

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	May 16, 2005
Plaintiff,	:	
	:	9:35 a.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
. . . . .	:	

VOLUME 104  
MORNING SESSION  
TRANSCRIPT OF TRIAL RECORD  
BEFORE THE HONORABLE GLADYS KESSLER  
UNITED STATES DISTRICT JUDGE

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

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

2 THE COURT: Good morning, everybody.

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

5 First of all, does everybody have their feed  
6 straightened out this morning? Okay.

7 Next, we have a number of preliminary matters this  
8 morning, and I'm aware of that, but I think it will advance the  
9 ball, as they say in some sport or other, if I give my ruling at  
10 this point regarding Mr. Myers' testimony because I know that's  
11 a subject of great concern to everybody. And, I'm sure you all  
12 got the ruling I made on Friday regarding additional discovery.

13 I have before me now the Joint Defendants' Objections  
14 to the Written Direct Testimony of Matthew Myers and their  
15 motion in limine to exclude evidence proffered in the direct  
16 testimony of both -- actually, both Dr. Gruber and Mr. Myers.

17 And, of course, as to the latter motion, as everybody  
18 knows, I denied it as it pertained very specifically to  
19 Dr. Gruber's testimony.

20 I'm going to address the legal arguments, of course,  
21 regarding Mr. Myers' testimony, but I do want to say that when I  
22 first read it, which now is probably about a week ago, I was  
23 quite taken aback.

24 Put simply, the testimony by and large is a  
25 straightforward opinion piece. It's presented by what I have

1     reason to believe -- I don't really know personally -- a  
2     dedicated and a long-standing, quote/unquote, antitobacco  
3     advocate.

4             When I use that term antitobacco, everybody, I'm always  
5     putting it in quotes. It's just a shorthand way of describing  
6     what I have been told about Mr. Myers. When I say told, meaning  
7     of course what I've read in these papers.

8             The testimony is not as the government purports it to  
9     be, a piece of evidence -- and I emphasize that word evidence --  
10    presented by a fact witness.

11            I want to emphasize what, of course, everybody knows.  
12    This is a courtroom. It's not a congressional hearing. It's  
13    not a press conference. It's not a speakers podium at one of  
14    these million people dinners at the Hilton or the Shoreham.

15            I don't mean those comments sarcastically and I don't  
16    mean them in any way to convey disrespect for Mr. Myers or the  
17    substance of his opinions.

18            But we are governed by the Federal Rules of Evidence  
19    and, in particular, as we've all been over it a hundred times,  
20    Rule 401, 402, 403, 602, 701, and 702, much, if not most, of  
21    Mr. Myers' testimony is basically a speech, not admissible  
22    evidence.

23            Initially, what I tried to do was to go through his  
24    testimony literally line by line to see what specifically could  
25    be left in and what was inadmissible. That didn't work,

1       everybody, for reasons that I'll spell out in a minute.

2               Given that this is a bench trial, I have consistently  
3       chosen to err on the side of admitting evidence when the  
4       question has been a close one, and we have had numerous  
5       difficult evidentiary issues presented in this case.

6               But testimony that is so blatantly political -- and I  
7       want to emphasize when I'm using that word "political," I'm not  
8       talking, of course, in a partisan sense, but political in the  
9       public policy sense -- that kind of testimony just can't be  
10      admitted. And I want to be very specific as to the reasons for  
11      my rulings and I'm going to start with a number of arguments of  
12      joint defendants upon which I am not relying, actually.

13              First. The joint defendants argue in their papers that  
14      Mr. Myers should be disqualified as a witness because of his  
15      bias and because of his long history as a, quote, antitobacco  
16      advocate. That, of course, is no reason for disqualifying a  
17      witness. That's why we have cross-examination. We've got  
18      lawyers very skilled on the defense side of the table, and I  
19      don't have to worry that they will bring out whatever biases may  
20      or may not exist.

21              Second. Joint defendants also rely heavily on Rule  
22      408, which I discussed earlier a couple of days ago in my ruling  
23      relating to Dr. Gruber. And for the reasons set out fully in  
24      the government's papers, and as I stated them on the record a  
25      few days ago, Rule 408 is not applicable.

1           Evidence pertaining to settlement negotiations is not  
2       admissible to prove liability. It is admissible if offered for  
3       another purpose. This evidence is not being offered to prove  
4       liability, it's being offered for the purpose of proving the  
5       appropriateness or wisdom or justification for the remedies  
6       sought by the government.

7           Third. The joint defendants also argue that the  
8       testimony shouldn't be admitted because it is not, quote,  
9       forward looking, unquote, because it's not specifically tied to  
10      particularized past violations of RICO and because of  
11      insufficient nexus between the remedies being offered or  
12      proposed and the RICO violations which are either alleged or  
13      found to have been proven.

14           Again, these are legal issues, and I've said this  
15      before, they are to be determined at a later point, but they are  
16      not legitimate justifications for completely excluding competent  
17      evidence, which is the rationale that joint defendants are  
18      offering.

19           As a fact witness -- which is what, of course,  
20      Mr. Myers is -- he may testify, as he does in sections 1 and 2  
21      of his written direct, to his present employment and activities  
22      in the smoking and health field.

23           He may certainly testify about his education, about his  
24      past employment, about honors he's been given. He may testify  
25      about his employment at the FTC and the Coalition on Smoking and



1 Health, and the work he did at those two organizations on  
2 smoking and health issues.

3 And he may give a factual comparison of provisions in  
4 the 1997 proposed resolution and the Master Settlement  
5 Agreement. And while it's arguable that that's all in the  
6 record and I can figure it out for myself, he may testify as to  
7 those facts, what's in one document and what's in the other  
8 document.

9 In addition, he may testify about facts relating to the  
10 International Formula 1 car racing team sponsorship. And while  
11 I certainly know that joint defendants strongly object to this  
12 testimony on the grounds that it lacks factual foundation, they  
13 are going to be able to fully explore on cross-examination  
14 whether Mr. Myers does have any personal knowledge on this  
15 subject. As I say, that will come out fully on cross and I  
16 don't have to worry about whether joint defendants can elicit  
17 that or not.

18 Much of the remainder of his testimony is inadmissible  
19 as being, one, either irrelevant under Rules 401 and 402 and/or,  
20 two, permeated with hearsay and/or expert opinion precluded by  
21 Rule 701 and 702.

22 In particular, the joint defendants' motion in limine  
23 to exclude evidence related to the 1997 proposed resolution is  
24 granted for these reasons.

25 Mr. Myers has given very lengthy and fulsome testimony

1     about the conversations, discussions, negotiations, motivation  
2     of the parties, and the general political and economic climate  
3     surrounding the 1997 proposed resolution.

4             All of that testimony is irrelevant under Rules 401 and  
5     402, and because it's legally irrelevant it would cause undue  
6     delay and waste time under Rule 403.

7             The 1997 proposed resolution and, of course -- well, I  
8     know what parties have told me in their legal pleadings and I'll  
9     get to what I know from testimony -- but the 1997 proposed  
10    resolution was a comprehensive, negotiated package of a number  
11    of different individual remedies, and those individual remedies  
12    were agreed to as part of that overall package, but never agreed  
13    to as separate and isolated individual pieces.

14            Perhaps even more importantly -- actually, more  
15    importantly -- the 1997 proposed resolution was conditioned on  
16    enactment of federal legislation, a condition precedent to  
17    implementation of the proposed resolution that was never  
18    satisfied because, as we all know, Congress failed to pass any  
19    legislation. Thereafter, the MSA was adopted.

20            But testimony about the extensive and convoluted  
21    history leading to agreement on that proposed resolution, a  
22    resolution which was never finalized or implemented, is simply  
23    irrelevant.

24            The ins and outs of why that proposal was finally  
25    agreed to by these joint defendants and certain state Attorney

1       Generals, who were not even parties to this lawsuit, and its  
2       particularized economic, political, and historical context are  
3       neither useful nor relevant in terms of the task before me which  
4       is selecting an appropriate remedy if liability is found. And I  
5       might add, everybody, that Order 610, which, of course, was  
6       entered a very long time ago, also sets forth almost identical  
7       reasoning.

8               While it's true, as the government argues, that there  
9       is already some evidence in the record from both government  
10      witnesses and defense witnesses about the 1997 proposed  
11      resolution, that testimony is either very discrete and narrowly  
12      focused evidence, such as that which I did allow Dr. Gruber to  
13      give in explaining the basis of the formula he used in his  
14      direct testimony -- I mean, that's one kind of testimony about  
15      the resolution -- or, on the other hand, it's so broad and  
16      general as a few sentences here and there in people's testimony  
17      as to be of little probative value. And a good example of that  
18      would be the very brief testimony that Ms. Keane gave and I know  
19      another joint defendant witness gave on the proposed resolution.

20             In any event, there is no testimony in the record that  
21      gives anything like the detailed broad-gauged history that  
22      Mr. Myers would offer.

23             And, finally, his testimony on that subject, which of  
24      course is a long chunk of his testimony, is simply riddled with  
25      hearsay and expert opinion that a fact witness cannot give.

1           And, finally, much of the evidence, much of the actual  
2       substantive evidence that is contained in other parts of his  
3       testimony -- not about the 1997 proposed resolution, but in  
4       other parts of his testimony -- is cumulative and actually  
5       duplicative or repetitive of the much, much more detailed and  
6       scientifically-based evidence of the government's superbly  
7       credentialed expert witness, Dr. Fiore, who will be testifying  
8       later this week -- tomorrow, actually, as we all know.

9           Now, let me focus on those other sections of Mr. Myers'  
10      testimony. The following is excluded.

11           Section 5. Virtually all of it is expert opinion,  
12      except for -- and I have gone over his testimony, everybody, at  
13      least three times line by line in terms of wanting to very, very  
14      carefully evaluate admissibility and exclusion. Anyway, section  
15      5 is virtually all expert opinion, except for the Formula 1 team  
16      material, which I discussed above, and the following very brief  
17      sections.

18           Page 30, line 21 through 31. No, let me say that  
19      again. Page 30, line 21 through Page 31, line 14 may be  
20      admitted.

21           Page 33, lines 19 through 22 may be admitted.

22           Page 35, lines 5 through 10 and 20 through 22 may be  
23      admitted.

24           Page 36, lines 1 through 14 may be admitted.

25           Section 6. Virtually all expert opinion and it must be

1 be excluded.

2 Section 7, again virtually all expert opinion, of  
3 course, being offered by a fact witness, except for Page 46,  
4 lines 19 through 21.

5 Section 8 excluded.

6 Section 9, all expert opinion. A straight piece of  
7 advocacy.

8 Section 10, all will be admitted -- excuse me --  
9 excluded, except for Page 54, lines 16 through 20, and section  
10 11.

11 Now, I think -- obviously, everybody will have to look  
12 at exactly how that ruling plays out, but it will certainly --  
13 that ruling will certainly dispose of a number of issues  
14 relating to Mr. Myers.

15 Now, on Friday the joint defendants submitted an  
16 expedited motion to compel production of documents regarding  
17 Dr. Fiore. Now, I couldn't get to look at it, mostly because I  
18 spent so much time on Mr. Myers' testimony, but in any event, I  
19 didn't get to look at it. I'm sure the government has looked at  
20 it since it was submitted on Friday. Dr. Fiore is scheduled for  
21 tomorrow.

22 You don't have to address it this minute, but I think  
23 you're going to have to address it today, Ms. Eubanks.

24 MS. EUBANKS: We can address it today, Your Honor, very  
25 briefly. What time would you like to do that and I'll have

1 Mr. Brody here to address it?

2 THE COURT: Up to you.

3 MS. EUBANKS: Would right after lunch be fine?

4 THE COURT: That's fine.

5 MS. EUBANKS: That will be fine with us.

6 THE COURT: That's good. I think that we are now ready  
7 for Dr. Eriksen's testimony.

8 MR. BERNICK: One, just very brief one.

9 With respect to Mr. Myers, you went over section 10.  
10 And then section 11, I didn't quite catch what your ruling was  
11 with respect to section 11.

12 THE COURT: Let me double-check it. That's the very  
13 last section which is conclusions, as I remember.

14 Section 11 is excluded. It is his conclusions. That's  
15 correct.

16 MR. BERNICK: Thank you.

17 THE COURT: As to Dr. Eriksen, let me just  
18 double-check, but my recollection is that there was several  
19 objections. I've been over them carefully, except for one.

20 And the only one that I do have to take a look at is  
21 issue number 3, which, according to the joint defendants, is  
22 barred by Order 622. And I have not had a chance to check that  
23 out, everybody, but Dr. Eriksen may -- all the other objections  
24 are overruled and he may testify. I will certainly look at that  
25 during the lunch break and we can proceed in the usual fashion

1       that we do.

2               Ms. Crocker, is he your witness?

3               MS. CROCKER: Yes, Your Honor.

4               THE DEPUTY CLERK: Please raise your right hand.

5       MICHAEL ERIKSEN, Sc.D., Government's witness, SWORN

6               THE DEPUTY CLERK: You may be seated.

7               MS. CROCKER: Good morning, Your Honor. For the  
8       record, Elizabeth Crocker.

9               THE COURT: Good morning.

10                               DIRECT EXAMINATION

11       BY MS. CROCKER:

12       Q. Dr. Eriksen, you may want to move the microphone. Do you  
13       have a copy before you of your direct testimony filed May 9,  
14       2005?

15       A. Yes, I do.

16       Q. Did you draft the answers in that testimony?

17       A. Yes, I did.

18       Q. Are there any corrections you want to make to your  
19       testimony, Dr. Eriksen?

20       A. No. It's fine.

21       Q. I notice there is one error on the notice of filing. You're  
22       referred to as a Ph.D. That's incorrect; is that right,  
23       Dr. Eriksen?

24       A. Yes. My degree is Sc.D, Doctor of Science.

25       Q. With that single correction at this time do you formally

1       adopt the testimony?

2       A.   Yes, I do.

3               MS. CROCKER:  And we offer Dr. Eriksen's direct  
4       testimony into evidence, Your Honor.

5               THE COURT:  It may be admitted.

6               MS. CROCKER:  And, Your Honor, just for the record, the  
7       court already accepted Dr. Eriksen as an expert on public health  
8       when he was offered on January 27th of this year.

9               THE COURT:  Correct.

10              MS. CROCKER:  I just wanted to note for Your Honor's  
11       information.  As you know, Dr. Eriksen has a medical condition  
12       he's been suffering from, which we had to delay his testimony by  
13       a week, and I think we told Your Honor about it.

14              I've let him know.  He said he may need to take some  
15       medication during the day.  He may need a break.  And I've just  
16       asked him to inform Your Honor if he does need a break at any  
17       time.

18              THE COURT:  Certainly.

19              MS. CROCKER:  Okay.  At this point we're going to start  
20       with the direct testimony, and I think it will be much less than  
21       an hour, Your Honor; likely less than half an hour.

22       BY MS. CROCKER:

23       Q.  Dr. Eriksen, did you create some demonstratives to show the  
24       court today?

25       A.  Yes, I did.



1 Q. And let's pull up United States' demonstrative Exhibit 18268  
2 of the Dr. Eriksen. What does this demonstrative depict?

3 A. This demonstrative outlines the two major categories of  
4 remedies that I'm recommending for the court to consider.

5 The first being a counter-marketing campaign that has  
6 subcomponents to it, and secondly certain reasonable  
7 restrictions on cigarette marketing.

8 Q. Let's pull up United States Demonstrative Exhibit 18269.  
9 And Dr. Eriksen, generally, what's outlined on this  
10 demonstrative?

11 A. This demonstrative shows in more detail the specific  
12 remedies that I would recommend the court to consider in  
13 relation to the defendants' behavior broken down underneath the  
14 broad headings that were on the first demonstrative of  
15 counter-marketing and advertising restrictions.

16 Q. And let me just ask you to briefly explain the different  
17 categories shown on the demonstrative.

18 Briefly, what is depicted under section 1A.

19 A. Under section 1A there is a focus on correcting the  
20 misperceptions associated with the glamour, acceptability of  
21 tobacco use that would include a youth focused counter-marketing  
22 media campaign, as well as corrective communications about  
23 marketing, and the disclosure of disaggregated marketing data  
24 that would be made available to the American public and to  
25 scientific researchers.

1           The second part of the first remedy under B would  
2 parallel the A section regarding correcting misperceptions, but  
3 in this instance primarily in relation to the safety of tobacco  
4 use, that would also include a counter-marketing media campaign  
5 related to smoking and the harm caused by smoking, and again  
6 corrective communications about issues, such as addiction and  
7 disease causation.

8           And then lastly under this area is also to make  
9 available scientific data to the American public and to the  
10 scientific community.

11       Q. Let me just briefly follow up. The counter-marketing  
12 campaigns that you've just described and corrective  
13 communications, are those the same thing as each other or  
14 different from each other?

15       A. No, they are different. By corrective communications, I  
16 mean basically admissions on behalf of the defendant regarding  
17 their knowledge of the harm caused by smoking, the effect of  
18 marketing on young people, the addictiveness of tobacco in a way  
19 that's consistent and unambiguous.

20           Counter-marketing, on the other hand, is much more of a  
21 campaign of persuasion that would be in the media looking at  
22 trying to influence the behavior of the population either with  
23 respect to preventing the onset of tobacco use or to assist  
24 smokers to quit smoking.

25       Q. And just to follow up. You made a reference to the

1 disclosure of marketing data. When you refer to that, are you  
2 referring only to marketing expenditure data or to a more broad  
3 category of data as well?

4 A. I'm referring to a broader category of data, and I'm sure we  
5 will discuss this at more length. But it would include  
6 disaggregated marketing expenditure data, but also marketing  
7 data that the defendants have in their possession related to  
8 smoking behavior that's obtained through surveys they conduct,  
9 sales data that we could then correlate with the expenditure  
10 data to better understand the relationship between marketing  
11 expenditures and smoking consumption and initiation from a  
12 scientific standpoint.

13 Q. And just one more follow up.

14 When you refer to a counter-marketing campaign related  
15 to smoking and health issues, and that's under B1, is that the  
16 same or different than a cessation campaign?

17 A. It would be different than a cessation campaign.

18 It would be to communicate in a persuasive fashion the  
19 harm caused by smoking and to correct some misperceptions  
20 regarding light cigarettes, compensation and other areas that  
21 may contribute to smoking cessation, but would have a broader  
22 impact.

23 Q. Okay. I'm going to keep up this slide, U.S. Demonstrative  
24 18269 and also ask you to bring up 18272. Put those side by  
25 side.

1                   Can you see those, Dr. Eriksen?

2       A.   Yes.

3       Q.   Now, what is shown on United States Demonstrative  
4       Exhibit 18272?

5       A.   In this demonstrative I just wanted to illustrate for the  
6       court that there is good scientific evidence that  
7       counter-marketing programs as part of larger efforts can be  
8       effective in reducing tobacco use among young people very  
9       quickly.

10               This data presented in this demonstrative illustrates  
11       what happened in the State of Florida who implemented a tobacco  
12       control program focused on young people in 1998 following their  
13       settlement with the tobacco industry. After one year of the  
14       program there was a nearly 20 percent reduction in smoking among  
15       Middle School students and an 8 percent reduction of smoking  
16       among high school students.

17               And this was really the first and strongest evidence we  
18       received from states about what could be done with the right  
19       ingredient of financial support and leadership and prevention  
20       programs.

21       Q.   Where is the data shown on this slide derived from?

22       A.   This data was originally published in the MMWR, the  
23       Morbidity and Mortality Weekly Report that CDC prepares and then  
24       subsequently was repeated in the 2000 Surgeon General's Report.

25       Q.   And which remedy shown on slide 18269 is this second slide

1 connected to?

2 A. This demonstrative was presented to reinforce the impact  
3 that would be achieved through youth focus smoking  
4 counter-marketing media campaign which would be 1A(i).

5 Q. Okay. Keeping 18269 up, let's next bring up United States  
6 Demonstrative Exhibit 18270. Do you see that on the screen,  
7 Dr. Eriksen?

8 A. Yes.

9 Q. And whose testimony is shown on this demonstrative?

10 A. This testimony is from Professor Heckman who recently  
11 testified for the defense.

12 Q. And which remedy does this testimony relate to from  
13 Demonstrative 18269?

14 A. This would -- this demonstrative pertains to the first major  
15 remedy, 1A, small 2, or II, regarding disaggregated marketing  
16 data and the importance of that type of data.

17 Q. Why do you create this demonstrative?

18 A. I wanted to illustrate to the court that it's just not  
19 witnesses for the government who support the importance and  
20 release of disaggregated marketing data for scientific purposes  
21 and that this topic was thoroughly discussed by witnesses for  
22 the defense -- by a witness for the defense.

23 Q. Keeping 18269 up, let's bring up United States Demonstrative  
24 18271. That's a little bit fuzzy, Charles. Can you pull that  
25 out or show it on its own?

1                   Can you read that, Dr. Eriksen?

2       A.   Yes, I can.

3       Q.   Whose testimony is shown on this demonstrative?

4       A.   This is testimony from Surgeon General Carmona where he  
5       testified on the importance of health literacy and informing the  
6       public about the health consequences of smoking as being central  
7       to his responsibility as Surgeon General.

8       Q.   And which remedy that you were testifying about is this  
9       testimony related to?

10      A.   I don't have the second demonstrative to look at.  Thank  
11      you.

12               This would also relate to 1B2, corrective  
13      communications about addiction and disease causation in keeping  
14      with the responsibility of the government in informing the  
15      public about the hazard of smoking.

16      Q.   If we can, keeping 18269 up, let's put up 18276.

17               Can you read that, Dr. Eriksen?

18      A.   Yes, I can, thank you.

19      Q.   What document is shown on this demonstrative?

20      A.   This is a quote from the 2000 Surgeon General's Report  
21      regarding the health effects of low tar and low nicotine  
22      cigarettes and the public's understanding of that effect.

23      Q.   Which remedy that you testify about does this demonstrative  
24      relate to?

25      A.   This would also pertain to the previous one of 1B, small 2,

1       regarding corrective communications about addiction and disease  
2       causation.

3       Q.   Why did you have this demonstrative created?

4       A.   To illustrate that there is -- the Surgeon General has  
5       concluded that both light cigarettes are not less hazardous as  
6       people think they are and that consumers don't have full  
7       understanding of that and may actually be misled in that regard.

8       Q.   And let's pull up 18275.  Dr. Eriksen, what document is  
9       shown on this demonstrative?

10      A.   This similarly is a conclusion from the 2000 Surgeon  
11      General's Report which is similar to the previous demonstrative,  
12      just reiterates the information deficit that exists among the  
13      public and smokers regarding the chemical constituents of  
14      tobacco products and regarding whether or not they are fully  
15      informed or actually possibly misled by terminology such as  
16      light and ultra-light.

17      Q.   And let's bring up United States Demonstrative Exhibit 1823.  
18      And what document is shown on this demonstrative?

19      A.   Similar to the other quotes.  This is a conclusion from the  
20      2000 Report of the Surgeon General pertaining to my second page  
21      conclusion, which is to suggest that the court consider certain  
22      reasonable restrictions on the marketing of cigarettes.

23      Q.   Let's bring up 18274.  And, Dr. Eriksen, what is the source  
24      of the quote on this demonstrative?

25      A.   I believe this is the last one, but this also comes from the

1     2000 Report of the Surgeon General reflecting the conclusion  
2     that regulation of tobacco products sale and promotion is  
3     required to protect young people from the influences to take up  
4     smoking. And this pertains also to my recommendation to the  
5     court for the consideration of reasonable restrictions on the  
6     marketing of cigarettes.

7     Q. When you refer to this as a conclusion, does that word  
8     "conclusion" have any special meaning in the context of the  
9     Surgeon General Reports?

10    A. Yes, it does.

11    Q. Please explain.

12    A. Since the first Surgeon General's Report in 1964, the model  
13    of presentation of these reports was to review the scientific  
14    evidence, and then following that, to have conclusions for each  
15    chapter that basically synthesizes the evidence and presents a  
16    scientific conclusion.

17           In addition to the chapter conclusions, there are also  
18    what we call main conclusions that span the entire report. I  
19    think it's important to note that the use of the word  
20    "conclusion" was very purposeful as opposed to "recommendations"  
21    because it was not felt that the Surgeon General's Report should  
22    provide recommendations, rather they should provide conclusions  
23    for policymakers than to act based on the scientific findings  
24    from the reports.

25    Q. Is this number 5 one of those conclusions in the 2000



1 Surgeon General's Report?

2 A. Yes, it is.

3 THE COURT: Was that a conclusion for a chapter or for  
4 the entire report?

5 THE WITNESS: My recollection is that it is a chapter  
6 conclusion.

7 BY MS. CROCKER:

8 Q. Let's bring up again -- put on the full screen 18269. Just  
9 a few final questions, Dr. Eriksen, about this slide.

10 Looking at the remedy that's specified under Roman  
11 numeral 1A 2, Corrective Communications About Marketing. In  
12 your direct testimony do you make recommendations as to exactly  
13 what the corrective communications should be?

14 A. No, I do not.

15 My goal was to present a framework for the court to  
16 consider of the types of actions that could be taken, such as  
17 corrective communications, whether it's pertaining to marketing  
18 or to addiction and disease, but not to spell out the specific  
19 wording of messages that -- or admissions that need to be made.

20 Q. And drawing your attention also to remedies listed under  
21 Roman numeral 1A 1 and 1B 1, the counter-marketing campaigns.  
22 Do you see those?

23 A. Yes.

24 Q. In your written direct testimony you provide specific  
25 recommendations for these counter-marketing media campaigns,

1       such as types of advertisements that should be run or where  
2       those advertisements should be run or other details?

3       A. I did not provide specific details as to the types of ads or  
4       where they should be run, but I do include in my written direct  
5       testimony some guidelines that have been put forward by CDC  
6       about what is associated with a successful counter-marketing  
7       campaign, and also I provide an estimate of -- again from CDC --  
8       of the type of funding that could be associated with a  
9       nationwide counter-marketing effort.

10      Q. And why in your written direct testimony did you not provide  
11      details of say the language of corrective communications or  
12      exactly what should be in certain advertisements for a  
13      counter-marketing campaigns?

14      A. I felt that that was a matter for the court to make the  
15      determination as to if there was liability, in what areas of  
16      liability existed, and those correct communications should  
17      address those areas, and that was for the court to decide, not  
18      for me.

19      Q. Okay.

20               MS. CROCKER: Thank you. I don't have any further  
21      questions.

22               THE COURT: Mr. Bernick.

23               MR. BERNICK: Thank you.

24               THE WITNESS: Your Honor, I lost my screen.

25               THE COURT: So you're not going to be able to see

1 anything.

2 THE WITNESS: I just moved it slightly and it lost  
3 power.

4 THE COURT: Why don't you press it? You might have  
5 turned it off by accident.

6 THE WITNESS: I think I did.

7 CROSS-EXAMINATION

8 BY MR. BERNICK:

9 Q. Are we all set here, Dr. Eriksen?

10 A. I am. Thank you.

11 Q. Good morning.

12 A. Good morning.

13 Q. We are here today, are we not, to talk about remedies?

14 A. Yes, sir.

15 Q. And would it be fair that in the language of people within  
16 your scientific field, that people often refer to interventions  
17 when they discuss something that might be done in order to  
18 change behavior?

19 A. Yes, I would agree. I believe in the public health  
20 community the term "interventions" or "programs" would be used  
21 rather than "remedies" and that remedies are of a legal term  
22 insofar as public health is concerned.

23 Q. So you would be comfortable if this morning we talked about  
24 interventions?

25 A. I think I would be. If I become uncomfortable, I'll let you

1 know.

2 Q. I'm already going to run out of room. In all of these years  
3 I still haven't really connected. It's probably some  
4 significance to that fact, too.

5 Okay. Now, the last time you were here I believe that  
6 you acknowledged that, in coming in to testify and offer  
7 opinions in this proceeding, that it was important to follow the  
8 same scientific methods and rules that you followed in  
9 connection with your research. Do you recall that?

10 A. I generally recall that conversation, yes.

11 Q. Okay. And do you stand by your testimony the last time,  
12 that again when you appear talking about interventions, it would  
13 be appropriate and important to follow the same principles, that  
14 is to use the same methods, scientific methods and standards  
15 that you would in talking about interventions in the course of  
16 your research?

17 A. Not necessarily.

18 Q. So, there's something about interventions that says that you  
19 don't have to follow the same standards and methodologies that  
20 you did follow when you came in and talked about the effects of  
21 advertising or something different?

22 A. Perhaps I can clarify why I said not necessarily. My --

23 Q. Go ahead.

24 A. My understanding is that my natural inclination is to think  
25 of a remedy or an intervention in terms of its impact on public

1 health, and in that regard I would say yes to your query, but  
2 I've been told by the government that that is not necessarily my  
3 role here today.

4 My role is to talk about remedies insofar as they will  
5 prevent and restrain future tobacco industry conduct.

6 Q. Well --

7 A. That requires -- I'm just trying to explain.

8 And that requires I think a different scientific method  
9 than it would in terms of whether an intervention is effective  
10 in reducing tobacco use or not.

11 Q. Well, is there an established scientific methodology in your  
12 field in order to be able to analyze the efficacy of legal  
13 remedies?

14 A. I know that there's a burgeoning area of interest in public  
15 health law and that there's a program at CDC that's been  
16 recently developed in that area and they've actually funded  
17 research to document the effectiveness of legal remedies, but  
18 that my understanding is that that's a field of study that's at  
19 its very beginning.

20 Q. But you're certainly not here as an expert in the efficacy  
21 of legal remedies, are you?

22 A. No, I'm not here as an expert in legal remedies.

23 I'm here to propose remedies, though, that I think will  
24 address the industry's behavior in a manner that would prevent  
25 and restrain that from occurring in the future.

1 Q. All that you can speak to as an expert based upon scientific  
2 methodology when it comes to interventions is whether those  
3 interventions are efficacious to achieve public health goals,  
4 correct, as an expert?

5 A. I think the -- no, I don't agree with that statement.

6 I think that the remedies that would address the  
7 industry's behavior are quite self-evident as we will get into  
8 them, that if they are done they will have an effect on the  
9 behavior in question.

10 Q. Well, I want to make a distinction because I want to be able  
11 to pursue what you've now said.

12 You've said that what will be good remedies for legal  
13 purposes is self-evident. That's what you just said; right?

14 A. In many cases, yes.

15 Q. I want to talk, not necessarily about what is self-evident,  
16 I want to talk about scientific methodology. And I think that  
17 you've told us that you're not an expert in scientific  
18 methodologies that are used to establish the efficacy of legal  
19 remedies; correct?

20 A. I think what I said was that in many instances the remedies  
21 that I am proposing, their efficacy is self-evident in that if  
22 there's a behavior that was taking place that needs to be  
23 remedied or corrected and that behavior is terminated, it is  
24 self-evident that that was an efficacious intervention.

25 Q. There's no question but that if the court were to adopt as a

1       remedy in this case an order that told the tobacco companies  
2       here not to do something, there's no doubt in your mind that  
3       that would be an efficacious way of proceeding; correct?

4       A. I would agree that that would be an efficacious way of  
5       proceeding in terms of that behavior not no longer being  
6       practiced.

7       Q. So, I want to go beyond the possibility that the court  
8       actually enters an order telling these defendants to stop doing  
9       something and talk about remedies that go beyond simply telling  
10      the defendants to stop doing something and actually say, "We now  
11      want you to affirmatively do something else."

12             Do you understand the difference?

13      A. No, I do not.

14      Q. Okay. We have remedies that say, "Don't do," and other  
15      remedies that say "You must do". Okay? Do you understand that  
16      distinction?

17      A. Yes.

18      Q. Okay. And certainly when it comes to talking about  
19      scientific methodologies for proving up the effectiveness of  
20      remedies that say, you must do, you do not hold yourself out as  
21      an expert in the methods of establishing the efficacy of legal  
22      remedies saying to the defendant, You must do.

23             That's not your area of expertise; correct?

24      A. I don't follow your line of reasoning. I could try to be  
25      helpful if you like.

1 Q. That's my fault and I'll go back.

2 You've told us that you are an expert in the efficacy  
3 of public health interventions; right?

4 A. Yes, sir.

5 Q. And those are interventions that are designed to achieve the  
6 public health goals; correct?

7 A. Yes, sir.

8 Q. And there are established methodologies for establishing  
9 whether a remedy, or an intervention, I should say -- there are  
10 established methodologies for determining whether intervention  
11 is effective in meeting the public health goal; correct?

12 A. Yes, sir.

13 Q. And you've just now told us, though, that when it comes not  
14 to talking about interventions that serve a public health goal,  
15 but remedies that tell a company what to do for legal purposes,  
16 you are not an expert in the methodologies that are used to  
17 establish the latter; correct?

18 A. Are you asking me did I say that?

19 Q. I'm asking you -- I think you already said it, I'm asking  
20 you to confirm that.

21 We're not talking about interventions designed to  
22 achieve public health goals, but interventions or remedies that  
23 are designed to achieved a legal goal, you are not an expert in  
24 the scientific methodologies that are involved in proving up the  
25 efficacy of those remedies; correct?



1 A. I don't believe that's what I said.

2 What I said was that the efficacy of the remedy would  
3 be self-evident in many cases.

4 For instance, if the court were to decide that the  
5 defendants had to restrict their marketing to not have youth-  
6 focused or misleading ads, that effect would be self-evident if  
7 they complied with that order. Or if there was an order to  
8 disclose information, that -- whether they are complying with  
9 that, whether that order remedy was effective or not would be --  
10 would not need to be proven to be efficacious; it would be  
11 self-evident as to whether or not that was being complied with,  
12 and that's why -- that's the point I'm trying to say.

13 It's not a scientific matter. It's a matter of  
14 compliance with the court order. The scientific issue is  
15 whether or not that compliance has an effect on public health.

16 Q. Fair enough. Would we agree, then, that no matter how the  
17 remedy is framed, the question of whether it serves a public  
18 health goal or effective in achieving a public health goal is a  
19 matter of science? Agreed?

20 A. Yes, sir.

21 Q. And there are established scientific methodologies, correct,  
22 for dealing with that?

23 A. Yes.

24 Q. Okay. And those established scientific methodologies should  
25 be fully applicable to your testimony in this court to the

1 extent that you talk about whether an intervention is effective  
2 for public health purposes. Fair?

3 A. To the extent that they can be applied, yes.

4 Q. Whereas, when it comes to talking about whether a remedy  
5 will be effective in telling a defendant how it should behave,  
6 that's not necessarily a matter of scientific methodology. Is  
7 that your testimony?

8 A. Yes, sir.

9 Q. And that's also not an area in which you hold yourself out  
10 to be an expert; true?

11 A. As I said before, I was saying that whether or not the  
12 companies were to comply with the remedy is self-evident. It's  
13 not a matter of expertise or being an expert, it's a matter of  
14 whether there is compliance with the remedy.

15 Q. Okay. But it's obvious it's going to be up to court to  
16 resolve these matters finally --

17 THE COURT: Mr. Bernick, I have a feeling we are  
18 playing with words. Let's get to substantive cross if we could,  
19 please.

20 MR. BERNICK: Sure.

21 BY MR. BERNICK:

22 Q. Let's talk a little bit about the scientific methodologies  
23 that do apply to determining whether an intervention serves a  
24 public health goal.

25 Are you familiar with the testimony that was offered by

1 Dr. Biglan in this case?

2 A. Some, yes.

3 Q. And is it true that Dr. Biglan actually analyzed  
4 interventions to determine whether they had been scientifically  
5 validated?

6 A. My recollection is that Dr. Biglan reviewed studies related  
7 to youth prevention programs in his written direct testimony.

8 Q. In particular, he reviewed studies regarding youth  
9 prevention programs that had been sponsored or -- sponsored or  
10 supported by the tobacco companies; correct?

11 A. My recollection is that he did both. It was primarily  
12 focused on public health prevention programs, but also included  
13 a critique of industry-sponsored prevention programs.

14 Q. And is it true that Dr. Biglan, when he took a look at  
15 interventions, took a look at them from the point of view of  
16 whether they had efficacy?

17 A. I'm not familiar enough with his testimony to answer that,  
18 particularly with respect to there's a scientific technical  
19 difference between efficacy and effectiveness.

20 Q. But actually he talked about both. He talked about  
21 effectiveness and he talked about efficacy; correct?

22 A. I'm not that familiar with his testimony.

23 Q. Well, actually, you cite his testimony at Page 5 of your  
24 direct examination in connection with this phase of the trial;  
25 right?

1 A. Yes, I do.

2 Q. Did you ever look at the cross-examination of Dr. Biglan  
3 after you looked at the direct?

4 A. I can't recall if I did or not. I've looked at a lot of  
5 documents. I'm not sure that I reviewed his cross-examination.

6 This quote pertains to his statement that I think we  
7 all would agree with the programs need to be evaluated.

8 Q. But they need to be evaluated, as he put it, for they need  
9 to be validated, is actually what he testified to; right?

10 MS. CROCKER: Objection, Your Honor.

11 Dr. Eriksen has said numerous times he doesn't recall.  
12 As you know, Dr. Biglan has 472 pages of testimony. Perhaps if  
13 there's something in mind Mr. Bernick would show it to  
14 Dr. Eriksen because at this point he just -- he said he doesn't  
15 recall this testimony. It's very lengthy.

16 THE COURT: Do you have the testimony to show him?

17 MR. BERNICK: Well, I've got 400 pages. I'll try to go  
18 about this in an efficient way. I wasn't expecting this would  
19 be controversial.

20 BY MR. BERNICK:

21 Q. Did you read Dr. Biglan's own publication on the standards  
22 of evidence that should be applied in determining whether an  
23 intervention is effective or efficacious?

24 A. I only read the transcript discussion of it as part of these  
25 proceedings.

1 Q. Well, it was the subject of testimony, was it not? That is,  
2 the standards of evidence.

3 A. My recollection is that he was cross-examined on those as  
4 part of his testimony here, yes.

5 Q. Okay. And do you recall that I showed him JD 013134, which  
6 is called "The Standards of Evidence. Criteria For Efficacy,  
7 Effectiveness and Dissemination"?

8 A. I recall it was a discussion of it. I'm not sure it was  
9 shown to him or not.

10 Q. Do you recall, though, that there was a discussion?

11 A. Yes.

12 Q. Do you recall the discussion focused specifically -- and  
13 this is the underlining from the part of the discussion that  
14 you're referring to -- focused specifically on the fact that the  
15 objective in writing these standards is to articulate a set of  
16 principles for identifying prevention programs and policies that  
17 are sufficiently empirically validated to merit being called,  
18 quote, tested and efficacious, period, close quote.

19 Do you see that?

20 A. Yes, I see that.

21 Q. In fact, what Dr. Biglan spelled out in these standards in  
22 cross-examination was the scientific methodology -- the  
23 scientific methodology for establishing whether or not an  
24 intervention was effective or efficacious; correct?

25 A. This is the first time I've seen this document. I don't

1 know what it includes or doesn't include.

2 I know Dr. Biglan was examined on this, but it's not  
3 something I'm referring to or I've ever seen before or have  
4 read.

5 Q. So your testimony is that you cite Dr. Biglan for the  
6 proposition that -- of the importance of an ongoing evaluation  
7 to assure continuing success.

8 This is Page 5 of your direct examination. But you've  
9 never actually read the standards of evidence that he  
10 promulgated?

11 A. First of all, he didn't promulgate these standards of  
12 evidence, they were promulgated by a society. They were  
13 discussed in this case. And my quoting of Dr. Biglan is  
14 regarding exactly what it says, that an ongoing evaluation is  
15 necessary and important.

16 The reason I referred to Dr. Biglan in this regard was  
17 because he appeared before the court and the court would be  
18 familiar with him and his testimony.

19 That doesn't pertain to this particular document. I'm  
20 not familiar with this particular document. I've not read this  
21 particular document. And so I can't -- you're asking me  
22 questions about it that I can't answer without taking the time  
23 now to read it.

24 Q. Do you know -- when you cited Dr. Biglan as a source for the  
25 importance of ongoing evaluation, I take it, then, that you

1       didn't take the time to see what Dr. Biglan actually had written  
2       on that subject; correct?

3       A.   Not comprehensively.  I haven't read his textbook on it or I  
4       have not read this document in that regard.

5               He was on a committee that prepared this report.  He  
6       wasn't the chair of the committee.  So I think you're  
7       attributing this document to Dr. Biglan in a manner that's not  
8       appropriate.

9       Q.  It's certainly based upon the testimony as a document that  
10      he approved of; correct?

11             He approved this document, did he not?

12             MS. CROCKER:  Objection.

13             Your Honor, Dr. Eriksen has testified he's not familiar  
14      with the document.  He doesn't recall the testimony.  He doesn't  
15      recall the cross-examination.  It was many, many months ago.

16             And if there are particular passages in either the  
17      cross-examination Dr. Biglan's lengthy written direct testimony  
18      that Mr. Bernick wants to point Dr. Eriksen to, I think we will  
19      move along a lot more effectively here.

20             THE COURT:  The objection is sustained.

21             You can certainly question him about the substance  
22      whether he agrees or disagrees.

23             He has testified clearly that his reliance is upon the  
24      testimony of Dr. Biglan, whatever the substance of that was in  
25      his written direct testimony.

1 MR. BERNICK: Just to be clear.

2 BY MR. BERNICK:

3 Q. Dr. Eriksen, do you know whether or not this very document  
4 was cited in Dr. Biglan's testimony?

5 A. As a matter of fact, I do not know whether or not it was  
6 cited in his testimony.

7 Q. Let's be candid. Did you ever actually read the entirety of  
8 Dr. Biglan's testimony before this court before you decided to  
9 refer to it in your examination here?

10 Did you or did you not actually read it?

11 MS. CROCKER: Objection, asked and answered.

12 THE COURT: Not quite that way.

13 You may answer the question. Objection is overruled.

14 A. I read extensive portions of his testimony. I did not read  
15 it in its entirety of 400-and-some pages.

16 Q. Did the government provide you with the part that you read?  
17 Did they provide you with the whole thing?

18 A. They provided me with the entire testimony.

19 Q. And did you, in fact, read it all, the cross-examination of  
20 Dr. Biglan, before you decided to testify about it here?

21 A. As I previously stated, I do not recall whether or not I  
22 read the cross-examination.

23 Q. How long ago did you review Dr. Biglan's testimony?

24 A. I would say it was a few months ago, one or two months ago.

25 Q. Well, did you review his testimony at the time that you



1 prepared your written direct that was submitted last week?

2 A. No, not in the context of over the last week. I did not.

3 Q. You got the testimony -- you got the testimony months ago.  
4 When did Dr. Biglan testify?

5 A. I don't remember the exact date. My recollection it was a  
6 month or two ago. Probably in January.

7 I stand by, totally stand by what I state in my written  
8 direct testimony around Dr. Biglan's conclusion that programs  
9 need to be evaluated and changed as a result of the evaluation.  
10 It's not a function of his testimony or his cross-examination.  
11 This is a statement that he's made and I support it, and it was  
12 presented before this court.

13 Q. I understand that. And all we're doing is probing what it  
14 is that you have read before you ventured the opinion before  
15 this court that his testimony supported your testimony here.  
16 That's all that we're doing. I'll close this off and I'll get  
17 at it this way.

18 Are you here as an expert -- do you have expertise --  
19 let me put it this way -- Dr. Eriksen, about the scientific  
20 methodology that is, in fact, applied to determining the  
21 efficacy or effectiveness of interventions?

22 A. Yes.

23 Q. And in that regard do you disagree with Dr. Biglan's  
24 statement at the beginning -- or I say the statement that  
25 appears at the beginning of the standards of evidence that's

1 before you, do you disagree with the statement that it's  
2 important to have empirical validation before an intervention  
3 can be called tested and efficacious?

4 Do you agree or disagree that it's important to have  
5 empirical validation?

6 A. I don't read this sentence as that's what it's saying, but I  
7 don't disagree with the comment that you need to have studies  
8 validated in order to determine effectiveness.

9 Q. Okay. Would you agree with me that validation requires  
10 empirical studies?

11 A. Sometimes, yes, sometimes no.

12 Q. So it's kind of yes and no.

13 Do you agree that when it comes to the efficacy of the  
14 tobacco companies' interventions, like their youth smoking  
15 programs, do you believe that those should be subjected to  
16 scrutiny about whether they've been empirically validated or  
17 not?

18 A. I believe all programs should be treated to similar  
19 standards of effectiveness, whether -- irrespective of whether  
20 it's a tobacco industry program or a public health intervention.

21 Q. I'm just asking you. When it comes to the tobacco industry  
22 programs to intervene and help stop youth smoking, do you  
23 believe they should be tested to determine whether they have  
24 empirical validity?

25 MS. CROCKER: Objection, asked and answered. It's the

1 same question he just answered it.

2 MR. BERNICK: He told me that there was yes, no. So I  
3 then went to the question of whether the tobacco companies'  
4 programs should be subjected to this test. He then said same  
5 test as everywhere else, but because it was a yes, no, I then  
6 asked, Well, should tobacco companies' interventions be tested  
7 to determine whether they have empirical validity?

8 MS. CROCKER: Your Honor, his answer is, "I believe all  
9 programs should be treated to similar standards of  
10 effectiveness, irrespective of whether it's a tobacco industry  
11 program or a public health intervention." He's answered this  
12 exact question.

13 MR. BERNICK: No.

14 THE COURT: The witness may answer this final question.  
15 And then let's try to move on again, Mr. Bernick, please.

16 THE WITNESS: If the question was should the tobacco  
17 industry programs be evaluated empirically, I believe I answered  
18 that and the answer is yes.

19 MR. BERNICK: Your Honor, I've got a series of  
20 questions that follow up on this, and if it's Your Honor's  
21 determination that this is not appropriate, I'd like to take  
22 that up perhaps outside the hearing of the witness because it's  
23 very important.

24 THE COURT: Well, the witness answered this question.

25 MR. BERNICK: I understand it, but I have follow-up

1 questions that relate to the same thing.

2 THE COURT: Go ahead, please.

3 MR. BERNICK: I'm sorry? I'm sorry?

4 THE COURT: Yes. Go ahead, please.

5 BY MR. BERNICK:

6 Q. Would it be important to scrutinize interventions in order  
7 to determine their efficacy using controlled studies?

8 A. It depends on what you mean by controlled studies.

9 But, generally, you would need to have some basis of  
10 comparison to look at a program versus what would occur in the  
11 absence of a program.

12 Q. Would it be important to, in examining the efficacy of an  
13 intervention, that the controlled studies be replicated?

14 A. Replication is an important part of building the scientific  
15 foundation. It's not always done because of cost reasons or not  
16 having funding to do it. But replication strengthens confidence  
17 in the results from a scientific study.

18 Q. Is the answer to my question yes then? It would be  
19 important to have replication of controlled studies?

20 A. I stand by my answer.

21 Q. I think that's fine.

22 Dr. Eriksen, would it be important in determining --  
23 strike that. Would it be important in conducting this  
24 validation process for a given intervention that the  
25 intervention be specifically studied? That is, that the

1 intervention be compared against studies that specifically deal  
2 with that intervention.

3 A. I'm sorry.

4 Q. I'll rephrase it.

5 When you're looking for empirical validation of an  
6 intervention to determine whether it's effective or not, is it  
7 important to look for that validation in studies that focus on  
8 that particular intervention?

9 A. If I understand your question correctly, yes. You would  
10 want to have your program -- whatever your evaluation would be  
11 would be in relation to what the program is that's being  
12 conducted and that's your -- it would be your independent  
13 variable and you would look at the effect of that program on  
14 your outcome, if that's what you're asking.

15 Q. I know that we will come back to this in a little bit.

16 But do you remember in connection with your first  
17 testimony here that we scrutinized studies very carefully to see  
18 whether they examined advertising exposure on the one hand and  
19 on the other youth initiation? Do you remember that?

20 A. Yes, sir.

21 Q. Okay. The same way. If we want to determine whether a  
22 given intervention has been validated or not, would it be  
23 important that we work with as one end point the intervention  
24 specifically, and the other end point its effect -- or I guess  
25 the intended effect to see whether, in fact, the intervention

1 does cause the intended effect?

2 Would that also be an important part of empirical  
3 validation?

4 A. Yes. This would be the basic component of a study.

5 You would look at a program and you would look at its  
6 effect to the extent that you can isolate it on an outcome or an  
7 a dependent variable.

8 Q. In this case if you're looking to see whether an  
9 intervention is effective for its intended purpose, you would be  
10 looking for, as one end point, whether it in fact it had that  
11 intended effect; correct?

12 A. Yes. An intervention study, when you're looking at with  
13 whether a program is effective, that's the model you would set  
14 up.

15 Q. Would you also agree -- we had the privilege of having the  
16 Surgeon General here a little while ago and he testified fairly  
17 extensively about chapter 8 of the 2004 Report. Are you  
18 familiar with chapter 8 of the 2004 Report?

19 A. Yes, I am.

20 Q. And are you familiar with the statement that says, "Tobacco  
21 control has always been built upon a foundation of conclusive  
22 scientific knowledge."

23 A. I agree that's what that sentence says, yes, sir.

24 Q. Okay. And would you agree with that statement; that is, in  
25 determining what should be done in tobacco control, it's

1       important to be based -- to have a foundation of conclusive  
2       scientific knowledge? Would you agree with that?

3       A. To the extent that the scientific knowledge is available, I  
4       agree with it. If it's not available, sometimes action is  
5       required in the absence of answers.

6       Q. Okay. And that judgment, that is whether action is required  
7       in the absence of --

8       A. Answers.

9       Q. -- answers, that's a question of public health judgment;  
10      correct?

11      A. Not just public health judgment.

12               I would look at -- if I could provide an example -- the  
13      effort for the FDA to regulate tobacco products. That effort  
14      was taken from a regulatory standpoint for the belief that there  
15      was a need for the product to be under a federal regulation.

16      Q. But when it comes to -- when it comes to deciding whether  
17      actions should be taken, even though there aren't answers,  
18      that's a judgment that there's no scientific methodology that's  
19      spelled out for when that judgment should be made; correct?

20      A. I would agree that there's not a scientific process to  
21      engage in to make that determination, to my knowledge.

22      Q. Let's talk about, then, the next part of the equation that I  
23      want to get up here, which is efficacious for what purpose.

24               It's true, is it not, that originally you wrote a  
25      report addressing remedies in this case? I think it was towards

1 the back end of 2001.

2 A. Yes, sir.

3 Q. Is it true that you gave a deposition on that same subject?

4 I think it was sometime in 2002, it may have spilled over to

5 2003.

6 A. Yes. There were depositions in both August of 2002 and then

7 December of 2003.

8 Q. Okay. And is it true that -- I've put up U.S. Exhibit 89269

9 on this easel and all I've done is to move it over to the side

10 of the board. Can you see that?

11 A. Yes, sir.

12 Q. And --

13 THE COURT: Excuse me. I think you misstated, though,

14 the number. It's U.S. Exhibit 18269. Right?

15 MR. BERNICK: Yes, it is. I misspoke.

16 BY MR. BERNICK:

17 Q. This is the demonstrative that you used on your direct

18 examination here today?

19 A. It appears to be.

20 Q. All I've done is to move it over to one side of the board;

21 right?

22 A. The formatting is different, yes.

23 Q. If we wanted to talk about all of these different remedies

24 that you've listed here in 18269, it's true, is it not, that

25 it's been your position that all of these remedies were spelled



1 out or encompassed by your original expert report in this case  
2 and your first deposition?

3 A. I believe so. If I could take a minute just to review them  
4 again to make sure.

5 Q. I thought we covered this the other day, but go ahead. Take  
6 your time.

7 A. (Pause) I believe that they are all included in my original  
8 expert report, not necessarily by chapter and verse, but by  
9 intent.

10 Q. Okay. Now, here is the key thing.

11 When it comes to the purpose or the goal of these  
12 different remedies as you originally developed the remedies,  
13 isn't it true that the goal that you had for developing each and  
14 every one of these remedies was public health benefit?

15 A. (Pause) Would you repeat the question, please?

16 Q. Is it true that when you developed each and every one of  
17 these remedies as set forth in your expert report, that the goal  
18 that you had for each one of these remedies was to benefit the  
19 public health?

20 A. My intent with the original expert report was twofold. One  
21 was to outline specific remedies that would benefit the public  
22 health and also remedies that would rectify the absence of  
23 actions that are currently -- that at that time were needed.

24 Q. So you say it's both?

25 A. Yes.

1 Q. So it's both public health goal and to then rectify the  
2 defendants' actions?

3 A. It could be -- I can't recall exactly what I said, but  
4 something to that effect. Perhaps it could be repeated.

5 Q. Well, do you recall testifying when you were asked this  
6 question you didn't mention anything about rectifying the  
7 defendants' conduct, did you?

8 A. I don't recall. Is this, I assume, at some deposition?

9 Q. Yes.

10 A. I don't recall having said that or not said that, but I  
11 would be pleased to discuss the remedies I proposed in 19 -- or  
12 in 2001 and describe how they will either benefit the public  
13 health or they will rectify an absence in my opinion that needed  
14 to take place.

15 Q. Do you recall giving this testimony in August of 2002? This  
16 is at Page 308 at your deposition.

17 "Question: Why did you include this in your expert  
18 report, this section on a discussion of the scientific evidence  
19 suggesting that selected public health actions would be  
20 effective in reducing the harm caused by tobacco use?

21 "Answer: I prepared this section at the request of the  
22 Department of Justice who wanted to draw upon my experience and  
23 expertise as to what could be done in conjunction with the  
24 litigation that might improve public health."

25 Was that your testimony?

1 A. Just give me a second, please.

2 (Pause)

3 MR. BERNICK: This is Page 308 of the August 23, 2002  
4 volume.

5 A. Yes, I said that. That was my testimony.

6 Q. And nowhere in that answer did you say that there was any  
7 purpose to correct the defendants' conduct; correct?

8 A. I would need -- I don't see in this page that phrase, but I  
9 wasn't implying that specific words would be there.

10 What I was trying to say was that when I prepared my  
11 initial remedies they would address both issues that would  
12 benefit the public health and both steps that needed to be  
13 taken, in my opinion, that were absent at the time.

14 Q. Well -- go ahead.

15 A. Just to provide, you know, an example.

16 Q. I'm not really focused on examples.

17 My question to you actually was: When you were asked  
18 for the why, why did you include this section in your report,  
19 you've identified improving public health and you never  
20 identified any other purpose; correct?

21 A. Not at this citation. There may be something elsewhere in  
22 the deposition, but not on this page.

23 Q. Do you recall anywhere in the deposition where you actually  
24 articulated a separate purpose changing the conduct of the  
25 tobacco industry?

1 A. Not without reviewing my deposition.

2 Q. In fact, isn't it true that you actually specifically  
3 disclaimed as a purpose changing the conduct of the tobacco  
4 industry?

5 A. If you can point me to a page.

6 Q. Do you recall?

7 A. No, I do not.

8 Q. Okay. Directing your attention to Page 421 of the same  
9 deposition, you say that there's some number of steps that  
10 should be taken to reduce the public health harmed caused by  
11 cigarette smoking. Then you were asked the question:

12 "Are these outlined in your report?

13 "Answer: Not directly. My remedies in the report were  
14 not necessarily actions to be taken by the tobacco industry.  
15 They were more broader issues that may relate to, as you know,  
16 price or counteradvertising or warning labels. There was not a  
17 listing of what the tobacco industry should do. That's not --  
18 that was not what I was asked to prepare."

19 Was that your testimony, Dr. Eriksen?

20 MS. CROCKER: Your Honor, I object.

21 This is improper impeachment because this answer is a  
22 totally different question than Mr. Bernick had on the table  
23 before, which was isn't it true you actually specifically  
24 disclaimed as a purpose changing the conduct of the tobacco  
25 industry? And this answer does not impeach that question, it's

1 an answer to a different question.

2 MR. BERNICK: To the contrary. It says, so there was  
3 not a listing of what the tobacco industry should do.

4 THE COURT: The objection is overruled.

5 But I'm going to say it again, Mr. Bernick. I think it  
6 would be helpful if you would focus on substantive  
7 cross-examination of this witness.

8 MR. BERNICK: I'm trying very much to do that, Your  
9 Honor. It is our position that the witness went down the road  
10 of developing proposals that were designed to serve the public  
11 health.

12 THE COURT: I understand that's your position. I mean,  
13 I understand where you're trying to go, but -- anyway, go ahead.

14 BY MR. BERNICK:

15 Q. In fact, isn't it also true that when it came to this idea  
16 of serving the purpose of preventing and restraining the  
17 defendants' conduct, isn't it true that within the last few  
18 weeks you actually specifically reviewed the Court of Appeals'  
19 decision in this case?

20 MS. CROCKER: Just to be clear for the record. Is the  
21 last question withdrawn so that we're no longer asking about  
22 this testimony? Because that question never was answered.

23 THE COURT: The objection was sustained.

24 MS. CROCKER: Thank you.

25 BY MR. BERNICK:

1 Q. Dr. Eriksen, isn't it true that it's only in the last few  
2 weeks that you were shown the Court of Appeals' decision in this  
3 case?

4 A. No.

5 Q. When did you see the Court of Appeals' decision in this  
6 case?

7 A. The day it was issued.

8 Q. The day it was issued. And you discussed that opinion with  
9 the Justice Department?

10 A. No.

11 Q. You never discussed it with the Justice Department?

12 A. I was very interested in it. It was front page news. I  
13 downloaded it. I read it the night it was issued.

14 Q. And the first time that you actually made the statement that  
15 you were going to talk about preventing restraint was in  
16 connection with the deposition that you gave a couple of weeks  
17 ago; correct?

18 A. I'm either -- I don't believe I was deposed a couple of  
19 weeks ago. I was deposed last Monday. Is that what you're  
20 referring to?

21 Q. Time flies.

22 That's the first time that you ever even mentioned the  
23 idea that the remedies that you're proposing relate to  
24 preventing and restraining the defendant companies' conduct;  
25 correct?

1 A. I don't know when else it was come up. The last time I was  
2 deposed was 2003 and then a week ago today.

3 Q. I didn't ask you that. I asked you specifically when was  
4 the first time that you expressed the opinion that the remedies  
5 that you were proposing were designed to prevent and restrain  
6 the defendants' conduct?

7 A. Well, I believe I -- if we could move down the screen just a  
8 little bit on what's on the board now, I believe the preceding  
9 paragraph that's not shown in its entirety speaks to that issue  
10 directly. It doesn't use the term prevent and restrain. But it  
11 says, I do though feel strongly there are a number of steps,  
12 most of which have not been undertaken, regarding the whole  
13 range of honesty, disclosure, product development and meaningful  
14 efforts to reduce the public health harm caused by cigarette  
15 smoking.

16 Q. And that was not responsive to the question that I'm asking  
17 you, but the ultimate purpose of that discussion was not prevent  
18 or restrain, it was reduce the public health harm; correct?

19 A. That was the ultimate outcome, but the steps in the  
20 paragraph were precisely the remedies that I'm proposing to  
21 prevent and restrain.

22 Q. I'm talking about the ultimate purpose of each and every one  
23 of the remedies as you set forth in your deposition was to  
24 improve the public health; correct?

25 A. Ultimately.

1 Q. Okay. And the first time that you talk about having as a  
2 separate purpose prevent and restrain, the very first time that  
3 you uttered those words, at least to the defendants in this  
4 case, was in your deposition a week ago; correct?

5 A. For the public record, yes.

6 Q. In fact, isn't it also true that even in the expert  
7 testimony that you're offering, you actually talk about --  
8 strike that. I'll come back to it in a different way.

9 When it comes to the question of serving the public  
10 health -- let's stick with that goal of your work. That is,  
11 improving the public health.

12 You're in agreement that each and every one of these  
13 remedies was developed originally for that purpose; correct?

14 A. As I just said and as reflected in the deposition that's on  
15 the screen now, that was the ultimate effect, but it was not  
16 necessarily the immediate effect.

17 Q. And is it also true that again to test out whether these  
18 remedies were efficacious in achieving that effect following,  
19 there are scientific methods for determining that. We all agree  
20 on that. Correct?

21 A. I believe I said when possible. In some instances, the  
22 science cannot be done or hasn't been done because the  
23 intervention has -- cannot be done in the absence of either  
24 industry cooperation or some type of study that is either  
25 unethical or infeasible.



1 Q. We're going to get into all of that, but the methods exist,  
2 do they not?

3 A. Not if it's infeasible.

4 Q. What the methods are is articulated, are they not?

5 A. If -- let's use the issue of restrictions --

6 Q. Would you just answer the question, please, Dr. Eriksen?

7 The methodology for determining whether an intervention  
8 is effective for public health purposes, those methodologies are  
9 well established, are they not?

10 MS. CROCKER: Objection, Your Honor, argumentative.

11 Interrupted Dr. Eriksen.

12 THE COURT: The objection is sustained. The question  
13 is a perfectly appropriate question, but the Doctor may answer  
14 it.

15 A. Methodologies are only possible if the -- if it's a feasible  
16 to do it.

17 If you can't restrict image advertising in the real  
18 world, you can't do a study to test its effectiveness. That's  
19 the only point I was trying to make.

20 Q. With that caveat, you would agree with me that these methods  
21 are well established; correct?

22 A. If the research question is feasible to be done, methods are  
23 established.

24 Q. I want to find out -- I'm going to ask you and just go  
25 through these -- and maybe this is what the court is anxious to

1       get to, I don't know.

2               I'm going to go through each one of these remedies and  
3       find out whether the remedy has been scientifically validated  
4       empirically as being effective for the public health benefit for  
5       which you originally designed it. Are we on the same page?  
6       A. I believe so.

7               THE COURT: All right. This is probably -- since  
8       you're about to start something, a new area -- a good time to  
9       take a morning recess, and we will take 15 minutes, everybody.

10              (Recess began at 10:59 a.m.)

11              (Recess ended at 11:16 a.m.)

12              THE COURT: All right. Mr. Bernick, please.

13              MR. BERNICK: Your Honor, I had a preliminary matter to  
14       raise outside the presence of the witness if that would be all  
15       right.

16              THE COURT: Oh, all right.

17              Dr. Eriksen, if you would step down for a minute,  
18       please, and if you would wait outside, please.

19              (Dr. Eriksen left the courtroom.)

20              THE COURT: All right. Mr. Bernick.

21              MR. BERNICK: Yes, I'm sorry, Your Honor, for pursuing  
22       things that perhaps fall into the category of beating a dead  
23       horse, but I want to be very clear because -- and I think  
24       probably as a procedural matter I should have stopped after the  
25       first answers were given and made a motion before the court.

1           But, to be clear, our position is that with respect to  
2       remedies the rules of evidence, including the applicability of  
3       the Daubert requirements as incorporated in Rule 702, is no  
4       different than the liability case.

5           That is, that when they have a witness take the stand  
6       and offer opinions about remedies as an expert, the rules of the  
7       road are absolutely no different.

8           And I would point the court to 11 Federal Reporter 3rd  
9       528. It's called People Who Care versus Rockford Board of  
10      Education. It was decided by the Seventh Circuit in 1997 which,  
11      of course, is a little bit before the rules were actually  
12      amended. And this came on appeal of a comprehensive remedial  
13      decree in connection with a school desegregation case.

14          And the court actually on appeal found that testimony  
15      that was offered by an expert did not satisfy Daubert and,  
16      therefore, could not be admitted to support the proposed remedy,  
17      and said, "A related point, as we shall see, is that the  
18      guidelines for the admissibility of expert testimony that the  
19      Supreme Court laid down in Daubert versus Merrell Dow applied to  
20      the testimony of the social scientists as well as to that of  
21      natural scientists." There's a citation. And not only to their  
22      testimony at the liability stage of the lawsuit, but also to the  
23      testimony offered at the remedies stage.

24          And we couldn't find a similar case in the DC Circuit,  
25      but there's no reason why the same principle wouldn't apply.

1       It's just part of the rules of evidence.

2               And particularly obviously in the Microsoft decision  
3       that came on appeal before the DC Circuit announced very clearly  
4       that when it comes to the remedial phase there has to be  
5       evidence proffered to support a remedy.

6               So we have an expert who takes the stand, purports to  
7       offer expert testimony that goes to remedies. And the reason  
8       that I'm pursuing the question of methodology with what may be a  
9       greater degree of diligence than would appear appropriate is  
10      that this is my one and only opportunity to make a record that  
11      says that anything that he offers by way of testimony concerning  
12      public health we would say that that's not relevant to an issue  
13      in the case, because the issue in the case is prevent or  
14      restrain.

15              And when it comes to the idea of intervention being  
16      efficacious to prevent or restrain, he's acknowledge that he's  
17      not -- that's not something which he is an expert. And somehow  
18      that self-evident doesn't have to follow the rules, in our view  
19      just doesn't cut it.

20              So we would actually -- I should probably have moved,  
21      after he made that statement, to preclude his testimony because  
22      the testimony was inadmissible.

23              I certainly feel that, barring that, I have got an  
24      obligation to make a record that says that there is established  
25      methodology for public health goals. It's not being met here

1       and I'll show that remedy by remedy. But beyond that, where is  
2       the methodology that he's bringing to the court that says that  
3       these are appropriate interventions for purposes of prevent and  
4       restrain. He's not the person for it.

5               And I apologize if I appear to be -- to the court to be  
6       taking too much time for it, but it is really pretty central to  
7       our position in this case. And succeeding witnesses who are  
8       called as part of our case will testify to this repeatedly; that  
9       is, that the plaintiff's case doesn't measure up to standard  
10      scientific methodology.

11             So that's the reason for it. And again I apologize if  
12      I'm not taking up too much of the court's time, but I felt  
13      obliged to do so.

14             THE COURT: Ms. Crocker.

15             MS. CROCKER: Could I briefly respond, Your Honor?

16             THE COURT: Oh, yes. Sure.

17             MS. CROCKER: I have a number of things that I could  
18      say in response to -- would you take your notes?

19             MR. BERNICK: That's okay. No one can read them,  
20      including me.

21             MS. CROCKER: But I'll limit myself just to saying a  
22      few things, Your Honor, and I'm sure if you want more, a  
23      detailed response, you would let me know.

24             First, as you know, since we have just had a ruling  
25      from Your Honor on the issue objections, defendants have ample

1 opportunity to make this type of argument in their issue  
2 objections and, in fact, have made pretty much the same argument  
3 that Mr. Bernick just made before Your Honor in their objection  
4 issue one, parts A and B, which went to Dr. Eriksen's expertise  
5 and reliability of the different scientific evidence. And as  
6 Your Honor, of course, knows, you just overruled those  
7 objections this morning.

8           Moreover, I do not think that there is an adequate  
9 record at this point to support the motion that Mr. Bernick has  
10 just made before, Your Honor.

11           First of all, I think that there's been some serious  
12 misstatements of Dr. Eriksen's testimony. It's difficult, since  
13 we are all doing it from memory at this point, it happened an  
14 hour ago, perhaps unintentionally.

15           I would say as a starting point, I do not think that  
16 Dr. Eriksen admitted any such thing as that he was not an expert  
17 in the matters covered in his direct testimony. I don't think  
18 that admission was made.

19           Secondly, I think that it's confusing the record -- and  
20 this is Mr. Bernick's cross, so it's his prerogative -- but it's  
21 confusing the record to first have an hour of examination on  
22 interventions, which is a technical term which applies only to  
23 certain of the remedies in Dr. Eriksen's remedies testimony, in  
24 his direct testimony, and then move over to say remedies  
25 recommended by Dr. Eriksen and try to parallel those two, and as

1 Mr. Bernick just did, argue to Your Honor that there were  
2 certain admissions made about the scientific evidence needed for  
3 interventions which would somehow apply to all remedies. I  
4 think that is just muddying the record. I don't think that  
5 there has been an appropriate basis made for anything like this  
6 type of a motion.

7 And, Your Honor, I could respond further, but --

8 THE COURT: No. Let me rule as follows. The motion is  
9 denied without prejudice. It's just plain premature.

10 I do want to say that I didn't read issue 1 and 2 of  
11 the defendants' objections to be raising a straightforward  
12 Daubert challenge. And as I look at it again -- look at those  
13 two -- actually, two points, A and B under issue 1, and issue 2  
14 is totally different -- they didn't raise those points. So --  
15 at least not in a straightforward way. So I don't think I ruled  
16 on the issue is what I'm really getting to.

17 MR. BERNICK: I would acknowledge that, Your Honor. In  
18 other words, we thought he was going to talk about public health  
19 benefit.

20 THE COURT: I understand.

21 MR. BERNICK: Which wasn't a Daubert issue, it was a  
22 relevance issue.

23 THE COURT: And second of all, defendants can certainly  
24 have to -- defendants are entitled to make their record. I've  
25 said all along that Daubert issues would be surfaced during

1 cross-examination and so I can't then turn around and tell  
2 Mr. Bernick he can't surface those issues because he can.

3 And so that's why I'm ruling that he may proceed with  
4 this line of questioning, but certainly the motion at this point  
5 there is not a basis for granting it.

6 And finally, maybe I shouldn't ask this question, but  
7 is Dr. Eriksen feeling all right?

8 MS. CROCKER: I just checked with him, Your Honor. He  
9 said that he's not feeling great, but he's going to let us know  
10 if he need to take another break. He said he should be fine.  
11 And I told him we had the lunch break at 12:30. He said he  
12 should be okay.

13 THE COURT: I could tell he seemed a bit different than  
14 the last time he testified. That was a long time ago, but I  
15 usually have pretty clear impressions of people's demeanor.

16 MR. BERNICK: I felt the same way. And I would add,  
17 Your Honor, with Your Honor's determinations about -- I'm happy  
18 to go forward, I don't really think that I'm going to be all day  
19 at this. But if at any time it looks like, you know, we're not  
20 going to get done, I think, you know, with Your Honor's rulings  
21 with respect to Mr. Myers, I'm responsible for Mr. Myers and  
22 obviously that's going to be a much -- I'm not sure what there  
23 really is left at this point, but obviously it would be a much  
24 more truncated examination of Mr. Myers. Maybe we can, if it's  
25 needful, we can bring Dr. Eriksen back on Wednesday.



1           THE COURT: I suspect that is not what he wants. He's  
2     from --

3           MS. CROCKER: He's from Atlanta, Your Honor, and he's  
4     rearranged his schedule substantially to be here today. He's  
5     making a great effort to be here and I think he's responsive to  
6     the questioning. So I don't think we have the type of concern  
7     where we need to delay.

8           Mr. Bernick's estimate for cross was only three to  
9     four hours. We should be able to finish that and the United  
10    States' redirect today, and perhaps even move on to Dr. Fiore  
11    today.

12          MR. BERNICK: I'm very hopeful of that, Your Honor.  
13    I'm just making an offer, Your Honor.

14          THE COURT: Let's bring him back in.

15          (Dr. Eriksen returned to the witness stand.)

16          THE COURT: Mr. Bernick, please.

17          MR. BERNICK: Thank you.

18    BY MR. BERNICK:

19    Q. Dr. Eriksen, I want to go through and start to get fairly  
20    specific about a couple of these remedies, and I want to begin  
21    with the corrective communications that you reference in Roman  
22    1A, little 2, and 1B, little 2, these corrective communications.  
23    Are you with me?

24    A. Yes, sir.

25    Q. And would it be fair to say that your recommendation to the

1 court that there be corrective recommendations relates only to  
2 those areas where you believe that a statement, the statement  
3 that is to be made, has been established by defendant to have  
4 signed; is that correct?

5 A. I'm sorry. I missed the last part of it.

6 Q. Your intent in making this recommendation is for corrective  
7 communications to be made in areas where you believe that the  
8 science has been definitely established; correct?

9 A. My belief is that the corrective communications pertain to  
10 areas where there has been miscommunications or denials as well  
11 as scientific findings of fact.

12 Q. But you've characterized these statements yourself as being  
13 kind of admissions by the defendants; right?

14 A. Yes.

15 Q. And you certainly wouldn't want to have the court direct the  
16 defendants to admit something which wasn't established as being  
17 true; correct?

18 A. Yes, that's true.

19 Q. And, in fact, you've been candid in that in your deposition  
20 testimony; correct?

21 A. Yes, sir.

22 Q. So certainly when you're recommending corrective  
23 communications, you are only recommending those in areas where  
24 you believe that the subject of the communication has been  
25 established through science as being true?

1 A. Yes, fundamentally.

2 Q. And would causation be one of those -- disease causation I  
3 think is one of those that's indicated on your chart there?

4 A. Yes, sir.

5 Q. I want to show you J-DEM 010422 and ask you this question.

6 On the left side of the chart we have what the Surgeon  
7 General's Reports says in 2004, which is, "The evidence is  
8 sufficient to infer a causal relationship between smoking and  
9 lung cancer."

10 Are you familiar with the 2004 Report in chapter 1  
11 where it deals with exactly how causation statements should be  
12 framed?

13 A. Yes, sir, I am.

14 Q. And is it true that the language that appears here on this  
15 chart, that is the evidence is sufficient to infer a causal  
16 relationship, is the language recommended by the Surgeon General  
17 for, in a sense, the strongest state of science in a given area  
18 of relationship?

19 A. Yes, sir, that's correct.

20 Q. Would it be then fair to say that the statement, "The  
21 evidence is sufficient to infer a causal relationship between  
22 smoking and lung cancer" would completely comport with the  
23 precepts that are set forth in the '04 Report?

24 A. Yes, sir.

25 Q. Now, we see on the right-hand side, PM USA website which

1       says, "Smoking causes lung cancer."

2       A.   Yes, sir, I see it.

3       Q.   Does it make a difference to you as an expert which language  
4       is used?

5       A.   I find the language to be equivalent.   In keeping with what  
6       you just described, the Surgeon General's language is precisely  
7       scientific in terms of their criteria of making a recommendation  
8       with "sufficient" being the highest level of evidence.   If you  
9       didn't know the report, you wouldn't necessarily understand that  
10      from that language.

11      Q.   Would you believe it's necessary for a defendant to make a  
12      corrective communication about disease causation if they simply  
13      said what the Surgeon General said?

14      A.   I'm sorry.   I don't think I follow the question.

15      Q.   Would you believe it would be necessary for a defendant to  
16      make a corrective communication, or for the court to order a  
17      corrective communication where the defendant used the language  
18      on causation set forth in the '04 Report?

19      A.   I'm still not sure I understand what you're asking.

20      Q.   If the defendant were to say, "The evidence is sufficient to  
21      infer a causal relationship between smoking and lung cancer,"  
22      would you believe it's then necessary for there to be a  
23      corrective communication?

24      A.   I understand.

25                   The message is what I would like to see.   I think it's

1 an issue of how it's communicated; that it's not solely on a  
2 website, but that it's communicated broadly and in a sustained  
3 fashion.

4 Q. Fine. Broad, sustained communication, using the language  
5 set forth in the '04 Report, would you believe that any  
6 corrective communication is necessary?

7 A. What I'm saying is that that is what is necessary, a broad,  
8 sustained communication of scientific conclusions on the harm of  
9 smoking.

10 Q. I understand that. But would you disagree -- would you  
11 believe that a corrective communication is necessary if the --  
12 if the language that's being used is the language that appears  
13 in the '04 Report?

14 A. As I said, I -- I'm fine with the message. It's a matter of  
15 consistency for all companies in a way that people understand  
16 the message. It's simply not a corrective communication if it's  
17 stated obscurely on a website. It needs to be communicated  
18 broadly in a sustained manner.

19 Q. But you don't quarrel with the content of the language in  
20 the '04 Report?

21 A. No, I do not.

22 Q. Likewise, you don't quarrel with the content of the language  
23 in Philip Morris' website?

24 A. Only minorly.

25 Q. Well, "smoking causes lung cancer." What's wrong with that

1 language?

2 A. When I said minorly, it's just they were agreeing with  
3 others who feel that way as opposed to acknowledging it more  
4 directly themselves.

5 Q. They say, "agree." Is there anything equivocal about saying  
6 agree?

7 A. I've just you giving you my -- responding to your question  
8 with my impression, that it's -- it's almost as though they  
9 don't admit it themselves, but that they are agreeing with  
10 others, with what others conclude.

11 Q. I see. Anything else that you would find problematic with  
12 the statement that smoking causes lung cancer?

13 A. No.

14 Q. What if one defendant were to use that language and another  
15 defendant were to say, "The evidence is sufficient to infer a  
16 causal relationship," any need for a corrective communication?

17 A. Not in terms of the substance of the message, only in terms  
18 of how it's communicated and the manner that actually corrects  
19 people's misperceptions.

20 Q. So the real purpose of all of this is to correct  
21 misperceptions; right?

22 The real purpose of the corrective communication in  
23 your view is to correct misperceptions; right?

24 A. I would say that is a major part of it, but I wouldn't say  
25 it's the only part of it. It's to be very clear as to what the

1 tobacco companies know and to communicate in a way that people  
2 clearly understand it, particularly smokers.

3 Q. Well -- but you say right here in your own demonstrative,  
4 that the purpose is to correct misperceptions; right?

5 A. Yes, sir.

6 Q. Okay. And would you agree with me that's a public health  
7 purpose?

8 A. Partially, but not only a public health purpose.

9 Q. Would you agree with me that the misperceptions that you're  
10 seeking to correct are misperceptions that emanate, at please in  
11 part in your view, from the defendants' conduct in the past?

12 A. Yes.

13 Q. In fact, as a result of that, isn't it true that you  
14 recommend a sustained communication because of the long period  
15 of time during which you believe that the defendants have made  
16 misleading statements?

17 A. Yes, sir.

18 Q. So the essence of what you're talking about focuses on  
19 curing or remedying the effects of a long period of what you  
20 believe is misconduct; fair?

21 A. Not only in the past, but also going forward.

22 Q. Well, it is today, but to the extent that the defendants no  
23 longer are making these statements -- when Philip Morris says  
24 "Smoking causes lung cancer," that's not mislead to anybody, is  
25 it?

1       A. No. My comment was how people know this, whether they are  
2       aware of it, whether it's actually being communicated in a  
3       manner in which people understand the message as opposed to  
4       having it simply on the website.

5       Q. Let's be clear. Philip Morris is no longer making a  
6       misleading statement about causation of disease; correct?

7               MS. CROCKER: Objection. Your Honor, this is really  
8       beyond the scope. This is going to the -- this is evidence  
9       that's been put on during the liability phase of this case.

10              Dr. Eriksen is really focused on remedying, and I think  
11       his testimony is very clear about this. The corrective  
12       communications are not about --

13              THE COURT: Let me rule as follows.

14              The question needs to be rephrased so that the witness  
15       isn't commenting directly on either the legality or illegality  
16       of the statement, but rather the question should be phrased in  
17       terms of "If a defendant has," or "If a defendant is not  
18       using -- is not at this time using any language that is  
19       misleading" and then you go on with the rest of your question.  
20       In other words, the Doctor shouldn't be making a legal judgment.

21              MR. BERNICK: I understand that. I'm just trying to  
22       figure out....

23       BY MR. BERNICK:

24       Q. Dr. Eriksen, would you agree with me that, at least in the  
25       case of Philip Morris, Philip Morris is no longer making



1 statements that tend to deny or question the causal relationship  
2 between smoking and disease?

3 MS. CROCKER: Objection, Your Honor. That's the same  
4 question. It's not rephrased in a way Your Honor suggested.

5 MR. BERNICK: It's not asking for a legal question.  
6 I'm asking whether they continue to make those kinds of  
7 statements. It's very important to probe what the purpose of  
8 the remedy is.

9 THE COURT: The objection is overruled.

10 You may answer. You heard the whole question asked?

11 A. If you could repeat it, that would be great.

12 Q. Do you agree with me that Philip Morris is no longer making  
13 statements that tend to question or deny the causal relationship  
14 between smoking and disease? Do you agree with that?

15 A. I agree with that insofar as today, and I'm just not sure  
16 about tomorrow.

17 Q. You agree with that insofar as today is concerned. Let's  
18 work with that.

19 Would you agree with me that any misperception that you  
20 are addressing with corrective communications in this area is a  
21 misperception that emanates from the past conduct, that is  
22 conduct before today, of these companies?

23 A. I believe the misperception continues into the present  
24 irrespective of the present conduct of the companies. That it's  
25 embedded in smokers' minds that if the product was harmful it

1 wouldn't be sold.

2 Q. And I think we're reading off the same page now. It's  
3 embedded in their minds in your view because of conduct of these  
4 defendants that has occurred in the past; fair?

5 A. With respect to Philip Morris as the example that you gave,  
6 primarily in the past.

7 Q. But you can't point out any exception that exists today, can  
8 you, given this caveat?

9 But today we don't have those statements being made;  
10 correct?

11 MS. CROCKER: Objection, vague. What statements?

12 MR. BERNICK: We've just been--

13 THE COURT: Objection is overruled. The record is  
14 clear on that.

15 A. I would say, for instance, with respect to secondhand smoke  
16 there's still the problem that exists of confusion and the need  
17 for corrective communications.

18 Q. I didn't intend to focus on secondhand smoke. I'm talking  
19 about smoking that is active smoking causes lung cancer in  
20 people who smoke. Smokers are far more likely to develop  
21 serious diseases. Okay?

22 In that area you have as one of your recommendations  
23 corrective communications; correct?

24 A. Yes, sir.

25 Q. And those corrective communications are aimed at

1 misperceptions that may exist today, but which were caused by  
2 the past conduct of these companies; correct?

3 A. What I was -- what I was saying was that not all companies  
4 are saying the same thing, and there's no assurance that it will  
5 continue.

6 Q. I understand that.

7 A. So I can't answer your question that it was in the past  
8 across-the-board because I don't know that that's --

9 Q. Focus on Philip Morris.

10 With respect to Philip Morris, any misperceptions that  
11 are out there are a function of past conduct, not current  
12 conduct; correct?

13 A. Yes.

14 Q. Okay. And to that extent, to the extent that you believe  
15 that Philip Morris must engage in corrective communications,  
16 that is a remedy that you're proposing by virtue of Philip  
17 Morris's past conduct with regard to whether smoking causes lung  
18 cancer or other diseases in smokers; fair?

19 A. I guess my point is that, as I said, it's believed now by  
20 the public, but there's no assurance from my standpoint that  
21 this communication of smoking causes lung cancer is known by  
22 smokers or that it will be continued, and that there needs to be  
23 corrective communication into the future that is consistent and  
24 sustained about the harm caused by smoking.

25 Q. And the reason -- again I'll put it to you one more time.

1           The reason that that's necessary is because of a  
2       misperception that at least in Philip Morris's case in your view  
3       was caused by Philip Morris's past conduct rather than their  
4       continuing conduct. The cause of the misperception is past  
5       conduct; correct?

6       A. In terms of an admission, yes. In terms of other aspects  
7       that we will get to later, no.

8       Q. I'm only talking about the corrective communication. Would  
9       you agree with me the answer to my question is yes?

10      A. Yes.

11      Q. Okay. Now, do you know of any defendant who is making a  
12      statement that is somehow weaker than -- in this area weaker  
13      than the statement that is blessed by the Surgeon General of the  
14      United States, which is that the evidence is sufficient to infer  
15      a causal relationship?

16           Any statement that you know of a defendant that is less  
17      strong than that statement? Today.

18      A. I'm not certain I'm aware of all the current statements that  
19      they change -- seem to change quickly and they seem to change  
20      and differ by company, and I'm not prepared here to critique  
21      each company's individual statements on disease causation. But  
22      they are different, and they do change.

23           And what I'm simply saying to the court is to consider  
24      the need for a corrective communication that reaches people  
25      beyond the website in a sustained fashion to change the

1 misperceptions.

2 Q. You can't say as an expert that the statements that are  
3 being made by these defendants today with respect to disease  
4 causation in smokers are substantively different, can you?

5 A. Different from one another?

6 Q. Yes, substantively different from one another.

7 A. I would want to go through them one by one to make that  
8 determination and I'm not prepared to do that today, and I did  
9 not put that in my testimony, but I think we could do that.

10 Q. What about addiction? Is that another area I think on your  
11 chart where you believe that a corrective statement is  
12 necessary?

13 A. Yes, sir.

14 Q. Now, in this case we heard from Dr. Henningfield, and the  
15 court asked the question of Dr. Henningfield in this whole area  
16 of addiction. Said, "Putting aside legal implications of those  
17 words -- that is words describing the effects of nicotine as  
18 habituating or addictive or dependence -- putting aside the  
19 legal implications of those words, does it really make any  
20 difference either to your conclusions or from a scientific  
21 viewpoint which of those terms is used to describe the manner in  
22 which nicotine can be most appropriately described? Or the  
23 effect, I should say, the most appropriate way to describe the  
24 effects of nicotine."

25 Dr. Henningfield said, "It does not. And in fact the

1 FDA at times has labeled addictive drugs as habit forming in  
2 labeling on the basis that at that time that communicated most  
3 accurately the core point, that is this drug could cause  
4 behavior that would lead to substantial loss of control."

5 And the court then asks for a definition of substantial  
6 loss of control.

7 Would it be correct substantively if the defendants in  
8 this case in describing -- in describing the effects of nicotine  
9 to say that those effects result in substantial loss of control?  
10 Would that be an accurate scientific statement?

11 MS. CROCKER: Objection.

12 Dr. Eriksen is not being offered as an expert in this  
13 substance of nicotine addiction. We've had Dr. Henningfield  
14 provide testimony on that.

15 Dr. Eriksen is only here to talk about the remedies,  
16 not about the liability, not rehashing the liability phase of  
17 this trial.

18 MR. BERNICK: But he's in there recommending corrective  
19 communications. If he has no actual recommendation for what the  
20 communication should say, then -- and if he will acknowledge  
21 that, then I'll move on.

22 THE COURT: The objection is overruled.

23 BY MR. BERNICK:

24 Q. Would it be accurate for the defendant today to describe the  
25 effects of nicotine as substantial loss of control?

1 A. I'm sorry. I'm trying to answer as thoughtfully as I can.

2 Could you repeat it one more time?

3 Q. Sure. Would it be accurate today for the defendants of this  
4 case to make a public statement that the effects of nicotine can  
5 lead to substantial loss of control?

6 A. I think -- I don't have a strong opinion one way or the  
7 other whether that is the ideal corrective communication that  
8 needs to be made regarding the addictiveness of cigarette  
9 smoking and nicotine.

10 Q. What about the statement, cigarettes -- again, Philip  
11 Morris, you recognize, says "cigarette smoking is addictive."  
12 Right?

13 A. Yes, sir.

14 Q. Do you have any quarrel with that statement?

15 A. No, I don't have a quarrel with it.

16 I thought, you know, there could -- something to be  
17 said about nicotine as well as cigarette smoking, but I don't  
18 have a quarrel with that statement.

19 Q. Would you have a quarrel if one defendant said "Nicotine  
20 leads to a substantial loss of control," and another defendant  
21 said, "cigarette smoking is addictive." Does it make a  
22 substantive difference?

23 A. I would recommend that there be as consistent a message as  
24 possible to the public so as not to confuse them.

25 And I can't say now that one would be superior to the

1       other or that -- but my judgment would be if there were  
2       different messages coming out it might be confusing to the  
3       smoking public.

4       Q.   Are you saying that the exact same words must be used by  
5       each defendant without variation?

6       A.   No, that's not what I said.

7                I was saying that there should be a consistent message  
8       that smokers could interpret as in a way that they would get the  
9       point about whether to run addiction or harm, and that may be  
10      able to be communicated with slightly different words.  But  
11      right now I don't believe that message is being communicated  
12      consistently across companies and I have no assurance at all  
13      that it will continue to be communicated over time.

14      Q.   Do you know what each one of the companies says about  
15      addiction today?

16      A.   I do not have that in front of me, no.

17      Q.   Are you able to say that any of the statements made by these  
18      defendants regarding addiction are substantively different?

19      A.   Different than?

20      Q.   One another.

21      A.   I'm not prepared to say that, but I'll be pleased to review  
22      them and comment on that if you like.

23               MR. BERNICK:  Your Honor, I would like to go into  
24      low-tar cigarettes, and I know that Your Honor was going to take  
25      a look at that.  Should I just defer that area?  It kind of



1 falls --

2 THE COURT: Yes.

3 MR. BERNICK: I'll go on the another one.

4 BY MR. BERNICK:

5 Q. Isn't it true that the Surgeon General in 2004, from the  
6 first time since 1964, addressed how to define what evidence is  
7 sufficient to establish causation?

8 A. Fundamentally, that was the purpose of the 2004 Report, was  
9 to review the criteria for causation in relation to smoking and  
10 disease.

11 Q. Would it be fair to say that that review resulted in a  
12 fairly precise articulation of how to describe the state of  
13 science on causation?

14 A. Yes, sir.

15 Q. Is it true that nowhere in the 2004 Report do we find any  
16 recommendation by the Surgeon General that any of the statements  
17 made by the industry, or really by anybody in public health  
18 generally, should be changed in light of the 2004 Report?

19 A. I think it's important to reiterate what the Surgeon General  
20 said in this issue around the 2004 Report being focused on  
21 disease causation.

22 The answer to your question is I'm not aware of whether  
23 that is in the 2004 Report or not, but it is in the 2000 Report.

24 Q. The 2004 Report reviewed the state of the science on what it  
25 takes to say causation, that wasn't done in the 2000 Report, was

1       it?

2       A.  It reviewed the state of science about causation with  
3       respect to smoking and disease.

4       Q.  In 2004?

5       A.  Yes, sir.

6       Q.  And are you familiar with the testimony that has been  
7       offered in this case about whether the same standards and  
8       criteria all should apply -- also should apply to other areas?

9               Let me withdraw it.  I'll clean it up little bit.

10              Do you recall yourself acknowledging that the criteria  
11       for causation set out in the 2004 Report also should be met in  
12       other areas involving causation?

13       A.  Yes.  We discussed that, and to the extent it's relevant and  
14       applicable, it should be applied.

15       Q.  So what I'm asking you is:  Are you aware of any  
16       recommendation made in the '04 Report to the effect that any of  
17       the statements that were being made by the industry with regard  
18       to causation should be changed?

19       A.  As I said, that was not the purpose of the 2004 Report, it  
20       was the purpose of the 2000 Report.  And in the 2000 Report  
21       there are specific conclusions regarding people's perceptions  
22       about the harm caused by smoking and other areas.  A response  
23       would be a yes to your question.

24       Q.  Is there anywhere in the '04 Report you can tell us of a  
25       specific recommendation made by the Surgeon General to the

1 effect that the industry should change what it says about  
2 causation?

3 A. No, because that was not the purpose of the report.

4 Q. You say that the Surgeon General's Reports really are not  
5 designed to provide recommendations. Do you remember saying  
6 that?

7 A. Yes, I do.

8 Q. Isn't it true that dating all the way back from the better  
9 part of 20 years, to the '81 Report, the Surgeon General has  
10 consistently made recommendations regarding public health policy  
11 in the reports?

12 A. If that's the case, you can show me.

13 I was just referring to my responsibilities and my  
14 familiarity with the Surgeon General's Reports, and the ones  
15 that I've been responsible for managing did not include  
16 recommendations, they just simply had conclusions.

17 Q. So the statements you made was only pertinent to the reports  
18 that you were involved with?

19 A. Or that I had -- that I was aware of, yes.

20 Q. Have you ever read the '81 Report?

21 A. What was the title of it?

22 Q. Well, let me be precise. The Changing Cigarette.

23 A. I'm familiar with it. I haven't read it from cover to  
24 cover, but I'm familiar with the report.

25 Q. This was -- Julius Richmond was the Surgeon General at this

1 time; correct?

2 A. If you say so. I don't know that firsthand knowledge.

3 Q. He was and -- did you say that you had received the  
4 Richmond, Julius Richmond Award?

5 A. No, I did not.

6 Q. Maybe it was another person that I'm thinking of. Okay.

7 Let me pursue another question, which gets -- which is  
8 the impact of these corrective communications and whether there  
9 is any scientific validation that these corrective  
10 communications will have impact.

11 I'm now going from what you're recommending to whether  
12 it's going to have impact and whether the impact has been  
13 scientifically validated. Are we clear?

14 A. Impact on what? Impact on the industry's behavior or impact  
15 on public health?

16 Q. Well, impact on public health. I want to begin with that  
17 first. Obviously, if you make -- if you make the industry admit  
18 something, you order them to admit it, it's going to have an  
19 impact on their behavior; right?

20 A. Yes, and that's what I'm focusing my testimony on.

21 Q. There's no disagreement between you and I, Dr. Eriksen; that  
22 if the court orders us to do something, we're going to do it.  
23 It's going to affect our behavior.

24 My question is whether you can say that these  
25 corrective communications will have an effect on public health

1 on the basis of scientific methodology.

2 My first question to you is, isn't it true that when it  
3 comes to company positions with respect to smoking and health,  
4 there actually is significant data on whether people really even  
5 pay attention to what the industry has to say to begin with?

6 A. Certainly there's data on warning labels and other types of  
7 efforts to inform individuals about the harm of smoking.

8 Q. Isn't it true that actually the FTC over time has looked at  
9 survey data on the question of whether people who are consumers  
10 care or look to what the industry has to say about smoking and  
11 health? Are you familiar with that data?

12 A. No, I'm not.

13 Q. I want to show you JD 013293, which is a study in 1978 of  
14 public attitudes towards cigarette smoking in the tobacco  
15 industry.

16 MR. BERNICK: And I'll represent to the court that we  
17 will tie down the foundation for its admission through the  
18 public record.

19 Q. It was prepared for the Tobacco Institute in May of 1998.  
20 And if you will turn to Page 13. Do you see where it is  
21 indicated that certain questions were asked in this?

22 "Question 69. Here is a list of different kinds of  
23 organizations. Would you look down this list and tell me which  
24 one or two you would consider the most reliable sources of  
25 information on smoking and health?"

1                   And you see where one of them, C, is tobacco companies?

2                   MS. CROCKER:  Objection.

3                   Your Honor, I have been given -- I don't know what  
4                   Dr. Eriksen has in front of him.  I've been given a cover page  
5                   and two pages.

6                   THE COURT:  Well, I think something is being handed to  
7                   him.

8                   MS. CROCKER:  Dr. Eriksen, do you have that full  
9                   version in front of you?

10                  THE WITNESS:  I have three binders and a separate  
11                  handout.

12                  MS. CROCKER:  It's been represented by counsel that  
13                  this is an FTC publication.

14                  MR. BERNICK:  No, I didn't say --

15                  MS. CROCKER:  There's been no foundation laid that  
16                  Dr. Eriksen is familiar with this document and we're plunging  
17                  right in to asking him about an excerpt from a single page  
18                  without any foundation being laid that he's aware of this or can  
19                  testify to it.

20                  MR. BERNICK:  I'm going to find out if he's aware of  
21                  it.  I didn't represent that it was an FTC study.  I represented  
22                  that there's a public record of this having been considered by  
23                  the FTC, and we will demonstrate that, and the government should  
24                  be aware of it because they proffered that record in connection  
25                  with another witness.  So all I want to do is point him to

1 certain data and ask him if he's familiar with it or not.

2 THE COURT: Why don't you proceed?

3 BY MR. BERNICK:

4 Q. Do you see, the question is put -- ask people whether they  
5 would rate a variety of organizations as the most reliable  
6 sources, and one of them is the tobacco companies?

7 A. Yes, I see the question number 69.

8 Q. And do you see that further on, on question 69, it's  
9 stamped -- the page is stamped 690, that respondents  
10 consistently from 1970 all the way through 1978, virtually no  
11 respondents have indicated that the tobacco companies are among  
12 the most reliable sources of information. Do you see that?

13 A. I see the table you're referring to.

14 I would find amongst smokers, that smokers rely on  
15 tobacco companies approximately equally to the government.

16 Q. Equally to the government. What about equally --

17 A. In the middle column.

18 Q. That's government agencies.

19 A. That's what I -- that's what I'm saying.

20 I mean, for smokers -- in 1978, for instance, 6 percent  
21 of smokers would rely on government agencies and 4 percent on  
22 tobacco companies.

23 My comment was simply that amongst smokers there seems  
24 to be fairly equal reliance between government agencies and  
25 tobacco companies.

1 Q. Fair enough.

2 Is there some reason you picked those out as opposed to  
3 the ones like organizations like the American Cancer Society and  
4 the American Medical Association?

5 A. No. I was just trying to respond to your question that you  
6 were implying that tobacco companies have the lowest level of  
7 credibility, and I'm just saying that amongst smokers for this  
8 time period the level of credibility or trust or whatever  
9 they're measuring here was not dissimilar between tobacco  
10 companies and government agencies.

11 Q. Do you know if there's a statistically significant  
12 difference or not?

13 A. You wouldn't be able to determine that from the information  
14 presented here.

15 Q. That's my whole point.

16 Would you agree with me -- let me ask you. This is the  
17 question I want to get to. Are you familiar with the survey  
18 data that puts the statements by the tobacco industry with  
19 regard to smoking and health at the bottom of the heap when it  
20 comes to being reliable?

21 A. I have seen some survey data to that effect, yes.

22 Q. Is this survey among the data that you've reviewed in  
23 connection with your own professional activities?

24 A. No, it is not.

25 Q. Now, in light of that type of backdrop, I then want to ask



1       you, is there any scientific validation, is there any study that  
2       you can point to when it comes to corrective communications that  
3       establishes that the corrective communications that you're  
4       recommending in fact will affect consumer behavior?

5               Is there any such study that you can point to?

6       A.   First of all, I'm not here to provide the public health  
7       evidence for each of the remedies that I'm proposing.

8               My intent was to provide the court remedies to consider  
9       that would change the industry's behavior, but they will have  
10      the sequential effect of my opinion of benefiting the public  
11      health.

12      Q.   You really have to be responsive a little bit more to my  
13      question.

14              MS. CROCKER:  Dr. Eriksen was not finished, so perhaps  
15      if we don't interrupt him, he will be able to respond to your  
16      question.

17              MR. BERNICK:  I have no problem with his finishing as  
18      long as it's responsive to the question.  The question is not --  
19      the question relates to the impact of his recommendations on  
20      consumer behavior.

21              THE COURT:  Dr. Eriksen, you may answer and finish your  
22      answer.

23              THE WITNESS:  Thank you.

24      A.   It's my opinion that you need to start with the industry  
25      being truthful about the harm and the addictiveness of smoking

1 and from that we will have positive behavior change.

2 Q. I'm sorry. Go ahead.

3 A. No. I've spent my career working in tobacco control and one  
4 of the biggest burdens that we have is individuals, smokers who  
5 don't believe that smoking is addictive or harmful because it's  
6 not what is said by the tobacco companies.

7 Q. I didn't ask you about any of that. I asked you whether you  
8 had any study that you can point to that provides scientific  
9 validation that the corrective communications that you're  
10 recommending actually will have any impact whatsoever on the  
11 consumer?

12 What studies can you point to that validate this  
13 intervention as having an impact on consumers?

14 A. Because it hasn't been done, I'm not aware of studies that  
15 validate it. I'm saying it's my experience based on my  
16 understanding of the literature and that it would be the place  
17 to start in order to reduce the harm caused by smoking. And  
18 that given the fact that smoking does have substantial impact on  
19 the public health, that you need to start with a truthful base  
20 and that would ultimately result in improved public health.

21 Q. Would you agree with me, in response to my question, that no  
22 such studies have been pointed out to the court by you?

23 A. Yes, I would agree with that. That wasn't my purpose.

24 Q. Would you also agree that the industry has changed, has made  
25 changes in its corrective communications over time?

1 A. Clearly it has changed and it is continuing to change and it  
2 seems to be changing often in conjunction with litigation.

3 Q. Again, I didn't ask you --

4 MR. BERNICK: Your Honor, I would ask that the witness  
5 please be instructed to at least focus on the question. I  
6 didn't ask him why the changes had been made. I asked him  
7 whether the changes had been made in the past.

8 THE COURT: Please answer the question.

9 A. Changes have been made in the past and continue to be made.

10 Q. And certainly one could do a study that looked to whether  
11 industry changes in public statements affected consumption;  
12 correct?

13 A. You could conceivably do an experimental study of what would  
14 happen if that was done, but you couldn't do a population study  
15 because it hasn't been done.

16 Q. It has been done. The industry changed its public  
17 statements in 1999 and 2000; correct?

18 A. Most of them.

19 Q. And certainly in 2000 people could do multiple regressions,  
20 like they've done for many other public statements, to see if  
21 the industry's statement, new statement, had any impact;  
22 correct?

23 A. Yes, that type of research could be done. To my knowledge  
24 it doesn't been done. And my understanding is that many smokers  
25 are unaware of these public comments that are on websites.

1 Q. And, therefore, today it's not a question of whether the  
2 methodology is available to be applied, what you're saying is  
3 that nobody has applied scientific methodology to validate these  
4 corrective communications as having an impact on consumers;  
5 correct?

6 A. I'm not aware of studies that have looked at the changes  
7 that have occurred on the industry websites and its effect on  
8 smokers' understanding of the harm caused by smoking, no.

9 Q. Would the same thing apply to corrective communications  
10 about addiction?

11 A. Yes.

12 Q. Has any study, to your knowledge, measured the impact of any  
13 statements that are made by the industry with regard to  
14 marketing?

15 Can you point to any study that demonstrates that  
16 anybody cares about what the industry says about marketing?

17 A. Well, I feel this is a huge impediment in terms of -- I'm  
18 sorry.

19 There haven't been studies done that I'm aware of, and  
20 the absence of them is an impediment in understanding the effect  
21 of marketing. The denial that marketing has an effect on young  
22 people allows advertising to continue the way it is and that's  
23 an impediment.

24 Q. Really, again respectfully, that's completely unresponsive  
25 to my question. My question is very simple.

1                   You have said -- are you all right, Dr. Eriksen?

2                   You have said that the industry's denials that the  
3 market -- that their marketing -- strike that.

4                   You've pointed out in your testimony, in your prior  
5 testimony, the industry has denied that its marketing has an  
6 effect on under age smoking; correct?

7           A.   Yes.

8           Q.   All I'm asking you is a very simple question.

9                   Are you aware of any scientific study which  
10 demonstrates an impact from any of those statements?

11           A.   I'm not aware of any scientific study that has measured the  
12 magnitude of the effect that has had on public health, no.

13           Q.   Are you aware of any study that determines whether it's had  
14 any effect whatsoever? Study. That is, the denials. Any  
15 impact of denials.

16           A.   I'm not aware of a study, but I know from firsthand  
17 experience that it's a major distraction. People like myself,  
18 who have public health responsibility, have to deal with the  
19 denial as opposed to doing more relevant program and research;  
20 that the denial was an impediment for program. That is not  
21 something that is amenable to a scientific study.

22           Q.   Well, would you agree with me -- I'm filling out my question  
23 marks -- that when it comes to these corrective communications,  
24 they have not been validated as achieving any public health  
25 benefit?

1           You don't know of any scientific validation of the  
2       corrective communications in terms of their public health  
3       effect?

4       A.   If I may just try to elaborate and see if this is responsive  
5       or not.

6           There is scientific evidence that's been peer-reviewed  
7       and published that more vivid and direct warning labels in  
8       certain countries have had an effect on increasing the desire to  
9       quit and quitting behavior.

10          I think that those scientific studies, which are many  
11       ways corrective communications, have relevance for your question  
12       as to what does the scientific literature indicate about candor  
13       and honesty and corrective communications and, with respect,  
14       it's smoking and harm and addiction.

15       Q.   You are not recommending warning changes in this case, are  
16       you?

17       A.   I'm sorry. You asked me about scientific evidence that  
18       relates to corrective communications, and I'm saying -- I'm  
19       saying that I would draw upon -- asked that question, I would  
20       draw upon the evidence that is comes from a number of countries  
21       that have changed their warning labels which are fundamentally  
22       corrective communications and they have shown an effect on  
23       desire to quit and quitting behavior.

24       Q.   Could you focus now on my question?

25       A.   I did.

1 Q. The question is this -- I'm sorry. My question is this.  
2 You are not recommending a change of warnings in your testimony  
3 before this court. True or not?

4 A. That's true.

5 Q. And we talked before about the importance of having studies  
6 in order to validate the focus on the intervention in question  
7 and its intended effect. Do you recall your testimony?

8 A. Yes, sir.

9 Q. And isn't it true that you're not aware of a single  
10 scientific study that focuses as one end point on public  
11 statements being made by the tobacco industry or any tobacco  
12 industry, public statements as opposed to warnings, you're not  
13 aware of any study that focuses on public statements regarding  
14 their position on smoking and health, are you?

15 A. That's my testimony. And, as I said, in the absence of that  
16 type of study being done I would draw upon as close I can, which  
17 would be the evidence from a number of countries about the  
18 impact of warning labels on smoking intention and smoking  
19 behavior.

20 Q. Let's focus on disclosure. You've advocated -- or you've  
21 recommended that disaggregated marketing data be made available  
22 and scientific data be made available to the American public  
23 from the tobacco industry; is that correct?

24 A. Yes, sir.

25 Q. Now, when it comes to disclosure, is it true that you are

1       aware when you did your original report back in 19 -- back in  
2       2001, you were aware of the fact that the industry had data of  
3       this character; that is, marketing data and scientific data  
4       regarding the health effects of smoking?

5       A.   I missed the middle of your question.

6       Q.   Is it true that back in 2001 when you did your original  
7       report you were already aware of the fact that the industry had  
8       the kind of data as to which you're now asking for a disclosure?

9       A.   Yes, sir.

10      Q.   Is it true that you specifically addressed disclosure in  
11      your expert report in this case?

12      A.   Yes, sir.

13      Q.   Is it true that the only recommendation that you made for  
14      disclosure when you filed your expert report in this case was  
15      disclosure of ingredient information?

16      A.   No, sir.

17      Q.   Well, I've actually got your expert report here, and it  
18      says, Ingredient Disclosure at Page 60 and it has a long  
19      discussion. "I would strongly recommend the full disclosure of  
20      ingredients along with toxicologic evidence of the safety of the  
21      ingredient when pyrolyzed or in combination with tobacco and  
22      other ingredients; correct?

23               MS. CROCKER: Is a copy going to be provided to  
24      Dr. Eriksen? A copy of his report.

25               MR. BERNICK: That's fine.



1 MS. CROCKER: What page are you reading from, please?

2 MR. BERNICK: Page 60 and 61.

3 A. Yes, sir, that's a correct statement in my expert report.

4 And we discussed this at length in my deposition and I referred  
5 to the previous page --

6 Q. Excuse me, Dr. Eriksen. We're going to get to the previous  
7 page in a minute. I'm asking whether this is the recommendation  
8 that you made in your report at that time which relates to  
9 ingredient disclosure.

10 A. Yes, sir.

11 Q. Now, on the prior page we see that there's a discussion  
12 leading into that recommendation; correct?

13 A. Yes, sir.

14 Q. That is also under the heading Ingredient Disclosure;  
15 correct?

16 A. Yes.

17 Q. And I believe in your deposition you told me that there  
18 was -- you pointed out that you had identified the current  
19 statute -- I'm sorry -- "I am well qualified to comment on the  
20 adequacy of the existing statute concerning ingredient  
21 disclosure and the need for greater consumer and scientific  
22 information."

23 That's the statement that you pointed out to me in your  
24 deposition; correct?

25 A. Yes, it is.

1 Q. And nowhere in that statement do you call out for a  
2 disclosure of marketing data; correct?

3 A. The statement reads as it is. It's calling for greater  
4 consumer and scientific information.

5 Q. Could you answer my question?

6 That statement does not call out for the disclosure of  
7 marketing data, does it?

8 A. That statement does not.

9 Q. It does not call for the disclosure of data regarding the  
10 health effects of smoking; correct?

11 A. It doesn't. When it says "greater consumer and scientific  
12 information," that was what was implied by that, yes.

13 Q. Implied?

14 A. Yes.

15 Q. But not stated?

16 A. Well, you can see what's stated.

17 Q. It doesn't state "disclosed marketing data." It doesn't  
18 state disclosed internal scientific research --

19 MS. CROCKER: Objection, asked and answered and  
20 argumentative.

21 THE COURT: Objection is overruled.

22 MR. BERNICK: I'll go on, Your Honor. I think it's  
23 very apparent from the language of the report.

24 BY MR. BERNICK:

25 Q. Now let's push on to talk now about what you're recommending

1 with regard to marketing, and again I want to get to the  
2 question of what it is that you're recommending and what its  
3 impact is.

4 You recommend that disaggregated marketing data be made  
5 available; correct?

6 A. Yes, sir.

7 Q. When that data becomes available, you don't know -- the  
8 reason that you're asking for disclosure is for purposes of  
9 additional research; fair?

10 A. Partially.

11 Q. Well, for purposes of making the tobacco companies disclose  
12 whatever it is that they have, right, on marketing.

13 A. I'm sorry. I missed. There's a question.

14 Q. Is the purpose of your recommendation first to compel  
15 disclosure of whatever the companies have with respect to  
16 marketing?

17 A. Yes.

18 Q. With the ultimate goal, then, of being able to do more  
19 research; correct?

20 A. I'm sorry. I'm not being trite. I said partially, because  
21 that's part of the reason that I'm recommending to be disclosed.  
22 The other part is to provide greater transparency to the public  
23 as to what is being spent and what effect it's having.

24 Q. Fine. So you're going to get greater transparency and  
25 you're going to get research done. Fair?

1 A. Yes.

2 Q. Now, you don't know how the research is going to come out,  
3 do you? It hasn't been done.

4 A. Some of it's been done. There is some preliminary work  
5 that's been done, but there's certainly -- not all the data are  
6 available that would allow for the type of analysis that needs  
7 to be done.

8 Q. And at a certain point you believe that if the research is  
9 done, it may be sufficient to make the tobacco companies admit  
10 that cigarette advertising causes initiation; correct?

11 A. I believe I so indicated in my deposition. I may have said  
12 cigarette marketing as opposed to advertising, but basically  
13 that was the intent, was this information would provide the  
14 evidence to allow for the denial to stop.

15 Q. So the sequence is, number one, the disclosure take place,  
16 number two the research gets done, number three conclusions are  
17 reached, and number four a time may come when the information  
18 may be robust enough to make the industry stop denying that it's  
19 not been demonstrated; that is, that marketing causes  
20 initiation. Fair?

21 MS. CROCKER: Objection. That was several questions in  
22 one. It was compound, vague. If we could take it a step at a  
23 time.

24 MR. BERNICK: Well, I believe the witness can answer  
25 the question.

1                   THE COURT: Objection is overruled.

2       A. That would be part of the process that would go on, yes, not  
3       the only part.

4       Q. At this point in time you can't identify to the court what  
5       level of evidence would be sufficient to compel the industry to  
6       stop its denial; correct?

7       A. Yes. I don't know what it would take, really.

8       Q. But, in particular, you can't identify a level of scientific  
9       knowledge about the relationship of marketing and youth  
10      initiation that would be sufficient to be able to direct the  
11      companies to make a corrective communication on the effects of  
12      marketing; correct?

13      A. I don't know what it would take for the tobacco industry to  
14      make that determination.

15                   My belief is that the court could direct the industry  
16      to make that determination based on the evidence that's been  
17      presented in this case.

18      Q. Remember giving this answer to the following question in  
19      your deposition last Monday?

20                   "Question: At what point in the evidence would you say  
21      it's then appropriate to require the industry to end its denial,  
22      or would that just be something that is in the end left up to  
23      the industry based on its assessment of the science?"

24                   You say: "I really don't have an opinion on that."

25                   Was that the answer that you gave at your deposition?

1 MS. CROCKER: Could we have a copy of the transcript  
2 and the page, please?

3 THE COURT: That was the recent deposition?

4 MR. BERNICK: Yes, that was May 9, 2005, last Monday.

5 MS. CROCKER: A copy for myself as well, please.

6 Thank you.

7 BY MR. BERNICK:

8 Q. Was that the testimony that you gave, Dr. Eriksen?

9 A. Yes, it is.

10 Q. The bottom line again, which is, Are you able to point to  
11 any scientific validation that the disclosure of this marketing  
12 data will, in fact, have an impact on consumers?

13 A. It's not this specific issue. As far as I know it has not  
14 been the subject of scientific study or could it be. It's a  
15 policy decision based on experience and evidence.

16 Q. The same thing with respect to internal scientific data.  
17 Let me ask you a couple of questions about that.

18 It's true, is it not, that over the years the tobacco  
19 industry has disclosed literally millions of pages of internal  
20 documentation?

21 A. Yes, sir.

22 Q. Is it true that over the years literally hundreds of  
23 depositions have been taken of company scientists?

24 A. I don't know if that's the case.

25 Q. Isn't it true that before you made this recommendation that

1       there be a disclosure of scientific data, you performed no  
2       systematic review to determine what has already been disclosed  
3       in the litigation posted on the websites?

4       A. I don't think it's necessary to do a systematic review to  
5       know that documents released in litigation or depositions of  
6       scientists is not the same as what I'm trying to convey here in  
7       terms of disclosure of scientific data.

8       Q. Could you bear with me and answer my question, please?

9               My question is: Is it true that you have done no  
10       systematic review to determine what scientific information has  
11       been produced in the litigation or disclosed during the course  
12       of depositions?

13       A. Yes, I have not done a systematic scientific review.

14       Q. Is it true, then, that you don't know whether there is  
15       anything that the companies have in their files of any  
16       scientific consequence whatsoever that has not been disclosed?

17       A. I don't see how anyone would know what they have versus  
18       what's disclosed, and just simply that it's been disclosed in a  
19       deposition is not available to the scientific community.

20       Q. I didn't ask you whether it's available to the scientific  
21       community. I asked you a very simple question.

22               Isn't it true that you have no basis to say that  
23       there's any significant scientific data which has not been  
24       disclosed in the litigation?

25       A. How would one know that?

1 Q. I didn't ask you -- first, I'm asking you the questions  
2 here, Dr. Eriksen. If you can just answer. I asked you a very  
3 simple question.

4 You have no basis to be able to say as an expert that  
5 there is significant scientific data in the possession of these  
6 companies that has not been disclosed? True or not.

7 MS. CROCKER: Objection, asked and answered twice. And  
8 Dr. Eriksen has said that's a question that no one could answer.

9 MR. BERNICK: First of all, that's a coaching  
10 statement. Nextly, it's a statement also not responsive to the  
11 question.

12 THE COURT: No. The question has been answered.

13 Let's move on, please. Objection sustained.

14 BY MR. BERNICK:

15 Q. Dr. Eriksen, isn't it true that when it comes to this area  
16 there are a number of experts in the various fields of  
17 scientific inquiry, such as smoking behavior and the health  
18 effects of smoking, there are a number of experts with expertise  
19 who have testified against the tobacco industry, including in  
20 this case?

21 A. Yes. I think I understand what you're asking there.

22 There have been experts who have testified against the  
23 industry in this case.

24 Q. Have you looked to see -- after all these years of those  
25 experts pouring through tobacco company files, are you aware of



1 any expert who has offered the opinion that there are yet areas  
2 of scientific research which the tobacco industries have failed  
3 to disclose?

4 A. Yes. In fact, that's a common complaint within the tobacco  
5 control community, that there's information that is in the  
6 possession of the tobacco industry often offshore and is not  
7 available to the scientific community.

8 Q. I didn't ask you about whether there was discussion within  
9 the public health community. I asked you whether you had ever  
10 looked at the testimony of any of the experts in this case to  
11 determine whether in their view there was significant scientific  
12 information that was yet to be disclosed.

13 A. I have not looked at the testimony of experts in this case  
14 on that regard. They may have or they may have not.

15 MR. BERNICK: I've got two more areas to cover, Your  
16 Honor. We can take a break. I'm more than happy to keep on  
17 going for a while, but it's really up to the court.

18 THE COURT: Well, let's try at least until 12:30 and  
19 see how far you can get.

20 BY MR. BERNICK:

21 Q. Let's turn to the counter media campaigns that you talk  
22 about in Roman 1A 1 and 1B 1, the counter-marketing media  
23 campaigns that you describe there.

24 Is it true that counter-media campaigns have been part  
25 of comprehensive tobacco control programs in a number of

1 different states?

2 A. Yes, counter-marketing campaigns have been.

3 Q. And we're talking about a relatively small number of states,  
4 are we not? Something less than about 10.

5 A. No. I would say more states have done counter-marketing  
6 than that. I don't have the precise number.

7 Q. Could you say whether it's as many as 20, 15, or you just  
8 don't know?

9 A. I don't know. I wouldn't be able to give you an estimate,  
10 but I would say it's definitely more than 10.

11 Q. Would you agree with me that in each of the different states  
12 that have adopted counter-marketing campaigns or antitobacco  
13 media campaigns, that they've done so as part of a broader  
14 program that involves different kinds of interventions?

15 A. Yes, sir, that's typically the case.

16 Q. So, for example, if we were to take California. California  
17 has had an antitobacco advertising campaign; correct?

18 A. Yes, sir.

19 Q. California has instituted that campaign together with a  
20 variety of other measures; correct?

21 A. Yes, sir.

22 Q. And they include tax increases; correct?

23 A. That was not part of the campaign, it was part of the  
24 environment at the beginning of the campaign, but it was not  
25 related to the campaign.

1 Q. But it happened at the same time; fair?

2 A. It actually preceded.

3 Q. In part, it raised money to fund the campaign; correct?

4 A. Exactly.

5 Q. But certainly during the period of time that the campaign  
6 was in place, taxes had been increased for the consuming public;  
7 correct?

8 A. Yes, the taxes were increased before the campaign began,  
9 just to be clear for the record.

10 Q. It also involved school educational programs; correct?

11 A. Yes.

12 Q. It also involved cessation programs; correct?

13 A. Yes. They funded a Quit line.

14 Q. Now, it's true, is it not, that one of the issues -- of  
15 course, it involved the media campaign; right?

16 A. Yes, sir.

17 Q. Now is it true that if we go from California to the other  
18 different states, different states have had different programs  
19 for achieving tobacco control?

20 A. Yes, sir.

21 Q. And not all states, for example, have followed the  
22 California model; correct?

23 A. That's fair.

24 Q. Is there any -- are there any two states, as you sit here  
25 today, that have followed precisely the same model?

1 A. I would think the states are more similar than they are  
2 different, but every state -- every state -- I'm sorry.

3 Q. Go ahead.

4 A. No. It's difficult answering your question when you, in the  
5 middle of my question, you give a reaction like that.

6 Q. My reaction is -- and I apologize for that. My reaction is  
7 based upon whether you're answering the question or not. But go  
8 ahead and answer the question, and I know that I can ask for  
9 relief if it's appropriate from the court. Go ahead.

10 A. What I was trying to say is that no states have identical  
11 programs, but the programs from many states are more similar to  
12 one another than different.

13 If you look at California, Massachusetts and Florida,  
14 for instance, most people would say those programs are more  
15 similar to one another than they are different.

16 Q. But there is no one model. There is no one model that has  
17 been applied in more than one state; correct?

18 A. No, I would not agree with that.

19 Q. Tell me the model that is common between California and  
20 Mississippi.

21 A. I'll tell you the model is common between California and  
22 Massachusetts.

23 Q. I didn't say that. Let's be clear.

24 The different states have developed different  
25 approaches. You may say that they are not significantly

1 different in some cases, but they developed different approaches  
2 for dealing with this problem; correct?

3 A. As I was saying, I would not agree with that. I would say  
4 that most states follow a similar approach, which -- if you want  
5 to see how has this been articulated, they will refer you to the  
6 best practices document that CDC produced in 1999 that  
7 specifically lays out a schema for states to follow that had  
8 nine elements for a comprehensive approach to tobacco control.

9 Q. That's not responsive to the question. I didn't ask you  
10 whether CDC recommended a common approach.

11 I asked you what the states actually have done. And my  
12 question is whether the different states have taken different  
13 approaches to tobacco control. Pretty simple.

14 MS. CROCKER: Objection. This question has been asked  
15 and answered many times.

16 THE COURT: Objection sustained.

17 MS. CROCKER: Mr. Bernick's manner is quite  
18 disrespectful.

19 THE COURT: Sustained.

20 Go ahead, please.

21 BY MR. BERNICK:

22 Q. Dr. Eriksen, isn't it true -- let's talk about California  
23 specifically -- the California program has been the subject of  
24 numerous assessments for its efficacy?

25 A. Yes. There's been a number of papers written on evaluating

1 the California program.

2 Q. Now, do you describe in your testimony what the success rate  
3 has been for the different programs as they've been developed in  
4 different parts of the country?

5 A. I'm not sure what you're referring to.

6 Q. Well, in point of fact, isn't it true that numerous  
7 publications have been issued commenting on the efficacy of the  
8 California program?

9 A. Yes, sir. As I already answered that, that's true.

10 Q. Isn't it true that over time people, including people from  
11 very invested in the California program, have basically opined  
12 that the California program has not been effective in reducing  
13 youth initiation?

14 A. I have no firsthand knowledge of that one way or the other.

15 Q. Well, do you recall being a co-author of an article that was  
16 authored by Michael Siegel, and it was published in March  
17 of 2000 called Trends in Adult Cigarette Smoking in California  
18 Compared With the Rest of the United States.

19 Do you recall that?

20 A. Yes, sir.

21 Q. You were a co-author, were you not?

22 A. Yes, I was.

23 Q. Isn't it true that what this article reflects is that they  
24 can't find a difference when it comes to adult prevalence, they  
25 can't find a significant difference between California and the

1 other states as a result of the California program?

2 MS. CROCKER: Could Dr. Eriksen and myself be provided  
3 with copies of this?

4 MR. BERNICK: That's fine. JD 063895.

5 MS. CROCKER: Could you let us know what page you're  
6 reading from, Mr. Bernick?

7 MR. BERNICK: Yes. This is Page 377.

8 MS. CROCKER: Thank you.

9 MR. BERNICK: I'm sorry.

10 THE WITNESS: Thank you.

11 BY MR. BERNICK:

12 Q. Are you familiar with this article?

13 A. Yes, sir, I was a co-author on it as you point out.

14 Q. And it was published in 2000, was it not?

15 A. Yes, sir.

16 Q. And it discusses Trends in Adult Cigarette Smoking in  
17 California As Compared With the Rest of the United States?

18 A. Yes, sir.

19 Q. And what it finds is that there is no significant difference  
20 in the trends of adult prevalence as between California and the  
21 rest of the United States; true?

22 A. No, that's not true.

23 Q. Let's direct our attention back and you can tell me where I  
24 have erred here.

25 "Although smoking prevalence in California still

1       declined significantly during the period 1990 to 1994, while  
2       smoking prevalence for the remainder of the United States was  
3       statistically unchanged during the period, the slopes for  
4       California and the remainder of the United States were not  
5       significantly different during this period or during any of the  
6       3 time periods in our study."

7               Is that the conclusion that was reached by the article?

8       A.   Well, I would like to spend more time with this article in  
9       terms of the conclusion that's reflected in the abstract of the  
10       article, which if you allow me to read, I will, which  
11       contradicts this. And it's going to confuse the court if you  
12       let this go up there as an article that I've been author on and  
13       characterize it in this way.

14       Q.   Well, that's fine. Before you do that, let me just ask you  
15       this. If you want to read the rest of the paragraph -- this is  
16       a concluding paragraph of the article. This is not the  
17       abstract.

18       A.   I know it's not the abstract. I wanted to read from the  
19       abstract.

20               THE COURT: Who prepared the abstract?

21               THE WITNESS: The authors.

22       BY MR. BERNICK:

23       Q.   Go ahead.

24       A.   The conclusion of the abstract on Page 372 states, "The  
25       presence of an aggressive tobacco control intervention has



1 supported a significant decline in adult smoking prevalence in  
2 California from 1985 to 1990, and a slower but still significant  
3 decline from 1990 to 1994, a period in which there was no  
4 significant decline in the remainder of the nation. To restore  
5 nationwide progress in reducing smoking prevalence other states  
6 should consider similar interventions."

7 Q. That talks about what was happening in California from 1985  
8 to 1994; correct?

9 A. Yes.

10 Q. And when it comes to making the comparison with between  
11 California and other states as reflected in figure 3, the period  
12 of time was 1978 to 1994; correct?

13 A. Yes.

14 Q. And isn't it true that when that comparison was made, there  
15 was not found to be a statistically significant difference in  
16 the slopes -- that is, California versus the rest of the United  
17 States -- as reflected in the portion of the article that I read  
18 to you?

19 It says, "Although smoking prevalence in California  
20 still declined significantly during the 1990 to 1994, while  
21 smoking prevalence for the remainder of the United States was  
22 statistically unchanged during this period, statistically  
23 unchanged, as between the two -- that is California and the rest  
24 of the United States -- the slopes for Colorado and the  
25 remainder of the United States were not significantly different

1 during this period or during any of the 3 time periods in the  
2 study."

3 Wasn't that the conclusion of the authors?

4 A. The first part of that paragraph says, "It is a significant  
5 difference in California and the rest of the country in terms of  
6 prevalence."

7 Q. Of course, there's a difference between California and the  
8 rest of the country with respect to prevalence. The question is  
9 what happened to the trends when the tobacco control program was  
10 instituted in California?

11 What the authors conclude is that, although the  
12 prevalence has always been different in California and the rest  
13 of the United States, during the period of the tobacco control  
14 program there was no statistically significant difference in the  
15 slopes.

16 Isn't that what the article concludes?

17 A. No, it's not the prevalence. If you look at where it says  
18 "although," it's "although smoking prevalence in California  
19 still declined significantly during the period 1990 to 1994,  
20 while smoking prevalence in the remainder of the United States  
21 was statistically unchanged." So California declined  
22 statistically --

23 Q. Yes --

24 A. -- during that period and the rest of the country didn't.

25 Q. But then go on to take a look at the rest of the sentence.

1           "The slopes for California and the remainder of the  
2       United States were not significantly different during this  
3       period or during any of the 3 time periods in our study. That  
4       is to say, although they are different slopes, they are not  
5       statistically significantly different when it comes to the  
6       comparison between the two."

7           What the authors talk about is what the implications  
8       are, and they say as follows. They say, "our failure, due to  
9       limited power, to detect significant differences in smoking  
10      prevalence trends in California compared with the remainder of  
11      the United States should not be interpreted to mean that the  
12      trends were the same, or that the California antismoking  
13      intervention had no effect. In light of the absence of any  
14      significant change in smoking prevalence in the nation as a  
15      whole during the period 1990 to 1994, we interpret the  
16      significant decline in smoking prevalence during this period in  
17      California as evidence suggestive of an effect of the tobacco  
18      control intervention."

19           That's as far as the authors would go; correct?

20       A. Yes.

21       Q. Okay. Now, isn't it true that after this article came out  
22       there were further articles that analyzed what was happening in  
23       California?

24       A. Yes.

25       Q. And isn't it true that there are articles that were

1       authored, in fact, by Doctors Siegel and Biener evaluating both  
2       Massachusetts and California in terms of whether they produced a  
3       reduction in adolescent smoking?

4               MS. CROCKER: Your Honor, I don't mean to interrupt,  
5       but we are 10 minutes past our lunchtime. I'm concerned about  
6       Dr. Eriksen going on for this extended period.

7               MR. BERNICK: That's fine, Your Honor. I had one --

8               THE COURT: We will take a lunch break and it might be  
9       the most efficient to give Dr. Eriksen the articles now that  
10      you're going to question him on next so that he can at least  
11      take a look at them.

12              I think he was concerned, even in this article which he  
13      coauthored, although a long time ago, that he didn't have enough  
14      time to look back at it. So if you will do that, Mr. Bernick.

15              We're going to come back at ten of 2:00 because I need  
16      the full lunch hour day today to work on things.

17              MS. CROCKER: Could I ask for an estimate from  
18      Mr. Bernick as to how much longer we will be going after that  
19      point?

20              MR. BERNICK: It's taking much longer than I had hoped,  
21      and I think I'll try to get done within an hour. So that's my  
22      best shot.

23              (Lunch recess began at 12:35 p.m.)

24

25

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4 DIRECT EXAMINATION BY MS. CROCKER 21051  
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10 CERTIFICATE

11 I, EDWARD N. HAWKINS, Official Court Reporter, certify  
12 that the foregoing pages are a correct transcript from the  
13 record of proceedings in the above-entitled matter.

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16 Edward N. Hawkins, RMR

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	May 16, 2005
	.	
Defendants.	.	
. . . . .	.	

VOLUME 104  
AFTERNOON SESSION  
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS  
BEFORE THE HONORABLE GLADYS KESSLER,  
UNITED STATES DISTRICT JUDGE

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1                   AFTERNOON SESSION, MAY 16, 2005

2   (2:00 p.m.)

3           THE COURT: Counsel, I'm sorry I'm so late this afternoon.  
4   There is just a lot of things I have to take care of at times.  
5   Now, someone made a request, I don't know who, that we finish  
6   Dr. Eriksen's cross and redirect before we deal with the other  
7   issues; is that correct?

8           MS. CROCKER: Yes, Your Honor, if that would be okay with  
9   you, that would be --

10          THE COURT: Is that the government's request?

11          MS. CROCKER: That would be our request.

12          MR. BERNICK: I don't think we have any problem with that.

13          MR. BROCHIN: That's fine, Your Honor. There's a timing  
14   issue, but --

15          THE COURT: We'll get to it today, one way or the other.  
16   The second thing is relevant to cross of Dr. Eriksen, and it  
17   might be just easier if we did it at the bench for a minute or  
18   two regarding an issue that the defendants raised in their  
19   objections so we can have the legal discussion at the bench.  
20   Obviously that's not a sealed discussion. Any problem with that,  
21   anybody?

22          All right, Ms. Crocker and Mr. Bernick, please.

23          (Following sidebar discussion had on the record:)

24          THE COURT: There is no place for Dr. Eriksen to step  
25   down. I'm not worried about the witness lying or anything like

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1     that. This is the joint defendants' argument that Dr. Eriksen's  
2     testimony is barred by Order 622. That testimony was barred as  
3     to liability because in my view it was not covered in his direct  
4     testimony -- excuse me, in his expert witness report. The  
5     defendants say that the government had an opportunity to file a  
6     supplemental report for Dr. Eriksen in the remedies phase of the  
7     trial but failed to do so on any topic.

8             I have the government's response, of course, which covers  
9     areas other than low tar, but you're really focused on low tar,  
10    Mr. Bernick, right?

11            MR. BERNICK: Right.

12            THE COURT: Okay. And so therefore, what is the  
13     government's response? We're only talking about his low tar  
14     testimony now.

15            MS. CROCKER: Your Honor, I don't want to talk so loud  
16     that Dr. Eriksen could hear me. Dr. Eriksen's testimony --

17            THE COURT: Don't worry about his listening. I'm not  
18     worried about that.

19            MS. CROCKER: -- in the liability phase, the defendants  
20     have had extensive discovery in that phase related to low tar at  
21     his first deposition in 2002, after his first report was filed  
22     related to remedies.

23            THE COURT: But did he ever disclose what remedies he  
24     might be asking for regarding the low tar issue?

25            MS. CROCKER: He testified that the descriptors, the

1 low-tar descriptors were misleading. He was asked about that at  
2 that deposition, and he was asked about it again at a full  
3 seven-hour deposition. Now, that was before we had this -- I  
4 mean, everything's changed, as Your Honor knows, as time passes.  
5 The ground we're standing on has changed, and as we came to this  
6 remedies part of the case, you know, we wouldn't have been able  
7 to anticipate in 2003 that then his testimony would be split in  
8 two and we would have these two different portions. So, in --  
9 what I can say is that in his first deposition taken in 2002,  
10 which was the deposition that related to the report which  
11 included remedies, that he was asked specifically about light or  
12 low-tar cigarettes and his opinion about them, and he stated that  
13 he thought the descriptors were misleading, which is essentially  
14 what he stated again here based upon the Surgeon General's  
15 Report.

16 THE COURT: Very briefly, Mr. Bernick.

17 MR. BERNICK: Refresh me, Your Honor, I thought that Order  
18 622 was issued after all of that discovery was -- what is the  
19 date of the 622?

20 THE COURT: August 10th, 2004.

21 MR. BERNICK: So, that would have been after all of the  
22 discovery had taken place with respect to his expert report,  
23 including discovery of remedies and the Order 622 issue -- there  
24 was no distinction between liability and remedies.

25 THE COURT: That's correct.

1           MR. BERNICK: So, we would have said that the ultimate  
2 issue, with the benefit of the record that counsel has just  
3 referred to, covered his report for all purposes, and our point  
4 about supplementation is that even after this Order was issued  
5 and after the evidence was reopened for purposes of remedies  
6 testimony, as we've had in the last few weeks, there was even  
7 then no supplemental expert report that got into the issue of low  
8 tar.

9           THE COURT: I ruled as follows. Because the government  
10 had consistently represented him as a youth expert, not a low-tar  
11 or light cigarette expert, he was precluded from offering any  
12 testimony at trial on the effects of advertising light cigarettes  
13 in smokers who might otherwise quit and the subject of low-tar  
14 marketing.

15           This is what I'm going to do, everybody, just so we can  
16 move along today. I'm going to allow testimony today on cross.  
17 At some point, which I'll set when we finish with him, because I  
18 think he needs to get off the stand, I'll give a deadline for  
19 people presenting to me any evidence that he was examined at any  
20 of his many depositions on the subject of low-tar marketing and  
21 what he believed the appropriate remedies were for dealing with  
22 what he identified as the problems.

23           (Sidebar discussion concluded.)

24           THE COURT: All right, Mr. Bernick.

25

1           CONTINUED CROSS-EXAMINATION OF MICHAEL P. ERIKSEN, Sc.D.

2   BY MR. BERNICK:

3   Q.       So, Dr. Eriksen, we conjured up some plans for you this  
4   afternoon. No real surprises in terms of where we're going, and  
5   I do want to finish up here your testimony promptly. And have  
6   you had an opportunity over the lunch hour to review those two  
7   articles that were furnished you?

8   A.       Yes, I did, I reviewed them, thank you.

9   Q.       Okay. And what I would like to do in order to get us to  
10   the end here, is to break up the counter-marketing media  
11   campaigns that you have identified in Roman 1-A-1 and 1-B-1 and  
12   take them a little bit separately. Would it be fair to say that  
13   the counter-marketing media campaign in Exhibit 1-A-1 is a  
14   youth-focussed smoking counter-marketing campaign?

15   A.       Yes, sir.

16   Q.       And if we take a look at the question, have there been  
17   articles, in fact, done, put together that have specifically  
18   addressed the question of whether the state anti-tobacco or  
19   tobacco control programs, whether they had a beneficial effect  
20   on youth initiation specifically? Do some of the articles  
21   address that issue?

22   A.       Yes, they do. Most of them look at it in the context of  
23   the entire program that's going on in the state.

24   Q.       That's where I was going and then we'll get to the  
25   separate thing here in a minute. But just so we're clear, in

1 taking a look at how the state comprehensive programs have done,  
2 one of the things that the scientists who have written these  
3 articles analyzed is the effect that they've had specifically on  
4 youth initiation, fair?

5 A. Yes, sir.

6 Q. Okay. And if we go, for example, to JD 060735, is this  
7 an article that you've had an opportunity to review that  
8 evaluates the impact of state-wide anti-tobacco campaigns in  
9 Massachusetts and California with specific reference to smoking  
10 initiation among adolescents?

11 A. Yes, I reviewed this over lunch. It's broader than --  
12 it's much more about adult than adolescent, but does include  
13 adolescents.

14 Q. Okay. Fair enough. And if we take a look at page 163,  
15 do we see under the discussion section where the authors of the  
16 article kind of summarize three basic conclusions that can be  
17 drawn about programs in California and in Massachusetts?

18 A. I'm sorry, I missed the question.

19 Q. At that point, that's at page 163, do the authors talk  
20 about three basic conclusions that can be drawn with respect to  
21 the programs in California and Massachusetts?

22 A. Yes.

23 Q. And there's kind of a good news/bad news situation. The  
24 good news is that they've resulted in significant decline in  
25 cigarette consumption, right?

1 A. Yes, sir.

2 Q. Another is that they've resulted in significant increases  
3 in the development of local smoke-free workplace and restaurant  
4 ordinances and regulations and most likely consequent reduction  
5 in ETS exposure, but the third conclusion is they have not yet  
6 brought about a reduction in smoking uptake among adolescents.  
7 Do you see that conclusion?

8 A. Yes, sir.

9 Q. And are the authors of this article people who are  
10 recognized as being authorities in this area?

11 A. Yes, sir.

12 Q. Now, it goes on to say, "it is disappointing to find that  
13 the California and Massachusetts programs have apparently not  
14 yet succeeded in reducing smoking initiation among adolescents."  
15 But then as a commentary, it says "some have attributed this  
16 failure to the massive and effective advertising and promotional  
17 campaigns by cigarette manufacturers, and it's also been  
18 suggested that the recent focus on reducing youth access by  
19 means of vending machine bans, prominent signs regarding minimum  
20 age for tobacco purchases, and fines to vendors who sell to  
21 minors may be a counterproductive strategy. These methods may  
22 increase tobacco's appeal to youth by emphasizing that smoking  
23 is for adults only, thereby reinforcing the tobacco industry's  
24 portrayal of smoking as an initiation into the adult world and a  
25 symbol of growing up."

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1           So really what the authors are saying is that it might be  
2   tempting in responding to the theory that the failure is due to  
3   marketing by the cigarette manufacturers, may be tempting to then  
4   say well, let's ban vending machines, let's have more prominent  
5   age signs, and fining the vendors, but these authors are pointing  
6   out that that may not be a productive move, correct?

7   A.       Yes, that's the point they're trying to make.

8   Q.       Okay. And what they're then advocating is having a  
9   broader focus, saying "a more effective route to prevention is  
10  to reduce the demand for cigarettes among youth by decreasing  
11  the overall prevalence of tobacco use in society. This requires  
12  a comprehensive focus that includes, in addition to more  
13  effective youth prevention programs, continued emphasis on adult  
14  cessation and continued delegitimatization of smoking in  
15  public." That's what they suggest as an alternative, correct?

16  A.       Yes, sir.

17  Q.       Let's go from this article -- this article dealt with  
18  California and Massachusetts -- and deal with Florida. That's  
19  another state that's had anti-tobacco media campaigns, correct?

20  A.       Yes, sir. The California study, the Massachusetts study  
21  that we discussed, I think it's important to point out they're  
22  not saying the programs didn't work. The third conclusion that  
23  you have up there, they have not yet brought about a reduction  
24  in smoking uptake among adolescents --

25  Q.       Well --

1 A. -- what I would like to explain is that during this time  
2 there was a very rapid increase nationwide in smoking initiation  
3 among young people. And what they're saying is they didn't  
4 reduce the rate, but in fact California in this article, there  
5 was no increase in California during this time. So, it's  
6 somewhat of a subtle distinction, but not reducing smoking  
7 uptake among adolescents in and of itself is not a failure if,  
8 in fact, the national rates are increasing quite dramatically.

9 Q. But in fairness, there's no conclusion in the article  
10 that the California antismoking program caused or was the reason  
11 why California did anything by comparison to anywhere else.

12 A. They just present the data.

13 Q. They just present the data. And there's no conclusion in  
14 this article that, in fact, the program has now been validated  
15 as a way to affect youth initiation, correct?

16 A. Well, I would draw that conclusion that it has from the  
17 data.

18 Q. But that's -- again, in all fairness, Dr. Eriksen --

19 MS. CROCKER: Objection, Your Honor.

20 BY MR. BERNICK:

21 Q. I didn't ask you about -- I asked you about what the  
22 authors of this article concluded. My question very  
23 specifically was, isn't it a fact that the authors of this  
24 article nowhere concluded that the California or the  
25 Massachusetts program were effective in changing youth

1 initiation?

2 MS. CROCKER: I don't know if Dr. Eriksen will be able to  
3 recall what he was in the middle of saying, but I object to  
4 continued interruption of his answers by Mr. Bernick.

5 THE COURT: The objection's overruled. He may focus on  
6 the particular question asked, please.

7 THE WITNESS: The authors conclude they have not yet  
8 brought about a reduction in smoking uptake among adolescents.  
9 That says a reduction. And what I'm saying is that the rate of  
10 increase nationwide during this time period was substantial and  
11 the data they present on page 158 for California show no increase  
12 at all, and so both are true. There was no increase. They did  
13 not reduce prevalence, but prevalence did not increase in  
14 California during this time period. And I think it's important  
15 to point out that both facts can be true at the same time.

16 BY MR. BERNICK:

17 Q. Well, but in fairness again, the authors, in assessing  
18 these programs nowhere offer the view -- that is your own  
19 opinion based upon how you read the California data, correct?

20 A. No, it is not my opinion, it's the data on page 158 that  
21 says specifically -- it says, "in California remain relatively  
22 stable from 1990 to 1993 ranging from 9.1 percent in 1990 to  
23 8.7 percent in 1992, to 9.1 percent in 1993." It's not an  
24 opinion, it's the data, and in California during this time  
25 period there was no reduction but it stayed flat while in the

- 1 rest of the country it increased.
- 2 Q. And it is a fact, is it not, that the authors nowhere
- 3 offer the opinion that the California program has been effective
- 4 in changing youth initiation, correct or not?
- 5 A. They did not offer that opinion, they just presented the
- 6 data.
- 7 Q. And in fact, they offer a negative view, a view that they
- 8 then feel obliged to explain at the end, which is that these
- 9 programs have not yet brought about a reduction in smoking
- 10 uptake among adolescents, correct or not?
- 11 A. Yes, sir, a reduction.
- 12 Q. Reduction. And isn't it a fact that California youth
- 13 prevalence continued to rise through 1997?
- 14 A. Not that I was aware, no.
- 15 Q. Are you familiar with the study that was done of the 10
- 16 years of experience with the California Tobacco Control Program
- 17 issued by the State of California itself?
- 18 A. No, I'm not.
- 19 Q. Have you actually made a study, Dr. Eriksen, of all the
- 20 studies that have been done, all the evaluations that have been
- 21 done of the experience of the California program in terms of
- 22 youth initiation?
- 23 A. Are you referring to peer-reviewed scientific studies
- 24 or --
- 25 Q. Peer-reviewed scientific studies.

- 1 A. I'm fairly familiar with them, yes; this one you're  
2 referring to is not a peer-reviewed scientific study.
- 3 Q. Which one am I referring to?
- 4 A. The one that you just mentioned as being a report of the  
5 state of California.
- 6 Q. Why do you say it's not peer-reviewed?
- 7 A. Well, it's a report; it's not published.
- 8 Q. It's issued by the California -- the California  
9 government subject to a peer review -- do you know the document  
10 or not?
- 11 A. The document was brought to my attention in the  
12 deposition, and I saw that it was a state report, it was not  
13 published, I had not seen it before the deposition, and there  
14 would be no way I would see it because it's not a published  
15 peer-reviewed manuscript.
- 16 Q. Did you ever read it?
- 17 A. I don't believe I was given a copy of it.
- 18 Q. Well, the copy is attached to your deposition.
- 19 A. I did not read it, no, sir.
- 20 Q. Have you analyzed the California data itself, that is,  
21 gone back -- the California data, the data on youth performance  
22 of the California program, that's publicly available data, is it  
23 not?
- 24 A. I would assume so.
- 25 Q. Do you know one way or another?

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- 1 A. I -- no, I would assume it's a public record like most  
2 information from states.
- 3 Q. Have you ever reviewed the data that's been issued by the  
4 California Tobacco Control Program yourself to analyze it?
- 5 A. Some aspects of it I have for some of the publications  
6 I've been involved with, but not recently for the purpose --  
7 certainly not for the purpose of this proceeding.
- 8 Q. Have you heard the conclusion expressed that in point of  
9 fact in the California program they were not able to determine  
10 any impact of tobacco marketing or promotion -- I'm sorry to  
11 keep my back to you, I'm looking around for a piece of paper.  
12 Are you familiar with the conclusion that was reached that the  
13 California program did not find any impact of tobacco marketing  
14 efforts in connection with smoking prevalence among youth in the  
15 1990s? Are you familiar with that conclusion?
- 16 A. I'm familiar with that conclusion that was presented in  
17 the legal proceeding from a manuscript that was not published or  
18 peer-reviewed.
- 19 Q. Did you ever look into the details of how that conclusion  
20 was reached?
- 21 A. I've looked at the paper which was attached to a  
22 deposition.
- 23 Q. So you did take a look at the paper that was attached to  
24 the deposition?
- 25 A. Yes.

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1 Q. And that paper concludes, does it not, that there is no  
2 impact, that they've seen, of anything that the tobacco industry  
3 was doing in connection with youth smoking in California in the  
4 1990s, correct?

5 A. That was the conclusion of that study, but it was  
6 financed by the tobacco industry with data no one else has had  
7 access to.

8 Q. Well, we're talking about different things here. Are you  
9 familiar that the same conclusion was reached by the California  
10 government-issued report?

11 MS. CROCKER: Your Honor, could we be more specific about  
12 what we're talking about? We're obviously speaking past each  
13 other and the record is getting confused.

14 BY MR. BERNICK:

15 Q. That's fair. Let me see if I can make it more focused  
16 without getting too distracted by something that the witness may  
17 not have read. Do you know a Dr. Pierce?

18 A. Yes, sir.

19 Q. And Dr. Pierce has worked extensively with the state  
20 government of California on smoking tobacco control?

21 A. Yes, sir.

22 Q. And he's published in peer-reviewed journals the results  
23 of the experience in California?

24 A. Yes, sir.

25 Q. And he also, is he not, responsible for the 10-year

1 report or do you know or not?

2 A. I do not know.

3 Q. And are you familiar with the fact that the 10-year  
4 report, whatever it is that -- whatever study you saw relating  
5 to tobacco industry funding, the 10-year report itself says that  
6 they don't find any evidence of impact of the tobacco industry  
7 on smoking initiation in California in the 1990s, correct?

8 A. I do not know that as a fact, sir, no.

9 Q. Do you purport to be an expert, Dr. Eriksen, on the  
10 details of each of the specific state-wide campaigns? I can  
11 show you articles, but I really, before I show you more  
12 articles, I want to know do you hold yourself out to be an  
13 expert before this Court in analyses that have been done about  
14 the details and efficacy of each of the state campaigns?

15 A. I'm familiar with the state campaigns from the published  
16 results from them; I'm not familiar with the internal documents  
17 that they may have released in the state on that, but I am  
18 familiar with the published results as reflected by the  
19 publications, as well as in the MMWR and in the Surgeon  
20 General's Reports.

21 Q. Are you familiar with the published results that were  
22 published by Dr. Siegel? Do you remember we saw that paper by  
23 Dr. Siegel earlier where you were a coauthor?

24 A. Yes, sir.

25 Q. Dr. Siegel has published an analysis of each of the state



1 programs, has he not?

2 A. Dr. Siegel's published many articles, I'm not sure which  
3 one you're referring to.

4 Q. Well, what articles has Dr. Siegel published other than  
5 the one I showed you?

6 A. He's published numerous articles, he's a very productive  
7 author. He's published on a variety of topics from secondhand  
8 smoke to counter-advertising to state programs, et cetera,  
9 and --

10 Q. Well, I showed you one article this morning. Can you  
11 identify for the Court any other article of Dr. Siegel's which  
12 he wrote concerning the California state program?

13 A. I believe he's written an article in the American -- the  
14 Annual Review of Public Health that reviewed evidence on the  
15 effectiveness of state tobacco control programs that included  
16 California.

17 Q. What conclusion did he reach with respect to the impact  
18 of the California program on youth initiation?

19 A. I have not reviewed that study for this purpose. I'm not  
20 prepared to comment on his conclusions without having a copy of  
21 the study that I can look at.

22 Q. Well, you came here to Court this morning to talk about  
23 these different programs in support of your recommendation that  
24 there be a counter-media campaign, correct?

25 A. I'm sorry, could you repeat the last part of your

1 question?

2 Q. Yes. You came here to Court today to talk about a

3 recommendation that there be a counter-marketing media campaign

4 focused on youth, correct?

5 A. Yes, yes, sir.

6 Q. And you purport in your direct examination to show the

7 Court the basis of that recommendation, correct?

8 A. Yes, sir, and I did.

9 Q. Yes, okay. So now, we get to the question that there is

10 experience with respect to the state programs, correct?

11 A. Yes.

12 Q. And all I'm asking you is you talked about California,

13 correct, talked about California in your direct examination, do

14 you remember?

15 A. I don't think I did, sir, but I may have. I may have

16 talked about California. The data I presented was on Florida in

17 the demonstrative. The data that I'm relying on in my testimony

18 was from CDC, the Best Practices for Comprehensive Tobacco

19 Control, as well as from the Community of Preventative Services

20 Task Force, which concluded that counter-marketing has the

21 strongest level of evidence of effectiveness.

22 Q. But the CDC, and all the rest of those folks, they're

23 relying on the same publications when they go ahead and make

24 recommendations, are they not?

25 A. Yes, they do a very broad review of the literature and

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1 assess the quality of the evidence and then come to a  
2 conclusion.

3 Q. And I'm now going to the literature itself, and you say  
4 you don't recall whether you referred to California in your  
5 direct examination?

6 A. What I said was I presented the data in the demonstrative  
7 on Florida and I speak specifically to the results in Florida  
8 numerically and I don't recall doing the same for California.

9 Q. Well, you actually mention California at page 9 of your  
10 direct examination, correct?

11 A. Yes, sir.

12 Q. And all I'm asking you is, did you come here today  
13 prepared to address the specific data relating to California,  
14 yes or no?

15 A. No.

16 Q. Did you come here today prepared to address the specific  
17 data relating to Arizona?

18 A. No, I did not come prepared for any of the states. I  
19 used Florida as an illustration for the Court as to the  
20 reduction that occurred.

21 Q. Okay. And in fact, is it true that you cannot represent  
22 to the Court today that youth-focused smoking counter-marketing  
23 media campaigns have actually been validated, scientifically  
24 validated as being effective with respect to youth initiation in  
25 any particular state, correct?

1 A. No, that's not true.

2 Q. Well, the only article that you pointed out to us so far  
3 is -- the only data you pointed out so far is Florida, right?

4 A. That's the data we discussed so far. As I said -- to  
5 simplify this, in my written direct testimony I cited to the  
6 Community Guide of Preventive Services, which was a systematic  
7 review of all the published literature, and they concluded that  
8 counter-marketing has the strongest level of evidence of  
9 effectiveness, both for initiation as well as for cessation, and  
10 that is the report that I'm relying on for my conclusion on that  
11 remedy in this case.

12 Q. But obviously, what I'm getting at is I'm looking for the  
13 specific data experience that they all reviewed and the articles  
14 that are available to all of us, and all that I'm saying is  
15 that -- all I'm asking you, I'm confirming really, that the only  
16 actual state's experience that you've been able to share with us  
17 in this courtroom is the Florida experience, correct?

18 A. No, I'm sorry, I disagree with that attribution. I'm  
19 saying I'm relying on the systematic review that was  
20 peer-reviewed and published that reviewed all of the published  
21 evidence, ranked it and came to a conclusion that  
22 counter-marketing programs work for youth initiation to prevent  
23 youth initiation.

24 Q. You're really saying that the CDC review specifically did  
25 a meta analysis of the state program data and found state

1 programs, in fact, did affect youth initiation?

2 A. No, that's not what I said. I said that the Community  
3 Guide of Preventive Services, the Task Force for Community Guide  
4 of Preventive Services, which is not a federal effort, it's a  
5 nationwide effort sponsored by CDC, but experts from around the  
6 country reviewed all of the peer-reviewed published literature  
7 on the effectiveness of a variety of tobacco control  
8 interventions. I described this in all my depositions, and in  
9 that regard the counter-marketing, they concluded that  
10 counter-marketing has strong evidence that it is effective in  
11 preventing youth initiation as well as smoking cessation.

12 Q. "Strong evidence." Let me get to it. In that CDC  
13 document, is there, in fact, a meta analysis of the actual  
14 empirical data establishing that, in fact, these programs do  
15 affect youth initiation? Can we find that analysis, meta  
16 analysis in data in the CDC guidance?

17 A. They did not do a meta analysis, but they did a  
18 systematic review where they plotted out the differences that  
19 were seen from the different studies; did not -- they did not  
20 pool the results as in a traditional meta analysis, but they  
21 went through a very rigorous analytic effort with explicit rules  
22 of evidence to make a determination as to whether the evidence  
23 was sufficient or not to conclude that counter-marketing made a  
24 difference with young people, and they gave it its highest level  
25 of conclusion that it does.

1 Q. Well, that's again -- you said that repeatedly and I'm  
2 kind of, obviously, focused on what you have not said, and let  
3 me get at it one more time and then I'll move on.

4 Was that CDC review able to identify a single actual  
5 empirical study which demonstrated that any particular state  
6 comprehensive program actually reduced or affected youth  
7 initiation?

8 A. That was not the purpose of this report. The purpose of  
9 the report was to review the published peer-reviewed scientific  
10 evidence, and may have included an evaluation of a state  
11 program. We can take it out and look at it to see. There are  
12 12 studies that they analyzed in that, and we can look to see if  
13 one of them is a state program or not.

14 Q. But as you sit here today, you're not able to point to a  
15 single peer-reviewed paper, peer-reviewed actual empirical study  
16 which demonstrates that any state-wide comprehensive program  
17 actually has affected youth initiation, true or not?

18 A. I don't agree with that, no, I'm sorry.

19 Q. Well, then tell me the story.

20 A. I would go to the MMWR in Florida that was published in  
21 1999 by CDC which the data were presented in the demonstrative  
22 that showed a dramatic statistically significant result,  
23 reduction in youth smoking for middle school students and high  
24 school students after one year in the program in Florida.

25 Q. That's this right here, you have this demonstrative

1 88272?

2 A. Yes, sir.

3 Q. Yeah, but that demonstrative picks up Florida but doesn't  
4 compare Florida to the experience of any other state, correct?

5 A. No, it just reported on reduction in Florida for that  
6 year.

7 Q. So, if we wanted to do a controlled study that looks for  
8 the impact in Florida where the program is versus other states  
9 where the program is not, you've not shown that study to the  
10 Court, correct?

11 A. No, this study does not show that, no.

12 Q. Today you cannot point to a single study that you've  
13 identified where any state anti -- or counter-marketing media  
14 campaign has been shown to reduce or change youth initiation on  
15 a controlled basis, true or not?

16 A. There are no studies that do a controlled study. All of  
17 this -- it's very important to understand, these are real life  
18 programs that are going on. None of the programs do  
19 counter-marketing, as you pointed out, in isolation and there  
20 are no such things as control when you're looking at states.  
21 There's a whole variety of activity that goes on. All of the  
22 work that's been done has clearly demonstrated that the impact  
23 of these -- there's an impact of these programs, that the more  
24 you invest the better results you have. There are econometric  
25 studies. They're not controlled studies. And to characterize

1    them as saying you don't have controlled studies is missing the  
2    point of the type of research.  It's impossible to do the  
3    controlled study that you're asking for.

4    Q.       First of all, Dr. Biglan in his standards of evidence  
5    when it comes to interventions says that not only can controlled  
6    studies be done, they should be done to validate an  
7    intervention, true or not?

8            MS. CROCKER:  Objection.  This is a question about the  
9    document that Dr. Eriksen testified he hadn't looked at before  
10   and we didn't give him time to look at on the stand.  If you want  
11   to point him to a specific page, he could pull that out and he  
12   could address that, but otherwise it's just speculative.

13   BY MR. BERNICK:

14   Q.       I really want to get past this because I think the point  
15   is plain.  Even the Siegel paper that you reviewed before lunch,  
16   that did an analysis of California versus other states as  
17   controls in order to see whether there was a statistically  
18   significant difference between California and those other  
19   states, correct?

20   A.       Are you referring to the article that you gave me to look  
21   at at lunch or --

22   Q.       No, the article that I gave you to look at this morning  
23   where Siegel talks about the effect of the California campaign  
24   on adult prevalence in consumption?

25   A.       Yes, it was on adult prevalence.



1 Q. Okay. And there he does a comparison between California,  
2 which had the controlled -- which had the program and other  
3 states that did not, and he did a statistical comparison between  
4 the two, correct?

5 A. Yes, that's true.

6 Q. Okay. And that is a methodology that also could be  
7 applied in determining whether California, which had this  
8 program, did better than other states when it comes to youth  
9 initiation, correct?

10 A. Yes. The other states -- you have to adjust for whatever  
11 else is going on in the other states. It's not a controlled  
12 state.

13 Q. But you can make adjustments so that you isolate the  
14 factors of interest, correct?

15 A. Possibly.

16 Q. Okay. And all I'm asking you, isn't it a fact that  
17 today, as you sit here, although that methodology has been  
18 available for 15 years now in California, no one has produced a  
19 study showing that the California overall program did a better  
20 job on youth initiation than other states that didn't have those  
21 programs, correct? No such study has been produced to this  
22 Court by you, correct?

23 A. I'm not sure -- there are studies that I'm not sure are  
24 on my reliance list or not, but there are studies, econometric  
25 studies that have looked at state programs, the investment in

1 the state programs, and have -- please -- have associated them  
2 with a reduction in tobacco use and that this evidence is strong  
3 and consistent, that the larger the program, the more  
4 comprehensive it is, the greater the reduction in tobacco use.

5 Q. Okay. Now, you just referred to something different and  
6 I don't want to go down that rabbit hole too soon. You referred  
7 to expenditures, a correlation between expenditures on the one  
8 hand and results on the other, right?

9 A. Yes.

10 Q. I'm not talking about general expenditures, I'm talking  
11 about the fact of there being a particular mass media campaign  
12 as part of a state comprehensive program and comparing that  
13 state versus other states. No such controlled study has been  
14 produced by you in this case, correct?

15 A. Not in those narrow terms, no.

16 Q. Okay. And actually, when we take a look at expenditures,  
17 even the study that was done on expenditures, that is, what is  
18 either the Stillman paper or the Farrelly '03 paper, I think  
19 it's Stillman, isn't it?

20 A. I'm not familiar with the Stillman paper and I'm not  
21 citing to that.

22 Q. Well, the one study that actually looks to see if there's  
23 a tie between expenditures on the one hand and smoking  
24 intervention outcomes on the other does not find that there is a  
25 favorable impact on youth initiation, correct?

- 1 A. I'm not sure what study you're referring to.
- 2 Q. Well, do you know about -- you just told me you didn't
- 3 know about the Stillman paper, right?
- 4 A. I know Stillman, I'm not sure what paper you're referring
- 5 to. I was not referring to that paper, I was referring to the
- 6 Farrelly paper that was Farrelly, Chaloupka, and Pachochosik
- 7 that was published in the Journal of Health Education -- or
- 8 Economics --
- 9 Q. Shouldn't --
- 10 A. -- the relationship between expenditures on tobacco
- 11 control programs and reduction in tobacco use.
- 12 Q. That didn't measure youth initiation, did it?
- 13 A. I didn't say it did. I said it was a relationship
- 14 between expenditures on tobacco control and reduction in tobacco
- 15 use.
- 16 Q. I'm focused on youth initiation. That's all the
- 17 questions I've been asking you about is youth initiation. Let's
- 18 do it one more time. There is no study that you can point to,
- 19 even using expenditures as a proxy, which demonstrates that
- 20 these state programs have, in fact, moved the needle on smoking
- 21 initiation, true or not?
- 22 A. I believe -- I go back to this. This is a study that --
- 23 you asked me this before. This is a study that was published in
- 24 a MMWR that showed a state program reduced initiation, youth
- 25 initiation for smoking, and it did it in a statistically

1 significant manner.

2 Q. But not -- there was no control. There's no other state  
3 to compare it to. This is just what happened in Florida. It  
4 doesn't tell us anything about control, right?

5 A. It doesn't. It's a reduction in the state of Florida.

6 Q. And that's the best you can do for us today?

7 MS. CROCKER: Objection.

8 THE COURT: Sustained.

9 MR. BERNICK: Okay. Well, then I'll go on and ask you  
10 another related question.

11 BY MR. BERNICK:

12 Q. Isn't it true that actually the experience in Florida has  
13 been the subject of commentary elsewhere, that is, whether the  
14 Florida experience really does demonstrate the efficacy of an  
15 antismoking campaign with respect to youth initiation?

16 A. I would assume there's been discussion. I'm not sure  
17 what you're referring to.

18 Q. Well, one of the papers that you reviewed over the lunch  
19 hour specifically comments on whether the Florida experience  
20 really does demonstrate that these antismoking campaigns can  
21 affect youth initiation, correct?

22 A. No, that's not the focus of the paper that you gave me.  
23 The focus of the paper that you gave me, which if you're  
24 referring to the Pechmann paper, was the comparison of different  
25 media approaches to reducing youth tobacco use, it wasn't a

1 global assessment of whether media campaigns work or not.

2 Q. But in point of fact, by way of introducing that topic,  
3 that is in an effort to -- this was an effort to suggest ways of  
4 improving the campaigns, correct?

5 A. It was an effort to understand what type of message  
6 worked best with young people.

7 Q. Right. But in the course of so doing, Dr. Pechmann or  
8 Peckman -- is it Pechmann or Peckman?

9 A. I'm not sure, I'm sorry.

10 Q. Well, we'll both be in error the same way. Can we say  
11 Pechmann? Okay. Dr. Pechmann actually goes through and this is  
12 a 2003 paper, JD 046889, correct?

13 A. No. I'm sorry, okay.

14 Q. Right? It's the bottom left-hand corner of the page.

15 A. I was getting confused on the exhibit number.

16 Q. Okay. That is right over here. So, it's down at the  
17 bottom of the page, there are two exhibit numbers, actually one  
18 is an AZ number and another is JD 046889. And Dr. Pechmann is  
19 not somebody who has any particular ties to the tobacco  
20 industry, is she?

21 A. I don't know one way or the other, sir.

22 Q. But she goes ahead and reviews, do you see, the evidence  
23 regarding the efficacy of different antismoking messages and  
24 says that it's limited and conflicting, right?

25 A. This is -- this is antismoking message themes. You left

1 the word out "themes". The whole purpose of the study was to  
2 evaluate themes not counter-marketing.

3 Q. Let's go on and see what it says. She recites a couple  
4 different reports and says many of these conclusions are based  
5 upon focus group research which can be unreliable. Even -- or  
6 "as can uncontrolled field studies," right?

7 A. Yes, sir, that's what she says, right.

8 Q. She goes on to say, "Florida has reported that it's  
9 'truth' advertisements attacking tobacco firms are effective on  
10 the basis of surveys showing 40 percent and 16 percent declines  
11 in smoking among middle and high school students in the state  
12 respectively," and actually cites Farrelly 2002 and Baur,  
13 correct?

14 A. Yes, sir.

15 Q. And goes on to say, however, in Monitoring the Future,  
16 and then there are cites, "shows nearly comparable declines, 30  
17 and 14 percent, in the southern region of the United States as a  
18 whole where no antismoking advertisements were running." And  
19 then she concludes "apparently most of the decline was due to a  
20 macro trend, rather than to an advertisement-specific effect."  
21 And she says, not simply themes, she says "therefore, it is  
22 unclear whether anti-tobacco industry advertisements work" and  
23 that again is JD 046889. That's her conclusion, correct?

24 A. That's her conclusion.

25 Q. Now, you never recite that conclusion anywhere in your

1 direct testimony, correct?

2 A. The reason I don't -- no, I do not and the reason I don't  
3 the study is not about the effectiveness of counter advertising,  
4 it's about different messages. She's reviewing the literature,  
5 that's her conclusion, it's inconsistent with the Surgeon  
6 General, the Community Guide of Preventative Services and all  
7 other documents I'm familiar with.

8 Q. I see, so Dr. Pechmann is writing in the year 2003, is  
9 she not?

10 A. Yes, sir.

11 Q. Okay. And actually, the data that you reported in this  
12 document here, 1998 and 1999 data in your Exhibit 18272, was not  
13 data that had been reported as of the time that the Surgeon  
14 General 2000 report was being put together, correct?

15 A. No, that's not correct.

16 Q. Isn't it true that the Surgeon General's Report of the  
17 year 2000 says that these state programs are actually a  
18 laboratory, a laboratory, and that the definitive results have  
19 not emerged from these state programs, that's what it said in  
20 2000, correct?

21 A. If it does you can point me to it, but I can tell you  
22 that these data appeared in the Surgeon General's Report of  
23 2000.

24 Q. Okay. I didn't ask -- my second question to you was,  
25 isn't it a fact that the Surgeon General's Report in 2000 says

1     that these state programs are a laboratory and they haven't  
2     provided definitive data, correct?

3             MS. CROCKER:  Objection, asked and answered.  Dr. Eriksen  
4     said he wasn't aware.

5             THE COURT:  Just a minute, the objection's -- well, let me  
6     take a look.

7             Objection's overruled.

8     BY MR. BERNICK:

9     Q.       That's what the Surgeon General's Report said in 2000,  
10    right?

11    A.       You would have to point me to a page so I can read that.

12    Q.       You don't have any recollection of that?

13    A.       I have a very good recollection of the Surgeon General's  
14    Report and it's coverage of comprehensive state tobacco control  
15    programs.  There may be a reference that it was a laboratory,  
16    but I'm not going to agree that he concluded that there's no  
17    evidence that they are effective without seeing a citation to  
18    that effect.

19    Q.       I didn't say that, I said they did not conclude that  
20    there is definitive evidence that these state programs had even  
21    moved the needle on youth initiation, correct?

22    A.       No, you'll have to show me that before I would agree to  
23    that statement.

24    Q.       Can you identify any study of any kind, any study of any  
25    kind that on a controlled basis points out the efficacy of youth



1 focus market media campaigns on youth initiation?

2 MS. CROCKER: Objection. This has been asked and answered  
3 a number of times about controlled studies, youth initiation,  
4 state programs.

5 MR. BERNICK: If it has, if it has I'm sorry.

6 THE COURT: Sustained.

7 MR. BERNICK: And I'll withdraw it.

8 BY MR. BERNICK:

9 Q. When we talk about the youth smoking counter media  
10 campaign, all the questions that I've asked you so far have  
11 pertained to the state programs taken as a whole. I now want to  
12 ask you a separate question. Are you aware of any study that  
13 isolates the counter-marketing media campaign and shows that in  
14 isolation it's affected youth initiation?

15 A. There's only one study that I'm aware of that isolates  
16 that effect and it's a European study and it's cited in the Task  
17 Force for Community Preventative Services. Their conclusion is  
18 that you cannot isolate these program components in real life  
19 programs that are going on because they're all being done  
20 together.

21 Q. Fair enough. So when it comes to the program as a whole,  
22 you've testified as to whether there are any controlled studies,  
23 and I won't repeat what your testimony was because we'll get  
24 into another quarrel and we're not supposed to do that here, but  
25 when it comes to the media campaign itself, the study that you

- 1 referred to says you really can't isolate its effect because  
2 they've been adopted, these media campaigns have been adopted in  
3 the context of a broader program, fair?
- 4 A. Yes, and the conclusion is that they work in that  
5 context.
- 6 Q. They work in that context, but you don't know whether  
7 they would work separate from a tax increase, separate from  
8 school education, separate from cessation, and other features of  
9 the state programs, fair?
- 10 A. You cannot pease out the independent effect of the  
11 counter-marketing campaigns in real life state programs. Given  
12 that limitation, the conclusion is that they are effective and  
13 in fact have the strongest level of effectiveness.
- 14 Q. Doctor, and again, that paper that was done, was that a  
15 controlled study where they looked at the differences between  
16 states that had the programs and states that did not?
- 17 A. It was a systematic review -- if you're referring to the  
18 task force.
- 19 Q. This is the task force?
- 20 A. I don't know what you're referring to when you said "this  
21 study".
- 22 Q. Well, when you just recited the conclusion that you did,  
23 that was not the outcome of a controlled study, that was the  
24 outcome of a literature review, correct?
- 25 A. It would be a disservice to refer to the Task Force for

1 Community Preventative Services to be a literature review. It  
2 was a review of all the published literature by experts  
3 dissecting each study individually, taking the quality studies,  
4 looking at the results and coming to a -- applying rules of  
5 evidence to it, and then based upon that assessment coming up  
6 with a conclusion for the public health community as to whether  
7 these programs could be recommended or not.

8 Q. But see, we're not here to talk about recommendations and  
9 task force. I'm trying to find out the underlying scientific  
10 data, and even in that task force there was no underlying  
11 controlled scientific data that compared the experience of one  
12 state versus another with respect to media campaigns, correct?

13 A. It was not an experiment, it was a synthesis of the  
14 published literature.

15 Q. And not done pursuant to the rules of meta analysis?

16 A. Most people would be would say it would be superior to  
17 the rules of meta analysis.

18 Q. In your first testimony here you heard us refer to the  
19 Cochrane article, correct?

20 A. I'm sorry, I missed the first part.

21 Q. The Cochrane article, do you remember the Cochrane  
22 article?

23 A. In my first study we discussed the Cochrane systematic  
24 review on the impact of advertising on marketing youth  
25 initiation, yes.

1 Q. Isn't it true that according to the protocols that are  
2 followed in the Cochrane review, if you can do a meta analysis,  
3 if it's possible to do one, you should do it first before you do  
4 any other kind of review?

5 A. I'm not aware that that's a recommendation.

6 Q. Let's pursue this second kind of counter-marketing media  
7 campaign on smoking and health-related issues.

8 Now, this is more general. This is not focused solely on  
9 youth, it's a broader goal, correct?

10 A. Yes, sir.

11 Q. Again, are you aware of any study that isolates the  
12 effect of such a campaign from the broader context of one of the  
13 state programs?

14 A. My answer is the same as it was for the youth media. The  
15 literature I rely on looks at it in the context of the  
16 counter-marketing campaign focused on cessation along with other  
17 activities that may be going on in the community or the state,  
18 such as physician activities, et cetera.

19 It's the same -- just to, you know, expedite the process,  
20 it's the same report, they use the same methods, it's the same  
21 task force and they came up with the same conclusion for  
22 counter-marketing programs directed at youth initiation and  
23 counter-marketing programs directed at cessation.

24 Q. So again, the conclusion would be positive for the  
25 program as a whole, but can't isolate the effect of the media

1 campaign, fair?

2 A. Yeah.

3 Q. I want to ask you one more question before we bounce down  
4 to the bottom of the chart and then I hope finish up this  
5 afternoon. We talked so far about public health benefits and  
6 whether there's scientific validation that your recommendations  
7 have, in fact, or will, in fact, produce a public health  
8 benefit. And I want to go all the way back to the beginning  
9 when you were talking about another purpose for your  
10 recommendations here today, which is to prevent and restrain  
11 industry conduct. I just have a couple follow-up questions.  
12 You told us in some cases it was, I think your words  
13 "self-evident", self-evident that your recommendations would  
14 have the effect of preventing and restraining industry conduct.  
15 Do you recall that?

16 A. Yes, sir.

17 Q. And I think that you indicated, in part, as we proceeded  
18 here, for example, to the extent that we are ordered to make a  
19 corrective communication or we are ordered to disclose data,  
20 those orders themselves tell us to do or not do something and  
21 therefore prevent us or restrain us in that respect, correct?

22 A. Yes, sir, it's a point of agreement that we have.

23 Q. Well, we've got to take those and mark them down.  
24 Especially when we come back and agree an hour later we've got  
25 to mark them down. But I want to take the youth focused

1 counter-marketing media campaigns and the more general  
2 counter-marketing campaign, and ask you this question: The  
3 audience for those campaigns is -- are consumers, correct?

4 A. Yes, sir.

5 Q. Those are campaigns that if they're done, they don't  
6 require that the tobacco industry do anything or not do anything  
7 other than if the Court says that it's appropriate pay money,  
8 correct?

9 A. Yes, that would be my assumption that they would be  
10 obligated to fund the campaigns.

11 Q. Okay. Is there any scientific data that you're aware of  
12 that if these campaigns are put into place, these  
13 counter-marketing media campaigns, that the fact of the  
14 campaigns will prevent the defendants in this case from engaging  
15 in unlawful conduct? Is there any science on that that you're  
16 aware of?

17 A. I believe the only science would pertain to  
18 counter-marketing campaign increasing public education about the  
19 hazards of smoking and that that would translate into pressure  
20 that could be placed on the tobacco companies for changing their  
21 practices and behavior.

22 Q. And that connection that you have just now traced for us,  
23 that's not a connection that's been the subject of any  
24 scientific demonstration, is it, that is that increased  
25 awareness will lead to pressure on the tobacco industry to

- 1 change its ways in some fashion?
- 2 A. No, not empirical, I think just more common sense.
- 3 Q. Let's go on to the bottom of the page and talk a little
- 4 bit about these restrictions on the marketing of cigarettes, and
- 5 I see that there are three. One is deals with "imagery" the
- 6 imagery that's used in ads. The second is "visibility of
- 7 imagery and logos at retail", and the third is "restriction of
- 8 promotional devices that lower the price of cigarettes,"
- 9 correct?
- 10 A. Yes, sir.
- 11 Q. Now, let's begin with the first one. I don't see
- 12 anywhere in your testimony where you actually single out a
- 13 particular kind of image and say, this image is misleading and
- 14 it shouldn't be allowed. You don't do that in your testimony,
- 15 do you?
- 16 A. I didn't see that as the scope of my testimony in that
- 17 there are other witnesses that have appeared before the Court
- 18 who have testified on specific brands and specific campaigns.
- 19 Q. Okay. But the answer to my question is, you have not
- 20 identified that kind of image in connection with your testimony
- 21 here today, fair?
- 22 A. Yes, that's fair.
- 23 Q. Okay. Now, instead what your position is, as I
- 24 understand it, is that you would advocate or suggest to the
- 25 Court a blanket prohibition on any imagery in advertising, is

- 1   that also fair?
- 2   A.     That is not what is contained in my written direct
- 3   testimony and there was a change from my expert report and to my
- 4   written direct testimony in that regard.
- 5   Q.     Oh, well, then maybe I don't understand something.  Do
- 6   you allow any imagery advertising?
- 7   A.     In my written direct testimony, yes, I do.
- 8   Q.     And where would that be?
- 9   A.     What I'm proposing to the Court is that image advertising
- 10  that is youth focused or misleading be prohibited.
- 11  Q.     Okay.  So, imagery as a whole is not prohibited, but only
- 12  that particular imagery which is youth appealing or misleading?
- 13  A.     Yes.
- 14  Q.     And is there anywhere, again, that's why I asked you, I
- 15  thought the question is on image, is there anywhere in your
- 16  direct testimony that you tell the Court, what is the test of
- 17  imagery that you would suggest be prohibited?  What's the test?
- 18  A.     I did not propose a test.  I was just describing -- I
- 19  think it's important to make sure that we're on the same page,
- 20  is that in my expert report I did suggest a remedy of
- 21  prohibiting all image advertising and limiting advertising to
- 22  the conveyance of factual information.  In my written final
- 23  report I restricted it to youth focused or misleading image
- 24  advertising.
- 25  Q.     But you don't provide the Court or the companies with a



1 definition of what would be prohibited under your  
2 recommendation, correct?

3 A. That's correct.

4 Q. Who is going to make that decision?

5 A. I don't know. My purpose in putting forth remedies is to  
6 provide a framework for the Court's consideration as to the type  
7 of steps that could be taken, but not to specify in detail how  
8 it could be done.

9 Q. Whose idea was that, that is not to specify a particular  
10 kind of or type of image that would be prohibited? Is that your  
11 decision or the government's decision? Whose decision?

12 A. It was at least my decision. I'm not sure if it was a  
13 shared decision or not. I assume it was, if they supported my  
14 written direct testimony, but I was not approaching this to lay  
15 out specific admissions or details for the remedy.

16 Q. Okay. Now, when it comes to this youth appealing or  
17 misleading imagery, you say, no, you can't do that, and it  
18 should be factual black and white communication, and I want to  
19 pursue this question with you: Isn't it true, in your expert  
20 report and in your prior testimony, you advocated taking imagery  
21 out of magazines or media that would be read by children?

22 A. In all due respect, that's not my recollection. My  
23 recollection was that in my expert report I was proposing that  
24 there would be an entire -- a complete prohibition of any type  
25 of image advertising irrespective of the venue and that

1 advertising would be restricted to the conveyance of factual  
2 information.

3 Q. Fair enough. I'm going back, I think -- I stand  
4 corrected. I'm going back to the deposition that you originally  
5 gave in this case on the remedy. Isn't it true, in connection  
6 with that deposition you said, well, there are really kind of  
7 two situations. You have what I'll call, you know, adult media,  
8 which would be defined by a percentage of youth readership, and  
9 then you had what we'll call kids' media, that is, the media  
10 that fell on the other side of that dividing line. And with  
11 respect to the kids' media, you said, had to be black and white,  
12 but the adult media wouldn't operate under that restriction.  
13 Wasn't that the original concept you shared with us during your  
14 deposition?

15 A. Not that I can recall. I'm sure you can point me to  
16 that.

17 Q. I'll just do that in order to try to save some time here.  
18 Page 64 of your deposition on August 22nd, of '02. Do you want  
19 to page to that and I'll ask you a couple questions?

20 A. I have August 23rd, but not 22. Is there a page?

21 Q. Page 64. Do you see at line 19, we're talking about --  
22 "we" because I wasn't there, you were. You're talking about  
23 what you characterized as the quote excruciating burden of how  
24 to limit exposure to cigarette ads, and the question that's put  
25 to you, "so to comply with this excruciating burden it would be

1 acceptable, in your view, to limit magazine advertising to those  
2 who have as much as" -- excuse me -- "as much as 90 percent  
3 adult readership". And you say, "I'm not -- I'm not saying  
4 that. I'm putting forth the exact percent. I'm just saying  
5 that magazine advertising should either be limited to those  
6 magazines that children do not read, and that one would need to  
7 agree upon a percent of how you operationalize that or magazine  
8 advertising or advertising in general could be imagery free to  
9 convey factual information on the product."

10 Do you recall that testimony?

11 A. Yes, sir.

12 Q. And under that scheme, a percentage line would be  
13 decided, you don't specify what it would be. Magazines that  
14 fell on the right side of that percentage line could be -- have  
15 images, magazines that fell on the wrong side of that percentage  
16 line would have to be black and white, fair?

17 A. Yes. This was all in response to a query about magazine  
18 readership, adult versus kid, but that was not the remedy that I  
19 was proposing in my expert report or subsequent to that.

20 Q. That's exactly my point. In deposition in response to a  
21 question, you laid out this kind of framework, not with a lot of  
22 detail, but you have laid out the framework, correct, and in  
23 your expert report you went with a complete ban on images, true?

24 MS. CROCKER: Objection, there's been two questions in  
25 there, was there --

1 THE COURT: I can't hear you.

2 MS. CROCKER: Sorry, Your Honor. There were two questions  
3 and Dr. Eriksen didn't get an opportunity to answer the first  
4 one, he moved straight to the second question.

5 BY MR. BERNICK:

6 Q. I'll put it again. In your deposition you laid out the  
7 framework that we've now described, right?

8 A. In response to questions specifically about advertising  
9 and magazines.

10 Q. Right. And then in your expert report, you have a  
11 different solution which is simply no images, right?

12 A. Yes, sir.

13 Q. And now in your testimony here you have a third solution,  
14 which is some images are allowed but only certain kinds of  
15 images, right?

16 A. Yes, it was limiting -- prohibiting images that were  
17 youth appealing or misleading.

18 Q. Now, when you have that third approach, what about where  
19 you're dealing with an adult readership, what about where you  
20 have direct communications between cigarette companies and  
21 adults? Would the prohibition against images that you've  
22 suggested apply under that set of circumstances?

23 A. No, my testimony, I think, speaks clearly to that, if  
24 it's not youth appealing or misleading it would be allowed.

25 Q. Well, I didn't ask you that. I said let's assume that

1 the companies communicate directly with the consumer and the  
2 consumer is legal -- is of legal age to buy cigarettes, that is  
3 18 and over, sometimes I guess it's 21. But let's assume that  
4 that's direct communication with people who are 18 or above. Is  
5 it your view that even when the communication is direct in that  
6 fashion, that it can't have any images or would you say that  
7 where the communication is direct and to adults, images could be  
8 used regardless of whether they are youth appealing or  
9 misleading?

10 A. Well, no, I would say that my testimony says that even  
11 though it's directed to adults, if it's youth appealing or  
12 misleading that would be inappropriate and that should not be  
13 allowed.

14 Q. What if they're youth appealing; is that correct? Is it  
15 okay to communicate to adults using youth appealing ads?

16 A. The -- this is a bit tortured in trying to figure out.

17 Q. I couldn't agree with you more, but you're the expert  
18 here, so I need to ask you the questions and the questions  
19 are -- let me just ask you this straight out. Have you really  
20 thought through to the point that you have a recommendation? Do  
21 you have a recommendation on whether the restriction that you've  
22 articulated on imagery would apply in all channels of  
23 communication or only certain channels of communication? Do you  
24 have -- have you worked that out so far?

25 A. My recommendation would be that it would apply to all

1 channels of communication and that would not allow imagery that  
2 was youth appealing or misleading.

3 Q. So, no matter whether it's adult, strictly adult  
4 communication, no images, if they are either youth appealing or  
5 misleading; is that right?

6 A. That's what my recommendation would be, yes.

7 Q. Now, let me ask you this: Is it true that in -- you're  
8 familiar with how the states Attorneys General have handled the  
9 issue of youth appealing imagery, are you not?

10 A. Not specifically, no.

11 Q. But isn't it true, actually you've looked at or you've  
12 been familiar with what the Attorneys General have done, and as  
13 far as you're concerned, when it comes to this area, they're on  
14 top of the situation, have it well in hand, and have been  
15 proceeding with appropriate investigations when it comes to  
16 imagery in ads?

17 MS. CROCKER: Objection. Dr. Eriksen just testified the  
18 opposite that he was unfamiliar with the Attorneys General --

19 THE COURT: The objection's overruled. The Doctor will  
20 answer the question.

21 THE WITNESS: Okay. Could you please repeat it, please?

22 BY MR. BERNICK:

23 Q. Isn't it true that you are familiar with what the  
24 Attorney Generals have done in the area of investigating ads  
25 that may appeal to kids?

1 A. I have a general familiarity that the Attorney Generals  
2 have launched a number of investigations regarding different  
3 aspects of compliance with the Master Settlement Agreement,  
4 including advertising that is youth focused.

5 Q. And isn't it true that your own assessment from your  
6 interactions is that the National Association of Attorneys  
7 General is on top of the situation, has it well in hand and were  
8 proceeding with the appropriate investigations that they deemed  
9 necessary, wasn't that your own assessment, Dr. Eriksen?

10 A. It may have been. I don't recall specifically when I may  
11 have said that, but --

12 Q. Take a look at your deposition in this case, I'll ask if  
13 it refreshes you at page 500 of August 23rd of 2002.

14 Do you see the question at the bottom of page 499 at line  
15 22 "what concerns about violations of the MSA did you bring to  
16 the attention of the National Association of Attorney Generals?"

17 Answer: "At this point I can't recall specifics. I know  
18 that there were some issues around the size of billboards that  
19 were still being used, and whether they were in keeping with the  
20 MSA, some sports promotional activities that we felt wasn't  
21 necessarily in keeping with the MSA."

22 You then went on to say in 2002. "My sense from those  
23 interactions was that the National Association of Attorney  
24 Generals was on top of the situation and had it well in hand and  
25 were proceeding with the appropriate investigations that they

1 deemed necessary."

2 Was that your testimony under oath in this case in the  
3 year 2002?

4 A. Yes.

5 Q. And what the National Association of Attorney Generals  
6 has done is they've recognized a distinction between adult  
7 oriented media and non adult oriented media, correct?

8 A. I'll take your word for it, I'm not familiar with how  
9 they differentiated it.

10 Q. Do you know about the so-called 15 percent rule?

11 A. I've heard it discussed, yes.

12 Q. The 15 percent rule says that where the readership of a  
13 given magazine has 15 percent youth readers or more, I guess  
14 it's more than 15 percent youth readers, it's considered a  
15 magazine that has adult readership and should be treated  
16 differently from a magazine that has 15 percent or less  
17 readership, correct?

18 A. I think you confused me there completely. I thought you  
19 would have said the opposite to that.

20 Q. I could have well meant to have said the opposite. That  
21 is to say, where the readership of a given magazine is  
22 15 percent kids or less, that is considered an adult magazine  
23 and the restrictions on whatever goes into the advertising is  
24 less severe than if the magazine were the other way around, that  
25 is, if it's readership was greater than 15 percent, correct?



1 A. I understand the question now, at least. I don't have --  
2 THE COURT: I still don't think it's right, Mr. Bernick.  
3 Why don't you take a look at the feed?  
4 BY MR. BERNICK:  
5 Q. It's embarrassing I suppose. I'll probably do it a third  
6 time, the third time around. 15 percent kids or less would be  
7 an adult oriented magazine, 15 percent or less. Over 15 percent  
8 would be, of kids readership, would be a magazine that's more  
9 sensitive with respect to kids?  
10 THE COURT: I guess that's it.  
11 MR. BERNICK: Is that better?  
12 THE COURT: It sound better to me.  
13 BY MR. BERNICK:  
14 Q. That's a distinction that the National Association of  
15 Attorney Generals have used in the context of reviewing the  
16 industry's activities for whether they target kids or not,  
17 correct?  
18 A. I don't know that's a fact, but I take it that's a true  
19 attribution of what they're doing.  
20 Q. Before you came into this Court to make a recommendation  
21 of what should be done in this area of youth-appealing or  
22 misleading imagery, did you actually study the history of how  
23 this same issue has been handled by the states?  
24 A. I'm generally familiar with it starting with the FDA  
25 proposed regulations and the Master Settlement Agreement. I'm

1 just saying that I'm not following precisely how NAAG is  
2 defining the differentiation between magazines. My remedy was  
3 not specifically limited, in fact, towards magazines, but  
4 towards imagery in general, particularly at point-of-sale, but  
5 not limited to that. So I didn't focus on the magazine rule  
6 that NAAG may have as a result of the MSA.

7 Q. Well, at least as applies to magazines, your prohibition  
8 would be broader than the one that NAAG is working with,  
9 correct?

10 A. As you ask the question previously as to whether it was  
11 youth focused or misleading, my recommendation would be that  
12 that not be allowed period, yes.

13 Q. And to the extent -- is it also true that to the extent  
14 that the prohibition that you've adopted -- let me ask you this.  
15 You said that you made reference to the proposed FDA regulations  
16 did you study the FDA regulations to see what they did in this  
17 area?

18 A. I was involved at the time in developing them but I  
19 haven't really gone back to study their final rule in relation  
20 to magazines for this purpose of this testimony.

21 MS. CROCKER: Excuse me, Your Honor.

22 BY MR. BERNICK:

23 Q. Do you know one way or another whether in fact --

24 MS. CROCKER: I wasn't going to object, I was just going  
25 to intervene and say Your Honor, we've gone almost an hour and a

1 half and I was just concerned for Dr. Eriksen if he felt tired or  
2 if he was in pain or if he needed to take a break. I wanted to  
3 inquire of that. I don't know if you want to take your afternoon  
4 break at this time.

5 THE COURT: I wasn't really focusing on the break, but how  
6 do you feel Dr. Eriksen?

7 THE WITNESS: I'm not sure which pain you're referring to,  
8 but if we can finish quickly, I would prefer if we can wrap it  
9 up, I would prefer to do that.

10 THE COURT: Let's go to 3:30, because I didn't take the  
11 bench until almost 2, everybody. At that point I think we'll  
12 have to take a break for our court reporter. Mr. Brody?

13 MR. BRODY: I would just like to get a sense, Your Honor.  
14 Dr. Fiore is in town. He is at our offices, I don't think we're  
15 going to get to him today, but if there is a chance that we would  
16 I would have to let him know pretty soon whether he should come  
17 down here or not.

18 THE COURT: I don't think that's realistic. How long, at  
19 a minimum, will the government's redirect be?

20 MS. CROCKER: 15, 20 minutes, Your Honor.

21 MR. BERNICK: I can try to get done so we can start  
22 Dr. Fiore, I'm anxious to get done as well. Right now my  
23 estimate would probably be a half an hour, but I don't want  
24 Dr. Fiore to have to rest on whether that works out or not.

25 THE COURT: No, you can tell him he needn't appear today.

1           MR. FREDERICK: Your Honor, just briefly, I may have 5 or  
2   10 minutes, I want to make sure that's clear for Dr. Eriksen.

3           THE COURT: Wait, are you going to have questions for  
4   Dr. Eriksen?

5           MR. FREDERICK: Yes, 5 to 10 minutes, Your Honor.

6           THE COURT: I didn't know that, I don't think.

7           MR. FREDERICK: And that's based on what he said here  
8   today.

9           THE COURT: Okay. Go ahead, please, but we will take a  
10   break, Dr. Eriksen but not now, let's try to go further.

11          BY MR. BERNICK:

12         Q.     Isn't it true that the FDA itself proposed the so-called  
13   15 percent rule originally in its proposed regulations?

14         A.     Yes, that's my recollection, sir.

15         Q.     So the FDA proposes it, NAAG adopts that proposal, and is  
16   it also true that, in fact, the tobacco companies themselves now  
17   follow the 15 percent rule?

18         A.     I believe that's the case, yes.

19         Q.     So we go from having an objective test of what is an  
20   adult communication to then having a content based test that is  
21   your test. Your test is a content based test, correct?

22         A.     It's based on the nature of the imagery, yes.

23         Q.     Okay. And would it be fair to say that your content  
24   based test, at least at this point in time, is undefined? That  
25   is, you don't have an objective test for what is proper content

- 1 and what's not proper content?
- 2 A. I don't think it's undefined. I'm not proposing a  
3 specific definition to the Court. But I am recommending that it  
4 be limited with respect to marketing that is youth focused or  
5 misleading. Just to say, I thought it would be very  
6 inappropriate for me to comment on these months of testimony  
7 that have already been presented before the Court about the  
8 nature of advertisements, concerns about it, defense regarding  
9 it, and that would be too lengthy.
- 10 Q. Let's talk about impact. Isn't it a fact that there is  
11 no scientific empirical study which shows us that there is a  
12 positive impact from restricting ad content?
- 13 A. There is an experimental work that has been done looking  
14 at image-free versus text advertisements with respect to  
15 cigarette advertisements. And there is econometric evidence  
16 about complete bans on advertising, but specifically on limiting  
17 image advertising in the real world, that research, experiment,  
18 has not been done and cannot be done.
- 19 Q. Okay. So, first of all, when it comes to experimental  
20 data that limits the content of ads, such experiments have not  
21 been done, true?
- 22 A. No, I said that there is some research in that area. It  
23 has been done.
- 24 Q. Has it been published?
- 25 A. Yes.

- 1 Q. What's it called?
- 2 A. What's what called?
- 3 Q. What's the name of the paper, who wrote it?
- 4 A. I'm not relying on it now, I can tell you the name of it,  
5 it's not something in my material, but you asked me the question  
6 whether there is any empirical evidence that restricting imagery  
7 on ads has made any difference and I said yes there is  
8 experimental evidence in that regard.
- 9 Q. Is this the paper that originally was identified and was  
10 then subsequently withdrawn to be a part of your reliance  
11 material?
- 12 A. No.
- 13 Q. It's not the Farrelly paper?
- 14 A. No.
- 15 Q. So there's a paper that's not in your reliance materials  
16 which demonstrates experimentally that if you limit ad content,  
17 it has a favorable effect on youth initiation?
- 18 A. That was not the outcome. It was an experimental  
19 setting. It was similar to the types of studies we previously  
20 talked about looking at attitudes towards the ads.
- 21 Q. Observations towards the ads, I'm not talking --
- 22 MS. CROCKER: Objection, Dr. Eriksen was in the middle of  
23 answering.
- 24 THE COURT: All right. Let him finish.
- 25 THE WITNESS: As all the experimental studies that we

1 reviewed here, when it's experimental it does not look at smoking  
2 behavior as an outcome but simply more proximal outcome of  
3 attitudes or favorableness towards smoking or towards the ad.

4 BY MR. BERNICK:

5 Q. I want to focus on the studies that have as an end point  
6 smoking behavior. Are you aware of any scientific study that is  
7 smoking behavior as an end point and demonstrates that limiting  
8 ad content affects smoking behavior?

9 A. No, I am not because I don't think it can be done because  
10 we can't restrict content in this country.

11 Q. Okay.

12 A. There is the -- as I said the econometric on the ban, but  
13 we'll get there.

14 Q. Let's talk about the econometrics. Now, with the  
15 econometrics, that is talking about smoking behavior, is it not?

16 A. Yes.

17 Q. So the econometric studies look at smoking behavior in  
18 the sense of consumption and they see what is it that affects  
19 consumption, right?

20 A. Yes, sir.

21 Q. And isn't it true -- you believe in your direct testimony  
22 reflects this -- where there's been an outright ban on  
23 advertising all together, there is some small effect on  
24 consumption, fair?

25 A. Yes, sir.

1 Q. But where we have what you've proposed, you have not  
2 proposed a ban on advertising, you've proposed a restriction on  
3 advertising, correct?

4 A. Yes, sir.

5 Q. And isn't it true that what that same -- those same  
6 studies show is that where you only restrict advertising, it  
7 does not affect consumption, true or not?

8 A. Yes, I basically would agree with you.

9 Q. Now, Mr. -- Dr. Gruber also spoke to this issue. Are you  
10 familiar with what Dr. Gruber said in his testimony on this  
11 issue?

12 A. I don't believe I am.

13 Q. Are you familiar with Dr. Gruber's paper, JD 013291, the  
14 Economic Impacts of the Tobacco Settlement?

15 A. No, I'm not familiar with it.

16 Q. Did you read Dr. Gruber's testimony in this case?

17 A. Not in its entirety. I skimmed certain sections of it,  
18 but I have not read it completely, no.

19 Q. Okay. That's fair. Let's get to this part. In this  
20 article he says as follows, and then I think -- well, we might  
21 finish up a little faster. Partly, as a result of this -- and  
22 this is at page 6, "the literature does not exhibit a very  
23 strong consensus on the role of cigarette advertising in  
24 affecting smoking. Chaloupka and Warner 2000 conclude that  
25 aggregate cigarette advertising has a small effect on total



1 cigarette sales, and that previous advertising bans, such as the  
2 ban on television advertising, did not appreciably affect  
3 cigarette smoking. In their view of the advertising literature,  
4 Andrews and Frank, who found a much more favorable disposition  
5 toward advertising effects, estimated an elasticity of smoking  
6 with respect to advertising dollars of only .06. Hence, a  
7 10 percent reduction in advertising, which is the largest effect  
8 that could be envisioned from this settlement, would lower  
9 smoking by only .6 percent, a very small result." As a result  
10 of this evidence, assessing the impact of the MSA, "No impact of  
11 advertising restrictions on smoking behavior is assumed."

12 Do you see that?

13 A. Yes, sir.

14 Q. And do you recall in the testimony that you did read,  
15 that when it comes to the lookback provision that Dr. Gruber has  
16 talked about in this case, which sets out landmarks for reducing  
17 smoke initiation, that Dr. Gruber testified that he's assuming  
18 that any limitations on advertising that the companies might  
19 adopt will not have any effect whatsoever on consumption. Are  
20 you familiar with his testimony in that regard?

21 A. No, I'm not.

22 Q. Are you familiar with what Dr. Mulholland said about the  
23 effect of restricting advertising?

24 A. In what regard? I mean, Dr. Mulholland and -- I'm  
25 familiar with Dr. Mulholland's work and his reports, but I'm not

1 familiar with his testimony.

2 Q. Let's get at it this way. You've told us you're not  
3 aware of scientific studies which demonstrate that limitations  
4 on content will affect consumption. Have you considered whether  
5 limitations on content might have an anticompetitive effect in  
6 the industry?

7 A. Only in so far if you mean by anticompetitive that it  
8 would only affect defendants and not other cigarette  
9 manufacturers. I'm aware of that argument.

10 Q. Well, in point of fact, what Dr. Mulholland and others  
11 have said is that advertising, the principle effect of  
12 advertising is to allow inter-brand competition. You're  
13 familiar with that idea, are you not?

14 A. I'm familiar with that argument.

15 Q. Okay. And obviously, if you were to impose this  
16 restriction on the use of imagery by these defendants but not by  
17 others, if Dr. Mulholland is right and imagery is a basis for  
18 inter-brand competition, wouldn't it simply logically follow  
19 that your restriction imposed on these defendants might affect  
20 the ability of these defendants to compete with folks who are  
21 not subject to these restrictions, wouldn't that be a logical  
22 common sense consequence?

23 A. It's a hypothesis, I don't know of any empirical evidence  
24 that suggests that would be the case.

25 Q. That's not a hypothesis that you've tested, correct?

1 A. I'm not sure it's been tested by anyone. I certainly  
2 haven't tested it, no.

3 Q. When it comes to this data that you want to make  
4 available, scientific data that's internal scientific data or  
5 marketing data, do you understand that that data may have  
6 commercial value?

7 A. What do you mean by commercial value?

8 Q. Marketing data, marketing data that's developed by a  
9 company that's trying to analyze what works and what doesn't  
10 work. That would be commercially sensitive information,  
11 correct?

12 A. Potentially current data could be potentially sensitive  
13 and historically data could potentially not be sensitive.

14 Q. Okay. But you have not made any distinction when you  
15 said give us your marketing data, you have not said that your  
16 request for disclosure is limited to data that no longer has  
17 commercial value, you've made a broad request for disclosure,  
18 correct?

19 A. Well, as I said before, I tried to provide a framework.  
20 I'm sure the Court will not -- will take into consideration any  
21 commercial concerns that might be associated with any of the  
22 remedies if it reaches that point of considering remedies.

23 Q. Let's see if we can close this off. You agree that there  
24 are potential commercial concerns with your recommendation to  
25 disclose internal marketing and research data, fair? There are

1 those concerns?

2 A. There are potential concerns around marketing data  
3 depending upon how the data would be released.

4 Q. Okay.

5 A. They do not necessarily, all of the data wouldn't  
6 necessarily have to have brand identifiers or there may be ways  
7 of releasing the data that would not provide any competitive  
8 harm to a company.

9 Q. But that's an issue that is -- what data has competitive  
10 value and how to protect that value, that is not an issue where  
11 you are providing any specific guidance to the Court, fair?

12 A. Yes, that's fair.

13 MR. BERNICK: This would be a fine time to break, and I'll  
14 see if I can finish up very promptly.

15 THE COURT: I'm certainly willing, more than willing to  
16 sit as late as we need to in order to finish Dr. Eriksen's  
17 testimony. Then we have to make use of Mr. Brody's time since he  
18 spent the afternoon here. Other than that, I'm not sure if there  
19 are any other issues we have to deal with this afternoon. But  
20 we'll certainly finish Dr. Eriksen's testimony. I have a couple  
21 of questions to ask. 10 minutes, everybody, please.

22 (Thereupon, a break was had from 3:26 p.m. until 3:37  
23 p.m.)

24 MR. BERNICK: We're on the home stretch, although judging  
25 from the Kentucky Derby the other week, a lot of things happen on

1 the home stretch. It's an amazing race.

2 BY MR. BERNICK:

3 Q. Dr. Eriksen, I want to talk about point-of-sale and then  
4 we'll get down to the promotional devices. One of your  
5 proposals is restriction of visibility of any youth-appealing or  
6 misleading imagery in logos at retail. And I guess in light of  
7 your prior testimony, I now know enough to ask the question  
8 again.

9 I'm assuming that when you're referring here to this  
10 restriction, again, it is a content-based restriction, number  
11 one; that is, it's got to be the wrong kind of images. And  
12 again, would your testimony with respect to content restriction  
13 in this area -- that is, point-of-sale -- be the same as your  
14 testimony with respect to content restriction with respect to  
15 Roman II A?

16 A. Yes, it would be the same with respect to youth-appealing  
17 and misleading imagery at point-of-sale.

18 Q. Okay. And then you have a second dimension of this  
19 restriction which is "visibility." Does that mean that if the  
20 image or logo is not visible at retail to, let's say, a child,  
21 that it's okay to have youth appealing imagery? Or would you  
22 just prohibit all such imagery at the point-of-sale?

23 A. Given since the -- I can't imagine a point of sale that's  
24 not accessible to young people. I would not want to have any  
25 imagery at point-of-sale.

1 Q. So really, you would say the use of the word "visibility"  
2 is probably not right; that is, that you would say you can't  
3 have at point-of-sale, at retail, imagery that is youth-  
4 appealing or misleading, regardless of whether it's visible or  
5 not?

6 A. I'm sure that's not an existential question as to whether  
7 it's visible or not.

8 Q. I don't think it is. But go ahead. If it is, tell me.

9 A. My suggested remedy is that there would not be  
10 youth-focus or misleading imagery visible at retail.

11 Q. But that just obviously leaves unanswered still my  
12 question. Is there any use of youth-oriented or appealing  
13 imagery that you would permit to take place at the point-of-sale  
14 at retail?

15 A. I think I said there would not be.

16 Q. Okay. Now, again, if we were to talk about scientific  
17 demonstration that this remedy would have an impact on  
18 consumers, is there any scientific study that you're aware of  
19 that demonstrates what the impact would be of eliminating such  
20 imagery at retail?

21 A. There's evidence of the converse, of the presence;  
22 increased presence at retail is associated with increased  
23 consumption and preference for that brand and so I would deduce  
24 that the reverse would be the case as well.

25 Q. Okay. But are you aware of any study that's been done

1 where visibility of images at the point-of-sale has been reduced  
2 and that reduction then has been traced to a consequence, an  
3 effect on consumers? Are you aware of any such study?

4 A. No, because imagery hasn't been reduced in the real  
5 world. The studies that have been done have looked at the  
6 extent of promotional activity in the stores and have associated  
7 that with increased smoking and preference for the brands that  
8 are highly promoted.

9 But there's been no studies that have looked at the  
10 converse of that simply because there is no way currently of  
11 restricting imagery at point-of-sale without the cooperation of  
12 the industry.

13 Q. What study are you indicating shows that increased  
14 visibility of promotions at retail point-of-sale has some  
15 consequence with respect to specific brands?

16 A. Just a study I just recently learned about that was  
17 presented at the national tobacco control conference in Chicago  
18 in the beginning of May.

19 Q. Is it published?

20 A. No, it was just a conference presentation.

21 Q. It's not part of your reliance materials?

22 A. No, it's not, but it's just in response to your question.

23 Q. If we confine ourselves to the record in this case, which  
24 is your -- the materials that you relied upon for purposes of  
25 your appearing here and your direct testimony, do we see any

1 scientific study demonstrating a relationship between  
2 point-of-sale imagery on the one hand and smoking behavior on  
3 the other?

4 A. As I said, no. The only example I used was the one I  
5 gave. That was a presentation from last week.

6 Q. I want to step back now to -- let's take care of the last  
7 one and then I want to come back to the subject that we talked  
8 about with the Court.

9 The last item, the last restriction is Roman II C,  
10 "Restriction of Promotional Devices That Lower the Price of  
11 Cigarettes."

12 I want to be a little bit careful here because you've  
13 been good enough to tell us where your testimony here has  
14 changed somewhat from your expert report.

15 I want to understand, when you say "restriction of  
16 promotional devices that lower the prices of cigarettes," what  
17 promotional devices are you referring to?

18 A. A wide variety of promotional activities that have the  
19 effect of reducing the price of a pack of cigarettes, whether  
20 it's "buy one, get one free" or "buy two, get one free" or  
21 couponing or other types of discounts that would make cigarettes  
22 cheaper at retail.

23 Q. Okay. So, they're all price -- they're all retail  
24 promotions or activities that have a price effect; would that be  
25 correct?



1 A. Yes.

2 Q. Okay. Now, you're familiar, are you not, that the  
3 different companies have over time set a certain price for their  
4 products and then, I think as you've indicated, through  
5 promotions and otherwise, they've provided a price discount?

6 A. Yes.

7 Q. So you have kind of a list price or across-the-board  
8 price and then, depending upon who gets the promotion or who  
9 gets the discount at the retail level and whether it's passed  
10 on, the consumer may or may not see the effect of that full  
11 price or a discount; fair?

12 A. Yes. Just to say there are some that are clearly  
13 directed toward the retailer and there are some that are  
14 directed towards the customer directly. And those would not be  
15 a matter of passing them on; they'd simply be available to the  
16 customer.

17 Q. Now, when you say at number 2 -- Roman II C, "Restriction  
18 of Promotional Devices," by "restriction," do you mean  
19 elimination or do you mean limitation?

20 A. I'm -- I mean restrictions -- limitations on the price  
21 promotions, particularly as they affect young people.

22 Q. But again, I'm looking for a test. I take it from what  
23 you're saying that you would not ban promotional procedures that  
24 had the effect of lowering the price of cigarettes? You  
25 wouldn't ban them; you would simply limit them?

1 A. May I just refer to my written report for a second?

2 Q. Sure.

3 (Brief pause.)

4 THE WITNESS: Okay. I'm fine. Can you repeat the  
5 question? I'm sorry.

6 BY MR. BERNICK:

7 Q. I take it you are not recommending a ban of promotions  
8 that have the effect of lowering prices, but you'd just limit  
9 the circumstances under which they're offered?

10 A. Again, as with all of the remedies, I would not -- I'm  
11 not preparing a specific recommendation for the Court to decide.  
12 I say here on page 29 that they would be either disallowed or  
13 limited. It would depend upon the specific price promotion and  
14 its effect that it was having.

15 The concern for all of this, of course, is that the lower  
16 the price, the more smoking occurs.

17 Q. Well, first of all, let's be clear what you're not able  
18 to recommend. You're not able to recommend to the Court either  
19 a ban or a particular limitation on the circumstances under  
20 which these discount procedures are offered; fair?

21 A. My recommendation would be that the Court consider  
22 disallowing promotional activities that reduce the effective  
23 price of cigarettes, particularly for young people.

24 Q. Well, that's a lot of different things. What I'm trying  
25 to struggle with is: Do you have a recommendation that defines

1 through some test the circumstances under which a promotional  
2 discount should not be allowed?

3 A. I did not provide one in my written testimony. I would  
4 only recommend to the Court that it consider restrictions on  
5 those that are direct to consumer, that have an effect directly  
6 on young people as the ones that I have the greatest concern  
7 with.

8 Q. Well, is there any promotion that is specifically -- that  
9 is specific -- strike that.

10 Is there any price promotion that is specific in being  
11 offered simply to younger people?

12 A. Not that I'm aware of. You know, the industry doesn't do  
13 anything specific to young people. That advertising and  
14 promotion cuts across the full spectrum of children and adults.

15 Q. Okay. So when it comes to the price promotions that the  
16 industry does offer, you can't single out any one or group of  
17 them today as being ones that you would say today you know  
18 that -- or that you would recommend that the Court not allow?

19 A. I would recommend to the Court to consider ones like "buy  
20 one, get one free," "buy two, get one free," dollar off, \$2  
21 off -- those types of direct-to-consumer price promotions as  
22 being the ones that would be of most concern.

23 Q. But those are all offered to adults, correct?

24 A. It depends on -- they're offered to adults as well.  
25 They're out there, period. They're available to be used.

1 Q. Now, if you wanted to lower -- if the industry wanted to  
2 lower the price, another thing that it could do is to simply  
3 lower the overall price, right?

4 A. Yes. Rather than having the promotional activity, it  
5 could just simply lower the cost, the price of a pack of  
6 cigarettes.

7 Q. Let me ask you this. I want to go back to the  
8 direct-to-consumer promotions. If the direct-to-consumer price  
9 promotions are made directly to adult consumers, do you have a  
10 problem with that?

11 A. Well, it would -- my only problem with it would be: How  
12 do you assure that it only is for the adult consumer and is not  
13 simply available to the family if it's in the store where the --  
14 if it's a two-for-one at retail, that would be open to --

15 Q. If the Court were to be satisfied that under the  
16 defendants' current practices, these direct-to-consumer  
17 promotions -- price promotions are offered on a basis that is  
18 reasonably calculated to get to adult smokers rather than to  
19 people who are underage, would you have any quarrel with the  
20 idea that those promotions still should be allowed?

21 A. It would, I would assume, depend on the quality of the  
22 evidence and to what extent it could be established that these  
23 price promotions were not being used by those underage.

24 Q. Do you have any quarrel with the Court deciding that  
25 rather than you?

- 1 A. No, I would recommend that the Court decide it and not  
2 me. The Court is the one who's been hearing the evidence for  
3 the last few months.
- 4 Q. Now, obviously, I think we're just about to say the  
5 overall price could be dropped, right?
- 6 A. Yes, sir.
- 7 Q. And if the overall price is dropped, it's your view that  
8 that will have the effect of allowing for greater consumption by  
9 underage smokers, correct?
- 10 A. Yes, I think that's something all the witnesses have  
11 agreed to, the fact that there's an inverse relationship between  
12 price and consumption, that the lower the price, the higher the  
13 consumption, and that young people are particularly price  
14 sensitive.
- 15 Q. You're not proposing, are you, that the Court restrict  
16 the defendants' ability to change overall price levels, are you?
- 17 A. No, I'm not.
- 18 Q. Okay. And therefore, would you imagine that one of the  
19 effects of limiting defendants' ability to offer selective  
20 discounts is -- one of the effects is going to be to affect the  
21 defendants' ability to compete with one another and with other  
22 manufacturers of cigarettes on a price basis? Have you analyzed  
23 that?
- 24 A. No. It's not a concern that I would have in this respect  
25 of -- I mean, again, I believe you're talking about the

Scott L. Wallace, RDR, CRR  
Official Court Reporter

1 participating -- or the defendants versus what I'll refer to as  
2 non-participating manufacturers from the MSA standpoint. And  
3 usually, they're already at a lower price.

4 Q. Do you actually have, Dr. Eriksen, any empirical data to  
5 demonstrate the impact of limiting these price promotions on  
6 youth consumption? Is there any study of the impact of these  
7 particular promotions -- not overall price levels, but the  
8 discounting in particular?

9 Let me put it this way: You're aware, are you not, that  
10 discounting is not offered across the board in all geographical  
11 locations in all outlets, correct?

12 A. No, I'm not aware of that.

13 Q. Okay. And the question is: Are you aware of any  
14 scientific studies that particularly focus on these types of  
15 discounts and point out their impact on youth consumption?

16 A. I'm aware of industry data that's been presented in this  
17 case looking at price discounts and promotions in relation to  
18 overall consumption; not specific to youth, but overall, it  
19 works.

20 Q. And that's really my question. Are you aware of any  
21 scientific study that's been done that picks up on these  
22 particular kinds of promotions and finds an impact on smoking  
23 behavior?

24 A. Yes.

25 Q. Which studies?

1 A. Just simply data presented in these proceedings, looking  
2 at the relationship between promotional expenditures and brand  
3 purchase of those items -- some of the witnesses from the  
4 defense.

5 Q. But that's not on youth -- on youth consumption. I meant  
6 youth consumption.

7 A. I'm sorry. You didn't -- it wasn't asked --

8 Q. Are you aware of any scientific study that actually  
9 measures the impact of these price promotions on youth  
10 consumption in particular?

11 A. Not youth consumption in particular, but there's no  
12 reason to think it would be any different. In fact, it would be  
13 greater for youth than with adults, based on the evidence.

14 Q. Are you aware of --

15 A. That's what the evidence would suggest from the price  
16 elasticity research.

17 Q. But that's not what any study has actually demonstrated,  
18 correct?

19 A. Yeah. I'm not aware of any study that's actually been  
20 able to manipulate promotional activity because it's not under  
21 the control of the researcher.

22 Q. I want to talk about low tar cigarettes for just a  
23 moment. You would, I believe, as part of your recommendations  
24 here, do away with the descriptors of low tar or mild or light  
25 and the like, correct?

- 1 A. Yes, sir.
- 2 Q. Is it your recommendation that the Court should also  
3 order that the defendants no longer publish the FTC tar  
4 deliveries?
- 5 A. Excuse me. The FTC --
- 6 Q. The FTC measured tar deliveries. Is that also part of  
7 your recommendation or do you have no recommendation in that  
8 regard?
- 9 A. I have an opinion, but it's not part of my formal  
10 recommendation to the Court.
- 11 Q. Well, let me ask you this: If, in fact, the descriptors  
12 are removed, but the FTC ratings remain, won't consumers still  
13 be presented with the impression that some brands of cigarettes  
14 carry with them lower risk and some brands of cigarettes carry  
15 with them higher risks?
- 16 A. It's my -- I think the evidence indicates that there is  
17 confusion from the FTC yield data and the presentation of it  
18 conveys impressions of relative safety that may not be based in  
19 reality.
- 20 Q. But I'm really asking for an incremental point. That is,  
21 if all that you do is take the descriptors out and leave the FTC  
22 tar ratings in, are you aware of any scientific evidence that  
23 simply eliminating the descriptors will have any impact on  
24 consumer perceptions at all?
- 25 A. There's good scientific evidence suggesting that presence



1 of the descriptors confuses smokers and that they have incorrect  
2 perceptions of the safety of these products.

3 Q. You know that's really not my question, don't you?

4 A. I guess my answer is that the converse of it, the  
5 elimination of the descriptors, is not possible in the real  
6 world because they exist. And what we know is that people who  
7 are exposed to those descriptors have misperceptions of the  
8 safety of those products.

9 Q. Let's take it one step at a time. I thought we could  
10 move through it more quickly.

11 But today, both the descriptors and the FTC tar ratings  
12 appear in connection with advertising and marketing of  
13 cigarettes, correct?

14 A. Yes. They're not always associated -- they're not  
15 consistently on packages of cigarettes.

16 Q. But they're both out there, right?

17 A. Yes.

18 Q. And it's your view that consumers are confused about what  
19 the tar ratings mean and what the descriptors mean, correct?

20 A. Yes.

21 Q. Okay. And all that I'm saying is: Are you aware of any  
22 data that you can show to the Court that says it would make a  
23 difference in changing the degree of confusion if the  
24 descriptors were eliminated, but the tar ratings remained?

25 A. I'm not aware of any data that would titrate it in that

1 way. I am aware of data that would -- certainly indicates that  
2 use of the descriptors has resulted in a lot of confusion and  
3 misperceptions on behalf of smokers.

4 Q. Well, in that data too, you can't isolate the effect of  
5 the descriptors versus the tar and nicotine deliveries, can you?

6 A. I don't believe so. Perhaps it is a good suggestion to  
7 eliminate that as well.

8 Q. Don't you think that the FTC would have some interest in  
9 whether it's tar and nicotine rating system should be changed?

10 A. They very much have interest in that and they're  
11 considering it.

12 Q. Now, when you say that these descriptors should be  
13 removed, I take it the purpose of that is to correct a  
14 misperception regarding the safety of tobacco use, correct?

15 A. It's primarily to prevent the continued misperception  
16 that results from people thinking that light cigarettes are  
17 somehow less harmful.

18 Q. Okay. Now, I think you said that in connection with  
19 taking the descriptors off, you'd want some information to go to  
20 consumers on what these descriptors really meant or did not mean  
21 and whether low deliveries are, in fact, lower in risk or not,  
22 correct?

23 A. Yes. I suggested there should be some corrective  
24 communications that are associated with the harm caused by  
25 smoking that would relate to that.

1 Q. Isn't it true, though -- but you don't really tell the  
2 Court exactly what the Court should require be said about  
3 whether lower delivery carries with it lower risk? You don't  
4 actually articulate what the statement should be, fair?

5 A. Fair.

6 Q. Now, the Surgeon General's Report as shown in JDEM 010421  
7 in 2004 says that: "Smoking cigarettes with lower  
8 machine-measured yields of tar and nicotine provides no clear  
9 benefit to health."

10 Does that square with your own recollection?

11 A. Yes, sir.

12 Q. But the IARC publication in 2004 expresses a different  
13 view, does it not?

14 A. I'm not sure what IARC publication this is.

15 Q. The IARC 2004 report on the effects of involuntary smoke.  
16 Are you familiar with that?

17 A. Somewhat, I am, yes. I've been at some of their  
18 meetings, but I haven't seen the final report.

19 Q. The IARC organization is a well known and highly regarded  
20 public health organization, is it not?

21 A. Yes.

22 Q. And as I've quoted the statement here, would you agree  
23 with me that what I've quoted expresses a different view from  
24 that in the Surgeon General's Report?

25 A. At the margins. I mean, I'm not being snide. I just say

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1 "have probably tended to reduce" and "no clear benefit" aren't  
2 that far apart.

3 Q. Let's take you to Dr. Samet's trial testimony in this  
4 case when asked by the Court about the same issue: "The  
5 direction is lower risk for today's cigarettes compared to those  
6 of the 50s."

7 Is that consistent or inconsistent with the Surgeon  
8 General's Report?

9 A. I would imagine Dr. Samet was talking about primarily  
10 filtered versus unfiltered, which is not the same issue of light  
11 designations among filtered cigarettes, which I'm thinking the  
12 Surgeon General is referring to.

13 Q. I see. Would it be okay to tell consumers today that  
14 filtered cigarettes have less risk than unfiltered cigarettes?

15 A. I would want to base that on a thorough assessment of the  
16 literature. I would tend to think that's an accurate statement.

17 Q. Do you have any feeling about which is the preferable  
18 statement, the Surgeon General's Report of '04 or the IARC  
19 report of '04? Which is more accurate?

20 A. Not particularly.

21 Q. All right. Let me ask two dollar questions. One is an  
22 issue of funding of your organization. Does your organization  
23 receive funds directly or indirectly from the American Legacy  
24 Foundation?

25 A. By "my organization," if you're referring to Georgia

1 State University, we have a grant that is awarded from the  
2 American Legacy Foundation to a Georgia healthcare foundation  
3 which, in turn, funds us, so it's not directly to us, but goes  
4 through an intermediary organization.

5 Q. But when you say "it funds us," it's funding the  
6 particular activities that you're involved in, correct?

7 A. Yes, it's funding part of my research portfolio.

8 Q. And over a two-year period, would it be fair to say that  
9 upwards of \$320,000 has come to fund your activities directly or  
10 indirectly from the American Legacy Foundation?

11 A. No, that's not correct.

12 Q. Was it 160 indirectly from then and then another 160  
13 through somebody else?

14 A. Very much so. It's \$80,000 from the American Legacy  
15 Foundation a year; it's a two-year award for a total of  
16 \$160,000. It's then matched by this other foundation.

17 Q. And where does the other foundation get the funds used to  
18 match?

19 A. Their funding is from -- they're a Blue Cross Blue  
20 Shield conversion foundation.

21 Q. They don't get any contribution from the American Legacy  
22 Foundation?

23 A. No.

24 Q. Do you know why it is that the American Legacy  
25 Foundation, which was supposed to fund antismoking media

1 campaigns, is funding your organization in particular?

2 A. Well, they're not funding my organization in particular.  
3 They don't fund me directly. They have awarded a grant to the  
4 Georgia Healthcare Foundation and the American Legacy Foundation  
5 has a broad portfolio of research projects that it supports.

6 This particular grant was a solicitation to get  
7 foundations involved with tobacco control at the local level.  
8 The foundation I work with submitted a grant; they were funded;  
9 the money came to the foundation and then they're using that to  
10 support my research.

11 Q. Fair enough. Have you ever met with Dr. Heaton about  
12 your work in connection with obtaining that grant or any other  
13 moneys?

14 A. No.

15 Q. Last question about money. It's true, is it not, that  
16 the very same media campaigns -- state-based media campaigns  
17 that you have talked about so extensively from a public health  
18 point of view have cut their funding for their media activities,  
19 correct?

20 A. Yes. There's been a decline in funding for state-based  
21 tobacco control programs and the media programs have suffered  
22 from that.

23 Q. And in fact, you showed the chart on Florida. Florida  
24 in, basically, 2003 went from multi-million dollars a year in  
25 funding down to \$1 million -- one million dollars a year,

1 correct?

2 A. I know there's been a reduction, I don't know the exact  
3 magnitude of it, but that may not be inaccurate.

4 Q. And would it also be fair to say that in any given year,  
5 the states as a group get roughly \$15 billion worth of tobacco  
6 money; that's between the excise taxes and the Master Settlement  
7 Agreement, about \$15 billion a year comes into the states from  
8 tobacco, correct?

9 A. I've seen that number quoted, but I think it's a little  
10 disingenuous to characterize it that way. The tobacco excise  
11 tax money goes into the general revenue of the state and then  
12 there's the Master Settlement Agreement payment, which is  
13 separate and distinct. And that also is up to the legislature,  
14 how it spends it.

15 Q. I don't mean to characterize it. It's just the facts.  
16 The facts are that every year the states as a whole get about 7  
17 billion from MSA and get about 7 billion from excise taxes; is  
18 that fair?

19 A. That's roughly my understanding.

20 Q. And every year the federal government gets about  
21 \$7 billion from excise taxes, fair?

22 A. That's -- yes.

23 Q. Is it also true that the CDC, which you have made  
24 repeated reference to, has set out recommendations for how much  
25 money should be spent by the states on tobacco control?

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1 A. Yes. CDC has prepared the best practices; that provides  
2 a range of expenditures for states to consider in order to have  
3 a comprehensive program.

4 Q. And isn't it true that almost none of the states actually  
5 meet that minimum standard?

6 A. Yes, most of the states do not. Only a few do.

7 Q. Okay. If we took in the last couple years, would it be  
8 fair to say that roughly 7- to \$800 million as been spent in the  
9 aggregate on an annual basis by all of the states collectively  
10 on tobacco control?

11 MS. CROCKER: Objection, Your Honor. I've not objected to  
12 the last few questions, but this is clearly beyond the scope of  
13 Dr. Eriksen's written direct testimony.

14 MR. BERNICK: Very simply, he's talked about what's  
15 necessary from a public health policy point of view.

16 THE COURT: The objection's overruled.

17 BY MR. BERNICK:

18 Q. Do you have my question in mind? That in any given year  
19 in the last few years, if we aggregated the total amount of  
20 money that the states have spent on tobacco control, it would be  
21 somewhere between 7- and \$800 million?

22 A. Approximately. The last estimate I saw, it was like  
23 \$650 million for the last fiscal year.

24 Q. And if we then asked the same question of the federal  
25 government, the federal government's average expenditures on



1 tobacco control are somewhere south of hundred million dollars?

2 A. I'm less familiar with what that would be simply because

3 there's money -- there's a whole variety of types of funds that

4 are spent, from surveillance, you know, surveys. It depends

5 what you included. If you include the surveys and research, it

6 would be dramatically more; if you include payments to states,

7 it would probably be around a hundred million dollars.

8 Q. Fair enough. And the minimum that the federal government

9 has recommended that the states spend on tobacco control each

10 year in the aggregate -- is that about 1.4 billion?

11 A. I believe that's the number, yes, sir.

12 MR. BERNICK: I think that Mr. Frederick has a couple more

13 questions, but I believe that I am done.

14 THE COURT: All right. Mr. Frederick.

15 MR. FREDERICK: Thank you, Your Honor.

16 CROSS-EXAMINATION OF MICHAEL P. ERIKSEN, Sc.D.

17 BY MR. FREDERICK:

18 Q. Good afternoon, Dr. Eriksen.

19 A. Hello.

20 Q. For the record, my name is Tom Frederick. I represent

21 Altria and Philip Morris USA, and we met last week.

22 A. Yes, sir.

23 Q. Sir, I'm going to put on the screen JDEM 010422 and try

24 to right-size it here, which is a demonstrative exhibit that

25 Mr. Bernick showed you earlier today.

1           Do you remember that, sir?

2   A.       Yes, sir, I do.

3   Q.       And this compares the language from the 2004 Surgeon  
4   General's Report with the language of the Philip Morris USA  
5   Website on whether smoking causes lung cancer, correct?

6   A.       Yes, sir.

7   Q.       And I believe you told Mr. Bernick that even if the  
8   language of the PM USA Website on lung cancer causation was  
9   equivalent to that of the Surgeon General's Report, it was not  
10   sufficient in your view just to have such a statement on a  
11   Website. Was that your testimony, sir?

12   A.       I believe it was.

13   Q.       Dr. Eriksen, do you know if Philip Morris USA has done  
14   more than just put this statement on its Website?

15   A.       Yes, I do. I've seen some advertisements as well.

16   Q.       Okay. Well, let me show you -- let me put on the  
17   screen --

18           And if I may approach the witness, Your Honor?

19           THE COURT: Yes, you may.

20   BY MR. FREDERICK:

21   Q.       I'll hand you what's been marked as JDEM 040028A. And,  
22   Dr. Eriksen, I'll represent to you the Court's seen that before  
23   even if you haven't.

24           Have you seen this before, Dr. Eriksen?

25   A.       No, I have not.

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1 Q. Did the government -- so the government didn't show you  
2 this in preparation for your testimony here today, correct?

3 A. Yes, that is correct.

4 Q. And did the government provide you with any information  
5 or any testimony regarding Philip Morris USA's communications  
6 about its Website positions on smoking and health in connection  
7 with your testimony here today?

8 A. I honestly don't recall. There's been a lot of documents  
9 that have been reviewed. I'm certainly familiar with the  
10 Website and have looked at it, but I'm not sure whether it's  
11 been by the government or not.

12 Q. I see. But you don't recall anything specifically, I  
13 take it, correct?

14 A. No, I do not.

15 Q. Now, looking at what's been marked as JDEM 040028A, which  
16 I've handed you and which is on the screen, it's entitled -- the  
17 title of it is: "Different Media Philip Morris Uses to  
18 Communicate With the Public About Smoking and Health Issues."  
19 And you see there are six items listed there: Internet,  
20 television, newspaper onserts, package onserts, direct mail and  
21 package warnings.

22 Do you see that, sir?

23 A. Yes, sir.

24 Q. And we've already covered the internet. You're obviously  
25 aware that Philip Morris USA posts its positions on smoking and

1 health issues on its Website on the internet, correct, sir?

2 A. Yes.

3 Q. By the way, do you know on average how many persons visit

4 the Philip Morris USA Website every month?

5 A. Every month? No.

6 Q. Okay. Sir, you see the second medium listed is

7 television, correct?

8 A. Yes.

9 Q. And, sir, are you aware that Philip Morris USA's -- of

10 Philip Morris USA's television advertising campaign to inform

11 the public about the health risks of smoking?

12 A. Are you asking me if I'm familiar with it?

13 Q. Are you familiar with it, sir?

14 A. I've seen some ads.

15 Q. And do you know -- you've seen ads featuring the

16 company's position -- Website positions on smoking and disease,

17 for example? Have you seen those?

18 A. That's what I've seen. I've seen TV advertisements

19 directing people to the web.

20 Q. And do you know how long that television advertising

21 campaign has been running, sir?

22 A. No. I believe -- no, I don't know factually. I know

23 within the last few years, but I don't know when it started.

24 Q. I'll represent to you it's been running continuously

25 since June 2003. You don't have any basis to disagree with

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1     that, do you?

2     A.     No, of course not.

3     Q.     Okay. Do you know how frequently the ads run?

4     A.     No, I do not.

5     Q.     Do you know how much Philip Morris has spent on its

6     television advertisement to promote its Website positions?

7     A.     No, I do not.

8     Q.     Sir, if you go back to JDEM 040028A, the third item

9     listed are newspaper inserts. Do you see that, sir?

10    A.     Yes, I see it.

11           MR. FREDERICK: And again, Your Honor, if I may approach

12    the witness?

13    BY MR. FREDERICK:

14    Q.     I'm going to hand you what I've just put on the screen,

15    Dr. Eriksen, which is JDEM 040027, which, again, is an exhibit

16    the Court has seen before; I take it you haven't seen this one

17    either, have you, sir?

18    A.     No, I have not.

19    Q.     Now, are you aware -- let me also hand you another

20    document.

21           And if I may approach again, Your Honor.

22           This is JD 052920. And, Dr. Eriksen, I'll represent to

23    you, this is a copy -- a poor copy, but a copy of a

24    free-standing insert that Philip Morris put in newspapers -- in

25    30 major newspapers in November 2002. Were you aware of that,

1     sir?

2     A.     No, I was not. I have not seen it.

3     Q.     Have you seen the document -- the insert marked as

4     JD 052920 before?

5     A.     I believe -- I have not seen it. I believe I heard about

6     this and I tried to find a copy of it and I couldn't.

7     Q.     All right. Well, sir, if you -- and I don't want to take

8     a lot of time here today, but if you flip through it, do you

9     see -- does it appear to include the company's positions on

10    smoking and disease, smoking and addiction, quitting smoking,

11    low tar cigarettes and other smoking and health issues?

12    A.     Yes, it appears to, sir.

13    Q.     And at any time before you appeared to testify here

14    today, were you aware that Philip Morris USA had included this

15    insert in 30 major newspapers in December of 2002 to set forth

16    its positions on smoking and health issues?

17    A.     As I previously said, I had heard that Philip Morris was

18    having an insert in the Sunday magazines -- Sunday newspaper and

19    I tried to find a copy and I wasn't able to. But I knew it was

20    occurring, but I had not seen the actual product.

21    Q.     All right. You can put that aside, sir. Let me go back

22    briefly to JDEM 040028A. Do you see the next item there listed

23    are package onserts, correct?

24    A.     Yes, sir.

25           MR. FREDERICK: And again, if I may approach, Your Honor?

1 BY MR. FREDERICK:

2 Q. I'm going to hand you, Dr. Eriksen, and put on the screen  
3 what's been marked as JDEM 40024, which is an exhibit that's  
4 previously been presented to this Court. And, Dr. Eriksen, have  
5 you seen this document before?

6 A. I have not seen this document, no.

7 Q. Are you aware that Philip Morris USA has included  
8 onserts --

9 Do you know what an "onsert" is, sir?

10 A. I think so. My understanding is it's a little brochure  
11 that goes in between the cellophane and the pack of cigarettes.

12 Q. Right. It goes -- it's attached to the pack of  
13 cigarettes by the cellophane wrapping; is that your  
14 understanding, sir?

15 A. Yes.

16 Q. And are you aware that Philip Morris USA included onserts  
17 warning or containing the language that's set forth in this  
18 demonstrative beginning in November of 2002?

19 Are you aware that it did that, sir?

20 A. I had not seen this specific language before.

21 Q. Were you aware they had an onsert that reads like this?

22 A. Yes.

23 Q. And are you aware they've done that also subsequently in  
24 2003 and 2004, that they included onserts on light cigarette  
25 packages going to smokers?

- 1 A. No, I was not. I actually thought it was not continuing.
- 2 Q. Now, Dr. Eriksen, finally, if we just go back to the
- 3 demonstrative chart a second. And you see the fifth item listed
- 4 there is direct mail. Do you see that, sir?
- 5 A. Yes, sir.
- 6 Q. And are you aware that in November of 1999, Philip Morris
- 7 USA used its direct mail database to mail out more than 28
- 8 million pieces announcing its Website to adult smokers?
- 9 A. No, I was not aware of that.
- 10 Q. Dr. Eriksen, you weren't aware of that and some of the
- 11 other facts you discovered when you arrived here to give your
- 12 testimony today, correct, sir?
- 13 A. I didn't have all of the details you've been sharing with
- 14 me about the number of mail-outs or the period of time that
- 15 inserts have been on packs and things like that.
- 16 Q. Well, would it appear that Philip Morris has done more
- 17 than just put its position on its Website? Would you agree with
- 18 that, sir?
- 19 A. I think there are a number of other activities that
- 20 Philip Morris has done. I guess my only point I was trying to
- 21 convey is to be assured that as much effort goes into warning
- 22 people about the hazards as it does to marketing the product.
- 23 Q. The answer to my question was yes, you would agree that
- 24 Philip Morris USA has done more than just put its position on
- 25 its Website; is that correct?



1 A. And I said, "Yes."

2 Q. And you'd agree that's fair for the Court to consider in  
3 determining whatever remedies it should enter, correct?

4 A. Certainly, I think the Court should consider all the  
5 information available to it.

6 MR. FREDERICK: Thank you. I have no further questions.

7 THE COURT: All right. Ms. Crocker, please.

8 Mr. Frederick, you were below your estimate.

9 MR. FREDERICK: Do I get more time?

10 THE COURT: No, just our undying gratitude.

11 Go ahead, Ms. Crocker.

12 REDIRECT EXAMINATION OF MICHAEL P. ERIKSEN, Sc.D.

13 BY MS. CROCKER:

14 Q. Dr. Eriksen, I'm just going to start by asking you about  
15 this last demonstrative you were shown, which is JDEM 040028A.  
16 Do you see that?

17 A. Yes.

18 Q. Do you know whether the media -- whether the different  
19 messages that you see there that were put out by Philip Morris,  
20 as just described by counsel, were created by Philip Morris  
21 itself internally or by some independent third party?

22 A. I do not know.

23 Q. Do you know whether these messages were validated by any  
24 independent third party?

25 A. No, I do not.

1 Q. Do you know whether any of these messages started before  
2 this case was filed?

3 A. Only the package warnings, if that's referring to the  
4 Surgeon General's warning.

5 Q. Is there any guarantee, to your knowledge, that any of  
6 these messages will continue after this case?

7 A. No, certainly not.

8 Q. Okay. I'm going to turn briefly to follow up on some  
9 questions that you were asked this morning. Do you recall being  
10 asked a number of questions about the corrective communications  
11 that you recommend in your direct testimony?

12 A. Yes, ma'am.

13 Q. Now, in your direct testimony, did you exhaustively list  
14 all the areas relating to smoking and health issues where you  
15 thought there should be corrective communications?

16 A. No. As I indicated, I wanted to try to provide a  
17 framework for the Court's consideration and not to prepare a  
18 laundry list of specific messages that should be communicated.  
19 I just felt that was inappropriate for me given the length of  
20 time this proceeding has been going forward and all the  
21 information that's been shared in that context.

22 Q. Did you take it upon yourself to investigate the  
23 substance, the truth of the substance of defendants' different  
24 messages to see if they were true or untrue or misleading  
25 currently?

- 1 A. What specific message -- I'm not sure I understand.
- 2 Q. Sure, let me rephrase it and be more clear. For example,
- 3 you were asked some questions about defendants' different
- 4 communications about addiction. Do you recall those questions?
- 5 A. Yes.
- 6 Q. Did you undertake to investigate all of defendants'
- 7 communications about addiction, say in the last several years?
- 8 A. No, I did not.
- 9 Q. Did you undertake to investigate whether those messages
- 10 were substantively true?
- 11 A. No, I did not.
- 12 Q. And why not?
- 13 A. I, as I said, I was trying to provide a framework for the
- 14 Court to consider in terms of types of remedies, if remedies are
- 15 appropriate, in that I knew that there was substantial testimony
- 16 by experts on nicotine addiction and on harm caused that would
- 17 be the basis for the Court's determination of what the language
- 18 should be in the remedies as opposed to coming from me.
- 19 Q. You've been asked a number of questions about the
- 20 communications that the company, such as Philip Morris, already
- 21 make to the public. Do you recall those questions?
- 22 A. Yes.
- 23 Q. Such as the ones that we have on the screen in front of
- 24 us, correct?
- 25 A. Yes.

1 Q. Now, in your testimony, are you recommending that  
2 defendants make additional communications?

3 A. I believe my recommendation is that defendants, or third  
4 parties, make communications, if in fact what was brought up  
5 earlier is valid, that people tend not to believe tobacco  
6 companies, that we want to make sure that corrective  
7 communications are understood and trusted by the intended  
8 audience.

9 Q. Do you recommend that defendants themselves create the  
10 substance of the communications?

11 A. No. I thought I was clear that the communications need  
12 to be based on the best available science and the example that  
13 we used about marketing, cigarette marketing being a factor  
14 contributing to the initiation of smoking is clearly something  
15 that we couldn't rely on the defendants to make that statement  
16 since they don't -- since they deny that relationship.

17 Q. You were shown a demonstrative with a number 010420, and  
18 it's a JDEM. Do you recall this demonstrative?

19 A. Yes, I do.

20 Q. Now, to your knowledge, does any company Website state  
21 that nicotine is addictive?

22 A. No, not to my knowledge. I think I tried to mention that  
23 earlier, was an example of the type of communications that would  
24 help people understand and correct the misperceptions now around  
25 harm and addiction.

1           THE COURT: Which do you think is clearer to the average  
2 consumer, cigarette smoking is addictive or nicotine is  
3 addictive?

4           THE WITNESS: I think it's nicotine is addictive. I think  
5 people will say cigarette smoking is addictive because I have it  
6 with my coffee, I'm used to having it. There is that dimension  
7 of habituation, I used to smoke, but I think clearly the  
8 scientific article of nicotine being addictive is clear and  
9 unambiguous, and that implies the physiologic addiction as  
10 opposed to -- I'm sure you've heard in the past it's even been  
11 referred that gummy bears are addictive by executives of the  
12 tobacco companies saying I can't stop eating them, and so I think  
13 it helps differentiate a casual reference to an addiction,  
14 something you like to do, versus a pharmacologic effect of  
15 nicotine.

16 BY MS. CROCKER:

17 Q.       Okay. Dr. Eriksen, do you recall being asked about the  
18 corrective communications that you are recommending with respect  
19 to defendants' marketing practices?

20 A.       Yes, I do.

21 Q.       And do you recall being asked a question with a sequence  
22 in it, the sequence was number 1, there's a disclosure, number  
23 2, there's research -- and I'm paraphrasing here -- number 3,  
24 conclusions are reached, and number 4, a time comes when  
25 information may be robust enough to make the industry stop

1 denying that its marketing causes initiation. Do you recall  
2 that question being posed to you?

3 A. Yes, I do.

4 Q. Now, are you recommending to the Court that there be a  
5 sequence, a four-part step before the corrective communication  
6 about marketing would be made by defendants?

7 A. No, I was not. I'm sorry if I left that impression. I  
8 was simply trying to say that I think the previous testimony was  
9 clear on my conclusions regarding the effect of marketing on  
10 smoking behavior and that the industry did not -- denies that  
11 relationship and that this type of information could help inform  
12 their perspective, but right now there's more than adequate  
13 science, published studies to come to that conclusion.

14 Q. Okay. I'm going to ask some questions about this large  
15 demonstrative board that we have up. It's a blow-up of U.S.  
16 Exhibit 18269 and it's labeled JDEM 010419. Do you see that?

17 A. Yes.

18 Q. Now, was the goal of the remedies that you recommended in  
19 this case to have a public health benefit?

20 A. Perhaps the ultimate goal would be that effect, but I  
21 presented my written direct testimony clearly to lay out that  
22 there would be a remedy that would affect tobacco industry  
23 behavior and if that were done that that would then have the  
24 ultimate goal of having a public health benefit, but knowing why  
25 I'm here and the nature of this case, I focused my remedies more

1 directly on -- in relation to the effect it would have on the  
2 defendants' behavior.

3 Q. Are the two goals, one of affecting defendants' behavior  
4 and the other of a public health goal, are those mutually  
5 exclusive?

6 A. No, not at all. I actually see them to be sequential,  
7 that the way to achieve public benefit is through changes in  
8 defendants' behavior along the lines that I've outlined.

9 Q. Can you explain what you mean by that?

10 A. Basically, simply -- I won't get up and illustrate, but  
11 if -- starting with remedies, that if the Court finds liability  
12 and there are specific remedies, that those specific actions  
13 that are on the board, if they take place, they will have the  
14 proximal immediate affect of influencing the industry's behavior  
15 both with respect to disclosures, with respect to corrective  
16 communications, with respect to changes in advertising and  
17 marketing practices, and when that is done, there will be a  
18 public health benefit that accrues to that.

19 Q. Now, you were asked a number of questions about  
20 validation. Do you recall that?

21 A. Yes, ma'am.

22 Q. In fact, some of your answers were recorded up there on  
23 the board, correct?

24 A. I'm not sure that I would say they were necessarily my  
25 answers that were recorded up there, but there were marks made

1 on the board.

2 Q. Did you make an effort to validate for each of the  
3 remedies that you proposed its effect on consumption?

4 MR. BERNICK: Objection. I'm not sure if the form is  
5 leading, but it is leading, although maybe the answer will reveal  
6 whether it is or it's not, but it's a leading question.

7 MS. CROCKER: It's simply, do you make an effort -- he can  
8 say yes, he did or no, he didn't.

9 THE COURT: The objection's overruled.

10 THE WITNESS: In proposing the specific remedies, even  
11 from the outset of my expert report, I wanted to come up with  
12 efforts and steps that would ultimately have a public health  
13 benefit, but that more immediately would fit into the legal  
14 parameters of this case regarding the industry's behavior.

15 BY MS. CROCKER:

16 Q. So, just to clear the record up, Dr. Eriksen, is your  
17 answer yes or no to my question or you can't provide a yes or no  
18 answer?

19 A. I want to be very careful, so if you could just repeat  
20 the question that will help me, please.

21 Q. In terms of validation, you were asked a number of  
22 questions about validation of your different remedies. Did you  
23 make an effort to validate each remedy to see if it had or if it  
24 didn't have an effect on consumption?

25 A. Well, I think we spent the whole day discussing that it's



1 not possible in every case to rely on established science  
2 because many of the things I'm proposing have never been done.  
3 They're certainly based on my experience that they would have  
4 this effect, but if you say "validation" is that there's an  
5 empirical, controlled study that shows if you reduce imagery  
6 it's going to have a population effect, I was not able to do  
7 that in each case.

8 Q. Can you explain why it's not possible, in your opinion,  
9 to do the type of controlled study as you just said to evaluate  
10 reduction of imagery?

11 MR. BERNICK: As long as that's the specific focus. I  
12 thought it was more general. I don't have a problem with that  
13 question.

14 THE WITNESS: Yes. As I think I mentioned earlier, to do  
15 that on a population basis or in a real world, you would actually  
16 need the cooperation and the ability to restrict exposure to  
17 image advertising which doesn't exist. The only type of work  
18 that can be done is experimental work, you know, in a laboratory  
19 with short-term outcomes of showing someone something, asking how  
20 it affects their attitude or perception.

21 BY MS. CROCKER:

22 Q. And I'm sorry, in your answer there you said that you  
23 would need the cooperation; you don't say the cooperation of  
24 whom?

25 A. I'm sorry. If we were to -- if the project or the

1 research question was to restrict exposure to image advertising,  
2 you would need the cooperation of the defendants to not  
3 advertise or use imagery in a certain venue or locale for an  
4 extended period of time, just something that is quite different  
5 than the status quo where there is no experimental differences  
6 between how cigarettes are marketed with use of imagery in  
7 different locales.

8 Q. You were also asked about proof for your last remedy,  
9 just to follow up on that. And you were asked about studies  
10 that have as their end point smoking behavior. Do you recall  
11 that?

12 A. I'm sorry, which was the last remedy?

13 Q. Sure. The Roman Numeral II, "restrictions on the  
14 marketing of cigarettes."

15 A. Okay.

16 Q. You were asked about studies that have as their end point  
17 smoking behavior. Do you recall that?

18 A. Yes, yes.

19 Q. Studies that have as one point exposure to advertising.  
20 Do you recall being asked about that?

21 A. Yes.

22 Q. Can studies that have on one hand exposure to advertising  
23 and on the end point smoking behavior be actually conducted?

24 MR. BERNICK: Objection. This actually is a liability  
25 issue. He testified to this specifically in connection with his

1 direct examination and cross-examination as part of the liability  
2 phase. And it really wasn't focused on the last thing that we  
3 talk about here is price promotions. He's now being asked about  
4 advertising exposure on the one hand and smoking behavior on the  
5 other. Advertising is not what we're talking about here. These  
6 are price discounts.

7 MS. CROCKER: I'm pretty sure that Mr. Bernick himself  
8 wrote this up on the board this morning, Your Honor. I know he  
9 asked it over a specific question.

10 THE COURT: The objection is overruled. Yes, this issue  
11 was discussed during the liability phase, but clearly it has a  
12 relationship to the remedies testimony, so you may answer the  
13 question.

14 THE WITNESS: I'm sorry to ask you to repeat it.

15 BY MS. CROCKER:

16 Q. Sure. No problem. Can studies that have as their end  
17 point smoking behavior, actual smoking behavior, and their other  
18 point advertising exposure, can those studies be done?

19 A. No. As we discussed previously, exposing young people to  
20 advertising and then randomly assigning them to different  
21 conditions to see what effect it has on smoking behavior would  
22 be infeasible and unethical. You really can't replicate the  
23 real world experimentally like that. So you would need to rely  
24 on what evidence you do have, which is what we discussed  
25 previously.

1 Q. Okay. Asking you about a different area of examination,  
2 you were asked a lot of different questions about the different  
3 state counter-marketing programs. Do you recall those  
4 questions?

5 A. Yes, I do.

6 Q. And do you recall providing testimony about controlled  
7 studies as related to those programs in different states?

8 A. Yes.

9 Q. And do you recall indicating whether or not you could  
10 cite to a controlled study performed in a state?

11 A. Yes.

12 Q. And what was your answer to that?

13 A. No, that these evaluations are not controlled studies,  
14 these are natural experiments that are occurring, and you can  
15 look at change over time in a state or you can compare one state  
16 to another state, but there is really nothing like a control, if  
17 you mean by that a state with either nothing going on or that  
18 you can just hold out as you would in a typical controlled  
19 trial.

20 Q. I'm just going to ask you one last question, Dr. Eriksen.  
21 This is related to Joint Defendants' Exhibit 813291, which is a  
22 paper by Cutler, Gruber and other authors that you saw from  
23 earlier today. You probably have a copy of it up there, but I  
24 will put this up for you to see.

25 A. Was this the Gruber --

1 Q. Yes. I'm just asking about the same paragraph that  
2 Mr. Bernick pointed you to. Do you see that paragraph there?

3 A. Yes, I do.

4 Q. And the sentence that was read to you is partly "as a  
5 result of this, the literature does not exhibit a very strong  
6 consensus on the role of cigarette advertising in affecting  
7 smoking". Did I read that correctly?

8 A. Yes.

9 Q. Is this study looking at cigarette marketing in general?

10 A. I believe it is looking strictly at advertising as  
11 opposed to marketing expenditures in mass media, but I would  
12 really need to review the entire section before I could be  
13 absolutely certain about that.

14 Q. In the remedy that you are recommending, are you limiting  
15 your recommendations to simply advertising or marketing?

16 A. No, it's most certainly focused on marketing. As you  
17 know, the advertising component is decreasing and the marketing  
18 component is expanding quite rapidly.

19 MS. CROCKER: Thank you, I'm done.

20 THE COURT: All right, Dr. Eriksen, thank you. You may  
21 step down.

22 MS. CROCKER: Your Honor, you said had some questions for  
23 Dr. Eriksen. You don't? Okay. I just wanted to make sure  
24 before we had him leave the courtroom.

25 THE COURT: Okay. You may step down. Thank you.

1 Mr. Brody and whoever is going to speak about Dr. Fiore. All  
2 right, Mr. Brody, in response to --

3 MR. BROCHIN: For the record, Your Honor, Jim Brochin for  
4 Philip Morris.

5 THE COURT: Thank you. In response to the motion for  
6 expedited briefing on discovery -- Of course, I can't lay my  
7 hands on it at the moment, but I read it and I know about it. Go  
8 ahead.

9 MR. BRODY: Well, Your Honor, as you know, the United  
10 States opposed not only the underlying motion but also the motion  
11 for expedited briefing, and we did so for the reason that things  
12 are --

13 THE COURT: Did you file an opposition?

14 MR. BRODY: We did not. We have not filed an opposition.  
15 Our opposition without expedited briefing is not due until Monday  
16 of next week. Given the number --

17 THE COURT: The motion was filed on Friday.

18 MR. BRODY: Late Thursday, I think.

19 MR. BROCHIN: Thursday.

20 MR. BRODY: I think they filed it late Thursday, Your  
21 Honor, Thursday night.

22 THE COURT: Okay.

23 MR. BRODY: But without expedition our memorandum in  
24 opposition is due on Monday of next week, and given the nature of  
25 this motion, as well as the other motions that we seem to be

1    seeing with every witness who provides a deposition and  
2    subsequently testifies, we simply do not have the resources at  
3    this point to provide an expedited response to every single thing  
4    that they are filing given the pace of the filing and given  
5    everything that's going on in the courtroom. And expedited  
6    responses to motions like this are not warranted because like the  
7    motion that we saw with respect to discovery connected to  
8    Mr. Myers, this is relitigating issues that have already been  
9    before Your Honor. Most of what defendants are asking for in  
10   this motion was specifically requested in their motion for  
11   discovery related to experts that was filed on April 12th. I've  
12   gone back through it. Some of the requests are exactly the same.  
13   We responded to that on the 15th of April. Your Honor issued,  
14   upon consideration of the motion and our response, Order 924  
15   which set out the parameters of the discovery that would take  
16   place with respect to the opinions to be offered by Dr. Fiore, we  
17   provided that discovery, when we did, defendants complained about  
18   it. We gave them about nine boxes of material. They said it was  
19   somehow too much. They are coming back now and asking for  
20   precisely what they asked for before, which was discovery from  
21   Dr. Fiore's files at the University of Wisconsin. The issue was  
22   briefed extensively, that exact issue was briefed. There is no  
23   assertion by the defendants that there has been obviously any  
24   intervening change in law. There are no new facts.  
25            The mere fact of his certain testimony that they cite to

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1 in the deposition, which we maintain and in filing a response to  
2 the motion will show has been mischaracterized in the brief that  
3 they filed, will show that there are no new facts that emerged in  
4 the course of the deposition that would warrant reconsideration  
5 of Order 924. And we just can't keep coming back to the exact  
6 same issues over and over and over again.

7 Now, the one new issue that's raised is a request for all  
8 documents that the government may have shared with Dr. Fiore, and  
9 that's one that's boiled right down to it, a request for insight  
10 in the way that we have chosen to prepare Dr. Fiore for  
11 cross-examination. He has provided defendants with a list of the  
12 materials that he considered in forming his opinions that he's  
13 offering in this case. You've seen defendants' objections to his  
14 written direct testimony, and you've seen that there is no claim  
15 by defendants and no objection that there is anything that  
16 appears in his written direct testimony that was not disclosed to  
17 defendants.

18 So what they're asking for now is, well, counsel for the  
19 government, why don't you tell us everything that you have  
20 discussed, all the documents that you have shared potentially  
21 with Dr. Fiore in order to try to anticipate and prepare for  
22 the -- first the deposition and then the cross-examination that  
23 we expect from defendants at trial. We have to anticipate that.

24 Your Honor addressed a similar situation with respect to  
25 Dr. Wyant in a motion that was argued in open Court in December



1 of last year. There's a ruling in the transcript where you were  
2 addressing things that Dr. Wyant himself had done in order to  
3 prepare for a deposition, a supplemental deposition by  
4 Mr. Biersteker last summer, and Your Honor observed that there is  
5 a cutoff to what Rule 26 requires in terms of expert disclosure,  
6 and it does not require that an expert -- and I believe Your  
7 Honor specifically observed that a good, well prepared expert,  
8 like a lawyer preparing for a proceeding, is probably going to be  
9 up until 3 in the morning a couple nights before taking the  
10 witness stand or presenting something in order to be prepared in  
11 order to be able to respond to questions that the expert gets on  
12 cross-examination. But the bulk of the motion is simply  
13 relitigating issues that were decided in Order number 924.

14 We urge the Court to look at the briefing that defendants  
15 provided on the 12th of April, to look at the United States'  
16 response on the 15th of April, and it will be clear that this is  
17 an issue the Court has considered.

18 THE COURT: Briefly, please.

19 MR. BROCHIN: I have a number of responses, Your Honor.  
20 First, procedural. The reason why it requires this amount of  
21 expedited consideration is simply that the government has refused  
22 to acknowledge kind of repeated requests. A request was made at  
23 the deposition, followed up quickly by a letter, and then there  
24 were repeated e-mails over the course of that following week  
25 which were simply ignored up until -- which necessitated the

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1 motion which followed quickly upon a brief meet-and-confer.

2 But turning to the substance, there are a number of  
3 issues. There are the notes that Dr. Fiore -- all of which were  
4 discussed at the deposition -- there were notes that Dr. Fiore  
5 took of his meetings with the government which clearly fall  
6 within matters considered by the expert in the formation of his  
7 opinions of this case. We directed in the briefing, Your Honor,  
8 to the R & R, I think number 116, which Your Honor adopted. I  
9 can't remember the number of the Order dealing e-mails from  
10 Dr. Gruber. We suggest this is directly an analogous situation.

11 Another key issue is, with respect to some of the other  
12 documents, there has been a significant change in the facts, and  
13 that is simply that Dr. Fiore has said that these documents, that  
14 he has documents, that they're readily accessible. They're  
15 either in the files of his assistant or at home and they're  
16 readily accessible, so the burden argument that the government  
17 put forward before this Court is simply not there anymore.

18 At the end of the day, Your Honor, these are documents  
19 that in a normal case, in a normal proceeding, and I won't make  
20 the multi billion dollar argument that Your Honor has heard so  
21 many times, but in a normal case, in a normal proceeding we would  
22 be entitled to these documents. We, too, are pressed by these  
23 proceedings. We, too, are stretched, but are doing our best to  
24 try to make the schedule that Your Honor has set work. And part  
25 of that -- but we're not going to do without discovery that we

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1 are entitled to, that it's important to enable us to  
2 cross-examine these witnesses and that's what this simply is.

3 THE COURT: I don't see any reason for expedited briefing  
4 on this. Virtually -- I don't want to say everything, because I  
5 will go back to those April 12th and 15th submissions, but my  
6 recollection is that almost everything in here has been discussed  
7 before and has been addressed before. And certainly I will look  
8 at the April submissions quickly, and if for some reason  
9 Dr. Fiore has to return, well then, despite his schedule, he's  
10 going to have to return, but that's my ruling on that issue.

11 Now, as to his testimony, what does the government  
12 anticipate, an hour of demonstrative testimony?

13 MR. BRODY: We've planned it to be a little shorter than  
14 that. It will probably run about 45 minutes duration.

15 THE COURT: All right. And then who -- oh, I know,  
16 Mr. Wells is going to do the cross. And what has the government  
17 been told to anticipate?

18 MR. BRODY: We have been told to anticipate five hours of  
19 cross-examination.

20 THE COURT: So we're probably not going to finish him  
21 tomorrow.

22 MR. BRODY: It would be my expectation that if Mr. Wells  
23 is close to that, that redirect will be taking place on Wednesday  
24 morning.

25 THE COURT: Has the government decided what you want to

1 do -- and you may not have yet -- about Mr. Myers?

2 MS. EUBANKS: Yes, Your Honor. To the extent that, one, I  
3 had told Mr. Bernick earlier today that I wanted to go back and  
4 review the transcript of the Court's ruling, and to compare that  
5 with the testimony given. I took a quick look at lunch and I  
6 found some issues that I thought were inconsistencies with my  
7 listening to the Court's rulings and some of the questions when  
8 you excluded sections in their totality of his testimony. So I  
9 wanted to take a look at the transcript, compare that with the  
10 written direct testimony, and I told Mr. Bernick that I would  
11 touch base with him either -- well, hopefully later today to try  
12 to get in touch with him to see -- basically to tell him what our  
13 position is on some of that.

14 I think that there are -- I'd like to reserve on that  
15 until I have a chance to compare it.

16 THE COURT: That's fine, that's fine. The ruling was only  
17 this morning, so I understand that.

18 One other issue. I would hope the government has or is  
19 about to reach a decision about whether there's going to be a  
20 rebuttal case?

21 MS. EUBANKS: Your Honor, as I explained last week, we  
22 haven't even finished -- there's a deposition going on today of  
23 one of the expert witnesses in the case who will give testimony.  
24 We haven't even received the first written direct of defendants'  
25 witnesses which are coming in today, so we are not in a position

1 to definitively state whether or not --

2 THE COURT: The rebuttal, though, would be only on  
3 remedies issues?

4 MS. EUBANKS: Your Honor, we had stated before that there  
5 were some prior written designations that we wanted to do, some  
6 prior testimony that we wanted to submit only with respect to  
7 liability issues, and that that's something that we had told  
8 you before that --

9 THE COURT: That's what I thought.

10 MS. EUBANKS: -- we wanted to do, but certainly nothing on  
11 liability. The question that's open is whether there would be  
12 any rebuttal case on remedies, and we are not expecting to bring  
13 any rebuttal evidence unless it's -- unless it's expressly  
14 necessary, definitely necessary, but we're just not in the  
15 position realistically to say, not knowing what the witnesses are  
16 going to testify to, whether or not we will need a rebuttal case  
17 or not.

18 THE COURT: The way it sounds for this week, then, we  
19 hopefully will have Wednesday afternoon free, Thursday is  
20 undecided at this point.

21 MS. EUBANKS: No, Thursday, Your Honor, if you recall,  
22 Dr. Heaton will definitely be back Thursday, and I can tell Your  
23 Honor that we're not removing Mr. Myers from the witness list.  
24 That's not going to happen. But it's, rather, making sure that I  
25 understand and interpret properly the Court's order so that we

1 can then -- I'm sure the defendants want to look back at that and  
2 then re-examine how long they would do a cross-examination of him  
3 as well.

4 THE COURT: And Dr. Healton will be on Thursday?

5 MS. EUBANKS: Yes, and I spoke with defense counsel last  
6 week. They anticipate another hour with Dr. Healton, and I think  
7 our redirect is probably about two hours.

8 THE COURT: Okay. That is a day where -- I believe that I  
9 have another long conference call with my Judicial Conference  
10 Committee. I'll know, obviously, before Thursday, but I think  
11 that I do. Tomorrow, everybody, we're going to start at 10.  
12 There are no other limitations on the day. The same is true for  
13 Wednesday. And next week I just want to tell you that Wednesday  
14 we do have to start late and it will probably be, to be  
15 realistic, 11:00. Tuesday will be a full day, Thursday will be a  
16 full day, and Friday will be a full day.

17 MR. BERNICK: I think that with respect to next week, if  
18 my memory serves, and I think we've been through this a couple  
19 times --

20 THE COURT: We have.

21 MR. BERNICK: -- so I hope it's right this time, Dr. Rubin  
22 will be testifying on Tuesday. Wednesday and Thursday, unless  
23 one of the witnesses -- I just -- it's hard to foresee this now,  
24 would be called -- we kind of put in reserve a little bit, but  
25 right now Wednesday, Thursday I think are going to be dark days,

1 at least insofar as we're concerned.

2 THE COURT: Why do I have down -- maybe I keep getting --

3 MR. BERNICK: It's Friday that we have Dr. Fischell.

4 THE COURT: Dr. Fischell is Friday.

5 MR. BERNICK: Right. And then the following week we have

6 the three other witnesses.

7 THE COURT: What about Dr. Wittis?

8 MR. BERNICK: Wittis is the following week, along with

9 Dr. Weil and Dr. Carlton.

10 THE COURT: I see.

11 MR. BERNICK: And I think, again if memory serves, it is

12 Weil on the 31st --

13 THE COURT: I have Dr. Weil down for Tuesday, Dr. Wittis

14 for Wednesday, and --

15 MR. BERNICK: -- Carlton will be --

16 THE COURT: I don't know who you have for the 2nd.

17 MR. BERNICK: For the 2nd, it will be Dr. Carlton. He's

18 got the 2nd and then we have the possibility of spillover to the

19 3rd, and there were three witnesses that were held in abeyance,

20 Parrish, Dr. House, and Mr. Szymanczyk. And as we've indicated

21 before, we have triggering dates for when we would let the other

22 side know about those, and those would be coming up pretty

23 much -- one of them this week, anyhow.

24 So, Wednesday -- I guess the reason I stood up is

25 Wednesday, Thursday next week, at least until -- unless something

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1 spills over, we would not be anticipating -- and then the other  
2 thing is that I believe that our last deposition, last deposition  
3 scheduled for one of our remedies witnesses would be a week from  
4 today. I believe that Dr. Carlton is scheduled to be deposed on  
5 Monday, and it seems to me that in light of that, we really ought  
6 to be able to get a fix from the government early that week about  
7 whether they will have a rebuttal case on remedies.

8 THE COURT: So Dr. Carlton will be the 23rd?

9 MR. BERNICK: I think he's being deposed on the 23rd, if  
10 my memory serves. He's the last of the bunch. And then I know  
11 we also kind of made a proposal last week with respect to closing  
12 arguments, and we don't -- there's nothing urgent about that, but  
13 maybe later this week or certainly earlier the next, we can just  
14 get a final fix on --

15 THE COURT: That can only be decided after I know about  
16 the government's rebuttal.

17 MR. BERNICK: Right.

18 THE COURT: I am keeping those days open on my calendar,  
19 although, again, from my perspective I have so many other  
20 competing things that I, too, would like to know as quickly as  
21 possible.

22 MS. EUBANKS: I certainly will let the Court know as soon  
23 as I know, but I don't think it's realistic to base it upon a  
24 deposition alone. My point is that we hadn't even deposed the  
25 witnesses. Until we see the written direct, we don't really know



1 what the testimony is that's going to be proffered. Just as  
2 defendants were waiting to see not just the examination of Matt  
3 Myers, what was in a written direct, they insist upon finding out  
4 what comes out on cross before they even make a decision about  
5 Mr. Parrish. I think in terms of a wise decision on a rebuttal  
6 case, we have to at least see what is proffered in the written  
7 direct, Your Honor.

8 MR. BERNICK: Well --

9 THE COURT: Let's not have this long discussion. I notice  
10 every day at 5 of 5 it's as if everybody has to have their -- I  
11 know I shouldn't say it -- but discovery therapeutic venting.  
12 We're not going to do it today, we're not going to do it.

13 So -- yes, Mr. Brody at your peril.

14 MR. BRODY: At my peril, just before we say that nothing's  
15 going to happen on Wednesday of next week, we're going to need to  
16 receive Dr. Rubin's testimony, written direct which will be filed  
17 today, we'll have to make an assessment as to the length of  
18 cross-examination. So we will know certainly by Thursday whether  
19 to expect his examination to carry from Tuesday into Wednesday  
20 next week, but we don't know that yet and I just didn't want the  
21 Court to clear Wednesday --

22 THE COURT: No, I wouldn't be scheduling anything in  
23 Court. It's what's out of Court that awaits me, everybody.  
24 Thank you. 10:00 tomorrow, everybody, please.

25 (Proceedings adjourned at 4:54 p.m.)

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

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

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

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