
14 correct?
- 15 A. And I guess by that they mean 62 percent -- this is an
16 important distinction -- 62 percent of the ads that they tell us
17 were airing somewhere, anywhere, because I go back to the fact
18 that I couldn't get an answer from them at this very important
19 meeting about whether it was a national buy because it did not
20 come out in the Video Monitoring Service tracking.
- 21 Q. We're going to go through all that sequence.
- 22 A. Okay. But it's very important. It's unlikely that it
23 was 62 percent of those exposed to your ads. I just want to
24 make that very, very clear.
- 25 Q. You can clarify anything you want because we're going to

- 1 tell the whole story and get a record of it.
- 2 A. Fine.
- 3 Q. This is not a meeting; this is a letter. Do you see the
4 letter in front of you?
- 5 A. Right, but --
- 6 Q. There's a meeting that occurred ten months later, in
7 January of '03, with Mr. Willard; is that correct?
- 8 A. No, there was a letter that included -- there was a
9 meeting long before the meeting with Mr. Willard that Carolyn
10 Levy attended -- a Philip Morris methodologist attended -- and
11 all of these issues -- this letter had been written; it was very
12 soon after this letter was written and all of these issues were
13 discussed over about a four-hour period.
- 14 Q. At least Philip Morris told you that they were running
15 nine different Youth Smoking Prevention advertisements. Do you
16 see that?
- 17 A. And they had thus far neither proven that nor indicated
18 that they were national buys. They were not being registered as
19 national ads, so -- this is a national campaign.
- 20 Q. Maybe I can come down to the nub of it. When you ran
21 your article, you continued to insist to put in your article
22 that you had included all advertisements from both campaigns.
23 We just read it; is that correct?
- 24 A. That were airing --
- 25 Q. Within six weeks of the survey; is that correct?

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 A. That's right.
- 2 Q. Is that right?
- 3 A. That's right.
- 4 Q. So I take it you made a decision that what Philip Morris
5 told you in this letter was false?
- 6 A. No, I didn't assume that. But when they failed to prove
7 it in any way with any documentation whatsoever, I found that
8 fairly telling. I don't know why they chose not to prove it.
9 I'm not speculating that there were any nefarious purposes, but
10 they would not prove it and the VMS data had suggested
11 otherwise.
- 12 Q. Actually, Philip Morris actually told you the name of the
13 monitoring service you could contact to verify the ads they were
14 running; is that correct?
- 15 A. That would verify ads they were running as of the
16 discussion we were having, not as of when the survey was done.
17 This survey was out of the field for a long time. What they
18 were saying was "go back out and start all over because now
19 we're running more ads."
- 20 Q. No. Actually, what Philip Morris told you is that at the
21 time of the survey -- at the time of the survey, they were
22 running nine ads, not two or not three, but nine. And they told
23 you that the place to contact is Starcom Worldwide in order to
24 verify that; is that correct?
- 25 A. And let me just respond to that. I know that we

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 attempted to reach any name they gave us and the problem was
2 that they don't keep archival data once it's been -- I don't
3 know how many months we were out of field, but it was some
4 substantial number of months when this communication took place.

5 So in all fairness, I believe it was incumbent upon
6 them -- if they knew where their ads are running, they can
7 hand us a report and say these ads were running at the same
8 time, but they never did that.

9 Not only did they never do it, when asked a direct
10 question, were those ads airing nationally, Mr. Willard declined
11 to answer me.

12 Q. What I want to know is --

13 A. There were many people in the room when that occurred, so
14 I think that as of this moment, I still have no proof
15 whatsoever, despite repeated attempts to try to find it out,
16 that this is an accurate statement.

17 Q. You have no proof whatsoever?

18 A. And I hasten to add: If the efforts here were so
19 egregious, why did you take the campaign off the air?

20 I know I'm not supposed to ask you questions, but, you
21 know, it is true that you removed the ads from the air, possibly
22 concerned about how Fairness and Practices would respond when
23 they saw this information.

24 Q. Doctor, you can say anything you want --

25 A. No, no --

1 Q. -- but we're going to be here all day --

2 A. That's fine. I just --

3 THE COURT: Counsel --

4 THE WITNESS: I'm sorry.

5 THE COURT: -- and the witness, let's get back to the

6 ordinary procedure, which is, Dr. Heaton, questions are asked of

7 you. It will serve everybody's interest if you would answer only

8 the questions that are asked of you. There will be redirect by

9 government counsel. You will have more than an opportunity to

10 respond to anything that is raised on cross-examination.

11 Also, don't talk over Mr. Webb. Mr. Webb knows better

12 than to talk over you. So let's just try and stay on track.

13 The pending question, please.

14 BY MR. WEBB:

15 Q. My question is, if I understand what you just told me and

16 told the Court, it is that by the time the article published in

17 June of '02, you had been unable to confirm that in fact Philip

18 Morris had more ads running than you tested?

19 A. That's correct. National ads, yes.

20 Q. Well, was there any doubt in your mind about it? I mean,

21 the conclusion you reached is that you had tested the exact ads

22 you should test?

23 A. That is the conclusion I reached because no effort was

24 made to prove it to us.

25 Q. Although, let me ask you this: Did you actually publish

1 another report on your website in June of 2002 where you
2 actually admitted that you probably did not test all the ads you
3 should test?

4 A. I do not recall that. And if it was stated there, it was
5 probably stated, and I'd have to see it -- it was probably
6 stated because we were in the middle of this battle of the pens,
7 trying to get the truth to us.

8 Q. We know you published the article in June '02; is that
9 correct?

10 A. I'm afraid you'll have to tell me what document it is.
11 I --

12 Q. That's fine.

13 A. -- don't have it.

14 Q. The article we've been talking about for the last
15 30 minutes --

16 A. Oh, that article?

17 Q. Yes.

18 A. Okay. I'm sorry. I thought you were talking about
19 something on the website.

20 Q. The article that was published -- you know the article
21 we're talking about, the article --

22 A. Yes. Yes. Okay.

23 Q. Do you have that in front of you?

24 A. Yes, I do.

25 Q. Was it published in June of '02? Is that correct?

- 1 A. Yes.
- 2 Q. That's your article, correct?
- 3 A. Yes, it is.
- 4 Q. That's the article which you have now just told the Court
- 5 that you, by the time -- you didn't change the article; you left
- 6 it to say "all advertisements" because you had not found any
- 7 evidence that would support what Philip Morris told you; is that
- 8 correct?
- 9 A. That is my recollection, yes.
- 10 Q. Okay. Now, let me show you another document from out in
- 11 June of '02, at the exact same time period.
- 12 Jamey, this is tab 135. It's JD 064819.
- 13 This document I put up on the screen -- do you see that
- 14 it is a publication of your organization?
- 15 A. Yes.
- 16 Q. Is it?
- 17 A. Yes.
- 18 Q. And it is called "The First Look Report 9," dated in
- 19 June 2002, the same month that the article was published; is
- 20 that correct?
- 21 A. Yes.
- 22 Q. And if you were to turn to page 15 -- do you have page 15
- 23 there?
- 24 A. Yes.
- 25 Q. Do you see there where you, your organization, state --

1 you're summarizing the results of the survey; is that correct?

2 A. You'd have to give me a minute to look at it.

3 Q. Why don't you go to the previous page and satisfy

4 yourself so you can put it in context.

5 A. Yes.

6 Q. You're summarizing the survey that's referenced in your

7 article; is that correct?

8 A. Yes.

9 Q. Okay. And then if you go over to page 15, you state

10 here: "Overall awareness of any 'Think. Don't Smoke' ad

11 included in the survey is 66 percent for 12-to-17-year-olds and

12 53 percent for 18-to-24-year-olds."

13 A. Which paragraph are you reading from?

14 Q. I'm sorry?

15 A. I'm trying to get the context in here.

16 Q. I'm on page 15. Are you on 15?

17 A. Yeah, I'm on 15.

18 Q. I'm up in the text at the top.

19 A. Okay.

20 Q. Do you see where you state: "Overall awareness of any

21 'Think. Don't Smoke' ad included in the survey is 66 percent for

22 12 to 17-years-olds and 53 percent for 18-to-24-year-olds"?

23 And then we see footnote 3. Do you see that?

24 A. Okay. I see the footnote 3, but I'm still not finding

25 the sentence that you're referring to.

1 Q. Okay.

2 A. Just -- can you tell me what line it is?

3 Q. It's right at the top. Look at the screen --

4 A. I got you. "Overall awareness" -- okay. I got you.

5 Q. Are you with me now?

6 A. Yes.

7 Q. And you see the footnote 3? You see that?

8 It says: "'Think. Don't Smoke' ads in the survey were

9 chosen based on the reports from a commercial monitoring service

10 and may not capture all of the campaign's ads."

11 Do you see that?

12 A. Yes, I do.

13 Q. And so that footnote, by the way, did not get put into

14 your article, did it?

15 A. Well, first of all, both of these were produced at very

16 different times and I --

17 Q. At different times?

18 A. Yes. They came out at the same time, but "First Look

19 Reports" go out -- they're being written, you know, in the two

20 weeks prior to when they're actually put on the website.

21 This was written a very, very long time ago and was in

22 press at a certain time. This may -- I mean, my sense -- and I

23 do not know who put this footnote and why they did it; I would

24 assume it's RTI.

25 By that time, the letter writing back and forth, you

1 know, had become extremely intense and the like. And my guess
2 is that absent Philip Morris proving that they were running
3 anything else, but maintaining that they were in the absence of
4 proof, they wanted to hedge their bets there, possibly even
5 legally.

6 But I can assure you it was our understanding that we
7 were -- that we were tracking all the ads that were reported to
8 the Video Monitoring Service. I don't think they slip outside
9 the system because of that code. I know sometimes you don't
10 have the code when you send the ad in, but there's a code that
11 tracks it so when it runs, you know where it runs.

12 Q. Do you recall what my question was that you're answering
13 now?

14 A. I'm sorry. I'm going on.

15 Q. I asked you a very simple question: Why didn't you put
16 that footnote into the article, was my question.

17 A. To be honest with you, I don't remember and I don't -- I
18 did not believe at the time, absent the provision of proof to
19 the contrary, that there were other ads running on a national
20 buy because if there were, I assume they would have been
21 provided. So I didn't include it, I guess, to be honest,
22 because I thought it was a false assertion, given the
23 unwillingness to prove it.

24 Q. Triangle was your contractor, correct?

25 A. Yes.

1 Q. Triangle authored this report I have on the screen; is
2 that correct?

3 A. I don't know who the authors were, but I can look.

4 Q. You said you assumed it was Triangle.

5 A. But I was assuming. I said I didn't know.

6 Yes.

7 Q. Triangle, correct?

8 A. Yes.

9 Q. Okay. The contractor that did the study that was
10 published --

11 A. Yes.

12 Q. -- in the same month the article was published stated in
13 this footnote that your survey "may not have captured all of the
14 'Think. Don't Smoke' ads."

15 Do you see that?

16 A. I see that.

17 Q. So we now know you may not have been convinced, but your
18 organization apparently was; is that correct?

19 This is a publication of your organization; is that
20 correct?

21 A. I can't say what was in the mind of the person who put
22 the footnote on. I would be speculating.

23 Q. Well, at least we know this is an out -- a report
24 published by your organization; is that correct?

25 A. It's not only by my organization; two, I reviewed this

1 report. I recall the report now. I have looked at the report.

2 Q. And you knew that the issue of whether you had captured
3 all of Philip Morris's ads was a critical issue as far as the
4 fairness of the survey; is that correct?

5 A. That's actually a "no." We can talk about the science of
6 that, but no, it is not critical.

7 Q. Well, let's go through it.

8 So in fact, am I correct -- by the way, do you recall
9 having discussions with Triangle or your coauthors -- strike
10 that question.

11 When Philip Morris gave you the name of the monitoring
12 service to go check to confirm the number of ads Philip Morris
13 was running during that six-week period and gave you the name
14 Starcom, did you go to Starcom and check that out?

15 A. I would not have, but I know that the marketing team was
16 asked to try to identify not only whatever one they named, but
17 any others that might be available. And it is my recollection,
18 but I am not certain, that the ad buy was so long ago that they
19 were unable to provide the information to us directly anymore.

20 Q. Just so I -- you said you did not do it; is that correct?

21 A. I personally didn't do it. I wouldn't know how to do it,
22 to be honest with you, but no, I did not personally do it.

23 Q. Did you instruct somebody to -- listen to my question
24 before you answer: Did you instruct somebody on your staff to
25 contact the monitoring service Starcom to verify the ads Philip

- 1 Morris was running during the six-week time period?
- 2 A. I believe -- I believe; it's a long time ago -- that I
- 3 asked staff to contact multiple services.
- 4 Q. I just asked about Starcom. Did you?
- 5 A. I can't remember, but it would be -- I'd be very
- 6 surprised if I did not.
- 7 Q. So do you remember what the response -- is there a letter
- 8 or a document or anything that you can show the Court as to what
- 9 response ALF got?
- 10 A. I don't recall, but I do know that I was told by staff
- 11 that we couldn't get the archival information. In other words,
- 12 that -- I think we were talking by that time a survey that had
- 13 closed out many months ago. And unless Philip Morris itself
- 14 would send us the report, we couldn't independently get it.
- 15 That's my recollection.
- 16 Q. Well, when you were going to publish this article in
- 17 June, after you had trouble verifying what Philip Morris told
- 18 you, but we know your organization concluded that you may not
- 19 have captured all of the campaign ads, did you have discussions
- 20 with Triangle about making sure that the article included at
- 21 least that much of a disclosure to readers?
- 22 A. I did not because -- for the reasons I've said earlier.
- 23 I'm even surprised to see this footnote here.
- 24 Q. Now, after the article was published, Philip Morris was
- 25 upset and came and met with you again and gave you more details

1 about the ads that you excluded from your survey; is that
2 correct?

3 A. You'll have to refresh my memory, which meeting you're
4 talking about, or are you talking about correspondence?

5 Q. I will.

6 Can I show the witness JD -- it's tab 130, Jamey.

7 I'm going to give you a document that's JD 052849, which
8 is a presentation that was made to you on January 29, 2003 by
9 Howard Willard, Senior Vice President of the Youth Smoking
10 Prevention Department.

11 A. Could you tell me -- this is the meeting that took place
12 at Columbia University.

13 Q. Actually, that's my understanding, but I'm not allowed to
14 testify, so all I can do is ask you --

15 A. I'm trying to place the meeting so I can --

16 Q. I understand. Did such a meeting take place at Columbia
17 in approximately January of '03?

18 A. There was a meeting in January '03 and my recollection is
19 that there was angst about the agenda after the fact and that
20 Mr. Willard was not able to complete his presentation. He did
21 make some of his presentation, but my recollection is that he
22 could not complete it because we ran out of time.

23 Q. Well, let me --

24 A. But, you know, with that said, I can't confirm that all
25 of this was presented to me. If you look if the correspondence,

1 there was an issue about the agenda.

2 Q. Let me just go to the page I want to call your attention
3 to.

4 Let me go to the page that's Bates, at the top, 6086.
5 There you have it, Jamey.

6 You can find it or you can look at the chart I put on the
7 screen.

8 Do you see here where Philip Morris explained again to
9 everyone at your organization and actually listed the 12
10 commercials that were aired during the time period of the
11 survey. Do you see that in the left-hand column?

12 MS. EUBANKS: I'm going to object to the form, given the
13 witness's testimony about this particular document, because
14 Mr. Webb's question says that you were shown this. I think
15 there's a lack of foundation establishing that.

16 THE COURT: Why don't you clarify whether Mr. Willard did
17 or did not get to this point in his presentation.

18 BY MR. WEBB:

19 Q. First of all, the chart -- do you see the chart I have on
20 the screen? Do you see what it is?

21 A. Yes, I see it.

22 Q. Okay. This is repeating what you had been told
23 earlier -- is that correct? -- about commercials that had not
24 been put into the survey?

25 A. I do not remember if I saw this, but I well may have.

1 I'm comfortable answering questions about it.

2 Q. Fine.

3 A. Because I believe this may have been the material that
4 led to my asking, was it local or national? I'm not certain,
5 but it may have been.

6 Q. By the way -- in fact, have you now confirmed that every
7 one of these commercials was national?

8 A. One, no one's confirmed that they were national; two,
9 recall what the study said it would look at. It would look at
10 the ads that were airing six weeks prior, because you have to
11 pick a time when the survey goes out. So we stated, I think
12 clearly in the paper, that what would be asked about were those
13 ads that were running six weeks prior to the onset of the
14 survey. It was only in the field a few months.

15 Q. I'm asking --

16 A. I'm just trying to answer you.

17 Q. Well, you see this chart that you're comfortable talking
18 about --

19 A. Right. I see -- I see --

20 Q. -- do you see the 12 commercials on the left-hand column?

21 A. I do.

22 Q. Okay. Philip Morris -- I take it you've seen Philip
23 Morris's nationwide "Think. Don't Smoke" commercials, have you
24 not?

25 A. I've seen them on a tape, yes.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 Q. Okay. And in fact as you look at those, are you
2 personally aware yourself that every one of those was a national
3 campaign -- was part of a national ad?

4 A. No, I am not. And nothing was ever provided to me to
5 prove that.

6 Q. Do you see right there it says Starcom/Worldcom is the
7 source. Do you see that?

8 A. It says it's the source and these ads may well have gone
9 on the air during the course of the survey. It's claiming that
10 they were airing in the six weeks prior, but when I asked
11 specifically Mr. Willard, were they airing nationally, he
12 declined to answer my question.

13 Q. Actually, I don't want to get into a swearing contest
14 with you and Mr. Willard. My question is: You yourself have
15 seen -- were you aware that Philip Morris's "Think. Don't Smoke"
16 campaign was a national campaign?

17 A. I was aware it was a national campaign, yes.

18 Q. Just like you're aware that "truth" is a national
19 campaign; is that correct?

20 A. Yes.

21 Q. And when you realized that you only had actually used
22 three of Philip Morris's ads --

23 Jamey, can I come back and clean this up back where I was
24 before, so I can see that.

25 According to this, you tested three out of twelve ads.

1 You tested "Bus," "Follow The Leader" and "Karate Girl" that at
2 least Philip Morris told you was running during the six-week
3 time period; is that correct?

4 A. It's not a six-week time period. It's that it ran any
5 time -- there was one ad six weeks earlier and it was -- we
6 asked about four ads.

7 Q. I think you're --

8 A. We asked about four ads and I -- okay. So we asked about
9 four ads.

10 Q. And one of the ads Philip Morris told you wasn't even
11 airing during that time period; is that correct?

12 A. That's what they told me.

13 Q. Okay. And by the way --

14 A. But I have no proof of that.

15 Q. When you say you had no proof, earlier, when I was asking
16 you about the issue of whether Philip Morris's campaign -- and
17 what age group it was directed at, you said you assumed Philip
18 Morris gave you truthful information?

19 A. In reference to their age category.

20 Q. Yes. You just told us that this morning; is that
21 correct?

22 A. Well, you -- I said that, but something that's happened
23 since then does make we wonder. You had me read a document
24 that --

25 Q. Something that happened this morning?

- 1 A. Just in the last few minutes. You had me read sections
2 from a document that actually may make me question that now,
3 too.
- 4 Q. Well, you may question the assumption, but at the time,
5 you made the assumption they were telling you the truth. That's
6 what you told us this morning.
- 7 A. I would like to have my testimony read back. I think I
8 said, "Let's assume that this was accurate," because you just
9 showed me a document where their reach for 18-to-24-year-olds is
10 over 50 percent and that's an entirely different media buy to
11 reach 18-to-24-year-olds.
- 12 Q. Doctor, I'm not going to get bogged down. What I'm going
13 to try to find out is the issue of whether or not you might have
14 missed 70 percent of Philip Morris's commercials -- was that an
15 important issue for you to try to sort out before you published
16 the article?
- 17 A. It's 70 percent of the rating points.
- 18 Q. That's correct.
- 19 A. And again, the operative question is: Were the rating
20 points national or local? If the rating points were in
21 Washington, D.C. and one other important and influential state
22 or city and the ads were running, you know, all over the place
23 over and over again, you can rack up very high gross rating
24 points. I think you probably understand how that works.
- 25 Q. I do.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 A. Okay. So we had no proof provided by you and it was
2 obviously not available from the services because they zero out
3 their system, so --

4 Q. But you know that somebody --

5 A. I don't agree with this -- I don't agree with your -- I
6 do not believe this proves anything. I don't know how else to
7 put it.

8 Q. Who in your organization apparently believed that it
9 raised a serious question to create the footnote in that other
10 report?

11 A. I believe that that footnote probably -- and I am
12 speculating -- was added because of concern about the tone of
13 the letters going back and forth.

14 Q. Now --

15 A. And the fact that -- you're right; it's assumed it's a
16 national campaign, so maybe you were running some of these ads
17 locally. So as not to be open to, you know, some kind of legal
18 action of some sort.

19 I mean, I don't know what would motivate these people.

20 Q. You knew that "Think. Don't Smoke" was a national
21 campaign; that's what you just told us, correct?

22 A. Yes.

23 Q. And you knew that every one of these commercials was part
24 of "Think. Don't Smoke" that's listed on the left-hand side of
25 the chart?

- 1 A. They ran some place, some time, but that's very different
2 than whether they were a national media buy. If they were, they
3 would have been picked up by VMS.
- 4 Q. Let me ask you this, Doctor: Do you agree with me that
5 if in fact ALF missed and failed to test a large number of
6 Philip Morris "Think. Don't Smoke" ads, that that would be a
7 serious problem with your survey?
- 8 A. No, because "Think. Don't Smoke" awareness over the ten
9 waves of the survey or the nine waves that have occurred has
10 changed only by three or four percentage points.
- 11 Q. Well --
- 12 A. You asked a question.
- 13 Q. What I want to know is as the author -- I just want to
14 make sure I get an answer and then I'm going to move on.
- 15 As the author of this article, if in fact you missed a
16 large number of Philip Morris ads in your methodology, do you
17 think you should have put that into your article, at least as a
18 disclosure?
- 19 A. No. One, because I didn't think that we did; and two, to
20 be perfectly clear, over the next wave, elements three and four,
21 there was virtually no change in the awareness of your campaign.
22 And we were at that point asking about 15 ads or whatever number
23 of ads you had on the air at that time.
- 24 Q. You're talking about LMST III and IV?
- 25 A. What I'm saying is that your awareness has not been

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 correlated with the number of ads you're airing and so, from a
2 scientific standpoint, it would not matter.

3 Q. Just so I can show the Court, where can we go -- is there
4 an article written about LMST III?

5 Is there a published article where you published your
6 data?

7 A. I don't believe we've published it yet. It may or may
8 not be on the website. But I've reviewed it very carefully and
9 it's not a secret. I know that it is repeatedly described in
10 the letters going back and forth between Philip Morris and
11 Legacy.

12 Q. Is it published in an article?

13 A. No, it's in the letters, just like all these other
14 allegations that we're looking at.

15 Q. Now, just so the Court can see what actually happened,
16 let's look at the questionnaire to see what happened with the
17 questionnaire given the survey respondents.

18 Could I have JD -- that's tab 132, JD 055219.

19 And I'll get -- do you have that in your hand now?

20 A. I do.

21 Q. I take it as the author of this article, you recognize
22 this as the survey questionnaire that actually gathered the
23 data?

24 A. Yes, I do.

25 Q. Okay. And if we want to show the Court -- I went

1 through -- there are 18 different ALF "truth" advertisements
2 specifically referenced in this questionnaire; is that correct?
3 A. That's correct.
4 Q. And there are four Philip Morris --
5 A. That's my understanding.
6 Q. I'm sorry?
7 A. I'm sorry. I said, "That's my understanding." I would
8 have to open it and count them to confirm.
9 Q. You can if you want on a break, but I represent to you I
10 count 18. Does that seem about right to you?
11 A. Yes. We were running a lot of ads.
12 Q. And you are aware that when you go through here, what we
13 see is that in comparison to those 18, you only jogged people's
14 memory on four of Philip Morris's "Think. Don't Smoke" ads; is
15 that correct?
16 A. I'm sorry. Repeat your question.
17 Q. I will. In the questionnaire you have in your hand --
18 A. What page did you want me to look at?
19 Q. Do you know, without -- do you know that there were
20 approximately four Philip Morris ads that were used to prompt
21 people's memory compared to 18 for ALF?
22 A. There were four ads and there was, of course, an open
23 question: Do you recall any other ads? And if the person
24 recalled anything about any other ads, they were --
25 Q. We're going to come to that.

Scott L. Wallace, RDR, CRR
Official Court Reporter

- 1 A. Okay.
- 2 Q. But I want to make sure the record's clear. As far as
3 specific ads where questions were asked to jog people's memory
4 and describe the ads, there are 18 ALF ads in the questionnaire
5 and four Philip Morris ads; is that correct?
- 6 A. That is correct.
- 7 Q. Thank you. Now -- in fact, just to give the Court an
8 example, go to page 29. This is just one example where, to jog
9 people's memory, the survey questionnaire says to the
10 respondent: "Have you recently seen an anti-smoking or
11 anti-tobacco ad on TV that shows young people unloading large
12 white bags from a truck onto a city sidewalk?"
- 13 That's the effort that the questionnaire is making to jog
14 someone's memory about a specific ALF ad; is that correct?
- 15 A. Right.
- 16 Q. That one happens to be "Body Bag," I believe. Is that
17 correct?
- 18 A. It is, yes.
- 19 Q. And so then, if somebody then answers that question with
20 a "yes," then you go on and you then ask the next question; is
21 that correct?
- 22 A. That happens in the --
- 23 Q. Is that right?
- 24 A. Yes.
- 25 Q. And so then you go through and ask more questions; is

1 that correct?

2 Let's go down a little bit further. Let's go to the next

3 page.

4 And then you ask a series of questions.

5 No, no, that's a different --

6 So let's go back to the previous page.

7 I'm sorry. I was on page 29. There you go.

8 If somebody then provides detail to satisfy the

9 questionnaire folks that the person remembers the ad, that

10 becomes what we call "confirmed awareness"; is that correct?

11 A. Yes.

12 Q. Thank you. So now, one thing that's certain, "confirmed

13 awareness" is not based on some general, overall catch-all

14 question; "confirmed awareness" develops from those specific

15 questions about specific ads; is that correct?

16 A. Yes, provided the ads have enough specifics and have any

17 level of recall.

18 Q. Right. And so as far as the importance of whether you

19 included all of the Philip Morris ads, let me go back --

20 Jamey, it's tab 133.

21 I want to go back -- this is page 45 of your written

22 direct. This is that basic conclusion I started asking you

23 about this morning. This conclusion that you told Judge Kessler

24 about, that the "Think. Don't Smoke" advertisement "was

25 associated with a 23 percent increase in the odds of reporting

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 an attempt to smoke in the next year."
2 Do you see that?
3 A. Yes, I do.
4 Q. So that figure that you put in your written direct -- if
5 you go look at your article, I could not find that 23 percent
6 figure anywhere in the article. Could you find it for us?
7 A. Yes. It's a percentage expression of what's called an
8 "odds ratio," so in the paper, odds are --
9 Q. Go ahead and get the paper. Why don't you get the paper
10 and we'll put on the screen where you --
11 I want to, first of all, show the Court where the
12 23 percent figure actually is set forth.
13 A. You have to give me a minute. This is extremely small
14 print and I'm a little challenged here.
15 (Brief pause.)
16 THE WITNESS: Yes. The figure is -- okay, go to table --
17 do you have table 1 to be able to bring it up on this?
18 BY MR. WEBB:
19 Q. Yes.
20 Jamey, that's page 904.
21 Is it page 904 of the article?
22 A. It's page 904, table 2.
23 Q. We'll try to call that up for you.
24 A. I can just read it out if you want.
25 Q. No, we have it on the screen.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 A. It's going to be very difficult to read.

2 Q. No. We'll call it out because I want you to show the
3 Court were you see 23 percent reported in the article.

4 A. Okay. That's fine.

5 Q. We'll call out table 2.
6 Jamey, could we call out table 2.

7 A. Okay.

8 Q. Okay. Just show the Court and me, where do you see
9 23 percent here?

10 A. Well, let me start by saying that this journal requires
11 that all results be reported as odds ratios and that's true of
12 all epidemiology journals as well. So, what you see is the last
13 line, "do you think you'll smoke a cigarette any time in the
14 coming year?" And what you see is that on the far right for the
15 "truth" campaign, that young people were less inclined, they had
16 a reduced odd, reduced odds. One is the middle. So if it's
17 below one, depending on the wording of the question, it's a
18 negative result.

19 In our case, above one is a positive result. They do not
20 intend to smoke in the coming year. But I would hasten to point
21 out it's not statistically significant. That's what's in the
22 second set of paragraphs. It's called the P-value. The P-value
23 is .3. It would have to be .05 for our campaign at this juncture
24 to have been significantly technically influencing the likelihood
25 of smoking.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 The next number is the analogous number for "Think. Don't
2 Smoke" and it's .770, and that is the odds of young people saying
3 that they intend to smoke some time in the next year. And if you
4 see in the parentheses after that, it's significant at the .01
5 level, which means this result would happen by chance 1 in 100
6 times. So what this is saying is that 23 percent -- that there's
7 a 23 percent off of a neutral answer greater likelihood of saying
8 they intend to smoke.

9 Q. I had started by asking is the -- the actual number
10 23 percent, what you told the Court in your written direct, all
11 I want to know is does that 23 percent figure itself appear or
12 get discussed in the article?

13 A. Well, yes, it certainly -- what gets discussed --

14 Q. Show me -- listen Doctor, can you just show me where it
15 says 23 percent? That's all I'm asking you.

16 A. It may not, because the journal requires that results be
17 reported as odds ratios and P-values. But if you take set .77
18 away from 1, you have 23. And anybody who's reading this who's
19 trained in basic statistics 101 will know exactly what that
20 means. So it's presented in the way that it's required by the
21 journal. I would have to read the entire journal to see if we
22 use a percentage figure.

23 Q. I can't find it in there, but you're certainly free --

24 A. Well, then, I want you to give me a minute.

25 Q. I will.

1 A. It may be there.

2 Q. I'll give you a minute and I want you to show the Court
3 and me where you see the figure 23 percent.

4 A. This, of course, is a -- it reports it the way the
5 journal generally asks you to report it. It says that the
6 increased odds --

7 THE COURT REPORTER: I need you to slow down.

8 THE WITNESS: Okay. Well, it's basically the data is
9 reported on page 905, middle column, top paragraph, and I will
10 say that it should read .05 and .01. As far as I'm reading this
11 now, it would slightly understate the impact of "Think. Don't
12 Smoke" with increased intentions.

13 Q. I'm just going to try to get an answer and try to move
14 on. Is it correct to say the actual figure "23 percent" that
15 you have in your written direct does not appear anywhere in the
16 article? Is that correct?

17 A. 23 percent is not stated in the article.

18 Q. That's all I'm asking you.

19 A. But the statistical equivalent is in the table.

20 Q. That's fine. Now I'm going to talk about that, because I
21 want to go to your explanation about why, why excluding a bunch
22 of Philip Morris ads wouldn't make any difference, and you just
23 told the Court a minute ago it's because of the catch-all
24 question. Do you recall that?

25 A. That's not what I said.

Scott L. Wallace, RDR, CRR
Official Court Reporter

1 Q. Did you say that in your written direct, that it's not
2 important because of the catch-all question?

3 A. No, I said that there were many opportunities for people
4 to disclose the ads. The reason I said it's not important is we
5 know from all the waves there's been virtually no change in
6 awareness of the campaign no matter how many ads are asked
7 about. There's high awareness and it stays the same.

8 Q. First of all, I want to come back to it. So you don't
9 recall stating in your written direct examination that it
10 doesn't matter if Philip Morris, all their ads are included
11 because of the catch-all question, you don't recall saying that?

12 A. I would be surprised if I said it doesn't matter, but
13 you'd have to show it to me. I probably said if there were
14 other ads, there were opportunities for people to report that.

15 Q. Because, Doctor, what you just told the Court where we
16 got that 23 percent figure from, that's under the heading
17 "dose"; is that correct? That what it says, "dose"?

18 A. It's GRP.

19 Q. I'm looking at the top of the column. This is a
20 measurement of something called "dose" in your article.

21 A. Just a second.

22 Q. Do you see the word "dose"?

23 A. I do. I know you're asking me about two different
24 articles, and if it was only one article -- you have another
25 article that you may talk about and I have to take a minute to

1 refresh my memory.

2 Q. You go ahead and look at it.

3 A. So that's all I'm doing.

4 Q. Would you like me to show you where "dose" is defined?

5 Is that what you are looking for?

6 A. No, I'm actually looking to see whether it was -- I

7 believe the dose was -- I don't think we were using GRPs in this

8 particular document, and so I'm trying to make certain that I

9 report what the actual measure of dose was in this study because

10 we have a more elaborate methodology for the other paper. Why

11 don't you point it out, because it's going to take me a while.

12 Q. If you go to page 902 -- before I keep skipping, let's

13 stick with my question. This 23 percent number that you just

14 told the Court where we got it from, do you see that?

15 A. Right.

16 Q. You just told the Court where you got the 23 percent

17 number from; is that correct?

18 A. From the odds ratio.

19 Q. From the odds ratio for something called "dose", D-O-S-E;

20 is that correct?

21 A. As well as confirmed awareness.

22 Q. That's fine.

23 A. Because that's also associated with intentions to smoke,

24 both confirmed awareness as well as the dose.

25 Q. All right. And the fact is, confirmed awareness and dose

1 are both based on the specific ad questions and not on the
2 catch-all question; is that correct?

3 A. No, I believe it does include a catch-all question, but
4 just again, to reiterate, the reach of the campaign has remained
5 virtually unchanged so --

6 Q. That's not what I asked.

7 A. So the dose stayed the same. Well, it's so material.

8 Q. You can keep on volunteering, we're not leaving until you
9 acknowledge. All I'm asking -- the fact is -- the issue about
10 leaving out a large number of Philip Morris specific ads, that
11 those questions where you got the 23 percent, whether it's dose
12 or current confirmed awareness, those calculations are based on
13 the specific ads that are asked about in the questionnaire; is
14 that correct?

15 A. It is and it --

16 Q. Thank you, that's all I need.

17 Now, Doctor, on this same study, just a couple more
18 questions on this study. If I understand it, the survey that
19 this article is based on contained nine different strata or sub
20 populations; is that correct?

21 A. Yes, it did.

22 Q. And each subpopulation is weighted different in the
23 survey analysis; is that correct?

24 A. It would have to be, yes.

25 Q. And tell me the name of the person who defined the

1 criteria for each of the nine subpopulations that are weighted
2 differently.

3 A. We chose subpopulations by race ethnicity so what we
4 needed to know is was our campaign working --

5 Q. I'll ask you who.

6 A. It was a whole group. I mean, it was a whole group
7 discussion about what the strata should be.

8 Q. The names of the people that define --

9 A. Certainly Matthew Farrelly would have been one of them.

10 Q. I've got him Mr. -- Dr. Farrelly; who else?

11 A. I don't know who else. I know that I probably said we
12 have to cover all racial ethnic groups in the survey.

13 Q. Did you participate in the actual structuring of the
14 criteria for each subpopulation?

15 A. I didn't enter a standard statistical approach, no I did
16 not.

17 Q. So your best belief is that Dr. Farrelly did that?

18 A. Probably, and also other methodologists working with him,
19 but I do not know for sure.

20 Q. Can you tell us -- will you be able to delineate for us
21 what factors determined the weights that were assigned to each
22 subpopulation?

23 A. There were nine strata so we could determine the impact
24 of the campaign on different minority groups and different
25 ethnic groups. So in order to do that you over sample them

1 because they're --

2 Q. Let me just start with this: Please name the -- let's
3 try to simplify it. Let me ask the question and then you can
4 respond, and if you can't answer it I'll move on. As an author
5 of the article, can you list for us now the nine subpopulations
6 that are weighted each differently in the study?

7 A. Off the top of my head I can't name them all, but it
8 would be the nine most prominent racial ethnic groups in the
9 country.

10 Q. Okay. And then as far as the weights to be assigned each
11 of those subpopulations, can you tell us the weight that was
12 assigned to each of the nine?

13 A. The weight that was assigned was their proportion in the
14 population, so that even if you had to over sample, you would
15 bring them back to comparable to the whole nation. It's
16 standard statistical procedure.

17 Q. Well, let's just -- give me the name of one
18 subpopulation?

19 A. African-Americans.

20 Q. African-American. Can you tell me the weight, just give
21 me the numerical weight that was used for that subpopulation in
22 that study?

23 A. It would have brought it back to roughly 12 percent
24 because that's the population level in this society. So it
25 would have brought it back to what it really is. Say there were

1 20 percent of the respondents were black, it would be brought
2 back to 12 percent so that it doesn't bias the results because
3 each ethnic group has a different smoking pattern. If you
4 didn't put the weights in, then it would be a totally
5 inappropriate study. It would be fatally flawed.

6 Q. All right. That's all I need. I just need to know that.
7 Now I'm going to move to the next study that you referred to in
8 your written direct examination.

9 Let me direct your attention to the second article, it's
10 tab 113, U.S. Exhibit 89452, and I'll hand a copy to you right
11 now. Do you have that in front of you now, Doctor?

12 A. Yes, I do, thank you.

13 Q. And this article -- this is another article that you
14 reference in your written direct examination; is that correct?

15 A. Yes.

16 Q. And if we want to show the Court what you say about this,
17 Jamey, tab 106, this will be on page 25 of your written direct
18 examination.

19 And you're asked this question: "What conclusions, if
20 any, were reached as a result of the evaluation of the "truth"
21 campaign?"

22 Your answer "Here I'm speaking to the second phase of our
23 evaluation: Did the campaign result in behavior change? Our
24 results indicate that the "truth" campaign contributed
25 approximately 22 percent of the overall decline in youth smoking

1 rates between 2000 and 2002."

2 That's one of the summaries from this study that you have
3 set forth in your written direct; is that correct?

4 A. Yes, it is.

5 Q. Now, Doctor, do you agree with me that one of the
6 problems that ALF has in trying to claim credit for part of the
7 decline in smoking rates between 2000 and 2002 is that the
8 decline in smoking rates that you see between 2000 and 2002 --
9 what you don't point out in your testimony is that that downward
10 decline actually began two years earlier; is that correct?

11 A. Yes.

12 Q. And that decline -- in fact, let me show you tab 107
13 Jamey -- JDEM 040429. This is a chart from Monitoring the
14 Future that I suspect you've seen charts like this before
15 showing the downward trend in youth smoking behavior. You've
16 seen charts like this, Doctor?

17 A. Yes, I have.

18 Q. And just so the Court is up to speed, it's probably -- as
19 much as you are, I won't go that far, but the downward trend?

20 THE COURT: Thanks, Mr. Webb.

21 MR. WEBB: I apologize for that, I didn't mean that.

22 THE COURT: Go ahead.

23 MR. WEBB: I didn't mean that. I meant we're not going to
24 get into that much detail.

25 BY MR. WEBB:

- 1 Q. But just to take the Court where I want to go, 1997 is
2 where the downward trend begins; is that correct?
- 3 A. Yes.
- 4 Q. And that downward trend continued up until 2003 when we
5 see a small spike upward; is that correct?
- 6 A. I think this spike upward occurred in '04.
- 7 Q. That's what I said, the downward trend continued
8 throughout 2003; is that correct?
- 9 A. Yes, it did.
- 10 Q. And then we see a slight upward click in 2004; is that
11 correct?
- 12 A. Yes, yes.
- 13 Q. Now, ALF did not begin any of its youth smoking
14 prevention commercials until February of 2000; is that correct?
- 15 A. Yes, it is.
- 16 Q. That was right in the middle of a downward trend that had
17 already started; is that correct?
- 18 A. Yes, that is correct.
- 19 Q. Now, in fact, let me show you another chart. This is tab
20 108, JD 55280. Let me hand this to you. What I put up on the
21 screen is actually a publication of Monitoring the Future. Do
22 you see that?
- 23 A. Yes.
- 24 Q. And what I would like to do is to show you table 4, which
25 is inside, if you go to table 4, I'll put it on the screen for

1 you if it's helpful, but see if you can find table 4. This
2 simply puts in numerical terms the downward trend we saw on the
3 graphing. Do you see that?

4 A. Yes.

5 Q. And just so the record is clear, the decline in smoking
6 rates between the years 1997 and 1998, which is from 36.5 to
7 35.1, is ALF taking any credit for that decline?

8 A. Not at all.

9 Q. And if we go to the next year, the trend continues
10 between 1998 and 1999; is that correct?

11 A. Yes.

12 Q. It goes from 35.1 percent to 34.6 percent; is that
13 correct?

14 A. Yes.

15 Q. Is ALF taking any credit for the continuation of that
16 downward decline in those years?

17 A. No.

18 Q. The next year is the time the trend between 1999 and 2000
19 where it shows a continued decline for a third year from 34.6 to
20 31.4. Do you see that?

21 A. Yes.

22 Q. Is ALF claiming credit for any part of that downward
23 decline?

24 A. It's possible at the very, very end of that year. The
25 survey is in the spring, so probably very little, if any.

- 1 Q. Actually, that's probably all -- just so the Court
2 understands, Monitoring the Future does its survey in the spring
3 of each year; is that correct?
- 4 A. Yes.
- 5 Q. So we probably, for the year 2000, would only have had a
6 couple of months of exposure to ALF ads; is that correct?
- 7 A. Yes, that's correct.
- 8 Q. So you're not trying to take much credit at all for that
9 third year of decline; is that correct?
- 10 A. That's right.
- 11 Q. Now, so what we now know is that there was a downward
12 decline that had been ongoing for three years before ALF's
13 commercials realistically could have had any impact; is that
14 correct?
- 15 A. Yes, that's correct.
- 16 Q. Now, another problem that ALF faces in trying to claim
17 some percentage credit of the effect of its ads is that in the
18 literature there is significant doubt raised as to whether
19 advertising itself even has any meaningful impact on kids'
20 decision to smoke; is that correct?
- 21 A. That's not correct.
- 22 Q. Well, is it correct, for example, that at most there are
23 some surveys that would suggest exposure to advertising may
24 affect six to eight percent of kids and decisions to smoke?
- 25 A. That's different than whether counter-advertising works

1 to stop them. The subject is whether counter-advertising works
2 to stop them. It's the inverse of what we're discussing.

3 Q. Well, as far as whether advertising would cause kids to
4 smoke, let's stick with that for a minute.

5 A. Okay.

6 Q. Do you believe, as far as whether advertising causes kids
7 to smoke, that there's certainly a question in the literature as
8 to whether advertising has any meaningful impact on kids'
9 decisions to smoke; is that fair to say?

10 A. Can I clarify one thing with you?

11 Q. Yes.

12 A. Your definition of "advertising," are you talking about
13 marketing or is it just advertising?

14 Q. Marketing.

15 A. Marketing. Okay. Marketing, of course. The lion's
16 share of the marketing expense is for promotions and that there
17 is no doubt about. It affects youth uptake and youth
18 consumption.

19 Q. That's fine, that's fair. Let's go to mass media
20 advertising. You know what that is?

21 A. Yes.

22 Q. I wasn't trying to be --

23 A. No.

24 Q. We're talking about mass media advertising of cigarette
25 brands. Do you agree that there's significant doubt in the

- 1 literature about whether that advertising has any meaningful
2 impact on kids' decisions to smoke?
- 3 A. No, I don't, because even if it was as conservative as
4 six or seven percent, that's a huge amount. I mean, that would
5 cut almost in half the current smoking rate.
- 6 Q. Well, let's compare. For example, I notice on the Today
7 Show you made the comment that you actually attribute 50 percent
8 of the reasons kids smoke to smoking in the movies; is that
9 correct?
- 10 A. I didn't say I attribute it, I said there was a study
11 from Dartmouth that was well designed that attributed it.
- 12 Q. Fair enough. You recognize there was at least a study
13 that put smoking in movies as high as 50 percent in causing kids
14 to smoke, correct?
- 15 A. Yes, I'm aware of that.
- 16 Q. Now, another problem that ALF has in trying to claim
17 credit for a specific decline in youth smoking rates is that the
18 study that you did did not control for some of the major reasons
19 why kids start to smoke cigarettes; is that correct?
- 20 A. That's not correct.
- 21 Q. Well, let me ask you this: Are you generally aware that
22 during this trial there's been evidence presented that two of
23 the most common reasons why kids begin to smoke is peer pressure
24 and parental smoking? Are you generally aware of that?
- 25 A. I'm generally aware of parental; peer, there's a great

1 debate about. But yes, I'm aware of those two factors.

2 Q. Okay. As far as those two factors, peer pressure and

3 parental smoking, the study that ALF is relying upon in the

4 article I just showed you does not control for either the

5 influence of peer pressure or parental smoking; is that correct?

6 A. The parental smoking, we already know is not associated

7 with GRP, and we discuss parental smoking at some length in the

8 article, and yes it was de facto controlled for because it was

9 not related to the GRP dose and it's not related to the GRP dose

10 it couldn't have influenced the study.

11 Q. But did you actually design a control for parental

12 smoking?

13 A. We were, as you know, relying on Monitoring the Future's

14 data, which is the only retrospective data on youth smoking.

15 Since they didn't have it in their data, we had to skin the cat

16 another way, and we did very legitimately.

17 Q. Can I get an answer to my question?

18 A. We did not and we could not, but we adjusted for it.

19 Q. That's fine. You did not design a control for parental

20 smoking; is that correct?

21 A. To do so would have been irrelevant given the data we had

22 at hand.

23 Q. Is the answer to the question you did not?

24 A. The answer is no, but we had the data from another

25 source.

1 Q. I've got to get the record clear.

2 A. No.

3 Q. No, meaning you did not design a control; is that
4 correct?

5 MS. EUBANKS: Objection, Your Honor, the record is clear,
6 the witness has answered it.

7 THE COURT: She has answered this question.

8 BY MR. WEBB:

9 Q. Did you design a control for parental -- for peer
10 pressure in this study?

11 A. For -- peer pressure is not something that's easily
12 measured, number one, and I think you're talking about did we
13 control for peer smoking.

14 Q. Did you --

15 A. We -- peer smoking does not belong in the model. It
16 would be violating a fundamental statistical principal because
17 our outcome of interest is to reduce the number of young people
18 who smoke, and whenever there's a choice variable where you
19 actually choose your friends or they choose you, that can never
20 be put in a regression model. It would be like putting the
21 relationship of lung cancer and smoking, if you put coughing in
22 the middle, there would be no association between lung cancer
23 and smoking because you put coughing --

24 Q. I understood everything you said. Can you answer my
25 question?

- 1 A. No, because it did not belong there statistically.
- 2 Q. Now, this issue about trends in youth smoking, do you
3 agree with me that what's interesting about it is that that --
4 when the prevalence of youth smoking began to decline in 1997,
5 the same identical downward trend started for other youth risky
6 behavior like drinking alcohol and using drugs; is that correct?
- 7 A. Certainly not in our findings in relation to our media
8 campaign.
- 9 Q. Well, let me show you -- could I have tab 111, JDEM
10 0040428. What I've given you is a chart, again, from Monitoring
11 the Future, 2004, which I charted out from Monitoring the
12 Future, alcohol, cigarette and marijuana, and you see I put the
13 cigarette decline on the chart?
- 14 A. Um-hmm.
- 15 Q. The same one we just looked at. Do you see that?
- 16 A. Yes.
- 17 Q. I'm sorry?
- 18 A. I'm sorry, I apologize.
- 19 Q. I also put on what Monitoring the Future says happened
20 with alcohol, and you see a downward trend in alcohol starting
21 at the same time, don't you?
- 22 A. A very different trend, but a slight downward trend, yes.
- 23 Q. Okay. And do I also see a downward trend, for example,
24 for marijuana usage starting exactly at the same time?
- 25 A. It appears to be flat, then falling, then rising and then

1 flat again. I need to see the numbers in-between to determine.

2 Q. Well, I can do that, but from -- do you dispute that from
3 1997 and 2004, for example, marijuana has changed from 23.7 to
4 19.9?

5 A. I assume that the data are correct. I mean, the numbers
6 are superimposed on this.

7 Q. Have you studied the issue as to whether there's
8 something going on out in society beyond your commercials that
9 may be causing -- strike that question.

10 Have you studied the issue of whether there's something
11 going on in society that seems possibly could be causing a
12 downward decline in risky youth smoking behavior generally?

13 A. The study controlled for all of that. That's called the
14 secular trend and it's in the study. It was fully controlled
15 for and it's in the paper.

16 Q. I asked you --

17 A. Our findings are these -- these two trend lines are
18 irrelevant to our findings because we controlled for the secular
19 trend.

20 Q. And I didn't ask you that. I just asked you, have you
21 studied the issue?

22 A. Yes, I very much studied the issue of all three of these
23 problems.

24 Q. Okay. Then let's go right into your study then and see
25 what you did study, and let's start with what you based your

1 study on. As one of the authors of this article, do you agree
2 with me that the validity of this article and the conclusion it
3 reaches requires an analysis of certain underlying data that the
4 study is based on?

5 A. That would be a logical thing, yes.

6 Q. Okay. For example, if we look at your study, at this
7 study -- Jamey, I don't think I have a tab. I want to go to
8 page 425 of the study. Tab 113, Jamey, page 425 down at the
9 bottom, the data used in your study, it says "our study used
10 data from the 1997 to 2002 Monitoring the Future annual spring
11 surveys, designed to monitor alcohol, tobacco, and illicit drug
12 use among youths in the United States." That's the data that
13 was used in your study; is that correct?

14 A. Yes, it is.

15 Q. Now, that data that says that you say that your study
16 used to reach your conclusions, as one of the authors of the
17 article, have you ever seen or analyzed the underlying data that
18 the study is predicated on?

19 A. I personally am not a data analyst, so no, but I
20 certainly had seen it. I mean, I had seen -- I understand their
21 methods and I understand what the survey is.

22 Q. Let me start with -- I'll break that question down. The
23 actual data that your study used from the University of
24 Michigan, Monitoring the Future, have you, as the author,
25 actually seen that data?

1 A. I think I understand what you're saying. As you know,
2 we're not permitted to. I'm sorry, we're not permitted to. No,
3 we have not seen the underlying data because of confidentiality
4 provisions to the schools and the young people who participate.

5 Q. Fine. Whatever the reasons are, as the author of the
6 article, you've actually never examined or seen the data that
7 the study is based on?

8 A. We certainly have seen the findings.

9 Q. I didn't ask you that, Doctor. I asked you have you seen
10 the data, the data that you described right here, that data,
11 have you seen that data that you described as data from the 1997
12 to 2002 Monitoring the Future surveys?

13 A. Please define "data" for me.

14 Q. Well, actually, I'm reading it from your report here,
15 okay. It says "our study used data." Do you see that?

16 A. We saw all the tabulations of the data. We didn't see
17 anything that would disclose a school or a student's identity.

18 Q. Well, so I -- are you telling me you did see the data
19 there or you did not? That's all I'm asking and then I'll move
20 on.

21 A. We didn't see it in its individual form-by-form form, and
22 they did not provide us data where we could say Miami has the
23 lowest drug problem in the United States of America because they
24 promised the schools not to disclose that.

25 Q. You can give all the reasons you want to give. I'm just

1 trying to find out --

2 A. The answer is yes and no; we saw a lot of data and a lot

3 of data we could not see.

4 Q. Okay. Because let me show you -- because we made a

5 request to get this data. Do you recall that?

6 A. I don't recall. You made a request to us or to whom?

7 Q. Doctor, we'll make it easy. Do you know who John Payton

8 is?

9 A. Yes, I do.

10 Q. He's in the courtroom; is that correct?

11 A. Yes.

12 Q. Is he counsel to your organization?

13 A. Yes, he is.

14 Q. Thank you. Could I have tab 114, which is JD 055285

15 called up, please. You've seen this document before; is that

16 correct?

17 A. I may have.

18 Q. Do you recall being shown this document in your

19 deposition?

20 A. That would be the place I would have seen it.

21 Q. And this is an e-mail from your lawyer, John Payton, to

22 someone named Jeffrey K. Beach. Do you see that?

23 A. That's right.

24 Q. And the e-mail says "Neither the Foundation nor

25 Dr. Healton have Monitoring the Future data." Do you see that?

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1 A. Yes, I do.

2 Q. Is that a truthful statement?

3 A. It's a truthful statement. We had the summaries, the
4 cells themselves based on what we told them to do, so they would
5 not give us the underlying data.

6 Q. That's fine. Did any of the other authors of this
7 article ever actually have the underlying data?

8 A. No.

9 Q. Now, this goes on to say that "for the draft paper,
10 instructions were sent to staff at the "Monitoring The Future"
11 Study Team at the University of Michigan and they used those
12 instructions to analyze the MTF data." Do you see that?

13 A. Yes, I do.

14 Q. And is what's set forth there a truthful statement by
15 Mr. Payton?

16 A. Yes, it is.

17 Q. Now, working off of that, if I understand it, the
18 University of Michigan is in possession of the underlying data
19 that your study is based on; is that correct? That's why your
20 lawyer says you don't have it in your possession?

21 MS. EUBANKS: Objection, Your Honor, there's a lack of
22 foundation, and how can she know what was in her lawyer's mind
23 when he wrote that? That's an improper question the way it's
24 framed.

25 MR. WEBB: She just testified it was a truthful statement.

1 THE COURT: The objection's overruled.

2 BY MR. WEBB:

3 Q. Do you understand my question?

4 A. Can you restate it? I apologize.

5 Q. When your lawyer told us that neither the Foundation nor

6 Dr. Heaton have the MTF data, that's because the University of

7 Michigan is in possession of the underlying data that your study

8 is based on; is that correct?

9 A. In possession and cannot disclose it.

10 Q. Is that correct?

11 A. Yes, that's correct.

12 Q. And no one connected with authoring the study has ever

13 seen that data; is that correct?

14 A. They have seen the resulting tabulations but not the

15 underlying data, nor has anyone else that's done that research

16 using that data set, I might add.

17 Q. Your voice is trailing off, so do you want to complete

18 that answer?

19 A. We are among the many many that have utilized that data

20 set who understand we can't have it because it could disclose

21 individual responses to questions about illegal drug use, et

22 cetera.

23 Q. But it also insulates you from being examined -- strike

24 the question. That data, the data that you're talking about as

25 the underlying data that the study's based on that you've never

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1 seen at all, describe your general understanding of what the
2 nature of that data is.

3 A. Well, there is a survey that is conducted annually of
4 8th, 10th, and 12th graders, it has a three-stage selection.
5 First they select randomly the geographic regions, then randomly
6 the schools, then randomly the classrooms within the schools and
7 they survey the young people there. There's an 80 percent
8 response rate by the students. It's been ongoing for tobacco, I
9 believe, only since 1979 and then they added additional
10 questions later. It's, I think everyone in this country would
11 agree it's the gold standard for measuring trends in substance
12 use and to try to explain those trends. So that's basically
13 what it is. It's federally funded by the National Institute of
14 Drug Abuse. It has a federal shield of confidentiality, I
15 think, issued by Justice possibly.

16 Q. That's fine. I want the record to reflect what the data
17 is that you've never seen. And then it says here in this e-mail
18 that the authors prepared instructions that told the University
19 of Michigan how to analyze their data; is that correct?

20 A. How to associate our GRP's with their data, right.

21 Q. Well, it says here, "instructions were sent to staff at
22 monitoring the study team at the University of Michigan;" is
23 that correct?

24 A. Yeah, probably instructions and data so they could match
25 the GRPs with the -- we probably had to give them some data as

- 1 well.
- 2 Q. All I'm asking you, were instructions sent to the
- 3 University of Michigan?
- 4 A. Yes, they would have to be.
- 5 Q. Well, that's what it says here, anyway; is that correct?
- 6 A. Yes, that's correct.
- 7 Q. And the University of Michigan then took those
- 8 instructions and they performed an analysis of the underlying
- 9 data. That's what the e-mail says; is that correct?
- 10 A. That's correct.
- 11 Q. And that's what happened?
- 12 A. That's what happened, yes.
- 13 Q. And so let's break that down a little bit. First of all,
- 14 did you personally participate in the preparation of written
- 15 instructions to be given to the University of Michigan to tell
- 16 the University of Michigan how to analyze their data?
- 17 A. No, I did not.
- 18 Q. Who prepared the written instructions that were sent to
- 19 the University of Michigan?
- 20 A. I'm not certain. Probably Matthew Farrelly and Kevin
- 21 Davis. Certainly they would both be involved. I don't know if
- 22 there were more people involved or not.
- 23 Q. That's Mr. Farrelly and Mr. Davis; is that correct? I'm
- 24 sorry, it's Dr. Farrelly, is it also Dr. Davis?
- 25 A. I believe so, yes.

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1 Q. They prepared written instructions to tell the University
2 of Michigan how to analyze their data; is that correct?

3 A. How to put the data together so it would match up with --

4 Q. I'm sorry, I didn't hear you.

5 A. Yes, they wrote them instructions so they could create a
6 data set for us.

7 Q. And so the Court can properly evaluate whether the study
8 has validity, do you have those written instructions in your
9 possession?

10 A. I do not, but they're -- I don't personally have them in
11 my possession. I could probably describe them.

12 Q. Well, no, what I wanted to do is I wanted to see them.

13 MS. EUBANKS: Your Honor, this is improper. We've had a
14 number of discovery requests that dealt with this witness leading
15 up to the testimony. It's highly irrelevant, given the Court's
16 rulings on what evidence was available and not available to
17 defendants at this point, and it's a waste of time to try to
18 cover with this witness what she may or may not have given the
19 Court's existing rulings with respect to discovery. It's
20 inappropriate to seek discovery through this witness.

21 MR. WEBB: Well, Your Honor, I'm trying to find an article
22 that has a conclusion that's put forth in a written examination
23 to you, and I'm trying to find out how the conclusion was arrived
24 at. I've established that the author has never seen the data and
25 now I'm finding out there were written instructions which I

1 didn't know until now, right now, by asking that question that
2 there are written instructions that tell the University of
3 Michigan what to do, and I don't know what else could be more
4 relevant than whether we can examine this witness on whether or
5 not the study results have any validity. We're certainly
6 entitled to find out where those written instructions are and
7 whether she can obtain them so we can cross-examine her on them,
8 otherwise we have no basis to determine and cross-examine on the
9 validity of the study.

10 MS. EUBANKS: Your Honor, this was a document, JD 055285
11 was used at Dr. Healton's deposition over a year ago. So this
12 information that Mr. Webb is so determined to get after is
13 something that if you note at the top, it's deposition exhibit
14 Healton 20 that defendants had adequate opportunity to question
15 her about at her deposition.

16 I don't have a problem if he wants to take his time and
17 ask her questions about what documents they have, but I
18 absolutely do have a problem if we're going to return to a
19 discovery request and evade the files of Legacy having briefed
20 that several times at this point and having argued that to this
21 Court and that's how we got to this point with this witness. We
22 were not permitted to seek discovery through one of defendants
23 witness when we had her on the stand and I think the same should
24 apply here.

25 THE COURT: The objection is overruled as to this question

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1 and we'll see where we go from there. Go ahead, please.

2 BY MR. WEBB:

3 Q. The written instructions are in the possession of
4 Dr. Davis and you can get access to them?

5 A. Yes, and I would just say, it's probably more than one
6 instruction. It may be a communication process. I'm not
7 certain, but there would be a starting point and that would be
8 written, yes.

9 Q. And the written instructions that were sent to the
10 University of Michigan, did you, as one of the authors on the
11 article, actually review the written instructions before they
12 were sent to the University of Michigan?

13 A. I did not. I'm not the lead author on the paper and I'm
14 not, by any means, the primary methodologist. So on some level
15 I would have to concede at the level of detail, it would kind of
16 be Greek to me. I understand research design, I understand
17 methodology, but I'm not a biostatistician.

18 Q. But the study is based on a regression analysis done at
19 the University of Michigan, isn't it?

20 A. I assumingly gave them all the data of ours. I think
21 they gave us data and then we added our data in. So, in answer
22 to your question, I do not remember personally reviewing it, but
23 I was at the meeting when we agreed with the University of
24 Michigan that it could be done and we talked about what would be
25 required of us to have it happen.

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1 Q. Well, let's take -- by the way, I can keep going but --

2 THE COURT: It's probably time for lunch, everybody.

3 2:00, everyone.

4 Dr. Healton, let me give you the standard instruction that
5 you're not supposed to talk to your lawyers about your testimony
6 or to anyone else about your testimony. You're not supposed to
7 refresh your recollection. You may not look back and go back
8 over your written direct.

9 2:00, please, and Mr. Webb, give me an estimate now,
10 please, of where you're going in terms of how much time you think
11 you're going to need.

12 MR. WEBB: Your Honor, if I could take the lunch break,
13 and can I give you an estimate when I come back? Because this is
14 going very slow. I'm actually going to cut things out because I
15 just don't want to spend so much time with it, but I need to
16 connoiter on this because it's going slow.

17 THE COURT: Okay. Thank you.

18 (Thereupon, a luncheon recess was had beginning at
19 12:43 p.m.)

20 C E R T I F I C A T E

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

23 -----
24 Scott L. Wallace, RDR, CRR
Official Court Reporter

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I N D E X

Examinations	Page
DIRECT EXAMINATION OF CHERYL G. HEALTON, Ph.D. BY MS. EUBANKS	20802
CROSS-EXAMINATION OF CHERYL G. HEALTON, Ph.D. BY MR. WEBB	20806

E X H I B I T S

Description	Page
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496 (GK)
	:	May 12, 2005
Plaintiff,	:	
	:	2:03 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 103
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: Afternoon, everyone.

3 Counsel, I want to raise a couple of issues, and I
4 don't want to say this directive as aimed only at Mr. Bernick,
5 but at everybody, including the witness, just answer my
6 questions and no more, please.

7 Mr. Webb, how much time do you anticipate on your
8 cross?

9 MR. WEBB: Most of the afternoon. We went back and
10 looked at it. I'm way behind. I'm going to consult portions
11 out, but I will eat up most of the afternoon.

12 THE COURT: Well, I'm going to give some specific
13 directions as well because I think we wasted a lot of time this
14 morning.

15 Mr. Bernick, I want a report from you about several
16 individuals.

17 Dr. Kraus, Mr. Parrish. You may not know about
18 Mr. Szymanczyk yet.

19 MR. BERNICK: We won't know about Mr. Szymanczyk.

20 With respect to Mr. Parrish, again I think I indicated
21 the other day that we will know about whether we are going to
22 call him following the testimony of Mr. Meyers next Wednesday.

23 THE COURT: I do have Wednesday down. Mr. Kraus?

24 MR. BERNICK: It's Dr. House, and we would be able to
25 know about that on Tuesday following the testimony of Dr. Fiore.

1 THE COURT: All right. And Mr. Bernstein, or
2 Dr. Bernstein, we are missing relevant counsel who was supposed
3 to report back, I think, yesterday, about this.

4 MR. BRODY: Your Honor, I was informed by Liggett
5 counsel this morning, by Ms. Straub, that they are not going to
6 be in a position to make that decision until after the
7 depositions of Mr. Fischell and some of the other experts that
8 are being called by defendants. So I would assume that would be
9 the end of next week.

10 THE COURT: Okay. People are going to have to come to
11 some decisions.

12 Now, next. I have a motion by BATCo in support of its
13 motion for leave to file a sur-reply in further opposition to
14 the United States' oral motion for adverse inferences based on
15 Mr. Kinnard's indication of the Australian privilege against
16 self-incrimination.

17 I know what that long thing refers to. Now, that came
18 in two days ago. Does the government have to have time to file
19 an opposition? BATCo represented, I'm sure appropriately, that
20 it would be opposed.

21 MS. EUBANKS: It is opposed, Your Honor, and I think
22 that the papers are very clear. We will submit a very short
23 opposition, unless the court would prefer to just take it as an
24 opposed motion and handle it. Either way, we feel fine with the
25 record as it stands.

1 THE COURT: Well, when would you file an opposition, if
2 you do?

3 MS. EUBANKS: You know what Your Honor? We oppose it
4 and I think the record is clear that we oppose it, and you can
5 do it on the papers that are currently before you.

6 THE COURT: All right. That's fine. That's good.

7 I will be getting the government's responses to the
8 defendants' objection to Mr. Myers' testimony. I'll be getting
9 that this afternoon.

10 I think it is necessary -- if I change my mind I'll let
11 you all know -- but I think we have to have a conference call
12 tomorrow afternoon. The morning is very tied up for me. And
13 obviously it will be on the subject matter of Mr. Myers'
14 testimony.

15 And let me just check with Mr. Wallace for a minute.
16 No, I think actually the time he and I talked about --
17 Mr. Wallace is not sitting here. I'm sorry, Mr. Hawkins. I
18 know 3:15 is good for him.

19 MR. BERNICK: Fine with me.

20 MS. EUBANKS: Your Honor, I would prefer -- I have to
21 take my daughter to a doctor's appointment at 3:10 and I've
22 already cancelled it once.

23 THE COURT: We can do it earlier, then. I will have a
24 12:15 conference call. It should be over by 12:30. And then I
25 have a 2:30 sentencing. So somewhere in the time frame of 12:30

1 to 2:15.

2 MS. EUBANKS: 12:30 is fine.

3 MR. BERNICK: That's fine.

4 THE COURT: Let's make ate little bit later. Well,
5 I'll be in chambers, in any event. So it will be approximately
6 12:30. I will call you all as soon as I have finished my 12:15
7 conference call. Ours will be on the record, of course. Okay.
8 And that will deal with Mr. Myers' issues.

9 Now, Mr. Bernick, you're going to volunteer something
10 other than answering the question.

11 MR. BERNICK: No, I won't if --

12 THE COURT: Do we have to deal with it now?

13 MR. BERNICK: Well, I think there are two things to be
14 helpful.

15 Number one is I want to make a report on two other
16 witnesses whose appearance here will bear upon the court's
17 schedule and I wanted to raise that early.

18 THE COURT: All right.

19 MR. BERNICK: As I think the bidding now is, subject to
20 the witnesses that Your Honor asked about and including
21 Dr. Bernstein, the Liggett's witness, but in any event, we have
22 Dr. Rubin set for the 24th, which is the Tuesday. And I
23 mentioned yesterday that we would probably -- we would ask the
24 court to make Friday the 27th available for Dr. Fischell, and
25 he's in the process of clearing his schedule to be able to do

1 that. That would leave, so the court is aware, both the 25th
2 and the 26th as days without witnesses unless they get filled
3 in.

4 THE COURT: I thought Dr. Wittis is the 25th, am I
5 wrong?

6 MR. BERNICK: No. Dr. Wittis is the 1st.

7 THE COURT: You're right.

8 MR. BERNICK: So we would have two dark days on the
9 25th and 26 unless one of those days is used for some of these
10 other witnesses. But right now, those two slots are open.

11 Then again the next week we have on the 31st Dr. Weil,
12 then Dr. Wittis, then Dr. Carlton. Now, Dr. Carlton I think he
13 should get done within the day, even allowing time for our hour
14 of live direct.

15 But in the event that there's any possibility of spill
16 over slash the possibility of Mr. Szymanczyk appearing, we were
17 wondering whether Friday the 3rd, at least in the morning, might
18 be available so that we can, I think, probably end up completing
19 our testimony in the remedies' case. Again, that's subject to
20 some of these other people, but I think that there's a
21 reasonable prospect that we will in fact be in a position to
22 close our remedies' case that week. So I wanted to alert the
23 court to that.

24 And, obviously, Your Honor will probably want some time
25 to reflect on that and think about it, but that's kind of where

1 we are headed.

2 THE COURT: I'm looking to see which is the Memorial
3 Day weekend. I just want everybody to realize -- and I know
4 we've talked about May 27th, and that is still fine with me, but
5 just so everybody knows, that's the Friday before Memorial Day.

6 June 3rd is still light enough that I could move
7 things.

8 MR. BERNICK: It would be very important from
9 Dr. Carlton's point of view as well because he does teach, and
10 Monday is a very -- is a tough day from a teaching point of
11 view.

12 THE COURT: We can do Friday the 3rd if it stills over.

13 MR. BERNICK: If it spills over. And on the basis of
14 Your Honor saying that, we will have him clear Friday the 3rd
15 from classes as well so that that is definitely open in the
16 event that there is spill over.

17 THE COURT: And, therefore, May 25th and May 26th,
18 there's a good chance that those will be dark days.

19 MR. BERNICK: Yes, unless one of those other witnesses
20 need to appear during those days. But right now we don't have a
21 witness for those two days.

22 The only thing that I would add, and I say this in
23 response to Your Honored comments this morning. We did check
24 about the briefs that were -- the objections that were filed,
25 and our records indicate that the objections were put on ECF at

1 6:21 last night. The reason for this being a little after 5:00
2 is typically we use 48 hours from the time that we receive the
3 direct. Mr. Myers' direct came in on Monday at 6:30, so it was
4 a little bit late.

5 And we apologize again if there's any misunderstanding,
6 but our knowledge about the practice with respect to delivering
7 hard copies to the court is that if it's after hours we -- I
8 think both sides have delivered them the next day. Obviously,
9 if we had known that Ms. Soneji was waiting for it, we certainly
10 would have --

11 THE COURT: We get lots of things after 5:00, lots.
12 Almost always tobacco, by the way. Everybody knows tobacco in
13 the courthouse.

14 MR. BERNICK: We apologize if there was a --

15 MS. EUBANKS: Very briefly, Your Honor.

16 Given what Mr. Bernick has said, I would appreciate if
17 we could have until 6:30 to get in our response on the Myers'
18 objections which are due today as well.

19 They filed theirs at 6:21, and if we operating on the
20 48 hours and 24 hours, ours are due the next day. If we could
21 have until 6:30 instead of 5:00 o'clock today to get those in,
22 we would really appreciate it.

23 THE COURT: Oh, so you're talking about this evening?

24 MS. EUBANKS: Yes.

25 THE COURT: All right.

1 MR. BRODY: And, Your Honor, if I can even add and make
2 a further request --

3 THE COURT: I did say okay, although not graciously, I
4 fear at 6:30. 6:30 hand delivered, please, so that I can read
5 them tonight.

6 MS. EUBANKS: Certainly.

7 MR. BRODY: Well, I guess that precludes what I was
8 going to report. I just received an e-mail from the people at
9 our office who were working on trying to turn around in 24 hours
10 a response to eight legal issues, motions totaling 21 pages, and
11 they have indicated that 5:00 and even 6:30 is going to be very,
12 very difficult.

13 THE COURT: On the Myers' one.

14 MR. BRODY: On the Myers' objections. We can file our
15 memorandum in opposition to the request for additional discovery
16 and certainly have that to chambers by 6:00 o'clock easily. But
17 if it's at all possible, given the length, 21 pages, 8 separate
18 issues and a 24-hour turn-around time, we would like to have
19 until midnight to file those.

20 We can e-mail them to Ms. Soneji so she has them first
21 thing in the morning by e-mail and we will also hand deliver a
22 copy to chambers first thing in the morning. But given the
23 length and the need to adequately respond, we request that of
24 the court.

25 THE COURT: All right. But the bottom line is I need

1 time to read them before our telephone call, and since I think I
2 know everybody's schedule, I think we need to make the telephone
3 call --

4 What time do you have to leave your office tomorrow,
5 Ms. Eubanks?

6 MS. EUBANKS: I probably need to leave the office
7 around 2:30. It's a 3:10 appointment.

8 THE COURT: That's all right.

9 We will schedule our telephone call at -- 1:30 will
10 give you plenty of time, is that correct?

11 MS. EUBANKS: Yes, it will, Your Honor, but I also
12 think that there is -- in terms of the issues surrounding
13 Mr. Myers' testimony, you still will not have all of the
14 briefing in at that point in time on all of the Myers' issues
15 that are before you.

16 THE COURT: What won't I have at that point?

17 MS. EUBANKS: The motion in limine on the proposed
18 resolution, which is due -- we promised to try to get it in on
19 Friday and I think we're on schedule to get it in on Friday, but
20 it's actually due on Saturday.

21 MR. BERNICK: I would think, Your Honor, that if they
22 are responding to the -- well, you understand where I was going.

23 THE COURT: I think I'll be able to make use of our
24 call tomorrow. If for some reason I think not, then I'll cancel
25 the call. But I have a pretty good idea of where I stand.

1 All right. We are now ready to conclude
2 cross-examination. Dr. Healton, I want to give you a very
3 specific direction at this point.

4 You're going to be asked questions. I am sure that
5 Mr. Payton and Ms. Vargyas have given you this instruction.
6 Listen to the questions, answer only the questions, and answer
7 them as briefly as you can. Of course, answer them totally
8 honestly. I don't need to say that. Do not volunteer
9 additional information and we will all make progress a lot
10 faster.

11 Mr. Webb.

12 CHERYL G. HEALTON, Ph.D., Government's witness, RESUMES

13 CROSS-EXAMINATION (Cont'd.)

14 BY MR. WEBB:

15 Q. Let me pick up right where we left off before the lunch
16 break. We were going through the process trying to determine
17 exactly what data and what analysis that the authors of this
18 report actually had participated in, so I'll get back to
19 Mr. Payton's e-mail here.

20 We have already talked about the data. We've talked
21 about the instructions. As I understand the e-mail, that,
22 according to this e-mail, the University of Michigan took the
23 instructions received by the authors and used those instructions
24 to analyze the MTF data; is that correct?

25 A. I believe so.

1 Q. Now, so the court is clear. The actual analysis that was
2 performed at the University of Michigan and not by the authors
3 was what is known as a multivariant logistic regression
4 analysis; is that correct?

5 A. Yes, it is.

6 Q. And that multivariant logistic regression analysis is
7 referenced in your article; is that correct?

8 A. Yes.

9 Q. Now, that regression analysis that's in your article, it was
10 done completely by people at the University of Michigan; is that
11 correct?

12 A. I don't believe so.

13 Q. Well, then tell me who else actually performed the
14 regression analysis on the data.

15 A. I believe that Kevin Davis and possibly also Dr. Farrelly
16 received a data set, and then they were able to merge their data
17 with it, but I cannot tell you for certain, but that's what I
18 believe was the case.

19 Q. Okay. What you told me earlier is that the data itself did
20 not leave the possession of the University of Michigan; is that
21 correct?

22 A. What left there were things that had been merged together
23 with our data so that we could never go back and get the
24 individual information. That's my understanding.

25 Q. So is this e-mail correct, that the analysis was done -- the

1 analysis was done based on the written instructions sent to the
2 University of Michigan?

3 A. Right. And I think we may have had to -- may, that's why I
4 said I believe -- so we may have had to add in some of the
5 variables from our data set, but I am not certain.

6 Q. You're not certain of that?

7 A. I'm not certain, no.

8 Q. As one of the authors, then, did the....

9 As far as what was actually provided to the University
10 of Michigan to do the regression analysis, did some of the
11 authors actually set forth in written instructions to the
12 University of Michigan the actual computer code for the logistic
13 regression analysis?

14 A. I don't know.

15 Q. Well, who has the computer code that was used to run the
16 regression analysis?

17 A. To be -- it's hard for me to answer because I don't know how
18 the computer code fits in.

19 The instructions, yes. So, I mean, the instructions
20 versus the computer code, I would assume all the computer code
21 is still at Monitoring the Future because it's their computer
22 code.

23 Q. Is it your understanding that Monitoring the Future actually
24 designed the computer code that was used to do the regression
25 analysis?

1 A. They probably had to discuss it, so that one team knew what
2 the other one had before it was put together. I mean, you're
3 getting into a level of detail that it's really hard for me to
4 answer.

5 Q. I'm not going to get into the detail of the computer code.
6 But just on the basic fundamental issue as to who designed the
7 computer code, was the computer code for the regression analysis
8 designed by people at the University of Michigan to the best of
9 your knowledge?

10 A. I would assume that the computer code, if I had to guess,
11 was designed -- but I am guessing -- by our group, but I don't
12 know how well they understood the data set that Monitoring the
13 Future had. So they may have had to collaborate, discuss what
14 was in it. I was not in those discussions personally.

15 Q. That's why I -- I want to make sure I know what you know.

16 Do you know, as one of the authors on this article, do
17 you know who actually designed the computer code that was used
18 for the regression analysis?

19 A. I would assume it would be RTI.

20 Q. I asked you if you knew.

21 A. I don't know for certain.

22 Q. And have you ever -- the written instructions that were sent
23 to the people at the University of Michigan, did those written
24 instructions from the authors actually contain the computer code
25 to be used to run the regression analysis? If you know.

1 A. I don't know. I didn't see them.

2 MR. WEBB: Your Honor, on the issue I raised this
3 morning that apparently -- these instructions that were sent to
4 the University of Michigan apparently are in the possession.
5 This witness said she could get access to them. I had asked --
6 right now we don't have that.

7 I mean, I have no ability to examine her on how the
8 regression was done, what code was used, what instructions were
9 given. I don't have any ability to do that.

10 I asked this morning if she could produce the code --
11 the instructions. It may be that there will be no need for me
12 to ever call this witness back, but I would at least like to
13 make a record.

14 The witness said she has access to the written
15 instructions. We tried to get that from Mr. Payton -- and I'm
16 not going to go through about Who shot John, it's not worth it.
17 We don't have it. Okay?

18 I don't have the written instructions that were sent to
19 the University of Michigan that led to the regression analysis
20 that led to the results in this study. I'm not asking for a lot
21 of discovery, but I think that's a fairly reasonable request. I
22 assume it's not here today.

23 I would never recall this witness for any willy-nilly
24 reason, but if there's something in those instructions that's
25 critical I'm not going to have it today. And all I'm asking is

1 that the witness be instructed to produce it in a reasonable
2 time, a few days, and I will report back to the court on any
3 need to recall the witness, with the promise from me as an
4 officer of the court I will not do so unless there's something
5 critical in there that I would have, should have crossed on.

6 MS. EUBANKS: Your Honor, in the first place, I believe
7 Mr. Webb misstates the testimony of this witness with respect to
8 what she believed was the status of the information.

9 In the second place, we have had full discovery in this
10 case and there has been a full and fair opportunity. Just as
11 the issues with Mr. Myers of reappearing time and time again, we
12 see the same similar issues, discovery issues with Dr. Heulton
13 appearing time and time again.

14 It's not appropriate for this third party witness to be
15 asked to come back. Defendants knew at the time that they
16 submitted their written witness who their witnesses would be and
17 what they didn't have.

18 So, it's completely unreasonable to suggest that under
19 any set of circumstances it would be appropriate to call
20 Dr. Heulton back.

21 Furthermore, these questions are beyond the scope of
22 the written direct examination. While I will certainly admit
23 that their questions raised by defendants here about the
24 efficacy of the "truth" campaign as established by a couple of
25 studies that this witness has authored, this level of detail is

1 not something that was put before the court and it's been fully
2 litigated since her testimony was filed in February of this
3 year. It's inappropriate to do a further discovery given the
4 court's rulings on this.

5 THE COURT: There's been a fair number of motions and
6 objections and responses on this issue. I have dealt with it.
7 I'm certainly not going to require this witness to come back at
8 this time. And I don't think the defendants are entitled to
9 these particular instructions.

10 And so, Mr. Webb, you should just proceed. You've made
11 your record, and you should proceed.

12 MR. WEBB: Thank you.

13 BY MR. WEBB:

14 Q. As the author of this article do you have in your possession
15 any of the underlying workpapers of the University of Michigan
16 that would reflect the actual regression analysis they
17 performed?

18 A. No.

19 Q. Do you know who has the workpapers of the University of
20 Michigan that would show us the actual regression analysis that
21 was performed?

22 A. I am not certain, but potentially both the University of
23 Michigan and RTI.

24 Q. Now, the people that did the work that we've been talking
25 about here, the people from the University of Michigan that --

1 it was their data, they did the analysis. They are not listed
2 at all as coauthors on this article; is that correct?

3 A. That's correct.

4 Q. And is the reason they are not listed as coauthors is
5 because they declined to be coauthors because they did not agree
6 with the results of your article? Is that correct?

7 A. Not at all.

8 Q. Pardon me?

9 A. No, that's not correct.

10 Q. Well, did you ask them to be -- did you ask those authors to
11 be listed because of the work that -- strike it. That's a bad
12 question.

13 Did you ask the people at the University of Michigan
14 who did the work you just described to be coauthors with you on
15 this article?

16 A. In advance of their doing the work, we said to them in a
17 meeting, "If you become substantively involved we obviously
18 would be happy to have you to be coauthors."

19 Q. And what happened?

20 A. They said they didn't feel any need to do that because they
21 were simply crunching the numbers for us. They thought it would
22 be inappropriate.

23 Q. Actually, let me just make sure I'm clear on that.

24 Does the -- the article itself, do you have the article
25 in front of you?

1 A. Just a moment. I'll get it.

2 Yes.

3 Q. That article, which is JD 89455, does that article disclose
4 to readers that none of the authors listed in the article ever
5 saw or had access to the underlying University of Michigan data?

6 A. Well, it acknowledges -- let me look. Okay. I see the
7 names of the people who assisted with the analysis here in the
8 acknowledgements. I have to look at what it says.

9 Q. You look and I'll try to call that up.

10 Jamey, can I call up tab -- I think it's 113. It's JD
11 89452. Go to the last page where we have acknowledgements and
12 contributions. If I can go to the last page of the article. If
13 we cull out that last page, contributions, acknowledgements.

14 I didn't mean to limit your -- did you want to look
15 through -- I thought you wanted to look through the article. My
16 question is --

17 A. No, I looked through one thing. Let me just look through
18 the top paragraph.

19 (Pause) Yes, okay. I've read it.

20 Q. My question what started this, I asked you, anywhere in the
21 article at all, not just what I have on the screen, is there
22 anywhere on the article that the reader would come to understand
23 that the authors -- that none of the authors had ever saw or had
24 access to the underlying University of Michigan data?

25 A. No, but that doesn't mean they didn't have some access. I

1 mean, we've gone through that before. No, it does not say that
2 they did not have access. And I am not saying that I know
3 whether they had any access or not, okay, as I made clear
4 before.

5 Q. I'm sorry. I guess I'll have to put Mr. Payton's e-mail
6 back up on the -- I thought you told us earlier that neither you
7 nor the other authors actually had access to or possession of
8 the University of Michigan data. Is that correct?

9 A. That's correct.

10 Q. That's all I'm asking.

11 And that data that you did not have access to, when you
12 read over the article, there's no way the reader would know that
13 you and the authors did not have access to that data; is that
14 correct?

15 A. That would be correct if they do not understand Monitoring
16 the Future because no one gets access.

17 Q. Well, in fact, in fairness, when you just read this article,
18 this article tries to conceal that the authors did not have
19 actual access to the data; is that correct?

20 A. That is not correct.

21 Q. Let's look at the acknowledgements section. Just read it as
22 of an ordinary use of language.

23 It says, "This study was supported by the American
24 Legacy Foundation. We express our appreciation to Lloyd Johnson
25 and Patrick O'Malley as the principal investigators of

1 Monitoring the Future, MTF, for their cooperation in providing
2 timely access to the MTF data."

3 The fact is based on your testimony, anyone -- first of
4 all, what we know for certain is those individuals did not
5 provide the authors with any access, timely or otherwise, to the
6 data; is that correct? That's what you just told the court.

7 A. It's a semantic distinction between what access is. They
8 formed a joint data pool and Monitoring the Future, as I
9 understand it, followed the instructions and they provided back
10 the answers. So it is semantic what you consider the data.

11 They did precisely what they asked them to do. And we
12 had to give them a great deal of data that in order to do it, so
13 it was a shared data set. We were merging our data with their
14 data. And they don't let people see their data because of
15 confidentiality, so we have -- I'm sorry.

16 Q. All I'm asking, I guess, Doctor, as far as -- the statement
17 here that you're thanking them for making timely access to the
18 MTF data, and yet Mr. Payton's e-mail said that you never ever
19 possessed the data. Is that correct?

20 A. We didn't possess their data, but they gave us timely access
21 to their data set and then gave us the answers, so we had all
22 the benefit of their data. That's what that was in reference
23 to.

24 We thanked them for doing the analysis for us with the
25 data we gave them and giving the answers back to us.

1 Q. Well, in fact, if you look at the -- when I look under who
2 contributed to this work. Contributors tells us who did the
3 work; is that correct?

4 You see where it says the word contributors?

5 A. Yes.

6 Q. That means the people who contributed to the survey; is that
7 correct?

8 A. Contribution is an attribution for those who are listed as
9 authors. That's what that technically means. I don't think you
10 will see people listed there who are not authors.

11 Q. So if people made -- for example, since we now know the
12 University of Michigan had all the data and they did the
13 analysis at the University of Michigan according to Mr. Payton's
14 e-mail, which you said was truthful, then they are not
15 considered people who contributed to this survey?

16 A. Yes, they contributed, the people who typed it up
17 contributed, lots of people contributed, but they did not feel a
18 need to be an author given the limited role that they had.

19 Q. As far as whether or not your "truth" campaign has the type
20 of effect on smoking prevalence that you've set forth, as I
21 understand it, your own organization actually has done your own
22 study on your own data to analyze that. Is that correct?

23 A. You would have to give me more information.

24 We've done a great number of study -- we've done a
25 great number of work -- a great deal of work about the campaign,

1 so I would have to know precisely what you're referring to.

2 Q. Here is where I'm going.

3 We know that this article that you published that we've
4 been talking about was based on data that you did not physically
5 have in your possession.

6 A. Some of it, yes.

7 Q. And my question is: Has your own organization, though, done
8 your own -- your own research where you actually have actual
9 data to see what impact your "truth" campaign is having?

10 A. Yes. We've done a fairly large study of the national youth
11 tobacco survey looking at baseline prior to the launch of the
12 campaign and a measure after the campaign had been on the air
13 for 16 months.

14 Q. Is that the same thing as the -- I see on your website
15 something called ALLTURS, A-L-L-T-U-R-S?

16 A. No. That's a third study.

17 Q. Can I have JD 055220, tab 117, and I'll cull this up on the
18 screen.

19 This is from the American Legacy Foundation website; is
20 that correct?

21 A. Yes.

22 Q. It's talking about A Longitudinal Tobacco Use Reduction
23 Study, which is, I guess the acronym is ALLTURS; is that
24 correct?

25 A. Yes.

1 Q. And it's a 3-year study which began in the spring of 2000
2 designed to provide valuable information about the impact of the
3 "truth" campaign on youth tobacco use -- on youth tobacco use.
4 Research Triangle Institute conducted this quasi-experimental
5 study as part of their evaluation; is that correct?

6 A. Yes.

7 Q. It goes on to describe the study. Do you see that?

8 A. Yes.

9 Q. That 3-year study, which began in the spring of 2002, I take
10 it that's been complete for about two years?

11 A. Well, it says here it began in the spring of 2000.

12 Q. I'm sorry. It began in the spring of 2000. It says it was
13 a 3-year study. So my question is: Was that study complete in
14 approximately the year 2003?

15 A. I think it was later because it didn't actually get started.
16 I mean, that was when they started working on it, but I don't
17 think they were in the field until after that.

18 They are out of the field and they are currently
19 writing up the results of this longitudinal study. So it's not
20 complete yet, but they are out of the field.

21 Q. Just so the record is clear. In that study you have your
22 own date that you're analyzing; is that correct?

23 A. Yes.

24 Q. Just so the record is clear. That study, as you testify
25 here today, the results of that study have never been published

1 in an article; is that correct?

2 A. Not yet. They are presently being written up.

3 Q. But the answer is they are not published yet; is that right?

4 A. No, they are not.

5 Q. Now, you're also aware that some very prominent members of
6 the public health community have looked at your article and have
7 found significant reasons to criticize your conclusion that you
8 contributed to a decline in youth smoking; is that correct?

9 A. If this is in reference to Michael Siegel and Dr. Moskowitz,
10 then yes, I'm aware of those two individuals.

11 Q. Well, let's talk about Dr. Maskowitz first. Am I
12 pronouncing it -- is it --

13 A. It's Moskowitz.

14 Q. Dr. Moskowitz. His name is Dr. Joel Moskowitz; is that
15 correct?

16 A. I'm sorry. I didn't know his first name.

17 Q. That's fine. I'm going to show you, I think what you and I
18 may both agree is a critique of your article.

19 Could I show the witness JD 055221, which is tab 119?

20 A. I've never read this. I've read something related to it,
21 but can you give me a minute?

22 Q. You can have whatever you need.

23 A. I apologize.

24 Q. Go ahead.

25 A. (Pause) Yes. I'm aware of the general issues raised in

1 this.

2 Q. Okay. Let's just -- for the record, Dr. Joel Moskowitz is
3 with the public health community. He's a director at the Center
4 for Family and Community Health, the School of Public Health,
5 University of California at Berkeley.

6 That's what it says here; is that correct?

7 A. I'm sorry, that's not the part I read. But yes.

8 Q. You will see it off to the left there. Do you see that?

9 A. Mm-hmmm.

10 Q. You became aware at some point that he had written a letter
11 or had issued some critique of your study; is that correct?

12 A. Yes.

13 Q. And if we just go through so the court understands what the
14 critique is -- now, actually, Jamey, I need to go up higher.

15 Doctor, if you would bear with me. Go into the middle
16 of the first paragraph. Do you see the sentence that begins,
17 "The authors failed to find a significant linear relationship."
18 Do you see that?

19 A. Yes.

20 Q. "The authors failed to find a significant linear
21 relationship between GRP --" I'm calling -- can I call that
22 exposure to the ads?

23 A. I think you could.

24 Q. I'm trying to --

25 A. King's English here.

1 Q. And smoking prevalence, and he says that the authors failed
2 to find that. Do you see that?

3 A. Yes, I do.

4 Q. Do you agree with that?

5 A. I'd have to look back at the article because it is really
6 required to analyze it with the quadratic because it's a yes/no
7 answer for the dependent variable.

8 Q. I'm going to pull this out. I don't mean to put it too
9 close to you.

10 A. That's okay.

11 Q. This axis here, we will call it smoking behavior, smoking
12 prevalence. And then here we are going to have exposure.

13 A. GRP.

14 Q. Is it --

15 A. GRP.

16 Q. I'm going to call this GRP.

17 And as I understand it, if there were some direct
18 linear relationship, what Dr. Moskowitz is referring to is that
19 you're looking to see whether smoking behavior is going to kind
20 of go down in a straight line based on the exposure to ALF
21 advertising; is that correct?

22 A. Yes, but the reason -- that's what you would expect, but you
23 are not -- I don't think it's appropriate to use a linear fit
24 for a regression model where the dependent variable, what you're
25 looking to see changes in, is categorized as yes or no.

1 And the categorization here is did you smoke in the
2 last 30 days or not? When it is a yes or no like that, it's my
3 understanding that you have to use a quadratic term.

4 Q. I'm going to come to quadratic in a minute.

5 A. Okay. But just to be clear I don't think you can use a
6 linear fit.

7 Q. We will come to the quadratic.

8 Do you agree that ALF study did not show the linear
9 relationship?

10 A. I want to look at that for a minute. I'm sorry.

11 (Pause) It may be here, but I don't see any reference
12 in the paper to having done a linear fit. It may be there. If
13 you have it -- can you show me? I only see the quadratic.

14 Q. My only question was, at least your article does not seem to
15 discuss a linear relationship. Is that fair to say?

16 A. Because the linear fit is not permitted unless the dependent
17 variable is a continuous range of numbers. If it's just yes or
18 no you have to fit to it a quadratic.

19 Q. Let me move on. What Dr. Moskowitz says here. "The authors
20 failed to find a significant linear relationship between GRP and
21 smoking prevalence. They tested for a curvilinear relationship
22 by adding a quadratic term to their statistical models."

23 Do you see that?

24 A. I do see that.

25 Q. Do you agree that that's what you did?

1 A. Well, I certainly know that we did a quadratic and that that
2 showed a relationship that had what's called an inflection
3 point, so we fit it to that, and over a certain number of GRPs
4 there were diminishing returns, yes.

5 Q. Let's talk about, what Dr. Moskowitz says here is that you
6 did this quadratic, but you added the quadratic term, and he
7 goes on to say the relationship between "truth" advertising and
8 smoking prevalence was U-shaped.

9 Do you see that? Do you see where he says that?

10 A. Yes. I think he's taken a different position since this was
11 put out, because I don't think he understood it fully.

12 But yes, he says it's U-shaped. And maybe we could put
13 up the actual graph, if you want to.

14 Q. Well --

15 A. It's in here. I mean, so the people can see what we're
16 talking about.

17 Q. And that's -- well, I can do that, but just bear with me. I
18 will do that in a minute.

19 A. Okay. Thank you, I appreciate it.

20 Q. As I understand it, by adding the quadratic -- I'll put the
21 actual graph up, so I can complete what's on the screen.

22 He says, "The relationship between the "truth"
23 advertising and smoking prevalence was U-shaped." Do you see
24 where at least he says that?

25 A. Yes, I see what he says.

1 Q. He goes on in the next paragraph, "The theoretical rationale
2 for inclusion of the GRP squared term was to test whether the
3 campaign had diminishing returns." He cites Page 428 of your
4 article.

5 A. Yes, sir.

6 Q. Do you agree with him when he makes that statement? You are
7 testing to see whether the campaign had diminishing returns?

8 A. Absolutely.

9 Q. This would suggest an L-shaped relationship between campaign
10 advertising and smoking prevalence; not the U-shaped
11 relationship found."

12 Do you see that statement?

13 A. I do.

14 Q. So the court understands, that what Dr. Moskowitz is saying
15 that if there were diminishing returns and it leveled off, we
16 might see a line that kind of goes down and then levels out like
17 this, more of an L-shape; is that correct?

18 A. Yes.

19 Q. And what Dr. Moskowitz is saying what actually happened is
20 that we see this come down and then we see it come back up more
21 in a U shape. At least that's what he's saying.

22 A. Yes. There was an error in his interpretation, but that's
23 what he was saying then.

24 Q. And what he goes on to say here, is that "Because of that U
25 shape," he says here, "the results suggest that the campaign had

1 no detectable effect on smoking prevalence among those who
2 resided in media markets that received higher levels of exposure
3 which included students in most major metropolitan areas."

4 Do you see that?

5 A. Yes, I do.

6 Q. And he goes on to say -- which I would assume that you would
7 consider to be significant comment -- he says, "Yet, the paper
8 obscured this finding and failed to address its policy
9 implications. Did an overdose of 'truth' render the campaign
10 ineffective? Or were the models improperly specified to
11 estimate campaign effects?"

12 Now, his observation there, he is correct that when you
13 read over your article, you do not see any discussion of this
14 issue of the fact that in major metropolitan areas there was not
15 a reduction in smoking behavior?

16 A. That's because it's not true. But there is discussion very
17 specifically in this paper that I would like to point you to
18 that directly addresses the point being made here.

19 Q. Bear with me. The U shape that Dr. Moskowitz is talking
20 about, you actually show the U shape on one of the graphs in the
21 paper; is that correct?

22 A. And you might want to put it up. But yes, that was what I
23 was saying we might put up.

24 Q. If I could go to -- Jamey, could I get the chart put up
25 please? The exhibit is just to give you a tab number -- it's

1 113 -- it's 110, actually. It's U.S. Exhibit 89452.

2 There you go. Do I have the right graph up on the
3 screen now for the court?

4 A. You want to bring it way up.

5 Q. We will cull it out. Do you see that?

6 A. Yes.

7 Q. Dr. Moskowitz was talking about -- do you see the U shape
8 there on the one graph?

9 A. Are you talking about the middle dashed line?

10 Q. Well --

11 A. Are you talking about each one of them, the two that have
12 that? I guess two or three that have that shape.

13 Q. Does it appear to you that there's two that seem to have a U
14 shape to them?

15 A. Maybe even three a little bit, yeah.

16 Q. And let me ask you this. This issue, did this study
17 establish that in fact at higher levels that the "truth"
18 campaign was not affecting smoking behavior?

19 A. No.

20 Q. Okay. Well, let's go back to what Dr. Moskowitz said to
21 your editor. Could I have that back up, Jamey, which is JD --
22 let me get it for you, Jamey. Tab 119. JD 55221.

23 If we go down to the bottom what Dr. Moskowitz then
24 says, "When examined by grade level the effect of "truth"
25 advertising on smoking prevalence was significant only for

1 students in grade 8 in media markets with moderate exposure,
2 Table 2."

3 Now by the way, do you agree with that statement by
4 Dr. Moskowitz?

5 A. No. It was significant for all grades combined as well.

6 Q. And Dr. Moskowitz's next statement to your editor was "That
7 the campaign's impact did not sustain through high school
8 suggests that "truth" advertising was no more effective than
9 school based, smoking prevention programs."

10 Do you agree with that statement by Dr. Moskowitz?

11 A. No, and I think he misunderstood the study and knows he did.

12 Q. Well, let me ask you this. Strike that. Let me move on.

13 I need to move back to the 2002 article from this
14 morning because I left a couple of points out that I need to
15 return to. So just to get you acclimated.

16 It's the 2002 study, which is JD 65578, and if you
17 want, I can help you find it, or if you find it in your pile
18 there, it's the first -- your first study which was done in
19 2002.

20 A. Here it is. I found it.

21 Q. Two points I forgot to bring out regarding that study and
22 then we're going to leave the studies behind, Doctor.

23 You told the court several times this morning -- in
24 fact, let me call up -- Jamey, can I call up that article? I
25 think it's tab 127A. JD -- actually, I want tab 127A, JD 65578.

1 That's it.

2 You told the court this morning several times that
3 after Philip Morris called to your attention that you didn't
4 include all of Philip Morris's ads in the survey for the time
5 period aired within six weeks of the survey's start, you told
6 the court that Philip Morris had not convinced you with any
7 evidence that, in fact, that was a false statement and,
8 therefore, you did not change the article. Is that correct?

9 A. That's correct.

10 Q. And what I'd like to show you is -- if I could show you JD
11 052681. Tab 143, Jamey. This is a letter that was sent to
12 Philip Morris before your article published by Dr. Havilland; is
13 that correct?

14 A. Yes.

15 Q. It's dated March 28, 2002; is that correct?

16 A. Yes.

17 Q. And it's addressed to Mr. Willard, and you can see if you
18 want to look at the beginning of the letter, Mr. Willard has
19 replaced Dr. Levy. Do you see that?

20 A. Yes.

21 Q. And Dr. Levy is the one who had written you a letter in
22 February telling you that you missed over 60 percent of the
23 "Think. Don't Smoke" ads.

24 Do you recall that letter we looked at this morning?

25 A. Yes.

1 Q. So this letter is dated March 28, still several months
2 before your article ran, and Dr. Havilland is your chief
3 operating officer; is that correct? Look at the second page.

4 A. Yes.

5 Q. So if we go to the second page of this letter, let's see
6 what Dr. Havilland says on this issue about whether your
7 organization still believes that you should keep your position
8 that you've tested all the Philip Morris ads.

9 Dr. Havilland on behalf of your organization, says to
10 Philip Morris, in March of 2002, "A second concern has to do
11 with the number of "Think. Don't Smoke" campaign ads included
12 in the survey." She says, "It is true that the survey did not
13 include every ad that was airing at the time."

14 Do you see that?

15 A. Yes, I do.

16 Q. Now, that statement, did you know that Dr. Havilland, as one
17 of the authors, had concluded that what Philip Morris was
18 telling you was true?

19 A. I believe she was taking their word for it.

20 Q. She was taking our word for it?

21 A. That's what I believe, yes.

22 Q. I thought you said you instructed your staff to go out and
23 try to confirm it.

24 A. I did, and they were unable to confirm it, so -- and said --
25 we said, since we can't confirm it, please give us the proof of

1 it. And I think she was being polite. I mean, I don't know
2 other than to tell you that's what I think. I don't know that I
3 saw this letter before it went out. I probably did.

4 But she was, I think, acknowledging, you know, this
5 list that was sent to us, and since we went to the monitoring
6 services and they could not go back that far to say what was
7 airing, she was, you know, saying even if this were true -- and
8 I don't think she should have worded it that way -- but even if
9 it were true --

10 Q. She didn't word it that way, Doctor. She worded it, "It is
11 true that the survey did not include every ad." That's what she
12 concluded.

13 A. That's why I said she probably shouldn't have worded it that
14 way.

15 Q. Well, when you say she shouldn't have, did she have
16 authority to speak on behalf of your organization in
17 communicating with Mr. Willard?

18 A. She certainly did, and she was taking them at face value.

19 Q. As far as just how fair ALF wanted to be to Philip Morris in
20 this survey, do you agree with me that to make a fair comparison
21 of what we talked about this morning called confirm awareness --
22 confirmed awareness, it is essential that the questionnaire has
23 to structure the questions for both the "truth" campaign and the
24 Philip Morris Campaign the same way; is that correct?

25 A. If that's possible.

1 Q. Well, if you start to -- the key question, which you're
2 going to measure, you call confirmed awareness. Do you recall
3 that this morning?

4 A. Yes.

5 Q. If you're going to try to do a survey and detect and measure
6 something accurately called confirmed awareness, you would want
7 your questionnaire structured so that you measured it the same
8 for both campaigns; is that correct?

9 A. Yes.

10 Q. And the key question that does the measurement should be
11 phrased the same for both campaigns; is that correct?

12 A. Unless there's differential recall, which there's five-fold
13 differential recall, so that's part of the problem I think. But
14 let's look at it. I haven't looked at it recently.

15 Q. Well, let me ask you. Are you aware -- as one of the
16 authors of the study, when you put your name on the study, were
17 you aware that ALF intentionally structured the confirmed
18 awareness questions in such a way as to be different for ALF
19 than Philip Morris in such a way as to bias the results?

20 A. I don't believe it biased the results.

21 We've asked the questions the same way for "truth"
22 campaign questions based on the type of ad.

23 Q. Did the questionnaire -- when you wrote the article, were
24 you aware that when you look at the questionnaire it actually
25 structures the key question for confirmed awareness different

1 for ALF compared to Philip Morris? Is that correct?

2 A. Yes. I think it relates to the amount of information in our
3 ads versus yours. But, yes, they were different. I'd have to
4 look now to see --

5 Q. We're going to look at them.

6 But when you authored -- when you put your name on this
7 study, you were aware that the key question to measure confirmed
8 awareness was changed between the way it was phrased for ALF
9 compared to the way it was framed for Philip Morris. You were
10 aware of that; is that correct.

11 A. I was aware that they had to ask the questions differently.
12 That, I was aware of.

13 Q. Well, let's look at it. Could I have -- if I could -- the
14 questionnaire again, it's JD 55219. Jamey, it's tab -- cull out
15 tab 132. You will find the questionnaire there.

16 Do you have it in front of you?

17 A. Yes, I do.

18 Q. And this is a questionnaire I showed you this morning. Is
19 that correct?

20 A. Yes, it is.

21 Q. And if we want to go to the confirmation question, go to
22 Page 29. Jamey, it's tab 141, and this will be on Page 29.
23 I've culled out for the court to see the confirmation question.

24 This is an example of one of ALF's ads; is that
25 correct?

1 A. Yes.

2 Q. It says, question D12, "Have you recently seen an
3 antismoking or antitobacco ad on TV that shows young people
4 unloading large white bags from a truck onto a city sidewalk?"

5 That's actually one of ALF's ads that you showed the
6 court this morning called body bags; is that correct?

7 A. Yes.

8 Q. And then if we look at about how ALF wanted to ask the
9 confirming question, ALF phrased it this way. What happens in
10 this ad? That's the question that you want the survey person to
11 ask the respondent. Is that correct?

12 A. Yes.

13 Q. And then in parenthesis, the instruction to the survey
14 person is, "Do not read response categories and code one only."

15 What that means is that if the respondent gives any one
16 of these answers that are listed there, at least up to number 8,
17 you want them, even if they give multiple answers or multiple
18 factors, you want it coded for one. Is that correct?

19 A. Right. They have to -- just a second.

20 (Pause) Right. In other words, they need confirmed
21 awareness. They need to have them say something about the ad
22 beyond the general description of it.

23 Q. Right. And they are trying to get them to say one of those
24 things, at least, you see line 9 says, "Other, specify." Do you
25 see that?

1 A. Yes.

2 Q. So the eight above that are specific items that if the
3 person says one of those --

4 A. Right.

5 Q. -- they are supposed to check it off in some fashion; is
6 that correct?

7 A. That's my understanding, yes.

8 Q. Now, if that's where it ended, but what ALF goes on to tell
9 with the ALF ad, it goes on to say, "If the respondent doesn't
10 give anyone of these responses, but if the respondent answers
11 with 'truth', then the person is supposed to probe for more
12 information."

13 That's what it says, correct? Is that right?

14 A. Yes, because it's the name of the brand. Yes.

15 Q. And so in this particular case, you want the person doing
16 the survey to ask more probing questions so that you can get a
17 confirmation on the ALF ad; is that correct?

18 A. Yes, on the assumption that they say "truth," that's ALF's
19 brand.

20 Q. And even if they can't remember anything else, even after
21 all the probing is done with, according to this, even if they
22 get nothing more after the probing, then if "truth" is all they
23 can remember, you want to count it as a confirmed awareness for
24 "truth"; is that correct?

25 A. Yes. I think that's what it is saying. "Truth" was the

1 name of the brand.

2 Q. So now, let's go to see whether you did the same thing with
3 Philip Morris and encouraged probing with the Philip Morris'
4 commercials.

5 If we could go to tab 142, Jamey. This would be
6 Page 44 and Page 45 of the questionnaire, and I think the
7 question on 44 and 45 -- no, I guess that's not the right. It's
8 D -- I'm sorry. I'm wrong.

9 Jamey, I want to put up -- is that Page 44? I want to
10 put up question D73 and D74. That's it.

11 I believe this is one of Philip Morris's ads to show
12 what was done with Philip Morris. D73 says, "Have you recently
13 seen an antismoking or antitobacco ad that shows a girl talking
14 to two boys before a karate class?"

15 Do you see that?

16 A. Yes.

17 Q. And that's one of Philip Morris's "Think. Don't Smoke" ads;
18 is that correct?

19 A. Yes.

20 Q. It's called Karate Girl. Is that your understanding if you
21 know?

22 A. I don't recall the name.

23 Q. That's fine. But it's a Philip Morris' ad; is that correct?

24 A. Yes, it is.

25 Q. So after the persons answers yes as far as getting a

1 confirmation, the instruction to the survey people is, "What
2 happens in this ad?" And the survey people are told Do not read
3 response categories and code one only. Do you see that?

4 A. Yes, I do.

5 Q. Up to that point is the same thing that you structured the
6 confirming question for the "truth" campaign; is that correct?

7 A. Yes, it is.

8 Q. However, what we see here is that you do not tell them to do
9 any more probing. Is that correct?

10 A. If these were analogous, the next thing would be to name
11 your brand and you don't have a brand. It's not a branded
12 campaign.

13 So, no. I mean, to keep asking them. If there was a
14 brand to it and you had a name of a campaign, we would have
15 said, you know, "If they say KOOL, code it."

16 Q. I'm sorry. I don't track you. But let me just make sure
17 the court -- can I have tab 144, Jamey? Let's put both of these
18 up together on one screen, if I can, Jamey.

19 I've tried to put both of these up together so we can
20 see it. But it's clear that the "truth" testing for the
21 confirming question clearly has this additional demand of the
22 people doing the questioning that there's supposed to be more
23 probing. If the respondents answer with "truth," probe for more
24 information.

25 Do you see that?

1 A. Yes.

2 Q. There's nothing on the Philip Morris' question that requires
3 or allows any more probing on anything; is that correct?

4 A. Well, they will generally probe. I mean, that's just saying
5 once you've named the brand, if they remember the brand, it's
6 clear they saw an ad, so you want to probe more.

7 Q. Maybe I'll just leave it at this.

8 On the ALF side of things the person doing the survey
9 is actually instructed to do probing and that's not the case
10 with the Philip Morris' question; is that right?

11 A. I think that's fair to say on this.

12 Q. So I suppose if -- for example, if in response to the Philip
13 Morris' question one of the kids should say something like, "You
14 shouldn't smoke," or "Think. Don't Smoke", that would not be
15 considered anything that should be probed on?

16 A. I believe they would probe if that occurred.

17 Q. That's not set forth in the instruction, is it?

18 A. No, because it's not your brand.

19 In other words, your brand came from corporate and it's
20 not really a childlike brand. It's not like Sprite.

21 Q. Were you trying to design the key confirming question to be
22 fair to both parties?

23 A. Yes, we were.

24 Q. But when you got -- did you have any internal discussion
25 that when you get to the key question, called the confirming

1 question, that to be fair to both parties you should certainly
2 make certain those questions are exactly the same with both
3 Philip Morris and your own ads? Did you have such a discussion?

4 A. I personally didn't because this was developed -- the
5 template of this was developed before I came. There was I think
6 a baseline taken before I started at the Foundation.

7 Q. Let me ask you this based on your experience.

8 If you had been involved at the time and you knew that
9 on the key question, the confirming question, that they were not
10 structured the same, would you have instructed people not to do
11 that?

12 MS. EUBANKS: Calls for speculation. She said she
13 wasn't there.

14 THE COURT: No. Overruled. She may answer.

15 A. If Philip Morris had a brand to their campaign, if it had a
16 name, then I would have said that name should have been there.
17 Most kids remember our campaign as the "truth" campaign.
18 Spontaneously 21 percent remember it, and 7 percent
19 spontaneously remember "Think. Don't Smoke" probably because
20 there isn't a name in there and a lot of compelling material in
21 the ad. So if you had a brand, then I would say yes, there
22 should be a brand name.

23 Q. That 7 percent that remembered this phrase called "Think.

24 Don't Smoke", we're not supposed to consider that a brand?

25 A. No. I'm certain what I'm saying is 7 percent of the

1 adolescents reached could spontaneously describe, could recall
2 any ad from your campaign. 21 percent could recall them from
3 ours, at that time. And it could be due to a lot of things.

4 Q. I'll just get an answer and I'll move on.

5 If you -- if you had been at ALF at the time these
6 questions were structured and you saw that the key confirming
7 question was different between the ALF ads and the Philip Morris
8 ads, you still would have left it the way it was. Is that your
9 testimony?

10 A. It had no material impact on the outcome. But I may -- I
11 may have, if I looked at it, said, Can we find a way to make
12 this more equivalent? I might have done that. It does call for
13 speculation.

14 Q. You might have done that because you recognized with your
15 experience in your field that if you're going to do a survey and
16 come down to the key question called confirmed awareness, if you
17 want to be above reproach, if you want to prevent a lawyer like
18 Webb in a courtroom suggesting that you were biased, just good
19 prudent practice methodology would say you would want that
20 question to be the same, wouldn't you?

21 A. If it was possible to be the same.

22 Q. Next, let me go to another topic.

23 I take it based on your written direct examination it's
24 fair to say that you're generally familiar with Philip Morris's
25 youth smoking prevention activities over the past several years?

1 A. Since -- pardon me, since I arrived at the Foundation, yes.

2 Q. When did you actually start on the job?

3 A. In 2000. I mean, I started in '99, but I was there on a
4 daily basis in early 2000.

5 Q. And I'm not going to go too far into this. Could I have tab
6 21, J-DEM 040032 called up on the screen?

7 This is a chart we used earlier in the case and I don't
8 intend to go through in much detail. But you're generally aware
9 that Philip Morris has a Youth Smoking Prevention Program that
10 they fund with about a hundred million dollars a year; is that
11 correct?

12 A. Could you repeat the question?

13 Q. Are you generally aware that Philip Morris has a Youth
14 Smoking Prevention Program that they fund with approximately
15 \$100 million a year?

16 A. I knew you had a program. I didn't know once you stopped
17 the ads that it was a hundred million dollars. So certainly I
18 know you have a program.

19 Q. The ads you're talking about are the "Think. Don't Smoke"
20 ads?

21 A. Yes.

22 Q. And the parent ads?

23 A. I don't know how much you spend on the parent ads, but
24 I'll -- for purposes this discussion, obviously I'll take your
25 word for it.

1 Q. You were aware that Philip Morris had a program that had a
2 communications function that included ads; is that correct?

3 A. Yes.

4 Q. And included grants to third parties who had Youth Smoking
5 Prevention Programs; is that correct?

6 A. Yes.

7 Q. You were aware that Philip Morris had programs regarding
8 access prevention?

9 A. Yes.

10 Q. And you were aware that Philip Morris did research, is that
11 correct, in the area of youth smoking behavior?

12 A. That I was less aware of, I must confess.

13 Q. Well, you criticized the tab's research in your written
14 direct; is that correct?

15 A. Oh, I'm sorry. You're referring to tabs.

16 Q. I'm sorry. That's all right.

17 A. It's never been published, so I don't really view it as --
18 you know, it hasn't been published. Yeah, I am aware of tabs.

19 Now that you reminded me, I know you have tabs.

20 Q. And you criticize it in your written direct; is that
21 correct?

22 A. Yes, I guess I do criticize it.

23 Q. Now, if I understand your position, it's your position as
24 you testify here before this court that you don't believe that
25 Philip Morris or any other tobacco company should spend any

1 money on youth smoking prevention activities because you contend
2 that the tobacco companies should be barred from engaging in any
3 youth smoking prevention activities. Is that correct?

4 A. Directly, yes.

5 Q. And it's your position -- I believe you testified in the
6 past -- that you believe that the tobacco companies should be
7 barred from youth smoking prevention activities because that's
8 like having the fox watch the chicken coop; is that correct?

9 A. Yes.

10 Q. Now, as far as your position that the tobacco companies
11 should not engage in any youth smoking prevention activities,
12 you are aware, are you not, as you sit here in this courtroom,
13 that under the express terms of the Master Settlement Agreement,
14 that the company -- that Philip Morris and the other companies
15 are required to establish corporate programs that assist in the
16 reduction of the use of tobacco products by under aged people?
17 Are you aware of that?

18 A. I would like to see that wording. That's not my
19 understanding.

20 Q. Then I'll show it to you. That's a fair request.

21 Can I have JD 0451358 which is the MSA, tab 27, Jamey?

22 I'm going to be on Page 29, Doctor. If you want to go
23 to the page I'm going to call to your attention. I have culled
24 out on the screen, in light of your testimony that we shouldn't
25 do any youth smoking prevention activities, what this says.

1 Have you read this in the past?

2 A. Yes, I have. That's why I didn't agree with your
3 interpretation of it. So if you give me a minute. Can I read
4 it?

5 Q. You can go ahead and read it and we will read it together.
6 You read it, I'll stop for a minute and then you read it.

7 A. (Pause) Yes, I've read it.

8 Q. Now, when you look at the commitments that these companies
9 made when they signed this agreement with the 50 Attorney
10 Generals, if the tobacco companies engaged into youth smoking
11 prevention activities, as you just testified should be the case,
12 the tobacco companies would be subject to Attorney General
13 enforcement actions. Is that correct?

14 A. Yes, but I don't see any -- yes, they would, but I don't see
15 a requirement that you do what you are presently doing in these
16 three --

17 Q. We will go through it. I'm only going to take it one step
18 at a time. If we could come back to the Judge's instruction.
19 If you answer my question I will move on to the next question.

20 All I want to know is you recognize that if we did what
21 you're saying we should do and have no youth smoking prevention
22 activities at all, the companies would be at risk and subject to
23 Attorney General enforcement actions; is that correct?

24 MS. EUBANKS: Objection, Your Honor. This calls for a
25 legal conclusion.

1 MR. WEBB: No, Your Honor.

2 THE COURT: It does not. Overruled.

3 A. Well, I don't believe so.

4 Q. Well, let's go through it then.

5 By the way, did you just a moment ago answer that
6 question with a yes?

7 A. Why don't you read the record?

8 Q. The question I asked you just a moment ago when I asked you
9 if they would be subject to enforcement actions, you said yes.

10 A. If you did -- do you want to read the question back because
11 I think you said if you did absolutely nothing with regard to
12 youth smoking.

13 Q. I'll read the question. Question: Now when you look at the
14 commitments --

15 MR. WEBB: I'll come back to it, Your Honor.

16 Does Your Honor have it?

17 THE COURT: Yes.

18 "Now, when you look at the commitments that these
19 companies made when they signed this agreement with the 50
20 Attorney Generals, if the tobacco companies engaged in youth
21 smoking prevention activities, as you just testified should be
22 the case, the tobacco companies would be subject to Attorney
23 General enforcement actions. Is that correct?

24 "Yes, but I don't see any -- yes, they would, but I
25 don't see a requirement that you do what you are presently doing

1 in these three --"

2 Then you interrupt and say, "We will go through it.
3 I'm only going to take it one step at a time."

4 BY MR. WEBB:

5 Q. Let's go through it one step at a time.

6 Looking at the first requirement. This requires the
7 tobacco companies to promulgate corporate principles that
8 express and explain its commitment regarding the reduction of
9 the use of tobacco products by youth; is that correct?

10 A. Yes.

11 Q. Is it your testimony to the court that what the tobacco
12 companies --

13 A. You're asking me if what you read is correct?

14 Q. Yes. That's all I'm asking. That's what it says; is that
15 correct?

16 A. Yes.

17 Q. Is it your testimony to this court that the tobacco
18 companies should promulgate corporate principles that express a
19 commitment to the reduction of the use of tobacco products by
20 youth and then the tobacco companies should do absolutely
21 nothing to carry out that commitment? Is that your testimony?

22 A. Are we still just talking about this one?

23 Q. Number one.

24 A. There's more coming.

25 Q. We are coming to all three. I just want to take one at a

1 time. I just want to make sure I know what you're saying.

2 Are you telling the court that my client, Philip
3 Morris, should promulgate corporate principles and we should
4 express a commitment to reduce the use of tobacco products by
5 kids and then Philip Morris should do absolutely nothing to
6 carry out that corporate commitment?

7 A. No, I'm not saying that.

8 Q. So do you recognize that if Philip Morris does what number
9 one says and we promulgate corporate principles that commit us
10 to reducing youth smoking, that we should do something to carry
11 out the commitment? Is that correct?

12 A. I think you should do precisely what's in the agreement.
13 What it says here, you should do it.

14 Q. After Philip Morris makes the commitment in its corporate
15 principles that it's going to reduce youth smoking, should
16 Philip Morris do something to carry out that commitment?

17 A. Well, it says to comply with the provisions of this
18 agreement and the reduction of use of tobacco products by youth.

19 So I think you're being -- I mean, that you have to
20 reaffirm your corporate principles to commit to the enforcement
21 provisions that are in the agreement. There are a lot of things
22 you're not allowed to do and that you have to do better, and so
23 they are spelled out in the MSA. And they are saying they want
24 you to make that part of your institutional culture, my read of
25 this.

1 Q. Well, if we make it part of our institutional culture to
2 reduce youth smoking, should we do something to carry out that
3 commitment?

4 A. I think the primary thing in this one is that you should
5 comply with the agreement. They are really talking about all
6 the things the Attorneys General told you that you needed to do,
7 like, you know, reduce youth marketing, you know, tobacco
8 imagery, cartoon characters, all the things that were going on
9 and that are dealt with in the master settlement agreement, that
10 you have to do the things to really almost control yourselves is
11 I think is what the first one is about.

12 Q. Well, I'm going to take you through each one.

13 If Philip Morris promulgates corporate principles that
14 express in a commitment to comply with the MSA and the reduction
15 of use of tobacco products by youth, we should not set up -- we
16 should not set up a Youth Smoking Prevention Department and
17 carry out the commitment. Is that your testimony?

18 A. I think you're required to have an executive level manager.
19 There is to be some point person for NAAG. They want to know
20 who it is. They want to know there's a person there. And you
21 left out when you were reading it back over, you know, comply
22 with the provisions of the agreement. This is really about the
23 provisions of the agreement.

24 Q. So -- that's fine. So are you saying that Philip Morris, if
25 it has corporate -- let's go to the next one.

1 Philip Morris then is required to designate an
2 executive level manager to identify methods to reduce youth
3 access to, and the incidents of youth consumption of, tobacco
4 products.

5 Do you see that?

6 A. Yes.

7 Q. So I take it, is it your testimony that Philip Morris, we
8 should designate an executive level manager? Is that correct?
9 We should do that?

10 A. Yes.

11 Q. And that person would then identify methods to reduce the
12 incidence of youth consumption of tobacco products. Is that
13 correct?

14 MS. EUBANKS: Objection, Your Honor.

15 This is really asking this witness for a contractual
16 interpretation of a legal document. And he's not just asking
17 her to confirm that these requirements are in the MSA and she's
18 not a lawyer. It is inappropriate to ask her to interpret the
19 agreement in this way.

20 MR. WEBB: Your Honor --

21 MS. EUBANKS: It's a waste of time.

22 MR. WEBB: Your Honor, it's not a waste of time. I'm
23 trying to make a point that we are obligated, and I have -- we
24 can read English language and she can tell me what she expects
25 or doesn't expect.

1 THE COURT: The objection is overruled.

2 Let's take a brief break now, though. Do you think
3 you're going to be able will to finish this afternoon, Mr. Webb?

4 MR. WEBB: I doubt it.

5 THE COURT: You doubt it.

6 MR. WEBB: I doubt it.

7 THE COURT: How much longer do you think you're going
8 to have on Monday?

9 MR. WEBB: What I'd like to do is tell you at the end
10 of the day. But I'm going to cut out huge sections. I've got
11 some more points I need to make. I'm going to cut out some
12 major sections.

13 MS. EUBANKS: Your Honor, may I ask what the witness's
14 availability is like for next week? I don't know.

15 THE WITNESS: I was supposed to be on a family trip at
16 Cape Cod.

17 THE COURT: Well, can you postpone it to Tuesday?

18 THE WITNESS: I was leaving Saturday morning, but it
19 will postpone the whole thing because I'm due back in the office
20 on Wednesday. So it means canceling the trip. If it was the
21 end of the trip --

22 THE COURT: Everybody can talk afterwards. There's
23 some flexibility in next week's schedule, in any event. We
24 don't have to decide that right this minute.

25 MR. WEBB: I agree.

1 THE COURT: We will take a short break. Just
2 10 minutes, everybody.

3 (Recess began at 3:21 p.m.)

4 (Recess ended at 3:37 p.m.)

5 BY MR. WEBB:

6 Q. Doctor, I want to just, right where we left out in the
7 break, as far as your testimony that the tobacco companies
8 should not engage in any youth smoking prevention activities, we
9 were looking at number 2 on the screen where the tobacco
10 companies committed in the MSA that they would designate an
11 executive level manager to identify methods to reduce youth
12 access to, and the incidence of youth consumption of, tobacco
13 products.

14 I take it you recognize, as you look at that language,
15 that -- do you agree that the tobacco companies should do what's
16 set forth there and that they should designate an executive
17 level manager? And that person --

18 First of all, do you agree we should appoint an
19 executive level manager to identify methods to reduce youth
20 consumption?

21 A. Certainly.

22 Q. And once that manager is in place and after that manager, he
23 or she are supposed to identify methods to reduce youth access
24 and youth consumption; is that correct? That's what it says.

25 A. That's what it says.

1 Q. So after that person identifies the methods to reduce the
2 incidence of youth consumption of tobacco products, after the
3 methods are identified, is it your testimony that the companies
4 are to do absolutely nothing to implement or carry out the
5 methods identified?

6 A. No. I think they should do everything to carry them out. I
7 believe this is a reference to your own activities which have
8 operated on the opposite direction.

9 Q. I'm sorry. The executive level manager is supposed to
10 identify methods to reduce the incidence of youth consumption.
11 Do you see that?

12 A. Yes, much of which is in response to your activities.

13 So I think this is a watchdog within your organization.
14 That's my understanding from Attorneys General with whom I have
15 spoken.

16 Q. Well, you have spoken to a lot of Attorney Generals about
17 Philip Morris's Youth Smoking Prevention Program?

18 A. Well, I spoke to Chris Gregoire and Bill Sorrell to clarify
19 what -- I'm sorry. I spoke to Bill Sorrell and Chris Gregoire
20 to try to understand what this section of the agreement meant,
21 and my understanding was it was basically telling you to do
22 business differently.

23 Q. We can see -- do you see what the words say here?

24 A. Yes. "There are many things that you are doing within your
25 company that promote youth consumption."

1 I think what they are saying is having an executive
2 manager and within your own company, you know, identify ways to
3 stop promoting, you know, youth smoking.

4 Q. Actually, what it says, "identify methods to reduce the
5 incidence of youth consumption." Do you see that?

6 A. Right. I mean --

7 Q. Do you see that?

8 A. I do see that, yes.

9 Q. Now, just so I know -- strike that. Go to the next
10 paragraph.

11 The next paragraph says, "that we are committed to
12 encouraging our employees to identify additional methods to
13 reduce youth access to, and the incidence of youth consumption
14 of, tobacco products." Do you see that?

15 A. Yes.

16 Q. Now, after we go to that trouble and our employees come up
17 with great ideas about how to reduce the youth consumption of
18 tobacco products, is it your testimony that the tobacco
19 companies are to do nothing to implement or carry out those
20 ideas?

21 A. I think it's a clear conflict of interest.

22 Q. Okay. Well, let's talk about that.

23 One reason why you believe that is because you view the
24 tobacco companies as your competitors in the area of youth
25 smoking prevention; is that correct?

1 A. Certainly that would be a dimension of it.

2 Q. But in spite of that, you also recognize, do you not,
3 that -- of all the tobacco -- let me call back.

4 Will Philip Morris and you are doing about -- could I
5 call up, Jamey, tab 21, J-DEM 040032.

6 I showed you this a moment ago. These are the areas in
7 which Philip Morris carries out youth smoking prevention
8 activities with about a hundred million dollars a year in
9 funding.

10 What Philip Morris does and what ALF does is
11 essentially the same thing; is that correct?

12 A. I beg to differ.

13 Q. Well, do you have nationwide TV ads to convince kids not to
14 smoke?

15 A. We have nationwide TV ads that result in kids not smoking.

16 Q. Does Philip Morris have nationwide ads?

17 A. Not directed at youth, directed at adults.

18 Q. I'm sorry?

19 A. You have -- yes, you have national ads, and I believe the
20 main focus is to parents, adults, and a campaign to -- you know,
21 that appears to be attempting to help people quit.

22 Q. Philip Morris at one time had the "Think. Don't Smoke"
23 campaign; is that correct?

24 A. Yes.

25 Q. You now know that Philip Morris has a parent campaign to

1 convince parents to talk to their kids about not smoking; is
2 that correct?

3 A. Yes.

4 Q. And so grants. Philip Morris gives grants to third-party
5 organizations. You're aware of that. Is that correct?

6 A. Yes, I'm a little bit aware of it.

7 Q. And so does ALF; is that correct? It's set forth in your
8 written direct, isn't it?

9 A. Yes. Yes.

10 Q. And research. We know that you've talked about the tabs
11 research; is that correct?

12 A. Yes, I've talked about it.

13 Q. In your direct examination; is that correct?

14 A. Yes, I believe so.

15 Q. And you also, your organization does research in the area of
16 youth smoking behavior; is that correct?

17 A. Yes, of a different sort, but yes.

18 Q. Now, when you look at what Philip Morris has done as a
19 competitor, you have -- you acknowledge, do you not, that Philip
20 Morris has engaged in good faith activities that you believe
21 will help prevent young people from starting to smoke; is that
22 correct?

23 A. It calls for an opinion of mine about what's inside, you
24 know, the thought process of executives there and those in
25 charge.

1 Do I think they are achieving their objectives? No, I
2 do not. I wouldn't want to speculate.

3 Q. Let's see what you've written.

4 Do you recall ever writing that it's your belief that
5 Philip Morris is committed to engaging in good faith activities
6 that would prevent young people from starting to smoke?

7 Have you ever written that anywhere, Doctor?

8 A. No. I wrote "it would appear that Philip Morris," and I
9 wrote it right after I wrote a sentence saying, "I've watched
10 with interest your efforts to reposition yourself in the, you
11 know, media marketplace."

12 Q. Let's show the court what you said in writing. Could I have
13 JD 054810, tab 31, Jamey? It's an October 7, 2003, letter from
14 you to Mr. Mike Szymanczyk at Philip Morris; is that correct?

15 A. Yes.

16 Q. And you're familiar with this letter; is that correct?

17 A. Yes, I am.

18 Q. You authored the letter and signed it; is that correct?

19 A. Yes, I did.

20 Q. I talked over you. I'm sorry.

21 A. I did, yes.

22 Q. Now, you stated to Mr. Szymanczyk, "I have watched with
23 interest your public efforts to reposition Philip Morris USA in
24 the national dialogue regarding tobacco -- the leading cause of
25 preventable death in the United States. From your statements

1 and advertising it would appear that Philip Morris is now
2 committed to encouraging smokers to quit along with preventing
3 young people from starting to smoke."

4 Was that your statement?

5 A. Yes, it was.

6 Q. Thank you.

7 Now, however, am I correct, ALF has gone out of its way
8 to try to prevent Philip Morris from competing against you in
9 the area of youth smoking prevention; is that correct?

10 A. I -- you would have the rephrase the question.

11 Q. Did you lose the question?

12 A. No, no. I don't understand the question.

13 Q. I'll ask it again.

14 Has ALF affirmatively done things to try to interfere
15 and prevent Philip Morris from competing against ALF in the area
16 of youth smoking prevention activities?

17 A. Other than, you know, doing the study that we did and
18 calling on them to stop the campaign, that we did do, yes.

19 Q. Let me ask you this. We just established that both Philip
20 Morris and ALF are in the business of giving grants to worthy
21 third parties in the area of youth smoking prevention. Is that
22 correct?

23 A. We've established the fact that we both make grants, right.
24 Presumably to worthy parties.

25 Q. And could I have tab 52? This is J-DEM 0040035A, tab 52.

1 This is a chart that was used earlier in the case. It just is a
2 quick visual summary of some of -- Philip Morris makes grants of
3 about \$110 million to 139 organizations, and some of the
4 organizations I've set forth here on this chart.

5 Do you see that?

6 MS. EUBANKS: Objection, Your Honor. This is beyond
7 the scope of the written direct, what kind of grant programs
8 Philip Morris might engage in. That's way beyond the scope.

9 MR. WEBB: Your Honor, this is not beyond the scope.
10 This witness, her entire testimony is attacking Philip Morris's
11 programs, and she talks about her grant.

12 I'll tell you what. I only have one question in this
13 area, Your Honor.

14 THE COURT: No. The objection is sustained. That was
15 not discussed in the direct. Her direct obviously focused on
16 advertising.

17 BY MR. WEBB:

18 Q. Your direct examination talks about your grant program; is
19 that correct?

20 A. Yes, I believe it does.

21 Q. Let's show you tab 44, written direct, Page 13. Go to
22 Page 13.

23 Do you have your written direct there still with you?

24 A. Hold on. It's over here.

25 Q. Tab 44, Jamey.

1 And you go on for a couple of pages -- strike that.

2 I'm sorry. Let me give you a moment.

3 A. I'm sorry. The page again?

4 Q. Page 13.

5 A. Yes.

6 Q. You talk about your grant program for a couple of pages. Do
7 you see that?

8 A. Let's see. We're on Page 13 or 33?

9 Q. Page 13. Do you see Page 13, line 20?

10 A. Line 20, about the youth, so it's starting at the bottom of
11 13?

12 Q. Line 20. Are you with me?

13 A. I'm with you.

14 Q. Can you give more information about youth empowerment
15 grants? And you go on to explain -- do you see the answer you
16 give?

17 A. Yes, I do.

18 Q. I take it ALF believes in grants to third-party
19 organizations can be an effective way of preventing youth
20 smoking behavior; is that correct?

21 A. Yes.

22 Q. But ALF has developed a formal policy that you've published
23 which tells potential grantees that they cannot receive any ALF
24 grant money if they receive any grant money or benefits from any
25 tobacco company; is that correct?

1 A. The board -- yes, the board passed that policy and
2 reaffirmed it.

3 Q. Let me show it to you. Tab 46. This is JD 054764.

4 And I believe what I've handed you is a document that
5 is ALF's, the American Legacy Foundation, grant guidelines; is
6 that correct?

7 A. Yes.

8 Q. And could you go to Page 4, and I'll cull out the section,
9 the provision I'm talking about. What you tell grantees that
10 part of the guidelines, if they want money from ALF, it says,
11 "To avoid any real, potential, or perceived conflict of interest
12 between Legacy's grant recipients and tobacco-related entities,
13 Legacy will not award a grant to any applicant that is in
14 current receipt of any grant monies or in-kind contribution from
15 any tobacco manufacturer, distributor, or other tobacco-related
16 entity.

17 "In addition, Legacy expects that a grantee will not
18 accept any grant monies or in-kind contribution from any tobacco
19 manufacturer, distributor, or other tobacco-related entity over
20 the duration of the grant."

21 Did I read that correctly?

22 A. You read it correctly. There's a further fact sheet for
23 them on Clause 12. We don't apply it to the entire institution
24 or the entire state government.

25 But, yes, this is what appears here. But there's an

1 additional Q and A, I believe, about Clause 12.

2 Q. Is this the -- is this your policy?

3 A. It's the policy, but then how we apply it has a Q and A, and
4 everyone is aware that we don't apply it -- it was a university,
5 across the whole university --

6 Q. I'm sorry. I just can't hear you.

7 A. I'm sorry. People understand that we don't apply it across
8 an entire university, it's at the school level. In a
9 government, it's at a departmental level.

10 Q. Well, am I correct. In a very professional way Philip
11 Morris came to ALF and explained to ALF that what you were doing
12 was very detrimental to youth smoking prevention activities
13 across the country. Is that correct?

14 A. We did receive a letter. Are you referring to the letter
15 that was sent to me by Denise Keane?

16 Q. Yes.

17 A. Yes, I am familiar with that letter.

18 Q. I'll show it to you. Tab 47, JD 050278. This is a letter,
19 I believe it's dated August 28, 2001, from Denise Keane to you.
20 Is that correct?

21 A. Yes.

22 Q. And if you look -- the letter is entitled, American Legacy
23 Foundation funding restrictions. Do you see that?

24 A. Yes.

25 Q. And if you go over to the next page, Ms. Keane explains to

1 you some of the problems that's created because of your
2 restriction. Is that correct?

3 A. Yes. I know she gave her perspective on it and the
4 perspective of the company.

5 Q. Let's see quickly what Philip Morris asked you.

6 Philip Morris says, "The funding restrictions imposed
7 by ALF impact governmental, public, health, academic and other
8 entities and serve to prohibit those entities from accepting
9 funding from a tobacco company in circumstances where no
10 conflict exists. The restrictions impact a wide variety of
11 initiatives that can very substantially limit Philip Morris
12 USA's ability to fund relevant organizations in the
13 participating states. More importantly, the restrictions can
14 negatively impact efforts to address the health risks of smoking
15 and to reduce the incidence of youth smoking.

16 "We believe that it would be appropriate for ALF to
17 except Philip Morris USA from the funding restrictions in the
18 absence of a reasonable basis for assuming or believing that the
19 tobacco source of funding is likely to present an actual or
20 potential conflict of interest.

21 "Specifically, Philip Morris USA respectfully requests
22 that the board adopt the position that on ultimate control and
23 authority for conducting scientific research into smoking and
24 health will related issues, or the creation and implementation
25 of programs intended to reduce youth smoking incidence and

1 increase positive youth development, resides with the researcher
2 or program grantee, there is no actual or potential conflict of
3 interest."

4 That was called to your attention; is that correct?

5 A. First to Chris Gregoire and then to me, yes.

6 Q. And it was called to your attention because Philip Morris
7 explained that when they give grant money to third-party
8 organizations, like the 4-H or the Boys and Girls Club, those
9 organizations make decisions about the money, not Philip Morris;
10 is that correct? That's what you were told.

11 A. These are grants. They are not -- you know, so you do have
12 control -- you do have control. You could stop giving them.

13 Q. I understand you can stop.

14 Once you give the money and fund it to an organization,
15 the organization gets to spend the money the way they want on
16 their program; is that correct?

17 A. Not normally.

18 Q. Well, actually, is that what Philip Morris told you they did
19 with their program?

20 A. I don't believe so. I think what they said is they don't
21 exert control, but I certainly asked them for an itemized budget
22 and asked them what they are going to do.

23 Q. After Philip Morris sent you this letter asking you to
24 exempt Philip Morris you responded and said no; is that correct?

25 A. I think my -- I don't think I did. My counsel did in

1 response to a unanimous vote of the board not to provide such an
2 exemption.

3 Q. Well, let me go to, if I could, tab 49. JD 055255. That's
4 not -- I'm sorry, that's the wrong.... tab 48, Jamey. JD
5 55227. Grace, I'm sorry.

6 This is the letter from the general counsel of ALF to
7 Denise Keane dated September 24, 2001; is that correct?

8 A. Yes.

9 Q. And which you tell Philip Morris that the request for the
10 exception will not be allowed; is that correct?

11 A. Yes. Communicating the board's unanimous vote, yes.

12 Q. ALF has actually stated that one of the reasons it has this
13 restrictive policy regarding grants is because of ALF's desire
14 to prevent tobacco companies from achieving respectability; is
15 that correct?

16 A. I don't recall that statement.

17 Q. Is that one of the reasons why you have the policy?

18 A. I think the primary reason that we have the policy is to
19 avoid our making a grant, Philip Morris making a grant, and the
20 next office over someone else with a similar purpose, and then
21 saying, you know, "Oh, we all did a great job together."

22 Q. Have you ever stated that one of the reasons why ALF has the
23 policy is because ALF wants to prevent the tobacco companies
24 from achieving respectability that might result when they gave
25 grants to respectable organizations?

1 A. I don't recall saying that, but I do believe that is one of
2 the purposes of the cause, is to -- one of the purposes of the
3 cause is to make it possible for us to be able to make grants
4 without worrying about whether the organization will be
5 influenced by, you know, a \$2 million gift or grant from Philip
6 Morris at the same time that we are there.

7 Q. Let's see --

8 A. And I know you do give a lot of money away. I have no idea
9 how much, but a great deal.

10 Q. As part of the grant program to worthy third-party
11 organizations?

12 A. I don't know that all you're giving is restricted to grant
13 making.

14 Q. Could I have tab 49? JD 055255.

15 This is a letter from you to Mr. Szymanczyk dated
16 January 8, 2004; is that correct?

17 A. I -- I have to read it to -- you have to give me a minute.
18 I haven't seen this in ages.

19 Q. Do you see the date, January 4, 2004?

20 A. Yes, I do.

21 Q. Do you see it's addressed to Mr. Szymanczyk?

22 A. Yes.

23 Q. And do you see that you signed it?

24 A. Yes.

25 Q. And you attach a letter to it; is that correct?

1 A. To be honest with you, I haven't seen this document in, you
2 know, a long time, so I'm -- add counsel contract.

3 Q. Why don't you go to the pages that's Bates 22355? Jamey,
4 can you do that? Do you see the Dear Colleagues letter here?

5 A. Right.

6 Q. Dated January 6th, '04. Do you see that?

7 A. Yes, I do.

8 Q. Do you remember drafting this?

9 A. I don't believe I drafted this.

10 Q. Did someone in your organization draft it?

11 A. I'd have to spend a minute to look at it. It's a draft
12 letter and I -- there are a lot of draft letters around, so can
13 I take a minute to look at it?

14 I don't know that it ever went out. I mean, things get
15 drafted that never go anywhere.

16 Q. Well, the letter to Mr. Szymanczyk went out, did it not?

17 A. Yes. Could I -- my problem is I'd have to read this. It's
18 a lot here.

19 Q. I'm going to let you do it.

20 Let's go back to the first page, Jamey. Can I go back
21 to the first page.

22 You tell Mr. Szymanczyk, "We are about to circulate the
23 attached letter to a broad range of parties." Do you see that?
24 On the first page of the letter.

25 A. Okay. The attached letter. Okay.

1 Q. Are you with me on the first page?

2 A. Yes.

3 Q. It says, "We are about to circulate the attached letter to a
4 broad range of parties to obtain feedback on our conflict of
5 interest clause to determine whether modification is warranted."

6 Do you see that?

7 A. Yes.

8 Q. And do you see that you attached a draft letter? Do you see
9 that?

10 A. And I think this was the survey we were doing.

11 Q. Okay. You can take a look at it. I'm going to ask you only
12 one question.

13 There is an attached draft letter called Dear
14 Colleagues. Do you see that?

15 A. Yes. I'm not certain this letter went through.

16 There is a draft letter attached and yes, it went to
17 Mr. Szymanczyk.

18 Q. That's all I'm asking.

19 And here under Background, if we go down to background,
20 what we see is that Legacy adopted Clause 12.

21 Clause 12 is the restricted provision we've been
22 talking about; is that correct?

23 MS. EUBANKS: Your Honor, the witness said she would
24 like an opportunity to review this document having never seen it
25 before.

1 MR. WEBB: Fine.

2 MS. EUBANKS: I think it's appropriate to let her do
3 that before we proceed.

4 THE COURT: She can take a couple of minutes if she
5 needs.

6 (Pause)

7 A. Yes, I understand. I understand that part. I haven't read
8 all the attachments. Do you want me to take a minute and read
9 all the attachments?

10 Q. I'm going to call your attention on the issue I'm asking
11 about as far as the reasons for the policy. Do you see where it
12 says background?

13 A. Yes.

14 Q. What is written here by Legacy is "Legacy adopted Clause
15 12."

16 Clause 12 is the restrictive provision we've been
17 talking about; is that correct?

18 A. Yes.

19 Q. "Legacy adopted Clause 12 to achieve two separate but
20 related goals. First," and you on to explain the conflict of
21 interest. Do you see that?

22 A. Yes.

23 Q. Then you give a second reason. Do you see that?

24 A. Second.

25 Q. Second. "Clause 12 directly takes on the efforts of the

1 tobacco industry to achieve respectability and influence through
2 its funding activities and creates a financial incentive for
3 potential grantees to reject tobacco funding."

4 A. Yes, I see that.

5 Q. Doctor, if what everyone is trying to do is to help and work
6 on the problem of kids smoking, what's wrong with different
7 organizations working together to accomplish that goal and not
8 fighting each other?

9 A. What's wrong with it is I think you probably know there's a
10 global consensus that direct grants from Philip Morris to an
11 organization to effect tobacco control are a very bad idea.
12 That's why many other organizations have similar conflicts of
13 interest clauses, MD Anderson, the CDC. It's a fairly common
14 practice to have something like this.

15 Q. Although in this letter to Mr. Szymanczyk you described it,
16 you say, "We have found it to be an obstacle in some cases to
17 funding worthy programs and we have had a number of objections
18 to it."

19 MS. EUBANKS: Objection.

20 THE COURT: Where is that? Is that in a letter?

21 MR. WEBB: It's on the front page.

22 THE WITNESS: It's in the letter.

23 MS. EUBANKS: Your Honor, the witness has testified
24 about this being a draft and having not seen it before. He's
25 characterizing this as her letter and it's not signed. I want

1 the record to be clear.

2 MR. WEBB: I'm sorry. There's a misunderstanding, so
3 I'll clarify it.

4 BY MR. WEBB:

5 Q. Let's go back to the front page of the letter you sent to
6 Mr. Szymanczyk. You, what you signed, do you see that?

7 A. Yes.

8 Q. You tell Mr. Szymanczyk, "We are about to circulate the
9 attached letter to a broad range of parties to obtain feedback
10 on our conflict of interest clause to determine whether
11 modification is warranted. We have" -- you're referring to ALF;
12 is that correct?

13 A. Yes.

14 Q. "We have found it to be an obstacle in some cases to funding
15 worthy programs and have had a number of objections to it."

16 When you wrote those words to Mr. Szymanczyk, were
17 those truthful words?

18 A. And they were in relation to Kraft, which is what the issue
19 was about with --

20 THE REPORTER: Excuse me.

21 A. It was about Kraft.

22 We made a grant in North Carolina, despite the fact
23 that Philip Morris provided food and water, Altria provided, you
24 know, food and water to the victims of the -- let's see, I guess
25 it was the flood that happened down there a few years ago, and

1 so we made an exception there.

2 And apparently Peggy Conlin's organization, the Ad
3 Council, at some time got some money from Kraft and still had
4 not spent it all. And when we did enter into an agreement with
5 her, this was brought to our attention by an Attorney General's
6 office.

7 Christine Gregoire called me very upset. I don't know
8 if it was in response to -- it wasn't her, it was actually her
9 right-hand lawyer, and I think that lawyer probably called
10 Ellen.

11 But a call came into us objecting to the fact that we
12 had made this grant to an entity that received tobacco money.
13 And what I was -- when I -- either I got a call or somehow I was
14 aware that Mr. Szymanczyk knew about it, and I knew that we were
15 going to go ahead and make the grant anyway because it seemed so
16 farfetched that -- you know, \$50,000 that came into the
17 organization a couple of years ago from Kraft should stop a
18 major secondhand smoke campaign that was going out, as it had
19 seem inappropriate in North Carolina with the water to the flood
20 victims.

21 So yes, there have been cases when it has been a
22 problem. And there are a lot of people who oppose it. They
23 oppose it on academic freedom grounds. And there are a lot of
24 people who support it and who do not believe that it's an
25 academic freedom issue.

1 In fact, we did in fact go forward with the survey
2 which is why I'm questioning the letter, because I think what we
3 decided to do was we needed to do a systematic survey. So we
4 sent a survey out to all of grantees and people who had applied
5 to us --

6 Q. Doctor, I don't mean to interrupt.

7 A. I'm trying to answer your question.

8 Q. Okay. But Doctor --

9 A. I apologize.

10 Q. I can shortcut this, because your draft letter sets forth
11 the type of obstacles that you had encountered; is that correct?

12 A. I'm sorry.

13 Q. If you go to the draft letter -- I don't care whether the
14 letter ever went out. I'm not asking about -- if you go to the
15 draft letter that you sent Mr. Szymanczyk -- if you go to the
16 page -- Jamey, can I call up the page that's Bates 2356? I
17 think it's, I'm not sure.... tab 51, Jamey.

18 In the draft letter you comment on some of the problems
19 or what the objections have been; is that correct?

20 A. Yes.

21 Q. You talk about some academic institutions have argued it
22 violates principles of academic freedom. Is that at an accurate
23 statement?

24 A. Yes, it is.

25 Q. You go on to talk about how civil rights and community-

1 based organizations have taken the view that because of the
2 urgency of their funding needs, the difficulty of obtaining
3 adequate funding for the programs and the great importance of
4 the services they deliver, they must have flexibility with
5 regard to sources of funding and it is, therefore, fully
6 appropriate for them to accept tobacco industry funding.

7 Now, this issue -- as of today, have you changed your
8 restrictive policy?

9 A. No, the board has not chosen to do that.

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

11 MR. WEBB: Your Honor, for the record someone pointed
12 out I may not have use a JD number on the last exhibit and I'm
13 just going to read it into the record. The JD number on the
14 January 8, 2004 letter to Mr. Szymanczyk is JD 055255.

15 Q. Now, Doctor, let me move to a little different subject and
16 direct your attention to, if you have your written direct
17 examination there. Jamey, this is tab 84. This will be on
18 Page 67 of your written direct examination. And I'm going to
19 ask you some questions about this. You told the court in your
20 written direct.

21 "Question: Let's turn back to the topic of the "truth"
22 campaign. What was the tobacco industry's reaction to the
23 "truth" campaign when it was first launched in February 2000?"

24 You start your answer with the word, "Unfortunately,
25 the industry aggressively attacked both the initial ads and

1 Legacy. Philip Morris criticized the foundation as violating
2 the MSA and threatened to pull its funding from the Foundation.
3 I was asked by our board chair and others who weighed in to
4 meet, with our lawyers, with Philip Morris lawyers to discuss
5 these issues and I did so.

6 "Question: Did this interfere with the campaign
7 itself?

8 "Initially, it absolutely did."

9 Now. When you gave that testimony to the court were
10 you trying to make it appear to the court that the tobacco
11 companies and my client Philip Morris acted unreasonably to that
12 first group of commercials that ALF released?

13 A. Yes.

14 Q. Let's talk about that. Did ALF intentionally create youth
15 smoking prevention commercials knowing that they were in direct
16 violation of a specific provision of the MSA that prohibited ALF
17 from using tobacco company money to develop advertising that
18 personally attacked or vilified the tobacco companies or their
19 executives?

20 A. May I consult with my attorney? I don't know if I can
21 answer that. Can I answer that?

22 MR. WEBB: Your Honor, I don't believe a witness can
23 consult with an attorney.

24 THE WITNESS: We're in other litigation.

25 THE COURT: No. I believe I'm aware of some tangential

1 litigation, but, first of all, it's civil, not criminal, and
2 that doesn't preclude the witness from answering the question.
3 So you will have to do your best to answer it.

4 A. I'm happy to answer it. Could you just restate it?

5 Q. The tobacco companies got upset because when ALF created
6 your youth smoking prevention commercials you did so in a way to
7 violate what was known as the vilification clause of the MSA; is
8 that correct?

9 A. I do not believe we violated the clause.

10 Q. Well, let's look at the clause.

11 Could I have tab 86, JD 045158, which you will see is
12 Page 47 of the MSA, and I believe what I put on the screen is
13 what you would recognize as the vilification clause, but take a
14 moment to look at it.

15 This is, for the record, Roman numeral 6H of the MSA.

16 Do you recognize that as what is known as the
17 vilification clause?

18 A. Yes, I do.

19 Q. Let's look at what this tells. It says, "This National
20 Public Education Fund," that's the fund that had 250 or
21 \$300 million a year funded into it, is that correct, by the
22 tobacco companies?

23 A. Yes.

24 Q. "That fund shall be used only for public education and
25 advertising regarding the addictiveness, health effects, and

1 social costs related to the use of tobacco products and shall
2 not be used for any personal attack on, or vilification of, any
3 person, whether by name or business affiliation, company, or
4 governmental agency, whether individually or collectively."

5 That language you know it as the vilification clause;
6 is that correct?

7 A. As the vilification and personal attack clause, yes.

8 Q. And when you were hired by ALF as the president you were
9 familiar with the clause or became familiar with it; is that
10 correct?

11 A. Yes.

12 Q. In fact, so there's no doubt that ALF was going to follow
13 it, ALF incorporated it into your bylaws; is that correct?

14 A. Correct.

15 Q. Could I have tab 88, please, which is JD 055230. And do you
16 recognize this as the bylaws of the American Legacy Foundation?

17 A. Yes.

18 Q. And if we go to Page 16, you will see a section called
19 section 12.2, which contains the same language in your bylaws;
20 is that correct?

21 A. Yes.

22 Q. Now, ALF became aware that the origin of that clause that
23 you put into your bylaws was a result of the fact that the
24 tobacco companies before the MSA had entered into a settlement
25 with the Florida Attorney General and the State of Florida took

1 some of the tobacco company settlement funds and they developed
2 a vicious series of advertisements that attacked and vilified
3 the tobacco companies. Is that what happened?

4 A. No. I'm really only aware of one ad where that was the
5 contention, but I may be not fully informed.

6 Q. Well, let me show you -- if I could show the witness tab
7 93A, JD 055263. And I'm handing you what is a memo from Wilmer,
8 Cutler dated December 15, 1999. And I'll give Jamey a chance to
9 cull it up. It's tab 93A.

10 And do you see this being a memorandum from the law
11 firm of Wilmer, Cutler & Pickering?

12 A. Yes.

13 Q. Its subject: Guidelines For Interpreting By Law
14 Restrictions on Foundation Advertising. Do you see that?

15 A. Yes, I do.

16 Q. If we could go to Page 4, we see that there's things that
17 are redacted here, so I obviously don't know what those are.
18 But we see that there's a recitation here to this history of why
19 the clause came into being. Do you see that?

20 MR. PAYTON: Your Honor, may I just confer for a
21 second?

22 This was a document -- I'm not denying the document.
23 It's my document. It was produced in the civil litigation you
24 just identified. But I believe it was marked as highly
25 confidential, restricted to that litigation.

1 THE COURT: How did you get it in this litigation? Did
2 you get it through just regular discovery in this litigation?

3 MR. WEBB: Yes.

4 MS. EUBANKS: We've never seen it before, Your Honor.

5 MR. CORNFELD: Richard Cornfeld representing Lorillard.

6 My understanding is the American Legacy Foundation has
7 agreed to waive the confidentiality. We have correspondence to
8 that effect.

9 THE COURT: Who signed that letter? Ms. Vargyas or
10 someone else? Meaning the letter that purports to waive
11 confidentiality.

12 MR. PAYTON: Your Honor, if I could be of some help
13 here.

14 It is correct that there is some set of documents that
15 we have agreed to allow to be public. I do not know if this is
16 one of them or not. I may have signed the letter, but I do not
17 know if this is one of those documents or not.

18 All I'm saying is, you know, my antenna become alert
19 when I see this document, and if it is one in which we have made
20 it public, I won't have a problem with it at all.

21 I do not want to inadvertently have a document produced
22 and used in this litigation that was not intended to be done
23 that way.

24 MR. WEBB: I might be able to save some time on this
25 document. Let me try to save time.

1 THE COURT: Do you know for sure whether this letter --
2 excuse me -- this memo was covered by the letter on
3 confidentiality?

4 MR. CORNFELD: Your Honor, I can say that if it was not
5 we wouldn't have it, because the only -- meaning my law firm,
6 Thompson & Coburn, would not have it -- because the only
7 documents that we have been provided are documents that the
8 Foundation has released.

9 MR. WEBB: Your Honor, my understanding is that the law
10 firm handling this matter in Delaware only released these
11 documents to us in this case because he was authorized to do so.
12 Otherwise, I would not have these documents.

13 MR. PAYTON: That may be true. I'm just saying I'm
14 being very careful. Things have been inadvertently produced.
15 If this inadvertently produced, I can't get it back, so I simply
16 want to check to be --

17 THE COURT: Do you think you can get around the
18 document?

19 MR. WEBB: I was trying to. I don't know for sure if I
20 can, but I'll try.

21 MR. PAYTON: If the witness is coming back we can
22 certainly sort this out so that this would be very clear for
23 when the witness returns. It shouldn't be a problem at all.

24 THE COURT: All right. For now -- after all, it is
25 almost 4:25 -- for now, Mr. Webb will either work around the

1 document or move to another subject and then certainly by next
2 week we will have the issue resolved.

3 Go ahead, Mr. Webb.

4 BY MR. WEBB:

5 Q. Dr. Healton, do you recall in connection with your job at
6 ALF that you came to learn that the industry insisted on the
7 vilification clause because they believed that the State of
8 Florida had unfairly used tobacco money to attack the tobacco
9 industry?

10 A. No, I do not. I do recall one ad being at issue.

11 Q. Well, all right. Do you understand that ad to be an ad that
12 the tobacco companies thought vilified them?

13 A. I don't think the word in the agreement in Florida was
14 "vilified." It was something like "criticized."

15 Q. I didn't ask you that.

16 A. Well, then I guess I'd have to say I don't know because
17 there's -- right now, that is being adjudicated, and it's a very
18 complicated case.

19 Q. And I'm not going there at all.

20 A. Okay. But I'm just saying, you know, that's -- someone is
21 trying to figure that out. The court said we have to figure
22 this out.

23 Q. We're not going there because I'm not litigating that case
24 here or take the time to do it.

25 I want to find out whether you as the president became

1 aware that the tobacco companies were concerned about an ad or
2 ads in Florida and that was the source of the vilification
3 clause.

4 A. That is my understanding.

5 Q. And after you reached that understanding, you went out --

6 A. I was told that. That's my understanding because I was told
7 it.

8 Q. Right. And after you found that out, you made the decision
9 to go out and hire the head, the former head of the Florida
10 "truth" campaign; is that correct?

11 A. By "you," you mean Legacy?

12 Q. I mean Legacy.

13 A. He was -- he was hired, yes, some number of months before I
14 came.

15 Q. You made a decision -- in spite of what you found out to be
16 the origin of the vilification clause -- you as the president of
17 ALF made a decision to go out and clone what had happened in
18 Florida.

19 MS. EUBANKS: Objection.

20 Q. Is that correct?

21 MS. EUBANKS: I object to the form of the question,
22 clone.

23 THE COURT: How about duplicate?

24 BY MR. WEBB:

25 Q. Duplicate.

1 A. Our campaign is quite different from the Florida "truth"
2 campaign, so we did adopt some elements from the "truth"
3 campaign, but we also discarded many of them. We conduct our
4 campaign in a very different way.

5 Q. Did you ever tell your board of directors that we are on the
6 right track now, cloning Florida?

7 A. I don't -- I'm surprised if I used that term. If that's in
8 the minutes, I'd be surprised it's in a quote. It doesn't sound
9 like me, but I guess I could have.

10 Q. Could I have tab 90, JD 055232. It's tab 90, Jamey.

11 A. Yes.

12 MR. PAYTON: Your Honor, this is the same -- I don't
13 want to make a big deal out of this. This document has the same
14 designation --

15 THE COURT: Let's take it down for the moment.

16 MR. PAYTON: And all I'm saying is we could easily sort
17 out what this category is.

18 I did not know they were going to be using these
19 documents, but I do not want a document used that was
20 confidential and has not been released from that designation in
21 the other litigation.

22 If it's released, I don't have a problem at all. And
23 I'm not really fighting about the substance here, but I do not
24 want to have something inadvertent produced that was in fact
25 designated highly confidential.

1 MR. WEBB: This is an important document. I have it in
2 my possession because it was given to me because it was released
3 in that case. Otherwise, I couldn't have this document. I have
4 no ability to get this document but for the fact that it was
5 released in that case and presented to me, and so I do want to
6 cross-examine on this document.

7 THE COURT: Mr. Payton's point is from his perspective
8 it may have been inappropriately released. It's a very simple
9 matter for you all to check this out over the weekend.

10 What I'm concerned about is if you're going to be using
11 other documents about which this same question will arise, I
12 have a feeling you don't want to disclose those documents over
13 the weekend, but you certainly need to disclose them the morning
14 of whenever we reconvene with this witness again, so that it can
15 be double-checked that documents that would ordinarily be
16 confidential, I'm assuming they are attorney-client documents,
17 so that we can double-check that those documents are not outside
18 of the waiver that was executed. That's all I'm saying.

19 MR. PAYTON: I believe I could actually solve I believe
20 everyone's concern here.

21 If we knew what the documents were, I will represent,
22 and I think I couldn't have done it anyway, that I will
23 certainly not disclose what the documents are, nor attempt to
24 brief the witness on what the documents are.

25 And if you want to just let me know what the documents

1 are, I could make this representation about whether or not they
2 are inside or outside without disclosing their existence to the
3 Department of Justice or the witness. I want to protect the
4 Foundation's interest.

5 MS. EUBANKS: There is another issue here.

6 Mr. Webb just represented that Philip Morris has these
7 documents. I mean, we have discovery requests and there are
8 obligations under 26E for continuing production of documents.

9 We are interested in knowing how long they've had these
10 documents because they may be subject to production requirements
11 in our case because, you know, we haven't seen these documents
12 before. I know this is cross-examination. But if Philip Morris
13 and other defendants have had these documents for some period of
14 time, it may be that pursuant to this court's orders we were
15 entitled to those documents before today when the witness is
16 taking the stand and testifying. That's something that I'm
17 interested in learning, how long have the companies had them.

18 THE COURT: This is the way we should proceed,
19 everybody.

20 Certainly Mr. Payton's offer is an efficient one, or
21 will be efficient, I believe.

22 Sometime tomorrow Philip Morris should let only
23 Mr. Payton know what documents it may use, then he can check as
24 to whether they fall within the waiver or not.

25 The issue of whether the government is entitled to them

1 or not we can deal with after cross is finished because, for all
2 we know, the documents may not even be utilized in cross.

3 MR. WEBB: I accept that. I will interact with
4 Mr. Payton. I have no difficulty with that proposal and his
5 representation, and we can do it that way.

6 I see we are almost at 4:30 anyway.

7 THE COURT: Well, is there another topic that you can
8 cover in 10 minutes or so?

9 MR. WEBB: I can -- I can finish this part of this
10 topic and go to a new topic.

11 THE COURT: All right.

12 BY MR. WEBB:

13 Q. ALF did make the decision to hire the former head of the
14 Florida "truth" advertising campaign, Mr. Chuck Wolfe; is that
15 correct?

16 A. Yes.

17 Q. And Mr. Wolfe was given the assignment on behalf of ALF to
18 launch ALF's "truth" advertising campaign; is that correct?

19 A. He was given an instruction to launch a campaign.

20 The name of the campaign actually came from the young
21 people -- the meeting of a hundred young people, and they
22 considered different names, so it became the "truth" because
23 they voted for that.

24 Q. I'll leave the word "truth" out.

25 Mr. Wolfe was hired and given the task on behalf of ALF

1 to launch its new advertising campaign; is that correct?

2 A. Social marketing campaign, yes.

3 Q. And ALF then made the decision to hire an advertising agency
4 to work on the ALF "truth" campaign that was responsible for the
5 State of Florida advertising that the tobacco companies had
6 complained about; is that correct?

7 A. If you're referring to Crispin Porter? Is that right?

8 Q. Yes.

9 A. They were on the team. They weren't the lead, but yes, they
10 were one of the agencies.

11 Q. And without -- without any reference to any document, do you
12 recall as the president of ALF making a decision that you
13 thought it would be a good idea to clone the Florida campaign --
14 clone or duplicate the Florida campaign?

15 A. That decision, the decision to have a campaign that was a
16 branded campaign was taken prior to my recruitment as president.

17 Q. Now, could I have the MSA page brought back up again, Jamey?
18 That's -- well, actually just bring up the ALF bylaws. That's
19 tab 88. JD 55230.

20 Now, as the president of ALF as you were beginning your
21 job, when you learned what the language was of the vilification
22 clause -- let's look at the first part of it. It says, "The
23 National Public Education Fund shall be used only for public
24 education and advertising regarding the addictiveness, health
25 effects and social costs related to the use of tobacco

1 products."

2 Did you do everything possible to make sure that that's
3 all that you did in your commercials?

4 A. Yes, bearing in mind that all three constructs are very
5 broad. They are very broad areas.

6 Q. Well, you understand what addictiveness is; is that correct?

7 A. Yes, and it involves how one becomes addicted. You know,
8 how one comes in contact with the product. How many, you know,
9 young people start before they are 18, that kind of thing. It's
10 a broad concept.

11 Q. Were you trying to find a way to get around this clause with
12 your advertising?

13 A. No.

14 Q. Well, so you believed that you were careful to limit your
15 advertising so that all it did is communicate about the
16 addictiveness, health effects and social costs and nothing else.
17 Is that your testimony?

18 A. My testimony is that's what we focus on, and in all three of
19 those concepts are quite broad and they encompass making weary
20 consumers of adolescents, 80 percent of whom start using the
21 product as teenagers.

22 Q. But it says here only.

23 A. That's right. But, as I said, the social costs -- the
24 social costs are 1200 people die a day. Forty-four young people
25 are left without a parent who are minors because they lost their

1 parents. It cost billions and billions of dollars. It's a very
2 broad concept. It's not that narrow.

3 Q. Are you the one who decided it was a broad concept?

4 A. I think that health effects is very broad. Social costs,
5 it's not one thing.

6 Q. Look at the rest of it. The rest of the clause says that's
7 all you're supposed to do, and that it tells you what you're not
8 supposed to do. Do you see that?

9 A. Yes.

10 Q. What you're not supposed to do is do anything that would be
11 a personal attack on or vilification of, any person, company or
12 government agency, whether individually or collectively. Do you
13 see that?

14 A. I see the words, and they are in adjudication. It's a very
15 complex clause.

16 Q. Actually, in the world I live in, does the word
17 "vilification" confuse you?

18 A. No, actually it doesn't. I have a general sense.

19 Q. We can look at a dictionary and know what the word
20 vilification means, can't we?

21 A. If we look at the right one. We don't want to look at a
22 dictionary that has the obsolete definition which is often --

23 Q. I'm sorry. What?

24 A. I mean, dictionaries often list the most obsolete definition
25 first as a matter of form. So provided that we put up the right

1 definition, yes, it's the commonly used one, I think we could
2 agree on --

3 Q. Do you know what the word -- what the phrase attack or
4 personal attack, do you know what those words mean?

5 Do we need to go to a dictionary to understand those
6 words?

7 A. I think that that is a complex concept.

8 Q. It is.

9 A. It's not a simple black and white situation.

10 Q. Do you think as the president of ALF, that you at any time
11 ever engaged in any conduct where you were trying to get around
12 this clause and actually vilify and attack the companies?

13 A. I don't believe that we have vilified or personally attacked
14 the companies. I do not.

15 Q. My question was: In the meetings that you had at ALF as you
16 designed commercials, did you have discussions about how far you
17 could go to vilify and attack the company but not violate that
18 clause?

19 A. We had discussions, which I think is appropriate, about how
20 to launch and execute an effective campaign knowing what we knew
21 about the extraordinary success of the Florida "truth" campaign.

22 Q. And you knew that at the time that you knew the tobacco
23 companies, that was the very thing the companies had negotiated
24 to avoid; is that correct?

25 A. No. As I said -- and I'll say it one more time -- one ad

1 was brought to my attention, called the Demon Awards, and I
2 frankly would not have allowed that ad to run in the
3 Foundation's campaign for a variety of reasons.

4 Q. Did you look at all the Florida "truth" -- have you seen all
5 their ads?

6 A. I've seen many of them. I have not probably seen every
7 single one of them. But what I was really focused on was our
8 ads, and our ads are actually quite different.

9 Q. Is it your testimony that you actually went out of your way
10 to make sure that ALF complied with that provision? Is that
11 what you did as the president of the organization?

12 A. I understood there was a high probability that pretty much
13 whatever we did we would probably be sued.

14 So, yes, I took this very, very seriously, because I
15 think if -- if you look at the Florida language, it said
16 criticize. If this is going to be defined as criticize -- if I
17 make a statement in an ad, if we make a statement, 80 percent of
18 young people start as teenagers, many of them as a result of
19 glamorization of tobacco and advertising, I would be criticizing
20 you.

21 So, I mean, I don't think it's a black and white -- I
22 don't think it's a black and white concept. In fact, I know it
23 isn't.

24 Q. When you say it's not black and white -- ALF is the one that
25 put it into its bylaws so that it would comply with it; is that

1 correct?

2 A. Yes. The Master Settlement Agreement I think required that
3 we put it in our bylaws.

4 Q. And you did?

5 A. Yes, we did.

6 Q. And you took the tobacco money; is that correct?

7 A. The states gave us the tobacco money that they had agreed to
8 share out of the settlement, yes.

9 Q. And my question -- I'll come back to it because you didn't
10 answer it. Then as the president of ALF, did you go out of your
11 way to try to make sure that ALF was in compliance with this
12 clause that you put into your bylaws?

13 MS. EUBANKS: Objection, asked and answered.

14 MR. WEBB: She didn't answer.

15 THE COURT: No, sustained.

16 Q. Well, let's look at some of your ads, or at least a couple
17 here. You showed some this morning. Do you recall that? Do
18 you recall showing the court?

19 A. Yes, in my testimony, yes. There were --

20 Q. Could I have -- are you familiar with -- don't play anything
21 yet -- are you familiar with one of your TV ads called Shredder?

22 A. Yes.

23 Q. And we're going to play that.

24 What we will see, am I right, Doctor, is that the way
25 you designed this is that we are going to see a wood chipper

1 actually pull up outside of my company's actual corporate
2 headquarters in New York at 120 Park Avenue; is that correct?

3 A. Yes, we had a permit for that. Yes, we did do that.

4 Q. You chose to actually film that right in front of Philip
5 Morris's corporate headquarters; is that correct?

6 A. Yes, that is correct. Not identified, of course, in the ad
7 but, yes, it's correct.

8 Q. And it's identified as outside a major tobacco company in
9 the commercial; is that correct?

10 A. That's correct.

11 Q. And what we're going to see is two teenagers using bullhorns
12 and they act out an info commercial for the Shredder 2000; is
13 that correct?

14 A. Yes.

15 Q. And these teenagers are going to explain that the shredder
16 can be used for the tobacco companies to shred embarrassing
17 documents; is that correct?

18 A. Yes.

19 Q. And certain documents are actually discussed on the
20 commercial; is that correct?

21 A. Actual, yes. Actual quoted documents.

22 Q. Could I play this commercial? It's tab 94, JD 055249. And
23 play that ALF commercial.

24 (Video being shown.)

25 Q. That particular commercial, is that commercial that the

1 Judge just saw only addressing the addictiveness, health
2 effects, and social costs related to the use of tobacco
3 products?

4 A. I think it's principally addressing the fact that young
5 people are a target of the industry to become their new
6 customers, and just pointing out to young people that they are a
7 market share.

8 Q. So you worked real hard to make sure that the only thing
9 that commercial dealt with and addressed is the message of the
10 addictiveness and health effects of smoking; is that correct?

11 A. I think that you are narrowing way too far what it takes to
12 get a young-open-to-smoking kid to stop.

13 The campaign is structured on creating weary consumers,
14 kids that understand -- you help them reframe the \$13 billion
15 worth of marketing promotions coming their way.

16 Q. Did you understand my question?

17 Did you as the president of ALF work real hard to make
18 sure that the only message that came out of that commercial is
19 one that communicates to the public about the addictiveness and
20 health effects of tobacco products?

21 A. Yes, I did. 4.6 young people -- 4.6 million young people
22 smoke right now.

23 Q. Just so I know. Just tell the court --

24 A. -- and that's a huge health effect.

25 Q. -- tell the court where in that commercial did you talk to

1 about addictiveness.

2 A. We talked about the fact that focus groups --

3 THE REPORTER: Excuse me.

4 A. Yes, were being undertaken with sixth graders and very young
5 children in order to understand how to appeal to them to get
6 them to become smokers.

7 We know that you don't stay a smoker unless you become
8 addicted. It's a highly addictive product.

9 Q. Did you hear any discussion on the commercial at all about
10 the addictiveness of tobacco?

11 Do you want to put a transcript up line by line and go
12 through it?

13 A. You can do that. But again, I would simply say that the
14 campaign has to work and resonate with young people. We can't
15 just put up an ad and go -- you know, you get lung cancer, you
16 get this, you get this, you get that. I think it's well
17 documented, very well documented that that doesn't work --

18 Q. -- By the way, if it doesn't work and that's all you're
19 allowed to do -- strike the question.

20 Let's put a transcript up because I want you to show
21 the court where addictiveness -- could I have tab 94A, JD 55295.
22 This will be a transcript so we can go through it carefully and
23 give you a chance.

24 I want you to tell the court where in this carefully-
25 designed commercial that you designed, where do you talk about

1 the addictiveness or the health effects of tobacco products.

2 A. And this is represented to be a complete -- a complete
3 verbatim transcript?

4 Q. I did. I hope I didn't make any mistake. You can certainly
5 check it out at any time you want. I had it transcribed so we
6 could look at it and make sure we can explore it.

7 A. Okay. So today's teenager is tomorrow's potential regular
8 customer. That's from -- that's a verbatim quote from a
9 company. I don't know if it's your company. We didn't name any
10 companies.

11 So, how does a -- how does today's teenager become
12 tomorrow's regular customer?

13 Q. I see that.

14 A. How does that happen?

15 Q. And that is communicating the addictiveness of cigarette
16 smoking?

17 A. It is in a way that will resonate with young aged kids.

18 Q. That's the clearest way you could think of to communicate
19 that?

20 A. Clarity is not always the best way to communicate with young
21 people who you're trying to have resist a \$13 billion marketing
22 machine.

23 I think -- with all due respect, I don't think there's
24 any evidence at all that that kind of communication would work.

25 Q. Doctor, so -- I just want to make sure. Is that the best --

1 just tell the court --

2 A. We can go on. I mean, in terms of the other three elements.
3 I'd be happy to go through all of them.

4 Q. Let me ask you this. So this commercial, the shredder, you
5 don't believe that there's any focus here on the conduct of the
6 tobacco companies?

7 A. I certainly do, and that conduct is inextricably linked to
8 addictiveness, health effects and social costs.

9 Q. So if, in fact -- well, let me just ask this.

10 Do you agree this commercial communicates the message
11 that people who work at this tobacco company have destroyed or
12 shredded embarrassing reports and documents?

13 A. I do believe it communicates that and I do believe they
14 have.

15 Q. And do you believe that when you say that, that that
16 degrades a company? Do you believe that?

17 A. I think doing it is degrading. I'm not sure disclosing the
18 fact of it is degrading.

19 Q. That's all I meant.

20 Do you believe that there's anything about this
21 commercial that degrades the tobacco company depicted herein?

22 A. And does it -- I'm sorry. The language in the -- the
23 language in the MSA that we just looked at, did it mention
24 degrade?

25 Q. Well, we will come back to the definition of vilification.

1 My question is do you believe that this commercial degrades the
2 tobacco company?

3 MS. EUBANKS: Your Honor, she's answered that question
4 already.

5 MR. WEBB: No, she didn't.

6 THE COURT: I don't think this particular question.
7 Let's have a yes or no to that and then we will break for the
8 evening.

9 THE WITNESS: No, I don't think it degrades them.

10 MR. WEBB: Do you want to stop here, we can stop here.

11 THE COURT: All right. Counsel should work over the
12 weekend in terms of the timing of the witness's return.

13 Obviously we sit four days a week, and I know that
14 there's some flexibility and it may be that the witness doesn't
15 have to totally disrupt her personal plans.

16 MR. WEBB: Could I raise one -- could I raise one
17 important scheduling issue which will just take a second? And
18 Dr. Heaton can be excused.

19 THE COURT: You may step down.

20 MR. WEBB: Your Honor, I think it's clear from the
21 discussion that Mr. Bernick had with the court earlier today, we
22 are going to finish our evidence, it looks like probably on June
23 2nd, possibly the morning of June 3rd.

24 THE COURT: I heard that.

25 MR. WEBB: Now, we've been involved in roughly a

1 9-month trial, and I know Your Honor, I believe, has a judicial
2 conference schedule -- at one time, I don't want to misstate the
3 dates, I think June 10th.

4 THE COURT: I actually have two. I have a meeting the
5 following -- no, not the following week -- the week after I have
6 a meeting of the Judicial Conference Committee. The Court
7 Administration and Court Management Committee. That's the week
8 of June 13th. And then June 23rd and 24th I have our local
9 judicial conference which is meeting out of town, though.

10 MR. WEBB: So I understood that. So we're going to be
11 done June 2nd and June 3rd.

12 What I'd like to propose to the court is that we
13 schedule closing arguments in the case -- and I'm going to make
14 a concrete proposal -- that we do it on June 7, 8th and 9th that
15 week, the following week. And that we have been involved in a
16 trial that's gone nine months. You gave us a day for opening
17 statements. I think a day and a half for each side for closing
18 arguments based on the scope of the evidence would be
19 appropriate and would give the parties an opportunity to educate
20 the court on where we've been in the last nine months. And also
21 get it done before you leave -- or before you have these other
22 commitments.

23 And quite frankly, we've been here for months. Those
24 of us from out of town, if possible anyway, if we could do it
25 that week, and you at one time indicated you would like to have

1 the trial complete by June 10th, and I believe we can do it.

2 MS. EUBANKS: Your Honor, we think that that's too
3 soon. For one thing, we have to make a determination after the
4 close of defendants' case whether there is a rebuttal case. And
5 Order 471 expressly states that I believe there is built in a
6 2-week period between the closing of defendants' case and any
7 possible rebuttal case.

8 We haven't deposed many of defendants' witnesses to be
9 in a position to know what the likely evidence is that's coming
10 in, and I think planning at this point for closing arguments for
11 that soon is probably not a wise move. I just think it's too
12 soon for us to be able to put together helpful arguments to the
13 court addressing nine months of trial the 7th, and 8th and 9th,
14 if the defendant are going to rest on the 3rd, even if there is
15 no rebuttal case.

16 MR. WEBB: Well, Your Honor, I think it was last week
17 Ms. Eubanks at least said at that time she had not pinpointed
18 any live witnesses that she knew of.

19 And number two, you've indicated that you're going to
20 strictly follow -- the DC Circuit law on rebuttal is extremely
21 strict, and it's got to be something totally unexpected -- I'm
22 not going to argue that now.

23 The likelihood that we're going to have live witnesses
24 for rebuttal I think is extremely small, if nonexistent. And
25 also as far as timing, the reason I'm raising it now is because

1 if we then -- the time is going to pass us by if we let more
2 time go by. We have just -- if you're going to be gone the
3 following week, I don't know why we can't get ready. This is
4 advance notice right now that we would argue this case on June
5 7th, 8th and 9th, and have the case done by June 10th.

6 MS. EUBANKS: Your Honor, I appreciate the fact that
7 Mr. Webb remembers what I said about a rebuttal case, but we
8 haven't had the discovery that we are entitled to of many of
9 their expert witnesses to know what evidence we will need in.

10 We are having a conference tomorrow to discuss more
11 discovery the defendants may have. I have to say that in terms
12 of knowing what the likely record is, we are not in a position
13 to say, you know, that we are not going to have live rebuttal
14 witnesses.

15 THE COURT: Well, certainly the government ought to
16 make up its mind within a reasonable period of time.

17 I'll certainly think about this schedule you proposed,
18 Mr. Webb. Because I knew everybody was shooting for June 10th
19 at a minimum, I must admit my own thinking was that we probably
20 wouldn't get to closing arguments until either June 20th, 21 and
21 22 or, at the very latest, the very latest, the following week,
22 but now it appears as if we can push things up a little bit, and
23 that would be good.

24 I want to think about it a bit and then also give a
25 deadline to the government in terms of when it has to make up

1 its mind about rebuttal. But I need to look at the schedule
2 really carefully.

3 MS. EUBANKS: Your Honor, I have to say, though,
4 that -- I mean, we have not had the opportunity to depose many
5 of the witnesses that are on defendants' list.

6 So giving us a deadline as to when it is we have to
7 make up our mind, without hearing the witness's testimony or at
8 least reviewing the written directs, is going to handicap our
9 position.

10 We are not going to know definitely what the evidence
11 is that's likely to come in actually until we get at least the
12 written directs.

13 Now yesterday, we talked about the fact that even
14 though --

15 THE COURT: Let's not take forever on this discussion,
16 everybody. The government is obviously objecting to it. We
17 could argue about it forever. I'm not going to decide it today.
18 If people really have new ideas to give to me about it while
19 they think about it, that's fine.

20 Mr. Bernick, two minutes.

21 MR. BERNICK: No, I have no new ideas. I want to make
22 sure that the week of the 13th -- at least, I had understood
23 that the week of the 13th we were not going to be in session
24 because Your Honor's own commitments.

25 THE COURT: Wait. Let me just get my weeks right,

1 everybody. We're talking June, right? That's correct. That is
2 right. Did I say June 13th?

3 MR. WEBB: You said it correctly.

4 MR. BERNICK: I wanted to make sure that was not on
5 the --

6 THE COURT: No. It will not -- closing arguments will
7 not be that week. That's for sure.

8 MR. WEBB: I understand that.

9 THE COURT: All right, everybody. Monday at 9:30, and
10 it's unclear at this point whether it's going to be Dr. Healton
11 or Dr. Eriksen.

12 MS. EUBANKS: I believe it will be Dr. Eriksen, and
13 what we can do is to allow Dr. Healton to make her trip. We can
14 shift around the witnesses and perhaps have her come on
15 Thursday.

16 MR. WEBB: I'll accommodate that schedule.

17 THE COURT: Now, let me check one other thing because
18 as I looked at this schedule, will we be full 4-day -- we don't
19 know about that yet.

20 All right, everybody. And I'll have a conference call
21 with counsel tomorrow afternoon. Thank you. Parties may be
22 excused at this time.

23 (Proceedings concluded at 4:49 p.m.)

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1 INDEX

2 WITNESS: PAGE:

3 CHERYL G. HEALTON, Ph.D.

4 CROSS-EXAMINATION BY MR. WEBB 20939

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9 CERTIFICATE

10 I, EDWARD N. HAWKINS, Official Court Reporter, certify
11 that the foregoing pages are a correct transcript from the
12 record of proceedings in the above-entitled matter.

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15 Edward N. Hawkins, RMR

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